

**United States Department of Labor
Employees' Compensation Appeals Board**

LAWRENCE E. TUCKER, Appellant)
and) Docket No. 05-1528
U.S. POSTAL SERVICE, FARMERS BRANCH) Issued: May 1, 2006
STATION, Dallas, TX, Employer)

)

Appearances:

Ron Watson, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 12, 2005 appellant, through his representative, filed a timely appeal from a May 24, 2005 merit decision of the Office of Workers' Compensation Programs terminating his compensation and entitlement to a schedule award on the grounds that he refused an offer of suitable work.¹ Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation benefits effective June 12, 2005 on the grounds that he refused an offer of suitable work under 5 U.S.C. § 8106(c); and (2) whether appellant is entitled to a schedule award for any period prior to June 12, 2005.

¹ The record also contains a January 4, 2005 overpayment decision. Appellant has not appealed this decision and thus it is not before the Board at this time.

FACTUAL HISTORY

On July 27, 2000 appellant, then a 51-year-old letter carrier, filed an occupational disease claim alleging that he sustained back stress due to factors of his federal employment. The Office accepted his claim for lumbar strain and a herniated nucleus pulposus (HNP) at L3-4, L4-5 and L5-S1.

Appellant stopped work on June 26, 2000 and returned to part-time work with restrictions on April 20, 2001 and full-time work with restrictions on May 18, 2001. The Office accepted that he sustained a recurrence of disability on July 19, 2002 and placed him on the periodic rolls effective July 28, 2002.

The Office referred appellant for vocational rehabilitation on October 24, 2002. The employing establishment subsequently offered him several limited-duty positions which his physician determined were not within his medical restrictions.

On March 18, 2004 the employing establishment offered appellant the position of modified letter carrier. He refused the position on March 22, 2004.

In a letter dated April 26, 2004, the Office informed appellant that it had determined that the position was suitable and provided him 30 days within which to accept the position or provide reasons for his refusal.

Appellant submitted the results of an April 27, 2004 functional capacity evaluation (FCE) which indicated that he could perform sedentary work with limitations on lifting over five pounds.

By letter dated March 26, 2004, the Office referred appellant to Dr. Robert Chouteau, who is Board-certified by the American Osteopathic Association in orthopedic surgery, for a second opinion examination. In a report dated April 27, 2004, Dr. Chouteau opined that appellant's accepted condition of a broad-based herniation at L3-4 and L4-5 had not resolved and found that his subjective complaints were supported by the objective findings. He determined that appellant was unable to return to his usual employment due to residuals of his employment injury. In an accompanying work restriction evaluation, Dr. Chouteau found that he could work 8 hours per day with restrictions on pushing, pulling, or lifting over 10 pounds for 2 hours per day, and sitting, walking, standing, reaching, twisting and bending for 2 hours per day.

In a report dated May 18, 2004, Dr. Huntley G. Chapman, a Board-certified orthopedic surgeon and appellant's attending physician, found that he could perform sedentary work and recommended an FCE.

On May 28, 2004 the Office requested that Dr. Chapman review Dr. Chouteau's report and indicate whether he agreed with his findings.

In a letter dated June 7, 2004, the Office notified appellant that the March 18, 2004 offered position was not suitable based on Dr. Chouteau's report.

On June 21, 2002 Dr. Chapman indicated that he agreed with Dr. Chouteau's finding. In a report dated June 30, 2004, however, Dr. Chapman opined that Dr. Chouteau's work restrictions were contraindicated by the FCE.

By letter dated July 21, 2004, the Office requested that Dr. Chouteau clarify his work restrictions.

A July 14, 2004 FCE, signed by Dr. Chapman, determined that appellant was at a sedentary minus level and could not perform at an acceptable level.

On July 23, 2004 Dr. Chapman informed the Office that he did not agree with Dr. Chouteau's findings. In a work restriction evaluation of the same date, Dr. Chapman found that appellant was unable to work based on the FCE findings.

In a supplemental report dated September 7, 2004, Dr. Chouteau clarified that appellant could work 8 hours per day with limitations on lifting more than 10 pounds, sitting more than 2 hours, walking more than 3 hours and standing more than 3 hours. He further noted that appellant required 15-minute breaks every 5 hours.

By letter dated September 13, 2004, the Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Arthur L. Sarris, a Board-certified orthopedic surgeon, to resolve a conflict in medical opinion between Dr. Chapman and Dr. Chouteau.

In a report dated October 20, 2004, Dr. Sarris discussed appellant's employment injury and listed detailed findings on physical examination. He found that his work injury of an HNP at L3-4, L4-5 and L5-S1 had not resolved and opined that appellant was unable to work as a letter carrier due in part to his employment injury. Regarding appellant's work restrictions, he stated:

"I would feel that [appellant] would qualify for only [a] sedentary type of position. A physical demand level of sedentary would be occasionally lifting up to 10 pounds, which should be approximately 1 to 2 hours during the workday; frequently which is 2 to 5 hours negligible; constant which is more than 5 hours negligible. If this can be adhered to, then I would see no reason why he cannot return back to some type of sedentary position."

Dr. Sarris further opined that appellant had reached maximum medical improvement on June 28, 2000.

In letters dated December 17, 2004 and March 2, 2005, the Office requested that Dr. Sarris complete a work restriction evaluation.

In an undated work restriction evaluation received on March 11, 2005, Dr. Sarris found that appellant could work 8 hours per day with the following limitations: sitting 4 hours per day; walking 2 hours per day; standing 2 hours per day; reaching 2 hours per day; reaching over the shoulder, twisting, bending, stooping and performing repetitive movements 1 hour per day; pushing up to 10 pounds for 1 to 2 hours per day; pulling up to 10 pounds for 1 to 2 hours per day; and lifting up to 10 pounds for 1 to 2 hours per day.

On March 15, 2005 the employing establishment offered appellant the position of modified city carrier. The position required intermittent lifting of up to 10 pounds for 2 hours per day, standing and walking for 2 hours per day and intermittent sitting for 2 hours per day.

By letter dated March 21, 2005, the Office informed appellant that the job offer was suitable and provided him 30 days to accept the position or provide reasons for his refusal. The Office notified him that he would be paid for any difference in salary between the offered position and his date-of-injury position, that he could accept the job without penalty and that an employee who refused or neglected suitable work was not entitled to further compensation.

In a letter received by the Office on March 29, 2005, appellant declined the position as he was retiring on disability and had additional health problems unrelated to his employment injury. He submitted a report dated May 10, 2004 from Dr. Paul Meier, a psychiatrist, who diagnosed major depressive disorder "secondary to his physical injury and the emotional distress it caused in addition to the turmoil he is experiencing related to his job status." Dr. Meier found that appellant had no restrictions "related to psychological concerns." In another report dated May 10, 2004, Dr. Paul A. Greenberg, an internist, indicated that he treated appellant for sleep apnea and hypertension. He noted that his condition "combined with a high stress work environment place him at increased risk for heart attack or stroke." Dr. Greenberg diagnosed hypertension, sleep apnea, degenerative disc disease, lumbar sprain, severe depression, and right knee problems. He referred to "attached documentation for [appellant's] restrictions as a result of his back injury."

By letter dated April 13, 2005, appellant notified the Office that he could not perform twisting and also experienced problems with his right knee. He submitted an MRI scan study of his right knee dated January 29, 2001, which indicated that he had a partial tear of the anterior cruciate ligament and an MRI scan study of the left knee dated April 5, 2001 which showed joint effusion. Appellant further submitted an MRI scan study of his lumbar spine dated April 5, 2001 which showed "[m]inor degenerative changes with mild disc bulges at L4-5 and L5-S1...."

Dr. Chapman, in an impairment evaluation dated April 8, 2005, found that appellant had reached maximum medical improvement and had a 14 percent permanent impairment of the whole person impairment due to S1 radiculopathy.

In a letter dated May 4, 2005, the Office notified appellant that his reasons for refusing the position were unacceptable. The Office informed him that retirement was not an acceptable reason for refusing an offered position and that the medical evidence he submitted did not establish that he was unable to perform the position due to preexisting or concurrent nonemployment-related conditions. The Office provided appellant 15 days to accept the position or have his compensation terminated and noted that it would not consider any further reasons for refusing the position.

On May 18, 2005 appellant filed a claim for a schedule award.

By decision dated May 24, 2005, the Office terminated appellant's compensation effective June 12, 2005 on the grounds that he refused suitable work. The Office further found

that he was not entitled to a schedule award due to his refusal of suitable work. The Office verified that the position remained available as of May 24, 2005.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.² In this case, the Office terminated appellant's compensation under section 8106(c)(2) of the Federal Employees' Compensation Act, which provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee is not entitled to compensation.³ To justify termination of compensation, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.⁴ Section 8106(c) will be narrowly construed as it serves as a penalty provision, which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.⁵

Section 10.517(a) of the Act's implementing regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured by the employee has the burden of showing that such refusal or failure to work was reasonable or justified.⁶ Pursuant to section 10.516, the employee shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.⁷

Section 8123(a) provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.⁸ The implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.⁹

When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the

² *Linda D. Guerrero*, 54 ECAB 556 (2003).

³ 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

⁴ *Ronald M. Jones*, 52 ECAB 190 (2000).

⁵ *Joan F. Burke*, 54 ECAB 406 (2003).

⁶ 20 C.F.R. § 10.517(a); *see Ronald M. Jones*, *supra* note 4.

⁷ 20 C.F.R. § 10.516.

⁸ 5 U.S.C. § 8123(a).

⁹ 20 C.F.R. § 10.321.

opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹⁰

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained lumbar strain and a HNP at L3-4, L4-5 and L5-S1. The Office terminated his compensation effective June 12, 2005 on the grounds that he refused a March 15, 2005 offer of suitable work by the employing establishment. The initial question in this case is whether the Office properly determined that the offered position was suitable. The issue of whether an employee has the physical ability to perform a modified position is primarily a medical question that must be resolved by the medical evidence.¹¹

The Office determined that a conflict in medical opinion existed between appellant's attending physician, Dr. Chapman, and the Office referral physician, Dr. Chouteau, on the extent of his employment-related disability. The Office referred appellant to Dr. Sarris for an impartial medical examination. In a report dated October 20, 2004, Dr. Sarris found that appellant had continuing residuals from his employment injury and was unable to work as a letter carrier. He determined that appellant could perform sedentary employment with occasional lifting up to 10 pounds for 1 to 2 hours or less and frequent lifting for a longer duration. In response to the Office's March 2, 2005 request for additional information, Dr. Sarris submitted a work restriction evaluation in which he found that appellant could work 8 hours per day with the following limitations: sitting 4 hours per day; walking 2 hours per day; standing 2 hours per day; reaching 2 hours per day; reaching over the shoulder, twisting, bending, stooping and performing repetitive movements 1 hour per day; pushing up to 10 pounds for 1 to 2 hours per day; pulling up to 10 pounds for 1 to 2 hours per day; and lifting up to 10 pounds for 1 to 2 hours per day.

When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹² The Board finds that Dr. Sarris provided a reasoned opinion based on an accurate background, and thus, his opinion is entitled to special weight. Consequently, his opinion represents the weight of the medical evidence in this case on the issue of the extent of appellant's disability and work restrictions.

On March 15, 2005 the employing establishment offered appellant the position of modified city carrier. The position conformed to Dr. Sarris' work restrictions as it required intermittent lifting of up to 10 pounds for 2 hours per day, standing and walking for 2 hours per day and intermittent sitting for 2 hours per day. The Office, therefore, properly found that the offered position was suitable as the weight of the medical evidence established that appellant was no longer totally disabled from work and had the physical capacity to perform the modified duties listed in the March 15, 2005 job offer.

¹⁰ *David W. Pickett*, 54 ECAB 272 (2002); *Barry Neutuch*, 54 ECAB 313 (2003).

¹¹ See *Gayle Harris*, 52 ECAB 319 (2001).

¹² See *David W. Pickett*, *supra* note 10.

To properly terminate compensation under section 8106, the Office must provide appellant notice of its finding that an offered position is suitable and give him an opportunity to accept or provide reasons for declining the position.¹³ The Office properly followed its procedural requirements in this case. By letter dated March 21, 2005, the Office advised appellant that the position was suitable and provided him 30 days to accept the position or provide reasons for his refusal. The Office further notified him that the position remained open, that he would be paid for any difference in pay between the offered position and his date of injury job, that he could still accept without penalty and that a partially disabled employee who refused suitable work was not entitled to compensation.

By letter received by the Office on March 29, 2005, appellant refused the position because he had been approved for disability retirement. Retirement, however, is not considered an acceptable reason for refusing an offer of suitable work.¹⁴

Appellant further contended that he had nonemployment-related conditions that prevented him from working. In a letter dated April 13, 2005, appellant notified the Office that he could not perform twisting and also experienced problems with his right knee. The Office must consider preexisting and subsequently acquired conditions in determining the suitability of an offered position.¹⁵ In this case, however, appellant has not submitted sufficient medical evidence to establish that he had a preexisting or subsequently acquired condition which would prevent him from performing the position of modified city carrier. In a report dated May 10, 2004, Dr. Meier, a psychiatrist, diagnosed major depressive disorder and found that appellant had no restrictions “related to psychological concerns.” Dr. Meier thus did not find that appellant’s psychological condition prevented him from performing the offered position.

In another report dated May 10, 2004, Dr. Greenberg indicated that he treated appellant for sleep apnea and hypertension. He noted that appellant’s condition “combined with a high stress work environment place him at increased risk for heart attack or stroke.” Dr. Greenberg referred to “attached documentation for his restrictions as a result of his back injury.” As Dr. Greenberg only referred to appellant’s disability due to his employment injury, his report does not establish that any preexisting or subsequently acquired condition precluded him from performing the position of modified city carrier.

Appellant further submitted the reports of MRI scan studies of his right and left knee and lumbar spine. These reports, however, merely report findings and do not contain an opinion from a physician regarding whether he was unable to perform the offered position.

The Office properly informed appellant that his reasons for refusing the offered position were unacceptable and provided him 15 days to accept the position. He refused to do so and thus the Office properly terminated his compensation for refusal of suitable work.

¹³ See *Maggie L. Moore*, 42 ECAB 484 (1991); *reaff'd on recon.*, 43 ECAB 818 (1992).

¹⁴ *Robert P. Mitchell*, 52 ECAB 116 (2000) (where the claimant chose to receive disability retirement benefits rather than accept a position offered by the employing establishment).

¹⁵ See *Gayle Harris*, *supra* note 11.

LEGAL PRECEDENT -- ISSUE 2

The Office regulation provides that in termination under section 8106(c) of the Act¹⁶ a claimant has no further entitlement to compensation under sections 8105, 8106 and 8107¹⁷ of the Act, which includes payment of continuing compensation for permanent impairment of a scheduled member.¹⁸ The Board has found that a refusal to accept suitable work constitutes a bar to the receipt of a schedule award for any impairment which may be related to the accepted employment injury.¹⁹

Although section 8106(c) of the Act may serve as a bar to compensation for the period after the termination of compensation for refusal of suitable work, if appellant reached maximum medical improvement prior to the refusal of suitable employment, he would be entitled to payment of any portion of a schedule award due prior to the termination of monetary compensation benefits.²⁰

ANALYSIS -- ISSUE 2

Appellant filed a claim for a schedule award on May 18, 2005. He submitted an impairment evaluation dated April 8, 2005 from Dr. Chapman, who opined that he had reached maximum medical improvement. The Office did not issue a final decision addressing his entitlement to a schedule award prior to the May 24, 2005 decision finding that he refused an offer of suitable work. In its May 24, 2005 decision, the Office further found that appellant was not entitled to payment for a schedule award based on its termination of his compensation for refusal of suitable work.

On appeal, appellant's representative argued that the medical evidence of record indicated that he reached maximum medical improvement prior to the date of the Office's termination of his compensation for refusal of suitable work and thus may be entitled to a schedule award from the date of maximum medical improvement to the date of the Office's termination of compensation benefits.

A claimant who refuses an offer of suitable work is not entitled to further compensation, including payment of continuing compensation for permanent impairment of a scheduled member.²¹ The Board has found that a refusal to accept suitable work constitutes a bar to the

¹⁶ 5 U.S.C. § 8106(c);

¹⁷ 5 U.S.C. §§ 8105, 8106, 8107.

¹⁸ 20 C.F.R. § 10.517.

¹⁹ See *Sandra A. Sutphen*, 49 ECAB 174 (1997); *Stephen R. Lubin*, 43 ECAB 564, 573 (1992).

²⁰ *Id.*

²¹ 20 C.F.R. § 10.517.

receipt of a schedule award for any impairment which may be related to the accepted employment injury.²² The Board has further held:

“[A]lthough section 8106(c) of the Act may serve as a bar to compensation pursuant to appellant’s claim for a schedule award for the period after the termination of compensation, based upon a refusal to accept a suitable offer of employment, it does not mean that appellant is entitled to no benefits at all under section 8107 of the [Act] for the period prior to the termination of monetary compensation benefits. Rather, if appellant reached maximum medical improvement prior to the refusal of suitable employment, appellant would be entitled to payment of any portion of a schedule award due prior to the termination of monetary compensation benefits.”²³

The Board will remand the case to the Office for further development in order to determine whether appellant reached maximum medical improvement prior to the termination of his compensation benefits effective June 12, 2005 and, if so, whether he is entitled to benefits for a schedule award prior to this date.

CONCLUSION

The Board finds that the Office properly terminated appellant’s compensation benefits effective June 12, 2005 on the grounds that he refused an offer of suitable work under 5 U.S.C. § 8106(c). The Board further finds that the case is not in posture for a decision regarding whether appellant is entitled to a schedule award for any period prior to June 12, 2005.

²² See Sandra A. Sutphen, *supra* note 19.

²³ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 24, 2005 is affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: May 1, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board