United States Department of Labor
Employees' Compensation Appeals Board

MICHAEL J. GEIGER, Appellant	)	
and	)	**Docket No. 06-319**
	)	**Issued: May 16, 2006**
DEPARTMENT OF THE ARMY, HUNTER ARMY AIRFIELD, Fort Stewart, GA, Employer	)	

Appearances:
Michael J. Geiger, pro se
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 November 21, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated September 28, 2005, terminating his compensation benefits on the grounds that he refused an offer of suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office met its burden of proof to terminate appellant's compensation benefits effective October 2, 2005 on the grounds that he refused an offer of suitable employment.

FACTUAL HISTORY

On September 6, 2000 appellant, then a 38-year-old laborer, filed a traumatic injury claim alleging that on that date he injured his back while lifting a pipe. The Office accepted his claim for a lumbar sprain and laminectomy at L5-S1. Appellant was placed on the periodic rolls.

In a work capacity evaluation dated August 13, 2001, appellant's attending physician, Dr. H. Clark Deriso, a Board-certified orthopedic surgeon, released appellant to work full time with permanent restrictions, including no repetitive bending and no lifting more than 50 pounds.

Appellant was referred for vocational rehabilitation. In accordance with a vocational rehabilitation plan, he attended a training program to become a dump truck driver or route sales driver until September 1, 2002, when he dropped out of the program, due to a recurrence of his accepted condition. On November 6, 2002 the Office approved surgery for a disc excision at L5-S1 and the rehabilitation file was placed in an "interrupted status." Appellant did not undergo surgery nor did he complete his training program. In an undated letter received by the Office on October 16, 2003, appellant stated that he was "too afraid to have another operation and all the pain and it does not eliminate the pain."

On May 19, 2004 the Office provided Dr. Deriso with copies of job descriptions for security guard, delivery driver and taxi driver and asked him whether or not appellant was capable of performing the duties of these positions eight hours per day.

In a March 26, 2004 report, Dr. Deriso indicated that appellant complained of persistent pain in his back and left leg. He also stated that there was evidence of straight leg raising at approximately 60 degrees on the left.

At the request of Dr. Deriso, appellant underwent a magnetic resonance imaging (MRI) scan of the lumbar spine on July 2, 2004. In a report dated August 17, 2004, Dr. Deriso recommended restrictions including no lifting over 10 to 15 pounds and no repetitive bending. Having reviewed the July 2, 2004 MRI scan report and the job descriptions provided by the Office, he opined that appellant should be able to perform the duties of security guard, taxi driver and delivery driver with no difficulty, so long as he worked within the recommended restrictions.

The record contains numerous reports by Sandra Atkinson, the vocational rehabilitation counselor, indicating that appellant failed to cooperate with vocational rehabilitation or efforts to assist him in obtaining employment. In a vocational rehabilitation progress report dated April 11, 2005, Ms. Atkinson indicated that, when appellant told her that he was unable to work, she informed him that he was required to provide medical evidence substantiating his inability to work.

In a letter dated March 22, 2005, Dr. Deriso stated that appellant was capable of performing the (light) duties of courier, cashier and valet parking attendant.

On June 29, 2005 the employing establishment made a limited-duty job offer to appellant. The position of motor vehicle operator was a temporary, "not to exceed 90 days," full-time position available on July 11, 2005. By letter dated July 18, 2005, the Office notified the employing establishment that the position of motor vehicle operator was deemed "not suitable." The Office asked the employing establishment to clarify whether or not the position met with appellant's restrictions of no repetitive bending and no lifting over 10 to 15 pounds.

On July 25, 2005 the employing establishment modified its limited-duty job offer to appellant, specifying that the position of motor vehicle operator required only driving a vehicle and did not require bending, stooping, squatting or lifting more than 10 pounds. The employing

establishment reiterated that the position of motor vehicle operator was a temporary, "not to exceed 90 days," full-time position. The employing establishment further advised appellant that the position paid an hourly wage of $12.57 per hour, was still available and that he could start work on August 1, 2005. The Office indicated that appellant's failure to accept the offer by July 29, 2005 would be considered a declination of the offer.

In treatment notes dated August 4, 2005, Dr. Deriso indicated that appellant continued to have leg and back pain and that he had positive straight leg raising at 70 degrees.

By letter dated August 5, 2005, the Office advised appellant that it found the position of motor vehicle operator suitable and in accordance with his medical limitations as provided by Dr. Deriso in his August 17, 2004 report. The Office confirmed that the position remained available to appellant and that he had 30 days to either report to duty or provide a written explanation of his reasons for refusing to do so. In response, appellant submitted a letter dated August 4, 2005 from Dr. Deriso, reflecting that appellant was having back and leg pain and had straight leg raising at 70 degrees. He did not offer an opinion regarding appellant's ability to perform the duties of the offered position. Appellant submitted a letter dated August 31, 2005 contending that he was having pain in his lower back and left leg; could not sit or stand in one place very long; and became very weak and numb when he laid down. He opined that it would be unsafe for him to accept a job that required him to drive.

By letter dated September 7, 2005, the Office advised appellant that it had determined that he had failed to provide valid reasons for refusing to accept the offered position and granted him an additional 15 days to accept the position. The Office further advised appellant that, if he had not accepted the position and arranged for a report date within 15 days of the date of the letter, his entitlement to wage-loss and schedule award benefits would be terminated.

Appellant submitted a report of a myelogram dated September 1, 2005, reflecting "no new significant findings." He also submitted copies of other notes and reports previously received and reviewed by the Office.

By decision dated September 28, 2005, the Office terminated appellant's compensation benefits, as of October 2, 2005, on the grounds that he refused an offer of suitable work.

LEGAL PRECEDENT

It is well settled that, once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. Section 8106(c) of the Federal Employees' Compensation Act 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. Section 10.516 of the applicable regulations states:

> "[The Office] shall advise the employee that it has found the offered work to be suitable and afford the employee 30 days to accept the job or present any reasons to counter [the Office's] finding of suitability. If the employee presents such reasons and [the Office] determines that the reasons are unacceptable, it will notify the employee of that determination and that he or she has 15 days in which

to accept the offered work without penalty. At that point in time, [the Office's] notification need not state the reasons for finding that the employee's reasons are not acceptable."

Before compensation can be terminated, however, the Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position. In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused by appellant was suitable.

ANALYSIS

The Board finds that the Office improperly terminated appellant's compensation benefits for refusing an offer of suitable work. The employing establishment offered him a temporary position as a motor vehicle operator, which the Office found suitable. However, because there is no evidence of record that establishes that appellant was employed in a temporary position at the time of his original injury, the position offered was unsuitable.

The Office's procedure manual provides for review of the offered position to determine if the position is temporary. A temporary position will be considered unsuitable unless the claimant was a temporary employee when injured and the temporary position reasonably represents the claimant's wage-earning capacity. The procedure manual also states that a temporary job would be unsuitable if it would terminate in less than 90 days. The Office must consider whether the type of appointment is at least equivalent to the date-of-injury position. If the employee's date-of-injury position was permanent, the Office may not find a temporary job to be suitable.

In this case, there is no indication in the record that appellant's date-of-injury position was temporary nor does the record reflect that the employing establishment offered appellant a permanent position. On the contrary the employing establishment specifically stated, in its July 25, 2005 letter to appellant, that the position of motor vehicle operator was available for up to 90 days, a temporary position. The Office did not address this aspect of the case in determining whether the offered position was suitable. The Office erred in terminating appellant's compensation benefits on the basis of his refusal of the temporary position, as such an offer did not conform with the Office's procedural requirements.

Therefore, the Office failed to meet its burden of proof to terminate appellant's compensation benefits.

CONCLUSION

The Board finds that the Office failed to meet its burden of proof to terminate appellant's compensation benefits effective October 2, 2005 for refusing a suitable job offer.

ORDER

IT IS HEREBY ORDERED THAT the September 28, 2005 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 16, 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