United States Department of Labor
Employees' Compensation Appeals Board

J.S., Appellant	)	
and	)	**Docket No. 06-772**
	)	**Issued: September 1, 2006**
U.S. POSTAL SERVICE, ATLANTA BULK MAIL CENTER, Atlanta, GA, Employer	)	

Appearances:
J.S., 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 February 21, 2006 appellant filed an appeal of a January 13, 2006 decision of the Office of Workers' Compensation Programs which denied modification of a September 20, 2005 decision terminating her wage-loss compensation 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 the case.

ISSUE

The issue is whether the Office properly terminated appellant's wage-loss compensation on September 20, 2005 pursuant to 5 U.S.C. § 8106(a).

FACTUAL HISTORY

On April 28, 2001 appellant, then a 47-year-old mail handler, sustained employment-related cervical, lumbar and left shoulder strains and cervical disc displacement. He stopped work that day and received appropriate continuation of pay and compensation. On August 11, 2001 appellant returned to limited duty.

Appellant came under the care of Dr. Feroze A. Yusufji, a Board-certified orthopedic surgeon, who performed a left shoulder arthroscopy and rotator cuff repair on February 12, 2002. He returned to a modified mail handler position on May 9, 2002 and continued under the care of Dr. Yusufji. On October 29, 2002 appellant filed a schedule award claim. On April 29, 2003 he was granted a schedule award for an eight percent impairment of the left arm, for 24.96 weeks, to run from October 24, 2002 to April 16, 2003.[1] He underwent authorized two-level anterior cervical fusion on April 29, 2003. In reports dated June 11, July 15 and August 4, 2003, Dr. Yusufji noted appellant's continued progress and provided restrictions that he was not to lift, carry or perform repetitive neck movements. On July 22, 2003 appellant returned to limited duty for four hours per day, working up to eight hours a day on August 20, 2003 in a modified mail handler position. Dr. Yusufji continued to submit reports providing the same physical restrictions.

By report dated December 2, 2003, Dr. Shaharam Rezaiamiri, Board-certified in neurosurgery, noted the history of injury and findings on examination and advised that magnetic resonance imaging (MRI) scan of the lumbar spine demonstrated degenerative disc disease at multiple levels, particularly at L4-5 with stenosis at L5-S1. On December 12, 2003 Dr. Asutosh C. Vyas, who practices pain management, reported that pain stimulation studies demonstrated pain generated by the L4-5 and L5-S1 discs. Dr. Rezaiamiri recommended that appellant stop work, pending surgery and filed a CA-7, claim for compensation beginning January 22, 2004. The employing establishment confirmed that he last worked on January 21, 2004. The Office approved the recommended surgery and expanded the accepted conditions to include lumbar degeneration and lumbar disc herniation. On March 9, 2004 Dr. Rezaiamiri performed a bilateral laminectomy at L5 with a partial laminectomy at L4 and S1 and foraminotomies at L4-5 and L5-S1.

In a work capacity evaluation dated May 27, 2004, Dr. Rezaiamiri advised that appellant could return to work, beginning at four to six hours per day with restrictions that he not twist, bend or stoop. Pushing, pulling and lifting were restricted to 10 pounds. In a July 2, 2004 report, Dr. Rezaiamiri noted that appellant was last seen on April 22, 2004 and was doing relatively well. He advised that maximum medical improvement was probably reached in June and that appellant could return to light duty, gradually increasing the number of hours worked. Appellant was to avoid heavy lifting, pulling or pushing or other strenuous activity. A July 29, 2004 functional capacity evaluation demonstrated that he was capable of performing light duty, lifting 30 pounds occasionally and 15 pounds frequently.

On August 4, 2004 the employing establishment offered appellant a modified mail handler position with restrictions that sitting, walking, standing, reaching and reaching above shoulders, squatting, kneeling and climbing were limited to 1 to 2 hours per day with no twisting, bending, stooping or driving and a 10 pound lifting restriction. Appellant refused the offered position on August 11, 2004 contending that it was outside his physical limitations.

In a work capacity evaluation dated September 1, 2004, Dr. Rezaiamiri advised that appellant could work eight hours per day with the restrictions provided in his May 27, 2004

[1] On January 30, 2003 the Office wrote off an overpayment in compensation in the amount of $204.96.

report. He noted that he should not repetitively move his neck or back for more than one hour per day. Dr. Francis K. Acquah, Board-certified in anesthesiology, provided a pain management consultation upper and lower extremities. He recommended steroid injections.

In an October 22, 2004 letter, the Office advised appellant that the position offered was found suitable. He was notified of the penalty provisions of section 8106 of the Federal Employees' Compensation Act[2] and given 30 days to respond.[3] By letter dated October 29, 2004 appellant stated that he was not physically capable of performing the position. He submitted an October 27, 2004 report in which Dr. Yusufji provided restrictions that appellant not repetitively move his neck and not work overhead, lift or carry. A November 26, 2004 lumbar myelogram with post-myelogram computerized tomography (CT) demonstrated evidence of previous laminectomy at L5 and degenerative changes at L4 to S1 with disc space narrowing and a posterior bulge at L4-5.

On January 20, 2005 the employing establishment offered appellant a modified mail handler position with physical restrictions that he not work overhead, lift or carry with no repetitive neck movement. The position was to begin at four hours a day, working up to eight hours a day and the duties were to be performed at his pace. Appellant could sit or stand as needed and lifting assistance was to be provided. The job offer stated that "only duties outlined that fall within your attending physician's limitations apply."[4]

Dr. Yusufji submitted reports dated January 19 and 21 and March 28, 2005, noting appellant's complaints of neck pain. Physical examination on January 19, 2005 demonstrated good neck range of motion and on March 28, 2005 range of motion was 85 to 90 percent of normal. Dr. Yusufji found no neurological deficit in the extremities and advised that appellant was not totally disabled and his limitations had not changed. In letters dated March 10 and April 8, 2005, the employing establishment informed the Office that appellant had not responded to the job offer. By letter dated June 17, 2005, the Office again advised appellant that the position offered was suitable. He was again notified of the penalty provisions of section 8106 of the Act and given 30 days to respond. In response, appellant resubmitted the reports by Dr. Yusufji dated January 19 and March 28, 2005. By letter dated August 26, 2005, the Office advised him that his reasons for refusing the offered position were not acceptable and he was given an additional 15 days to accept the job.

By decision dated September 20, 2005, the Office terminated appellant's wage-loss compensation on the grounds that he refused an offer of suitable work. On October 13, 2005 appellant requested reconsideration, noting that he was on Social Security retirement and had applied for disability retirement through the employing establishment. He again submitted Dr. Acquah's pain management consultation and Dr. Yusufji's reports dated January 19 and

[2] 5 U.S.C. §§ 8101-8193.

[3] In October 2004, appellant received a third-party recovery with a surplus to be offset by future compensation benefits.

[4] The employing establishment offered appellant a position on January 7, 2005 that is not contained in the case record before the Board. Appellant refused this position on January 13, 2005, stating he was not physically capable of performing the job.

March 28, 2005. Appellant also submitted a notice from the Office of Personnel Management (OPM) that his disability retirement had been approved, effective September 2004.

LEGAL PRECEDENT

Section 8106(c) of the Act provides in pertinent part, "A partially disabled employee who (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation."[5] It is the Office's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.[6] To justify such a termination, the Office must show that the work offered was suitable.[7] The implementing regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of showing that such refusal or failure to work was reasonable or justified and shall be provided with the opportunity to make such a showing before entitlement to compensation is terminated.[8] To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.[9] In determining what constitutes "suitable work" for a particular disabled employee, the Office considers the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work and other relevant factors.[10] 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.[11] The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by medical evidence.[12]

ANALYSIS

The Board finds that the Office properly terminated appellant's compensation for refusal to accept suitable work. The employing establishment offered him a position as a modified mail handler within the physical restrictions that were provided by both Dr. Yusufji and Dr. Rezaiamiri. Both doctors advised that appellant could work up to an eight-hour workday, and the offered position, which was to begin at four hours a day, required no squatting, kneeling, climbing, reaching above the shoulders, lifting or carrying and no repetitive neck movements.

[5] 5 U.S.C. § 8106(c).

[6] *Joyce M. Doll*, 53 ECAB 790 (2002).

[7] *Id.*

[8] 20 C.F.R. § 10.517(a).

[9] *Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[10] 20 C.F.R. § 10.500(b); *see Ozine J. Hagan*, 55 ECAB ____ (Docket No. 04-584, issued September 2, 2004).

[11] *Gloria G. Godfrey*, 52 ECAB 486 (2001).

[12] *Gayle Harris*, 52 ECAB 319 (2001).

The medical evidence of record, therefore, establishes that appellant could physically perform the duties of the offered position.[13]

In order to properly terminate appellant's compensation under section 8106, the Office must provide notice of its finding that an offered position is suitable and give appellant an opportunity to accept or provide reasons for declining the position.[14] The record in this case establishes that the Office properly followed the procedural requirements. By letter dated June 17, 2005, the Office advised appellant that a partially disabled employee who refused suitable work was not entitled to compensation and that the offered position had been found suitable. He was notified of the penalty provisions of section 8106 and allotted 30 days to either accept or provide reasons for refusing the position. In a letter dated August 26, 2005, the Office advised appellant that the reasons given for not accepting the job offer were unacceptable. He was given an additional 15 days in which to accept the job. There is no evidence of a procedural defect in this case as the Office provided appellant with proper notice. He was offered a suitable position by the employing establishment and such offer was refused. Thus, under section 8106 of the Act, his compensation was properly terminated on September 20, 2005.[15]

Appellant generally alleged that it was improper for the Office to terminate his compensation benefits because he had retired on Social Security and disability from the employing establishment. A finding of disability by another agency that appellant was unemployable is insufficient by itself to show that he could not perform the duties of the offered position.[16] Rather, he must submit medical evidence to establish that he was physically unable to perform the duties of the offered position and, as stated above, appellant has not provided such evidence in this case. The Office, therefore, properly terminated his wage-loss compensation on September 20, 2005 on the grounds that he refused an offer of suitable work.[17]

On appeal appellant generally argued that he is entitled to an additional schedule award. The facts in this case show that appellant filed a schedule award claim on October 29, 2002 and he was granted a schedule award for an eight percent left upper extremity impairment on April 29, 2003. As the issue of whether he is entitled to a greater award was not adjudicated by the Office, it is not before the Board on this appeal.

CONCLUSION

The Board finds that the Office properly terminated appellant's wage-loss compensation on September 20, 2005 pursuant to 5 U.S.C. § 8106(a).

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[13] *Id.*

[14] *See Maggie L. Moore*, *supra* note 9.

[15] *Joyce M. Doll*, *supra* note 6.

[16] *See David Budzik*, 52 ECAB 339 (2001); *see also* Federal (FECA) Procedure Manual, Part 2, Claims, *Refusal of Job Offer*, Chapter 2.814.5(c) (July 1997).

[17] *Joyce M. Doll*, *supra* note 6.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 13, 2006 and September 20, 2005 be affirmed.

Issued: September 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