United States Department of Labor
Employees' Compensation Appeals Board

C.P., Appellant	)	
and	)	**Docket No. 06-1028**
	)	**Issued: September 22, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Wilmington, DE, Employer	)	

Appearances:
C.P., 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

JURISDICTION

On March 27, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions dated September 28, 2005 and February 14, 2006 terminating his schedule award and 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 schedule award and compensation benefits effective August 8, 2004 on the grounds that he refused an offer of suitable employment.

FACTUAL HISTORY

On June 24, 2002 appellant, then a 42-year-old mail clerk, filed an occupational injury claim that was accepted for bilateral carpal tunnel syndrome. He underwent carpal tunnel release surgery on March 20 and September 17, 2003 and received compensation for temporary total disability.

The record contains an unsigned report dated January 30, 2004 from appellant's treating physician, Dr. Leo Raisis, a Board-certified orthopedic surgeon, whose neurological examination of his upper extremities revealed no deficits with regard to motor, sensory and reflex function of either extremity. He indicated that appellant could work with restrictions, including no repetitive use of either hand; no use of his left arm at shoulder level or above and no lifting over 30 pounds.

On March 1, 2004 the employing establishment made a limited-duty job offer to appellant. The offer indicated that the position of modified mail processor required no repetitive grasping or fine manipulation; no pushing or pulling; no operating of machinery; and limited use of the hands. The offer identified the limited-duty station as "rips and torns table -- LMLM table." The physical requirements of the position included: "lifting one envelope at a time and placing it into the three different trays, then repair[ing] envelope[s] in order of priority. Sit at LMLM table and face up mail one letter at a time."

The Office referred appellant, along with the entire medical record and a statement of accepted facts, to Dr. Robert F. Draper, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated April 12, 2004, Dr. Draper provided a diagnosis of bilateral carpal tunnel syndrome, which he opined was caused by the repetitive duties of his job. He reviewed the history of appellant's condition and related the findings of his examination. In the right upper extremity, Dr. Draper found a negative Tinel sign over the median and ulnar nerve of the right wrist and elbow; no thenar or hypothenar atrophy; normal light touch sensation over the tips of the index and little fingers; normal two-point discrimination of four millimeters over the tip of the index finger and tip of the little finger; and +5/5 grip strength. Range of motion testing for the right elbow reflected extension lag and flexion of 0 and 150 degrees respectively; forearm supination and pronation of 85 and 80 degrees respectively; and wrist extension, flexion, ulnar deviation and radial deviation of 80, 80, 40 and 50 degrees respectively. In the left upper extremity, he found a negative Tinel sign over the median and ulnar nerve of the left wrist and elbow; no thenar or hypothenar atrophy; normal light touch sensation over the tips of the index and little fingers; and two-point discrimination of four millimeters over the tip of the index finger and tip of the little finger. Range of motion testing for the left elbow reflected extension lag and flexion of 0 and 150 degrees respectively; forearm supination and pronation of 85 and 80 degrees respectively; and wrist extension, flexion, ulnar deviation and radial deviation of 80, 80, 40 and 30 degrees respectively. The range of motion of the distal interphalangeal joints of all fingers of both hands was 0 to 70 degrees; range of motion of the proximal interphalangeal joints in all fingers was 0 to 100 degrees; and range of motion of the metacarpophalangeal joints was 0 to 90 degrees. Dr. Draper opined that appellant had been totally disabled due to the work-related condition from March 17 to May 17, 2003 and from September 17 to November 17, 2003. He further opined that he was able to return to work with the restrictions provided in his accompanying work capacity evaluation, and could perform the duties of the "rips and torns" position. Stating that he really did not have enough information about the LMLM machine, Dr. Draper stated that his inclination would be to return appellant to light-duty work "but not put him on the LMLM table." In the accompanying work capacity evaluation dated April 12, 2004, Dr. Draper stated that appellant could work eight hours per day, provided that he did not perform repetitive movements of the wrists and elbows. Appellant was

also restricted from standing more than four hours; squatting, kneeling, climbing more than four hours; and pushing, pulling or lifting more than 30 pounds.

On March 16, 2004 the employing establishment offered appellant the position of modified mail processor. The offer indicated that the location of the position was the "rips and torn mail table." The duties consisted of repairing ripped and torn mail six hours per day and separating and putting rips and torns into the mail stream one and a half hours per day. The physical requirements of the position were "lifting one letter at a time and plac[ing] it into the three different trays, then repair[ing] envelope[s] in order of priority."

In notes dated April 23, 2004, Dr. Raisis indicated that appellant continued to be released to light duty, with no repetitive use of his upper extremities. He noted that he conceded that appellant was able to perform the duties involved in the "rips and torns" position, but had a particular problem with the LMLM position. Dr. Raisis found that he had full range of motion in his fingers and wrists; grip strength in the right hand was 84 pounds first attempt and 68 pounds second attempt; and left hand grip strength was 150 pounds first attempt and 65 pounds second attempt.

By letter dated June 1, 2004, the Office advised appellant that it found the position of modified mail processor to be suitable and in accordance with his medical limitations as provided by Dr. Raisis in his April 23, 2004 report and by Dr. Draper in his May 12, 2004 second opinion report. It noted that the employing establishment had confirmed that the modified position required no use of the LMLM machine. 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.

By letter dated June 26, 2004, appellant refused to accept the limited-duty position, contending that it was "not modified according to [his] current medical restrictions." He stated his belief that returning to a position repairing damaged mail without modification would "lead to future recurrences."

By letter dated July 20, 2004, the Office advised appellant that he failed to provide valid reasons for refusing to accept the limited-duty job and 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.

Notes from Dr. Raisis dated July 28, 2004 reflected appellant's "subjective report" that his "hands ha[d] worsened recently" and that he did not feel that he could "do the rips and torns at work."

By decision dated August 17, 2004, the Office terminated appellant's wage loss and schedule award benefits effective August 8, 2004 on the grounds that he refused an offer of suitable work.

On August 30, 2004 appellant requested a review of the written record. He submitted notes dated September 13, 2004 from Dr. Raisis. Electromyogram (EMG) testing of appellant's

right upper extremity showed possible mild right carpal tunnel syndrome (CTS) and mild right ulnar nerve entrapment at the elbow. A left upper extremity EMG was normal. Although appellant continued to complain of bilateral hand pain, x-rays of both hands showed no evidence of bony abnormalities. Dr. Raisis noted some continued sensitivity along both ulnar grooves and right elbow; mildly positive Tinel's; and some sensitivity along the right computerized tomography (CT). On October 27, 2004 stating that appellant was concerned that he might have to resume a job that caused problems with his hands, Dr. Raisis recommended that he try to continue his work.

By decision dated December 29, 2004, an Office hearing representative affirmed the August 17, 2004 decision. He found that appellant had not provided a valid justification for refusing the modified position and stated that Dr. Raisis had provided no medical reasoning to support an opinion that appellant was unable to perform the duties of the "rips and torns" position.

On March 25, 2005 appellant filed an appeal with the Board.[1] At his request, the Board dismissed his appeal so that he could submit a request for reconsideration to the Office.[2]

On September 6, 2005 appellant requested reconsideration of the December 29, 2004 decision. He submitted an EMG report dated September 3, 2004. Unsigned notes from Dr. Raisis dated April 15, 2005 reflected a diagnosis of bilateral overuse syndrome and indicated that appellant's restrictions remained unchanged.

By decision dated September 28, 2005, the Office denied modification of the hearing representative's December 29, 2004 decision finding that the evidence submitted did not refute the determination that appellant had refused an offer of suitable employment.

In an unsigned July 29, 2005 report, Dr. Raisis indicated that appellant had been released to do "rips and torns" on April 23, 2004 but was restricted from an LMLM position. He indicated that appellant reported at that time that he was capable of performing the job. Dr. Raisis stated that appellant returned to his office on August 30, 2004 complaining of increased paresthesias in his right upper extremity and that EMG testing showed evidence of possible mild right CTS and mild right ulnar nerve entrapment at the elbow. He opined that appellant had developed bilateral CTS and mild right ulnar nerve entrapment at the elbow directly as a result of his work activities. Based on his increased symptoms, Dr. Raisis opined that he could not perform duties at the LMLM table or "rips and torns."

Appellant submitted a report dated August 31, 2005 from Dr. Scott M. Fried, a Board-certified osteopath, specializing in the field of orthopedic surgery, who indicated that he had returned to work in August 2004. Dr. Fried stated that appellant's then current job was repetitive in nature and recommended that his duties be modified to accommodate his recurrent bilateral

[1] Docket No. 05-1022.

[2] Docket No. 05-1022 (issued August 23, 2005).

CTS. Restrictions included reducing his schedule to every other night and limiting his reaching and allowing frequent breaks.

An October 14, 2005 memorandum to the file from a senior claims examiner reflected that, after returning to work in August 2004, appellant filed a separate claim (032042899), that was accepted for aggravation of bilateral CTS and right ulnar nerve entrapment.[3] On December 9, 2005 the Office combined the two claims under his June 24, 2002 claim.

By letter dated November 28, 2005, appellant, by counsel, requested reconsideration of the Office's September 28, 2005 decision.

Appellant submitted an August 31, 2005 disability certificate signed by Dr. Fried, who recommended the following restrictions: limited repetitive activity; no reaching; no prolonged head or neck activity; breaks 10 minutes every hour; headset for telephone; no regular keying or writing; and working three nights per week on alternate nights.

By letter dated December 14, 2005, the Office asked the employing establishment to clarify certain issues, including the specific duties of the modified job that was offered to appellant and whether those duties included working on the LMLM table. The Office also inquired as to the date he returned to work and the position description and the physical requirements of the job to which he returned.

An Office memorandum to the file dated January 18, 2006 reflects that appellant delivered several documents to the Office on January 11, 2006. At that time he informed "SBF" that he returned to work in August 2004 in the same job he had since 1994. Appellant also stated that he had not worked on the LMLM table since 1994.

In a letter dated January 11, 2006, appellant stated that he returned to work in August 2004, when he was given the same job that had caused his CTS, with the addition of working on the LMLM table.

In an undated statement referencing claim no. 032042899, appellant indicated that his "bilateral CTS and ulnar nerve of the right and left extremity" was first brought to his doctor's attention August 30, 2004 after his return to work. He stated that, prior to returning to work, he was having problems with his right hand, with tingling, numbness and pain in his right hand and elbow. Appellant alleged that on August 30, 2004 he became aware that the duties of his return-to-work job had aggravated his condition, such that both hands were affected. He indicated that he was filing a CA-2 for the injuries that occurred subsequent to his return to work.

In a letter from the employing establishment to the Office dated January 20, 2006, Robert C. Wiedman, manager of distribution operations, stated that the establishment had not used the LMLM machine in over two years and that appellant was never required to perform any duties on the LMLM machine. Mr. Weidman indicated that appellant's return-to-work job was

[3] The Board notes that the record does not contain a copy of the CA-2 relating to claim no. 032042899.

not repetitive in nature, in that he was required to complete approximately one piece of mail every four and a half minutes.

On February 14, 2006 the Office denied modification of its September 28, 2005 decision, finding that appellant had failed to establish that the offered position was unsuitable. The Office stated that the evidence did not support that he was required to work at the LMLM table.[4]

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.[5] Section 8106(c) of the Federal Employees' Compensation Act[6] 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 provides that 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.[7]

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.[8] 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.[9]

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[4] Appellant submitted documents subsequent to the Office's August 23, 2004 final decision. The Board does not have jurisdiction to review this evidence for the first time on appeal as its review of a case is limited to the evidence in the case record, which was before the Office at the time of its final decision; *see* 20 C.F.R. § 501.2(c).

[5] *See Melvin James*, 56 ECAB ___ (Docket No. 03-2140, issued March 25, 2004).

[6] 5 U.S.C. § 8106(c)(2).

[7] 20 C.F.R. § 10.516.

[8] *See Linda Hilton*, 52 ECAB 476 (2001).

[9] *Id. See also Glen L. Sinclair*, 36 ECAB 664 (1985).

ANALYSIS

The Board finds that the Office properly terminated appellant's compensation benefits effective August 8, 2004 on the grounds that he refused an offer of suitable work.

The Board finds that the reports of appellant's physician, Dr. Raisis and the second opinion examiner, Dr. Draper, established that the position of modified mail processor was within his physical capabilities. Dr. Raisis' January 30, 2004 neurological examination of appellant's upper extremities revealed no deficits with regard to motor, sensory and reflux function of either extremity. He opined that appellant was able to work with restrictions, including no repetitive use of either hand; no use of his left arm at shoulder level or above; and no lifting over 30 pounds. On April 23, 2004 Dr. Raisis reiterated his opinion that appellant was able to work, provided that he be restricted from repetitive use of his upper extremities. He noted that he conceded that he was able to perform the duties involved in the "rips and torns" position, but had a particular problem with the LMLM position. Dr. Raisis found that appellant had full range of motion in his fingers and wrists; grip strength in the right hand was 84 pounds first attempt and 68 pounds second attempt; and left hand grip strength was 150 pounds first attempt and 65 pounds second attempt. In his April 12, 2004 report, Dr. Draper reviewed the history of his injury. Following a thorough examination of appellant and review of the entire medical record and statement of accepted facts, Dr. Draper opined that appellant was capable of working a modified position for 8 hours, provided that he was not required to perform repetitive movements of the wrists and elbows; stand more than 4 hours; squat, kneel or climb more than 4 hours; or push, pull or lift more than 30 pounds. He further opined that he was able to perform the duties of the "rips and torns" position, but recommended that he not be placed on the LMLM machine. The Board finds that Dr. Draper's opinion with respect to appellant's work limitations is based on a proper factual background and is sufficient to establish that he was capable of returning to work subject to the recommended restrictions.

Based on Dr. Draper's restrictions, on March 16, 2004, the employing establishment offered appellant a modified mail processor position that required him to repair ripped and torn mail six hours per day and to separate and put "rips and torns" into the mail stream one and a half hours per day. The physical requirements of the position were "lifting one letter at a time and plac[ing] it into the three different trays, then repair[ing] envelope[s] in order of priority." The Board notes that the March 16, 2004 job offer eliminated the requirement that appellant work at the LMLM table, which was a provision of the previous March 1, 2004 job offer. The employing establishment confirmed that the offered position was not repetitive, in that it required the completion of one piece of mail approximately every four and a half minutes. The Board finds that the physical requirements of the offered position were consistent with the restrictions set forth by Dr. Draper and Dr. Raisis and that the position was medically suitable to appellant's work restrictions.

The Office properly followed its procedural requirements in this case. By letter dated June 1, 2004, it informed appellant that it found the position suitable and in accordance with his medical restrictions and advised him that he had 30 days to report to duty or provide valid reasons for refusing to do so. The Office specifically advised him that the employing establishment had confirmed that the modified position required no use of the LMLM machine.

Appellant rejected the job offer on June 26, 2004, contending that it was "not modified according to [his] current medical restrictions" and stated his belief that returning to a position repairing damaged mail without modification would "lead to future recurrences." His concern about a future injury is not justification for refusing a position that has been found suitable,[10] nor is appellant's subjective report on July 28, 2004 that his "hands had worsened recently" and that he felt he could not perform the "rips and torns" job, a valid reason for refusing to accept the limited-duty position. The Board finds appellant's contention that the job was not modified according to his restrictions without merit. Both Dr. Draper and Dr. Raisis opined that he could perform the duties of the "rips and torns," but not those of the LMLM table. The modified job offered to appellant on March 16, 2004 did not contain a provision for work at the LMLM table. Moreover, the employing establishment verified that the position offered did not include working at the LMLM table and that the establishment had not used the LMLM machine since prior to January of 2004. Appellant did not submit any additional medical evidence in support of his claim that he could not perform the duties of the modified position. On July 20, 2004 the Office advised him that his reasons for not accepting the job were unacceptable and that, if he did not accept the offer within 15 days, his monetary compensation benefits would be terminated. Appellant did not accept the position within the required period. Accordingly, his compensation was properly terminated.

As the Office met its burden of proof to terminate appellant's compensation based on his refusal of suitable work, the burden shifted to him to show that his refusal to work was justified.[11] None of the medical evidence submitted subsequent to the August 17, 2004 decision established that appellant was unable to perform the duties of the modified position on the date the Office terminated his benefits. He submitted EMG reports and reports from Dr. Raisis dated September 13 and October 27, 2004 and April 15 and July 29, 2005. Appellant also submitted a report dated August 31, 2005 from Dr. Fried. On September 13, 2004 Dr. Raisis noted that EMG testing revealed possible mild right CTS and mild right ulnar nerve entrapment at the elbow. On October 27, 2004 he recommended that appellant try to continue his work. Dr. Raisis April 15, 2005 notes reflected a diagnosis of bilateral overuse syndrome and indicated that appellant's restrictions were unchanged. None of these reports specifically addressed whether appellant was capable of performing the duties of the modified job as of August 17, 2004 and they, therefore, lack probative value. In his July 29, 2005 report, Dr. Raisis stated that appellant had returned to his office on August 30, 2004, after the termination of benefits, complaining of increased paresthesias in his right upper extremity. He opined that, based on his increased symptoms, appellant could not perform the duties at the LMLM table or "rips and torns." However, Dr. Raisis did not address whether he was capable of performing the duties required of the modified position on the date of termination of benefits. Dr. Fried's August 31, 2005 report also failed to address whether the modified position was within appellant's limitations on the date of termination. Noting that he had returned to "his same job in August 2004," Dr. Fried did not address the specific duties outlined in the modified position refused by appellant or whether he was capable of performing those duties. All of the above-referenced reports address his

[10] The Board has held that the possibility of a future injury does not constitute an injury or form a basis for payment of compensation under the Act. *See Andy J. Paloukos*, 54 ECAB 712 (2003); *see also Geatan F. Valenza*, 39 ECAB 1349 (1988).

[11] *See Ronald M. Jones*, 52 ECAB 190 (2000).

condition after the termination of benefits and are, therefore, not relevant to the issue at hand. Rather, they relate to appellant's later claim filed for conditions that allegedly developed after his return to work on August 30, 2004. The Board finds that he has submitted no probative medical evidence providing valid reasons for his refusal of suitable work. Therefore, appellant has not established a reasonable basis for refusing the offered position.

The Office properly advised appellant in its July 20, 2004 letter, that his reasons for refusing the offered position were not valid and that he must either accept the position within 15 days or face termination of his compensation benefits. However, appellant did not accept the position prior to the issuance of the August 17, 2004 termination decision. As the weight of the medical evidence at the time of the August 17, 2004 decision established that appellant could perform the duties of the offered position, he did not offer sufficient justification for refusing the position. Therefore, the Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective August 8, 2004, as he refused an offer of suitable work.[12]

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation and schedule award benefits effective August 8, 2004 for refusing a suitable job offer.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 14, 2006 and September 28, 2005 are affirmed.

Issued: September 22, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

[12] *Karen L. Yaeger*, 54 ECAB 323 (2003).