United States Department of Labor
Employees' Compensation Appeals Board

T.P., Appellant **and** **DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Coppell, TX, Employer**	**Docket No. 07-114** **Issued: April 24, 2007**

Appearances:
Appellant, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 11, 2006 appellant filed a timely appeal of the Office of Workers' Compensation Programs' August 1, 2006 merit decision terminating her compensation for refusing suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this appeal.

ISSUE

The issue is whether the Office properly terminated appellant's compensation effective August 6, 2006, based on her refusal to accept suitable employment.

FACTUAL HISTORY

On July 20, 2001 appellant, then a 38-year-old transportation security screener, filed a traumatic injury claim alleging that she injured her right shoulder while lifting a bag. On June 8, 2005 the Office accepted appellant's claim for sprain/strain of the right shoulder and she was

placed on the periodic rolls. Subsequently, the Office authorized a rotator cuff repair, which was performed on November 16, 2005.

Appellant was treated by Dr. Thomas Diaz, Board-certified in the field of family medicine, and Dr. Mark A. Kazewych, a Board-certified orthopedic surgeon. In a narrative report dated April 24, 2006, Dr. Kazewych opined that appellant was able to work full time, provided that she be restricted from any pushing, pulling or working with either arm away from the body or from lifting more than 10 pounds with her elbows at her sides. His examination of appellant's right shoulder reflected range of motion of 170 degrees of flexion and abduction; internal rotation to T10; and external rotation of 60 degrees. Appellant had 4+/5 supraspinatus and infraspinatus muscle testing on the right. Belly press test was negative. Rotator cuff strength on the left was completely normal. An accompanying work capacity evaluation reflected that appellant was able to work eight hours with restrictions. Dr. Kazewych recommended that appellant should not engage in any lifting with her elbows away from her sides and should lift a maximum of 10 pounds with elbows at her sides. He recommended against any pushing, pulling or repetitive lifting.

On April 28, 2006 the employing establishment offered appellant a light-duty position as an exit lane monitor, commencing April 30, 2006. Hours of employment were midnight to 8:30a.m., five days per week. Physical requirements of the job included sitting, walking, standing and lifting and carrying up to 10 pounds intermittently. The assignment specified that appellant would not be required to push, pull, reach or reach above the shoulder. Stated duties included answering questions from military passengers and family members; directing passengers and family members to meeting rooms; facilitating identification of passengers and family credentials; monitoring exit points to ensure that no one gained access to the sterile area via the exit lane; and calling the supervisor for deviations or attempts at gaining access. The job description provided that appellant would have a podium and chair available; would be authorized to take two 15-minute breaks and a ½-hour lunch; and would be able to read employment-approved material while on duty. She rejected the offer, stating that she could not work the hours offered "due to child care."

In a May 18, 2006 letter, the Office advised appellant that it had found the offered position suitable and in accordance with the medical restrictions provided by Dr. Kazewych on April 24, 2006. The Office informed her that an employee who refuses an offer of suitable work was not entitled to further compensation and that she had 30 days to accept the position or provide a written explanation of her reasons for not doing so.

Appellant submitted numerous physical therapy reports for the period April 27 through July 6, 2006. She also submitted a March 7, 2006 operative report of a right cervical facet injection. In a narrative statement dated June 3, 2006, appellant indicated that she felt justified in rejecting the limited-duty position, due to the fact that the employing establishment was "much aware" that she worked only during the daytime. She alleged that the employing establishment had treated her in a rude manner. Appellant stated that she felt that she had no alternative but to seek out new employment that could provide her with light-duty status on a day shift. She informed the Office that she had resigned from her position at the employing establishment.

By letter dated June 27, 2006, the Office advised appellant that her reasons for refusing the offer of employment were not valid and that she had 15 days to accept the position.[1]

By decision dated August 1, 2006, the Office terminated appellant's compensation effective August 6, 2006, on the basis that she refused an offer of suitable work. The Office found that the position was within the physical restrictions set by appellant's physician and her desire not to work the night shift was not a valid basis for refusing the job offer.[2]

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. Under section 8106(c)(2) of the Federal Employees' Compensation Act,[3] the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.[4] Office regulations provide that an employee who refuses or neglects to work after suitable work has been offered or secured 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 a determination is made with respect to termination of entitlement to compensation.[5] To justify termination, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[6] Before compensation can be terminated, the Office has the burden of demonstrating that the employee can work, setting forth specific restrictions, if any, on the employee's ability to work. The Office must also establish that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.[7]

[1] The record contains a nurse closure report for the period May 20 through June 19, 2006, indicating that appellant had accepted a position as a bookkeeper.

[2] The Board notes that appellant submitted additional evidence after the Office rendered its August 1, 2006 decision. The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952). Therefore, the Board cannot consider this newly-submitted evidence. Appellant may submit this evidence to the Office, together with a formal request for reconsideration, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b)(2).

[3] 5 U.S.C. § 8101 *et seq*.

[4] *Patrick A. Santucci*, 40 ECAB 151 (1988); *Donald M. Parker*, 39 ECAB 289 (1987).

[5] 20 C.F.R. §§ 10.516 and 10.517; *see also Catherine G. Hammond*, 41 ECAB 375 (1990).

[6] *See John E. Lemker*, 45 ECAB 258 (1993).

[7] *Linda Hilton*, 52 ECAB 476, 481 (2001).

According to Office procedures, certain explanations for refusing an offer of suitable work are considered acceptable.[8] Unacceptable reasons include appellant's preference for the area in which she resides; personal dislike of the position offered or the work hours scheduled; and lack of promotion potential or job security.[9]

ANALYSIS

The Board finds that the Office met its burden of demonstrating that the work offered to appellant was suitable and that she failed to show that her refusal to accept the modified-job offer was reasonable or justified. Thus, the Office properly terminated appellant's compensation under 5 U.S.C. § 8106(c)(2), for refusing an offer of suitable work.

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.[10] The record demonstrates that the physical capacity required for the exit lane monitor position was within appellant's work restrictions, as identified by Dr. Kazewych. On April 24, 2006 Dr. Kazewych opined that appellant could work full time, provided that she should not engage in any lifting with her elbows away from her sides; should lift a maximum of 10 pounds with elbows at her sides; and should not engage in any pushing, pulling or repetitive lifting. Physical requirements of the position of exit lane monitor included sitting, walking, standing and lifting and carrying up to 10 pounds intermittently. The assignment specified that appellant would not be required to push, pull, reach or reach above the shoulder. Stated duties included answering questions from military passengers and family members; directing passengers and family members to meeting rooms; facilitating identification of passengers and family credentials; monitoring exit points to ensure that no one gained access to the sterile area via the exit lane; and calling the supervisor for deviations or attempts at gaining access. The job description provided that appellant would have a podium and chair available; would be authorized to take two 15-minute breaks and a ½-hour lunch; and would be able to read employment-approved material while on duty. As the physical requirements of the position of exit lane monitor were within the restrictions recommended by Dr. Kazewych, the Board finds that the position was suitable. The Board notes that appellant did not contend that the duties of the position exceeded her limitations nor did she disagree with the restrictions recommended by her physician.

By letter dated May 18, 2006, the Office notified appellant that it found the exit lane monitor position offered to her on April 28, 2006 to be suitable, based on the April 24, 2006 report of Dr. Kazewych. The Office advised her that she had 30 days to accept the offer or provide reasons why she believed the position was not suitable. Appellant rejected the offer, stating that she could not work the hours offered "due to child care." On June 27, 2006 the

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[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(1)-(5) (July 1997). *See Cloteal Thomas*, 41 ECAB 310 (1989); *Carl W. Putzier*, 37 ECAB 691 (1986).

[9] *Arthur C. Reck*, 47 ECAB 339 (1996); Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 2.814.5(c) (July 1996).

[10] *Marilyn D. Polk*, 44 ECAB 673 (1993).

Office informed appellant that she had failed to provide valid reasons for refusing the offered position and allowed her 15 additional days to accept the position. The Board finds that the Office met its burden of proving that the work offered was suitable and that appellant was informed of the consequences of her refusal to accept the offered employment.[11] When appellant failed to accept the position within the prescribed 15 days, the Office properly terminated her benefits.

Appellant contended that the position offered was not suitable because it required her to work a night shift. She felt justified in rejecting the limited-duty position, due to the fact that the employing establishment was "much aware" that she only worked during the daytime. Appellant stated that she felt that she had no alternative but to seek out new employment that could provide her with light-duty status on a day shift. The Board finds appellant's argument to be without merit. Office procedures provide that an employee's dislike of the position offered or the work hours scheduled, is not an acceptable reason to refuse a suitable job offer.[12] In this case, appellant refused an offer of suitable work after stating a personal preference for a day shift instead of the offered night shift, due to child care concerns. The Office advised her that her reasons for rejecting the job offer were not justified and allowed her another 15 days to accept the position. The Office properly terminated appellant's compensation benefits when she did not accept the position.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation effective August 6, 2006, on the grounds that she refused an offer of suitable work.

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

[12] *Patricia M. Finch*, 51 ECAB 165 (1999).

ORDER

IT IS HEREBY ORDERED THAT the August 1, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 24, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board