United States Department of Labor
Employees' Compensation Appeals Board

S.J., Appellant	)	
and	)	**Docket No. 06-2135**
	)	**Issued: August 21, 2007**
DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, WA, Employer	)	

Appearances:
John Goodwin, Esq., for the appellant
No appearance, for the Director

Oral Argument June 6, 2007

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 22, 2006 appellant, through his attorney, filed a timely appeal of the August 11, 2006 merit decision of an Office of Workers' Compensation Programs' hearing representative denying his recurrence of total disability claim for the period August 20 to October 25, 2004 and rescinding payment of compensation for the period January 17 to 21, 2005. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly adjudicated appellant's recurrence of disability claim for the period August 20 to October 25, 2004; and (2) whether the Office properly rescinded appellant's compensation for the period January 17 to 21, 2005, on the grounds that he was not totally disabled from employment during this period due to his accepted employment-related injuries.

FACTUAL HISTORY

On April 17, 2003 appellant, then a 42-year-old welder, filed an occupational disease claim for bilateral epicondylitis of the elbows, bilateral wrist flexor tenosynovitis and bilateral carpal tunnel syndrome. He constantly used his hands and arms in flexed and articulated positions. Appellant also lifted, carried, pushed, pulled, twisted, turned, gripped and torqued. He stated that he used many hand and power tools. By letter dated June 27, 2003, the Office accepted his claim for bilateral carpal tunnel syndrome, bilateral wrist flexor tenosynovitis and bilateral epicondylitis of the elbows. It paid him appropriate compensation.

By letter dated August 11, 2004, appellant's attorney advised the Office that, during that year appellant had been assigned to a light-duty firewatcher position until recently, when the employing establishment withdrew the position. The employing establishment wanted him to perform clerical work in its personnel office. Counsel stated that the employing establishment did not provide a written job offer for this position, but promised that his duties would be in accordance with the physical limitations set forth by his attending physician. Counsel requested a written job offer from the employing establishment so that appellant could ask Dr. Michael McManus, an attending physician, to review it.

On August 20, 2004 appellant filed a claim for wage-loss compensation for the period August 20 to September 3, 2004. In an undated memorandum, Louis J. Fattrusso, director of the employing establishment's injured workers' program, stated that appellant had been performing firewatch work which should not have aggravated his employment-related carpal tunnel syndrome. This position was the type of job employees returned to while recovering from surgery. Mr. Fattrusso stated that it was within appellant's limitations and that he had refused to perform any work within his latest limitations. On August 24, 2004 appellant presented a new work limitation of no waterfront work due to his blood pressure. He stated that a position in the pass and identification office was available commencing August 20, 2004. It involved receiving new hire packages which consisted of approximately 10 pieces of paper. The position allowed standing, sitting, moving and numerous breaks as needed. No filing, use of the hands, other than to accept the packages from new hires, lifting, bending, squatting or kneeling were required. Mr. Fattrusso advised appellant that he would have a written description of his work duties by the close of business on August 23, 2004 or at the start of his shift on August 24, 2004, but appellant refused the job offer. He contended that appellant failed to provide any documentation establishing his total disability for work. Mr. Fattrusso noted that the position in the pass and identification office was still available.

By letter dated September 16, 2004, the Office advised appellant that there was no medical evidence of record establishing that he sustained a recurrence of disability. The Office characterized the issue in this case as a recurrence of disability claim because appellant returned to light-duty work following his November 23, 2001 employment injury. It addressed the factual and medical evidence he needed to submit to establish his recurrence of disability claim.

On September 17, 2004 appellant filed a claim for wage-loss compensation for the period beginning September 6, 2004.

In a letter dated September 19, 2004, counsel requested that the Office provide him a copy of the employing establishment's job offer for the offered light-duty position. He noted that the employing establishment advised appellant that light-duty work was available, but refused to provide him with a written job offer that he could take to his physician. Counsel argued that appellant sustained a recurrence of disability because the employing establishment withdrew his light-duty job as a firewatcher.

On September 27, 2004 the Office held a telephone conference with Mr. Fattrusso and Sheila Connelly, a human resources specialist, regarding the issue of whether light-duty work was withdrawn from appellant. Mr. Fattrusso provided a history of appellant's participation in the injured workers' program from November 22, 2000 to August 11, 2004 and his modified-duty work. On August 2, 2004 appellant presented medical evidence showing an increase in his work restrictions, which included no use of a hand torch, welding no more than five minutes at a time for a total of one hour per day, work requiring the hands and wrists in awkward positions and lifting more than 60 pounds. He could occasionally lift up to 30 pounds, use ladders, structures and scaffolding and seldom driving and use vibration tools. On August 11, 2004 appellant was referred to the injured workers' program by the welding shop. He used leave for his absence from work on August 11, 12, 17, 18 and 19, 2004. Mr. Fattrusso stated that appellant left work on August 20, 2004 following a verbal job offer made to him on that day for a position in the tool room that was within his restrictions. Appellant rejected the job offer and presented another restriction dated August 13, 2004 which further limited his work capacity. Based on these restrictions, Mr. Fattrusso stated that appellant was offered a position in the pass and identification office on August 20, 2004. He noted that appellant would have received a written description for this position by the end of business on August 23, 2004 or at the beginning of August 24, 2004. Mr. Fattrusso contended that appellant could have performed the positions in the tool room or pass and identification office because they were within his restrictions.

By letter dated October 4, 2004, appellant's attorney contended that the employing establishment did not make a valid offer of light-duty work by merely stating that all tasks would be within appellant's work restrictions. He contended that Lanny Kelso, a resource manager, advised appellant that no work would be available within his work limitations. Counsel stated that Mr. Fattrusso never offered appellant, verbally or in writing, a position in the tool room. On August 13, 2004 he was verbally offered a job directing traffic on a pier by Jeff Robinson. Counsel contended that the job offer violated the restrictions set forth by an employing establishment physician. After reviewing these restrictions, Mr. Robinson withdrew the job offer. Counsel also contended that Mr. Fattrusso never offered appellant a position in the pass and identification office. On August 20, 2004 Mr. Robinson informed appellant that he was assigned to this position, but did not provide him with a written job offer or verbally describe the duties and physical requirements of the position. He noted that the implementing federal regulations provide that job offers must be put into writing. Counsel related that Mr. Kelso advised appellant in writing on August 2, 2004, that effective August 9, 2004 no more work was available within his restrictions. To date, appellant had not received any written job offer.

On October 26, 2004 the employing establishment offered appellant a light-duty position in the pass and identification office in writing. He accepted the job offer on that day.

By letter dated January 18, 2005, the Office notified appellant that it found the offered position to be suitable. It informed him that the position was currently available; that he would be paid compensation based on the difference, if any, between the pay of the offered position and the pay of his position on the date of injury; and that he would be able to accept the position with no penalty. The Office advised appellant that he had 30 days to accept the offer or provide reasons why he believed the position was not suitable. Appellant did not respond.

On January 21, 2005 the Office issued a decision denying appellant's recurrence of disability claim, finding that he was not totally disabled during the period August 20 to October 25, 2004 due to his accepted employment-related injuries. The Office found that, while the August 20, 2004 light-duty job offer was not valid, appellant was not released by the employing establishment from the injured workers' program which it characterized as a modified job because it generated a wage. Rather, he removed himself from the program. The Office found no medical evidence which established that appellant could not attend the program or that he was dismissed by the employing establishment from the program. Accordingly, the Office found that appellant was not entitled to compensation benefits.

On January 22, 2005 appellant filed a claim for wage-loss compensation for the period January 17 to 21, 2005. The Office paid him compensation for this period as of February 28, 2005.

In a March 16, 2005 letter, counsel contended that appellant did not receive a written job offer for the pass and identification position until October 26, 2004 and that the position was not deemed suitable by the Office until February 1, 2005.[1] He reiterated that Mr. Fattrusso did not personally offer appellant a position in the tool room. Appellant recalled Mr. Robinson's verbal offer which was withdrawn as soon as Mr. Robinson realized that it violated appellant's work restrictions.

On March 24, 2005 the Office received appellant's February 4, 2005 request for an oral hearing regarding the Office's January 21, 2005 decision. A January 12, 2005 letter stated that appellant was suspended by the employing establishment for five days due to his unauthorized absence and continued failure to perform his assigned duties as directed.

By letter dated June 2, 2005, the Office requested that the employing establishment resolve a discrepancy between its January 12, 2005 suspension letter and a notification of personnel action (SF-50) form which stated that appellant's suspension was due to his continued failure to perform his assigned duties for medical reasons.

By letter dated May 4, 2005, the Office proposed to rescind appellant's compensation in the amount of $762.75 for the period January 17 to 21, 2005 on the grounds that it was paid in error. The Office stated that the record established that appellant was not disabled during the period but was not employed due to a disciplinary action. Appellant was advised to submit evidence in support of his claimed disability within 30 days.

[1] In a February 1, 2005 letter, the Office noted that, since appellant had accepted the offered modified position, the issuance of a final suitability determination was not necessary.

In a May 29, 2005 letter, counsel contended that the employing establishment did not have any light-duty work available for appellant during the period January 17 to 21, 2005. He stated that appellant was willing to perform light-duty work established by Dr. Iverson, an Office referral physician, and not approved by Dr. McManus.

> The employing establishment submitted a June 15, 2005 SF-50, which stated that appellant was suspended for the period no later than January 21, 2005 for unauthorized absence and failure to perform assigned work as directed.

By decision dated July 8, 2005, the Office rescinded payment of compensation for the period January 17 to 21, 2005 on the grounds that appellant was serving a five-day suspension due to a personnel action. The Office found that the employing establishment accommodated appellant's work restrictions even during the period January 17 to 21, 2005. On July 27, 2005 appellant requested an oral hearing.

At the March 29, 2006 hearing, appellant testified that he had refused verbal job offers from the employing establishment at the advice of counsel and requested a written job offer. He stopped work after not receiving a written job offer and filed a claim for compensation. Appellant testified that he accepted the employing establishment's October 26, 2004 written job offer and returned to work on that day.

In response, the employing establishment provided a detailed description of its injured workers' program. Mr. Fattrusso stated that he verbally gave appellant job assignments within his physical limitations, which was normal procedure and appellant refused offers for suitable work based on the advice from his attorney.

By letter dated May 9, 2006, the Office requested that Dr. McManus complete an accompanying work capacity evaluation to determine appellant's ability for work.

On August 11, 2006 a hearing representative affirmed the January 21 and July 8, 2005 decisions. The hearing representative also found the evidence of record insufficient to establish that appellant sustained a recurrence of disability from August 20 through October 25, 2004. There was no evidence that he would not have continued to receive his salary after the employing establishment advised him on August 11, 2004 that his modified position was no longer available, if not for his decision to stop work pending receipt of a written job offer. The hearing representative also found that appellant's suspension was the result of disciplinary action taken for unauthorized absence in conjunction with his participation or lack thereof in the employing establishment's injured workers' program. This action constituted an administrative matter and appellant was not entitled to compensation for disability during the five-day suspension period.

LEGAL PRECEDENT -- ISSUE 1

The Office's implementing regulation define a recurrence of disability as the inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which has resulted from a previous injury or illness without an intervening injury or

new exposure to the work environment that caused the illness.[2] If the disability results from new exposure to work factors, the legal chain of causation from the accepted injury is broken and an appropriate new claim should be filed.[3]

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence, a recurrence of total disability and to show that he or she cannot perform such light-duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.[4] This includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.[5] An award of compensation may not be made on the basis of surmise, conjecture, speculation or on appellant s unsupported belief of causal relation.[6]

Office regulations provide that, where an attending physician notifies the employer in writing that the employee can return to restricted duty, the employer must advise the employee in writing of any available positions which accommodate his restrictions.[7] The offer must include a description of the duties of the position, the physical requirements of those duties and the date by which the employee is either to return to work or notify the employer of his decision to accept or refuse the job offer.[8] When the employer sends a copy of the offer to the employee, it must simultaneously send a copy of the offer to the Office.[9]

The Office's procedures states that, to be valid, an offer of light-duty must be in writing and must include the following information: (1) a description of the duties to be performed; (2) the specific physical requirements of the position and any special demands of the workload or unusual working conditions; (3) the organizational and geographical location of the job; (4) the date on which the job will first be available; and (5) the date by which a response to the job offer

[2] 20 C.F.R. § 10.5(x); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3.b(a)(1) (May 1997). *See also Phillip L. Barnes*, 55 ECAB 426 (2004).

[3] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3 (May 1997); *Donald T. Pippin*, 54 ECAB 631 (2003).

[4] *Albert C. Brown*, 52 ECAB 152 (2000); *see also Terry R. Hedman*, 38 ECAB 222 (1986).

[5] *Ronald A. Eldridge*, 53 ECAB 218 (2001); *see Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

[6] *Patricia J. Glenn*, 53 ECAB 159 (2001).

[7] 20 C.F.R. § 10.507(b).

[8] *Id.*

[9] *Id.* at § 10.507(d).

is required.[10] The employer must make any job offer in writing. However, the employer may make a job offer verbally as long as it provides the job offer to the employee in writing within two business days of the verbal job offer.[11]

ANALYSIS -- ISSUE 1

The Board finds that the Office improperly adjudicated appellant's recurrence of disability claim for the period August 20 through October 25, 2004. Appellant did not allege that he was totally disabled from August 20 through October 25, 2004 due to his accepted employment-related bilateral carpal tunnel syndrome, bilateral wrist flexor tenosynovitis and bilateral epicondylitis of the elbows. Instead, he contends that the employing establishment withdrew his light-duty position of firewatcher beginning August 20, 2004, the date he was advised that this position was no longer available and, instead was offered a position in the pass and identification office. Appellant asserts that the employing establishment failed to put the new light-duty job offer in writing. The employing establishment contends that appellant refused to accept a suitable job offer and, therefore, is not entitled to compensation for the claimed period. However, the Office failed to comply with the implementing Federal (FECA) Procedure Manual, which provide that several steps must be followed prior to a determination that a position offered to an injured employee is suitable.

Once notified by appellant's physician that he was able to return to light-duty work with restrictions, the employing establishment was obligated to provide a written offer to him. To be valid, the job offer must describe the duties of the position, the physical requirements of those duties and the date by which appellant was to return to work or provide notification of his decision to accept or refuse the job offer.[12] As stated, appellant worked as a firewatcher following his accepted employment injury based on the restrictions of Dr. McManus, his attending physician, until his position was withdrawn by the employing establishment. The employing establishment contends that it presented a suitable job offer to appellant on August 20, 2004 which he refused. However, the evidence of record reflects that appellant did not receive a written job offer as required until October 26, 2004.

There is no evidence that, as of August 20, 2004, the employing establishment submitted a written job offer in compliance with the regulations and the Office's procedure manual. On August 20, 2004 the employing establishment verbally offered appellant a light-duty position in the pass and identification office. Mr. Fattruso stated that this was normal procedure for job offers. Although the employing establishment indicated that it was planning to provide appellant a written job offer, the record does not establish that a job offer was provided to him until October 26, 2004. Accordingly, neither appellant nor his physician could have determined whether the offered job was within his medical restrictions prior to that time.

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4 (December 1993).

[11] 20 C.F.R. § 10.507(c).

[12] *Harold S. McGough*, 36 ECAB 332 (1984).

The employing establishment should have complied with Office regulations by making a job offer verbally, as long as it provided the job offer to appellant in writing within two business days of the verbal job offer.[13] However, the evidence of record does not show that appellant received a written job offer within two days of any verbal offer.

For these reasons, the Board finds that a suitable job offer was not made available to appellant prior to October 26, 2004. Accordingly, the Office improperly denied his recurrence of disability claim for the period August 20 through October 25, 2004.

LEGAL PRECEDENT -- ISSUE 2

The Board has upheld the Office's authority to reopen a claim at any time on its own motion under 5 U.S.C. § 8128 and, where supported by the evidence, set aside or modify a prior decision and issue a new decision. The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.[14] It is well established that, once the Office has accepted a claim, it has the burden of justifying termination of modification of compensation benefits.[15] This holds true where the Office later decides that it has erroneously accepted a claim for compensation. In establishing that its prior acceptance was erroneous, the Office is required to provide a clear explanation of its rationale for rescission.[16]

The Board has held that, if the record establishes that limited-duty work within a claimant's work restrictions would be available for him if his behavior was acceptable and there is no evidence that the claimant stopped work due to his physical condition, then the claimant has no disability within the meaning of the Act.[17]

ANALYSIS -- ISSUE 2

In order to rescind acceptance of appellant's claim for total disability compensation for the period January 17 through 21, 2005, the Office must establish that his inability to earn wages was not due to his accepted employment injury. In the instant case, appellant stopped work on January 17, 2005. On January 12, 2005 the employing establishment suspended him for five days due to his unauthorized absence and continued failure to perform his assigned duties as directed. The Office paid appellant compensation for the period January 17 to 21, 2005. The Board finds that the evidence of record does not establish that appellant was disabled for work due to his accepted employment conditions of bilateral carpal tunnel syndrome, bilateral wrist flexor tenosynovitis and bilateral epicondylitis of the elbows. Rather, he stopped work from

[13] 20 C.F.R. § 10.507(c).

[14] *Andrew Wolfgang-Masters*, 56 ECAB ___ (Docket No. 05-1, issued March 22, 2005); *see also* 20 C.F.R. § 10.610.

[15] *Jorge E. Stotmayor*, 52 ECAB 105 (2000).

[16] *Andrew Wolfgang-Masters*, *supra* note 14.

[17] *Janice Green*, 49 ECAB 307, 308 (1998); *Lester Covington*, 47 ECAB 539, 542 (1996).

January 17 to 21, 2005 due to his suspension for failing to perform his assigned work duties. Since appellant's inability to perform his limited-duty position and consequential loss of wages was due to his suspension, he was not disabled within the meaning of the Act and is, therefore, not entitled to compensation for his lost wages.

CONCLUSION

The Board finds that the Office improperly adjudicated appellant's recurrence of disability claim for the period August 20 to October 25, 2004. The Board, however, finds that the Office properly rescinded appellant's compensation for the period January 17 to 21, 2005.

ORDER

IT IS HEREBY ORDERED THAT the August 11, 2006 decision of the Office of Workers' Compensation Programs is reversed in part, with regard to the denial of appellant's recurrence of disability claim for the period August 20 to October 25, 2004 and affirmed in part, with regard to the rescission of his compensation for the period January 17 to 21, 2005.

Issued: August 21, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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