United States Department of Labor
Employees' Compensation Appeals Board

M.G., Appellant	)	
and	)	**Docket No. 07-848**
	)	**Issued: August 16, 2007**
DEPARTMENT OF THE ARMY, HUNTER ARMY AIRFIELD, Fort Stewart, GA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On February 6, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated November 3, 2006 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, this 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 November 4, 2006 on the grounds that he refused an offer of suitable employment.

FACTUAL HISTORY

This case is before the Board for the second time. In a decision dated May 16, 2006, the Board reversed the Office's September 28, 2005 decision terminating appellant's wage-loss benefits for refusing an offer of suitable employment. The Board found that the Office failed to meet its burden of proof to terminate appellant's benefits. Although the position offered was

temporary, there was no evidence of record that appellant was employed in a temporary position at the time of his original injury. The findings of fact and conclusions of law from the prior decision are hereby incorporated by reference.[1] On June 13, 2006 appellant was restored to temporary total disability effective October 2, 2005.

On May 19, 2004 the Office provided appellant's treating physician, Dr. H. Clark Deriso, a Board-certified orthopedic surgeon, 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. On August 17, 2004 Dr. Deriso recommended restrictions including no lifting over 10 to 15 pounds and no repetitive bending and 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. On March 22, 2005 he stated that appellant was capable of performing the (light) duties of courier, cashier and valet parking attendant. On September 9, 2005 Dr. Deriso stated that appellant exhibited no evidence of recurrent disc disease; that he should return to employment; and that he was not limited in performing any of the jobs reviewed. On May 31, 2006 he indicated that he found no evidence of recurrent disc disease on a recent magnetic resonance imaging (MRI) scan, and expressed surprise that appellant was not engaged in productive employment.

The record contains several SF 50s (Notification of Personnel Action) reflecting that appellant was employed as a temporary laborer at the time of the original injury on September 6, 2000. An SF 50 dated May 23, 2000 showed that appellant was employed as a temporary laborer effective January 24, 1999. The form indicated that a temporary employee serves under appointments limited to one year or less and are subject to termination at any time. Form SF 50 dated April 21, 2001 reflected that appellant's temporary appointment had been extended effective May 24, 2000. An undated Form SF 50 reflected that appellant's temporary position was terminated effective April 21, 2001.

On August 8, 2006 the employing establishment made a limited-duty job offer to appellant. The position of motor vehicle operator was a temporary full-time position available on August 8, 2006. The employing establishment specified that the position required only driving a vehicle and did not require loading or unloading materials or performing any bending, stooping, squatting or lifting more than five pounds. The employing establishment further advised appellant that the position paid an hourly wage of $13.35 and was still available. He would be given an in-processing date upon notification of his acceptance. The employing establishment indicated that appellant's failure to accept the offer by August 21, 2006 would be considered a declination of the offer. The record contains a description of the position of motor vehicle operator. Duties included operating a motor vehicle. Physical requirements included use of the feet, arms, legs and hands to operate the vehicle. No lifting over 10 pounds was required. The position was described as "light duty." On August 16, 2006 appellant accepted the position of motor vehicle operator.

By letter dated August 28, 2006, the employing establishment confirmed that the position offered was temporary in nature. The employing establishment informed appellant that it was

[1] Docket No. 06-319 (issued May 16, 2006). Appellant's September 6, 2000 traumatic injury claim was accepted for a lumbar sprain and laminectomy, L5-S1. He underwent back surgery in March 2001.

permitted to offer him a temporary position, in that he was a temporary employee at the time of his original injury, and reissued the job offer, with an extended reply period of September 5, 2006.

On September 3, 2006 appellant declined the position of motor vehicle operator. By letter dated September 8, 2006, appellant informed the Office that he continued to experience back and leg pains related to his September 2000 injury.

By letter dated September 26, 2006, 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 and subsequent medical notes. 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. Appellant was informed that if he failed to accept the offer, and failed to demonstrate that the failure was justified, then his compensation would be terminated.

Appellant submitted an October 5, 2006 report from Dr. Deriso, who opined that appellant was able to return to employment that would not require lifting over 50 pounds. He indicated that recent examinations revealed no clinical evidence of recurrent disc disease. In a letter dated October 16, 2006, appellant informed the Office that, as a result of his accepted injury, he continued to experience leg and back pain which rendered him unable to work without pain. He also expressed concern that the job offered to him would be discontinued. Appellant also submitted copies of notes dated May 31 and October 5, 2006 from Dr. Deriso.

By decision dated November 3, 2006, the Office terminated appellant's compensation benefits effective November 4, 2006 on the grounds that he refused an offer of suitable work.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proving that the employee's disability has ceased or lessened before it may terminate or modify compensation benefits.[2] Section 8106(c)(2) of the Federal Employees' Compensation Act[3] provides that the Office may terminate the compensation of a disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[4] The Board has recognized that section 8106(c) is a penalty provision which must be narrowly construed.[5]

The Board has held that due process and elementary fairness require that the Office observe certain procedures before terminating a claimant's monetary benefits under section

[2] *Karen L. Mayewski*, 45 ECAB 219, 221 (1993); *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

[3] 5 U.S.C. §§ 8101-8193; 5 U.S.C. § 8106(c)(2).

[4] *Camillo R. DeArcangelis*, 42 ECAB 941, 943 (1991).

[5] *Steven R. Lubin*, 43 ECAB 564, 573 (1992).

8106(c)(2) of the Act.[6] Section 10.516 of the Office's regulations states that the Office will advise the employee that the work offered is suitable and provide the employee 30 days to accept the job or present any reasons to counter the Office's finding of suitability.[7] Thus, before terminating compensation, the Office must review the employee's proffered reasons for refusing or neglecting to work.[8] If the employee presents such reasons and the Office finds them unreasonable, the Office will offer the employee an additional 15 days to accept the job without penalty.[9]

Once the Office establishes that the work offered was suitable, the burden of proof shifts to the employee who refuses to work to show that such refusal or failure to work was reasonable or justified.[10] The determination of whether an employee is physically capable of performing a modified position is a medical question that must be resolved by medical evidence.[11] Office procedures state that acceptable reasons for refusing an offered position include medical evidence of inability to do the work or travel to the job.[12] Furthermore, if medical reports document a condition which has arisen since the compensable injury, and the condition disables the employee, the job will be considered unsuitable.[13]

ANALYSIS

The Board finds that the Office failed to provide appellant proper notice prior to terminating compensation pursuant to 5 U.S.C. § 8106(c)(2).

The Office properly advised appellant on September 28, 2006 that the offered position of motor vehicle operator was deemed suitable and in accordance with his medical limitations as provided by Dr. Deriso; confirmed that the position remained available to appellant; and informed him that he had 30 days to either report to duty or provide a written explanation of his reasons for refusing to do so. Additionally, the Office informed appellant of the consequences under 5 U.S.C. § 8106(c)(2) of refusing an offer of suitable work.

Subsequent to the issuance of the Office's 30-day letter, appellant informed the Office that, as a result of his accepted injury, he continued to experience leg and back pain which rendered him unable to work without pain. He also expressed concern that the job offered to him

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

[7] 20 C.F.R. § 10.516.

[8] *See Maggie L. Moore, supra* note 6.

[9] 20 C.F.R. § 10.516; *see Sandra K. Cummings*, 54 ECAB 493 (2003).

[10] 20 C.F.R. § 10.517(a); *Deborah Hancock*, 49 ECAB 606, 608 (1998).

[11] *See Robert Dickerson*, 46 ECAB 1002 (1995).

[12] *Id.*

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(5) (July 1996); *see Susan L. Dunnigan*, 49 ECAB 267 (1998).

would be discontinued. He submitted an October 5, 2006 report from Dr. Deriso who opined that appellant was able to return to employment that would not require lifting over 50 pounds. He indicated that recent examinations revealed no clinical evidence of recurrent disc disease. Appellant also submitted copies of notes dated May 31 and October 5, 2006 from Dr. Deriso. However, the Office did not make a determination that appellant's reasons for refusing the offered position were unacceptable, prior to terminating compensation; nor did it notify appellant that he had 15 days in which to accept the offered work without penalty, as required. In the decision terminating appellant's benefits on November 3, 2006 without making such a determination, or affording appellant the opportunity to accept the position without penalty, the Office failed to follow the procedures necessary to establish that appellant had refused an offer of suitable employment. Accordingly, the Office improperly terminated appellant's compensation.

CONCLUSION

The Board finds that the Office improperly terminated appellant's compensation on the grounds that he refused an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the November 3, 2006 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 16, 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