United States Department of Labor
Employees' Compensation Appeals Board

D.B., Appellant	)	
and	)	**Docket No. 07-993**
	)	**Issued: August 20, 2007**
DEPARTMENT OF LABOR, MINE SAFETY & HEALTH ADMINISTRATION, Hindman, KY, 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 10, 2007[1] appellant filed a timely appeal from the Office of Workers' Compensation Programs' February 10, 2006 merit decision which affirmed the termination of his compensation based upon his refusal of 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 properly terminated appellant's compensation benefits effective May 19, 2005 on the grounds that he refused an offer of suitable work.

[1] The date of the appeal was determined by the postmark on the envelope received by the Board. *See* 20 C.F.R. § 501.3(d)(2)(ii).

FACTUAL HISTORY

On October 21, 2004 appellant, then a 54-year-old coal mine inspection supervisor, filed a traumatic injury claim alleging that on October 20, 2004 he injured his back, neck, right wrist, hand arm and right leg when he slipped and fell on wet steps. He stopped work on October 20, 2004, returned to intermittent light-duty work on November 17, 2004 and then stopped work again shortly afterwards. Appellant returned to work on January 13, 2005 on an intermittent basis. The Office accepted the claim for fractured fourth and fifth right hand metacarpal and a right anterior cruciate ligament tear.[2]

Dr. Mohammed Q. Islam, an examining physician, conducted a nerve conduction study (NCS) of the lower extremities on February 24, 2005. He reported the electrodiagnositic studies revealed a S1 right-sided radiculopathy, which could not be ruled out and normal electromyography (EMG)/nerve conduction velocity of both lower extremities.

In a March 10, 2005 work capacity evaluation (Form OWCP-5c), Dr. Mukut Sharma, a treating physician, indicated that appellant was capable of working eight hours with restrictions. The work limitations included no pushing or pulling more than 10 pounds, no lifting more than 5 pounds, walking and standing up to one hour at a time, twisting up to two hours and no bending or stooping.

On March 17, 2005 the employing establishment offered appellant a job as a mine safety and health specialist based on the work restrictions outlined in the March 10, 2005 report of Dr. Sharma. The employing establishment advised appellant that the job was located in Duluth Minnesota, outside of his current commuting area. However, the employing establishment informed him that he was entitled to compensation for relocation expenses.

By letter dated March 28, 2005, the Office advised appellant that a suitable position was available and that, pursuant to section 8106(c)(2), he had 30 days to either accept the job or provide an acceptable explanation for refusing the offer. The Office stated that, if appellant refused the job or failed to report to work within 30 days without reasonable cause, it would terminate his compensation pursuant to 5 U.S.C. § 8106(c)(2).

On April 14, 2005 the Office received a February 28, 2005 progress note from Dr. David C. Dome, an examining physician, who noted appellant's employment injury history and reviewed medical records by Dr. Sharma. A physical examination revealed limited cervical spine range of motion, full range of motion of his elbow, positive Tinel's sign at the cubital tunnel and excellent lower extremity range of motion. Dr. Dome recommended that appellant continue with his physical therapy and that he perform only sedentary work. Restrictions included no pulling, pushing or lifting more than five pounds.

In an April 12, 2005 progress note, Dr. James A. Chaney, a treating physician, noted a torn right knee anterior cruciate ligament, a right wrist injury, cervical disc disease, lumbar disc disease, chronic obstructive pulmonary disease and post-traumatic stress disorder.

[2] The employing establishment noted that appellant filed for Social Security disability retirement.

By letter dated May 3, 2005, the Office advised appellant that he had 15 days in which to accept the position or it would terminate his compensation.

In a letter dated May 5, 2005, appellant declined the offered position and offered medical and factual evidence in support of his refusal. He related that he had informed the employing establishment on April 18, 2005 that he was declining the offered position and was granted an extension to respond to the job offer. Appellant stated that his injuries had not resolved and that the nerve damage in his hand and knee was getting worse.

In a March 10, 2005 progress note, Dr. Sharma reported the NCS showed no lower extremities radiculopathy. He opined that appellant's back and neck pain were related to his injury. A physical examination revealed tenderness in the neck and lumbar areas. Appellant informed Dr. Sharma that the neck and back pain occurred only after the accident.

In a February 28, 2006 work capacity evaluation by Dr. Dome indicated that appellant was capable of working eight hours. He found that appellant was only capable of performing sedentary work and recommended that an upper extremity EMG be performed.

Appellant subsequently submitted a March 14, 2005 report from Dr. Muraleedhara P.B. Menon, an examining Board-certified physiatrist, who diagnosed bitemporal and occipital headaches, which were secondary to appellant's neck problems; right knee partial anterior cruciate ligament tear; healed right wrist fracture and fracture dislocation of the fourth metacarpal with residual wrist stiffness and chronic pain; posttrauma lumbar and cervical strain with chronic myofascial pain syndrome; right hand median and ulnar nerve distal neuropathy, likely due to entrapment and related to the wrist injury; and lumbar and cervical disc degenerative disease with no evidence of radicular nerve compression. In an attached medical assessment of appellant's ability to perform work-related activities, Dr. Menon noted restrictions on his work capability. He listed that appellant was capable of occasional lifting up to 5 pounds with his right hand and 15 pounds with his left hand; 1 to 2 hours of standing with a 15 minute interruption; and sitting up to 4 hours per day with an hour interruption

By decision dated May 19, 2005, the Office terminated appellant's compensation benefits effective that date on the grounds that he refused an offer of suitable work.

On May 31, 2005 appellant requested an oral hearing before an Office hearing representative and submitted additional medical and factual evidence. A hearing before an Office hearing representative was held on November 29, 2005 at which appellant submitted his April 18, 2005 letter and testified.

Subsequent to the hearing the Office received progress notes date December 9, 2005 and January 9, 2006 by Dr. Cesar O. Agtarap, a treating physician and a February 28, 2005 x-ray interpretation of the right hand. Dr. Agtarap diagnosed moderate-to-severe chronic pain, lumbago, degenerative disc disease, lumbar radiculopathy, lumbar spine spondylosis, sacroiliac pain, opioid dependence and status post right wrist fracture, right wrist pain, possible RSD.

By decision dated February 10, 2006, the Office hearing representative affirmed the termination of appellant's compensation based upon his refusal of an offer of suitable work.[3]

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides at section 8106(c)(2) that a partially disabled employee who refuses or neglects to work after suitable work is offered is not entitled to compensation.[4] Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits under section 8106 for refusing to accept or neglecting to perform suitable work.[5] The Board has recognized that section 8106(c) serves as a penalty provision as it may bar an employee's entitlement to future compensation and, for this reason, will be narrowly construed.[6] To establish that a claimant has abandoned suitable work, the Office must substantiate that the position offered was consistent with the employee's physical limitations and that the reasons offered for stopping work were unjustified.[7] 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 the medical evidence of record.[8]

Before compensation can be terminated, however, the Office has the burden of demonstrating that the employee can work; setting for 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.[9] However, all of appellant's medical conditions, whether work related or not, must be considered in assessing the suitability of the position.[10]

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[3] The Board notes that, following the February 20, 2006 decision by the Office hearing representative, the Office received additional evidence. However, the Board may not consider new evidence on appeal. *See* 20 C.F.R. § 501.2(c); *Donald R. Gervasi*, 57 ECAB ___ (Docket No. 05-1622, issued December 21, 2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

[4] 5 U.S.C. § 8106(c)(2).

[5] *See Bryant F. Blackmon*, 56 ECAB ___ (Docket No. 04-564, issued September 23, 2005); *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

[6] *See Richard P. Cortes*, 56 ECAB ___ (Docket No. 04-1561, issued December 21, 2004); *H. Adrian Osborne*, 48 ECAB 556 (1997).

[7] *See Wayne E. Boyd*, 49 ECAB 202 (1997).

[8] *See John E. Lemker*, 45 ECAB 258 (1993); *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

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

[10] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(4) (December 1993).

If possible, the employer should offer suitable reemployment in the location where the employee currently resides. If this is not practical, the employer may offer suitable reemployment at the employee's former duty station.[11]

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.[12] This burden of proof is applicable if the Office terminates compensation under 5 U.S.C. § 8106(c) for refusal to accept suitable work.

ANALYSIS

The issue is whether the Office properly found that appellant refused an offer of suitable work. Appellant was a resident of Kentucky at the time of his accepted injury and when he began receiving wage-loss compensation. On March 17, 2005 the employing establishment offered appellant the position of mine safety and health specialist in Duluth, Minnesota. By decision dated February 10, 2006 an Office hearing representative affirmed the May 19, 2005 decision terminating appellant's compensation based upon his refusal of an offer of suitable work.

The Board finds that the Office did not develop the issue of whether work was available near appellant's home in Kentucky. As the Board has previously explained: the regulation now states that the employer should offer suitable reemployment where the employee currently resides, if possible.[13] It was error for the Office to terminate appellant's compensation benefits without positive evidence showing such an offer was not possible or practical. The Board notes that the evidence of record indicates that the offer of employment in Duluth, Minnesota would have required relocation from appellant's home in Kentucky, but that the Office did not develop the facts to ascertain whether suitable reemployment as a mine safety and health specialist was available near appellant's home in Kentucky, before requiring the relocation to Minnesota. The Office adopted the employer's choice of location without questioning whether a position was located near appellant's home in Kentucky.

As it is the Office's burden of proof to establish that appellant refused a suitable position, the Office did not meet its burden of proof in this case to terminate appellant's compensation benefits pursuant to 5 U.S.C. § 8106.[14] Accordingly, the Board reverses the Office's February 10, 2006 hearing representative's decision affirming the May 19, 2005 decision terminating appellant's compensation on the grounds that he refused an offer of suitable work.

[11] 20 C.F.R. § 10.508.

[12] *See John E. Lemker, supra* note 8.

[13] *Sharon L. Dean,* 56 ECAB ___ (Docket No. 04-1707, issued December 9, 2004); *see also* 20 C.F.R. § 10.508.

[14] *Barbara R. Bryant,* 47 ECAB 715 (1996).

CONCLUSION

The Board finds that the Office did not meet its burden to terminate appellant's compensation benefits pursuant to 5 U.S.C. § 8106.

ORDER

IT IS HEREBY ORDERED THAT the February 10, 2006 decision of the Office of Workers Compensation Programs be reversed.

Issued: August 20, 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