United States Department of Labor
Employees' Compensation Appeals Board

J.A., Appellant	)	
and	)	**Docket No. 06-1979**
	)	**Issued: January 11, 2007**
DEPARTMENT OF THE AIR FORCE, LITTLE ROCK AIR FORCE BASE, AR, Employer	)	

Appearances:
Richard M. Mays, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 17, 2006 appellant, through counsel, filed a timely appeal from a July 20, 2006 merit decision of the Office of Workers' Compensation Programs terminating his entitlement to wage loss and schedule award compensation 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 properly terminated appellant's compensation benefits effective July 20, 2006 on the grounds that he refused an offer of suitable work under 5 U.S.C. § 8106(c).

FACTUAL HISTORY

On April 8, 1996 appellant, then a 53-year-old equipment supervisor, filed a traumatic injury claim alleging that on March 7, 1996 he hurt his back and left hip, leg and foot. While

climbing down from a bed of a dump truck his foot slipped off a tire. Appellant fell about three feet and his left foot hit the pavement jamming his back. He stopped work on April 9, 1996 and returned to work intermittently from April 9 through May 3, 1996. By letter dated July 11, 1996, the Office accepted appellant's claim for lumbar strain. It authorized a laminectomy which was performed on May 3, 1996 by Dr. Ronald N. Williams, a Board-certified neurosurgeon. Appellant has not returned to work.

On January 25, 2005 the employing establishment offered appellant a part-time clerk position that required him to work four hours per day. It stated that this position was specifically within the limitations set forth by his attending physician. The position involved sitting in a chair while performing simple, routine clerical work. It required answering the telephone and referring callers or visitors to appropriate personnel and taking simple messages when staff members were unavailable but may involve copying material, using a fax machine and assembling copies of correspondence as instructed. Appellant would be allowed to sit or stand at his convenience for comfort and to take walks if needed. The work was classified as sedentary and did not require significant walking. It was performed in a typical office setting and required the use of normal safety precautions necessary for an office environment. The work area was adequately lighted, heated and ventilated. The physical requirements included possible walking, standing, bending, carrying and/or lifting of light items like papers or books. No special physical demands or walking were required to perform the work.

On January 31, 2005 appellant refused the job offer, stating that he experienced extreme pain constantly and could not sit or stand for any length of time. He further stated that he took medication and was unable to always focus on driving.

On April 5, 2006 appellant underwent a functional capacity evaluation. Based on this examination, Dr. Patricia A. Knott, an attending Board-certified physiatrist, opined in an April 18, 2006 report that appellant could perform sedentary work. She believed the examination was not genuine because appellant did what he was asked to do; he told the therapist that certain activities caused him pain and he believed he was being penalized. Appellant related that driving a long distance caused back pain and he would have to drive approximately 80 miles to work at the employing establishment. Dr. Knott noted appellant's awareness of being watched while performing certain activities at home. She stated that he may experience increased pain if he performed activities outside his physical restrictions, but that he could not perform these activities on a consistent, repetitive or daily basis. Dr. Knott concluded that appellant could perform sedentary work but driving a long distance could increase his back pain.

In a May 23, 2006 report, Dr. Knott provided a history of appellant's medical treatment for his employment-related back condition. She noted the employing establishment's job offer for a sedentary position, four hours per day with breaks. Appellant complained that he would not be able to tolerate the drive to and from work. Dr. Knott reviewed a videotape taken by an employing establishment investigative special agent which showed appellant engaging in questionable activities, especially in March 2006, considering his injury.[1] Appellant was observed bending and tying down articles to his truck, without the use of a cane, standing for

[1] The Board notes that there was no objection to the videotape authenticity or that appellant was the individual shown on the tape.

long periods of time, loading a recliner chair into the back of a truck or without assistance, riding a four-wheeler, placing a ladder to the side of a home and testing it for stability, carrying grocery bags out of a store to the car without assistance, operating a leaf blower, chopping wood and pushing a wheelbarrow and bending over to pick up wood. Dr. Knott opined that, in looking at the ease in which appellant performed activities, it was reasonable to expect that he could perform sedentary work with breaks and the opportunity to sit or stand as needed.

In a work capacity evaluation (Form OWCP-5c) dated May 30, 2006, Dr. Knott stated that appellant could not perform his usual work duties due to pain and lower extremity weakness. However, appellant could perform sedentary work, four hours per day with restrictions. He could not push, pull or lift more than 10 pounds, operate a motor vehicle, squat, kneel or climb. Dr. Knott stated that appellant should be allowed to take a five-minute break each hour.

On June 1, 2006 the employing establishment again offered appellant the modified-duty clerk position.

By letter dated June 1, 2006, the Office informed appellant that a suitable position based on the physical limitations set forth by Dr. Knott was available. Pursuant to 5 U.S.C. § 8106(c)(2), appellant had 30 days to accept the position or provide reasons for his refusal. The Office notified him that he would be paid for any difference in salary between the offered position and his date-of-injury position and that he could accept the job without penalty. It advised appellant that his compensation would be terminated based on his refusal to accept a suitable position pursuant to section 8106(c)(2).

On June 15, 2006 appellant declined the offered position contending that he could not perform this type of work. He stated that he was unable to endure the drive to and from work. Appellant wished to retire on disability as he could no longer tolerate all the hassle.

By letter dated July 5, 2006, the Office advised appellant that his reasons for refusing the job were not valid and that he had 15 days to accept the position. Appellant did not respond within the allotted time period.

In a decision issued on July 20, 2006, the Office terminated appellant's entitlement to wage loss and schedule award compensation benefits effective that date because he refused an offer of suitable work.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[2] Under section 8106(c)(2) of the Federal Employees' Compensation Act, the Office may terminate the compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.[3] To justify termination, the Office must show that the work offered was suitable and

[2] *Linda D. Guerrero*, 54 ECAB 556 (2003).

[3] 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

must inform appellant of the consequences of refusal to accept such employment.[4] Section 8106(c) will be narrowly construed as it serves as a penalty provision, which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.[5]

Section 10.517 of the Act's regulation provides 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.[6] Pursuant to section 10.516, the employee shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.[7]

ANALYSIS

The Office accepted that appellant sustained a lumbar strain as a result of falling on March 7, 1996. It subsequently terminated his compensation benefits effective July 20, 2006 finding that he refused an offer of suitable work based on the medical opinion of Dr. Knott, his attending physician. The initial question in this case is whether the Office properly determined that the offered position was medically suitable. The issue of whether an employee has the physical ability to perform a modified position is primarily a medical question that must be resolved by the medical evidence.[8]

Dr. Knott opined in an April 18, 2006 report that appellant could perform sedentary work, although he might experience increased pain if he performed certain activities outside his physical restrictions on a consistent, repetitive or daily basis or if he drove a long distance. However, in a subsequent report dated May 23, 2006, she opined that he could perform the duties of the offered modified-duty clerk position with breaks and the opportunity to sit or stand as needed based on her review of the employing establishment's investigative videotape. The videotape showed appellant bending and tying down articles to his truck, ambulating quite often without the use of a cane, standing for long periods of time, loading a recliner chair without assistance from the back of a truck, riding a four-wheeler, placing a ladder to the side of a home and testing it for stability, carrying grocery bags out of a store to the car without assistance, operating a leaf blower, chopping wood and pushing a wheelbarrow and bending over to pick up wood.

Dr. Knott's OWCP-5c form provided that appellant could perform sedentary work, four hours per day with the following restrictions: pushing, pulling and lifting no more than 10 pounds, no operation of a motor vehicle, squatting, kneeling or climbing and a 5-minute break each hour.

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

[5] *Joan F. Burke*, 54 ECAB 406 (2003).

[6] 20 C.F.R. § 10.517(a); *see Ronald M. Jones*, *supra* note 4.

[7] 20 C.F.R. § 10.516.

[8] *See Gayle Harris*, 52 ECAB 319 (2001).

The Board finds that Dr. Knott's opinion is sufficiently well rationalized and based upon a proper factual background such that it is the weight of the evidence on the issue of the extent of appellant's disability and work restrictions.

On June 1, 2006 the employing establishment offered appellant the modified position of clerk. This position conformed to Dr. Knott's work restrictions. It listed activities, including some walking, standing, bending, carrying and/or lifting of light items like papers or books. No special physical demands or ambulation were required. Appellant was permitted to walk, stand and sit when accommodation was needed.

The Board finds that the Office properly found that the offered clerk position was suitable. The weight of the medical evidence establishes that appellant was no longer totally disabled from work and has the physical capacity to perform the duties listed in the June 1, 2006 job offer.

The Board further finds that the Office complied with its procedural requirements in advising appellant that the position was found suitable and providing him with the opportunity to accept the position or provide his reasons for refusing.[9] By letter dated June 1, 2006, the Office advised appellant that the offered position was suitable and provided him 30 days to accept the position or provide reasons for his refusal. It further notified him that the position remained open, that he would be paid any difference in pay between the offered position and his date-of-injury job, that he could still accept without penalty and that a partially disabled employee who refused suitable work was not entitled to compensation. Appellant responded to the Office's notice in a letter dated June 15, 2006 stating that he was both physically and mentally unable to perform the duties of the offered position and that he could not endure the drive to and from work. Dr. Knott, his attending physician, however stated that he could perform the duties of the offered position. Appellant also refused the job offer because he was seeking disability retirement. Retirement, however, is not considered an acceptable reason for refusing an offer of suitable work.[10] The Board finds that appellant has submitted no probative medical evidence providing support for his refusal of suitable work. Therefore, he has not established a reasonable basis for refusing the offered position.

The Office properly advised appellant in its July 5, 2006 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 July 20, 2006 termination decision. As the weight of the medical evidence at the time of the July 20, 2006 decision established that he could perform the duties of the offered position, appellant did not offer sufficient justification for refusing the position. Therefore, the Board finds that the Office met its burden of proof to terminate

[9] *See Bruce Sanborn*, 49 ECAB 176 (1997).

[10] *Robert P. Mitchell*, 52 ECAB 116 (2000) (where the claimant chose to receive disability retirement benefits rather than accept a position offered by the employing establishment).

appellant's compensation benefits effective July 20, 2006, as he refused an offer of suitable work.[11]

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's entitlement to wage loss and schedule award compensation effective July 20, 2006 for refusing a suitable job offer.

ORDER

IT IS HEREBY ORDERED THAT the July 20, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 11, 2007
Washington, DC

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

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

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

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