United States Department of Labor
Employees' Compensation Appeals Board

M.H., Appellant	)	
and	)	**Docket No. 06-2020**
	)	**Issued: July 17, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Fort Worth, TX, Employer	)	

Appearances:
Ron Watson, 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 September 5, 2006 appellant, through his representative, filed a timely appeal of a November 30, 2005 merit decision of the Office of Workers' Compensation Programs, terminating his compensation benefits because 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 termination appeal.

ISSUE

The issue is whether the Office properly terminated appellant's compensation benefits effective November 30, 2005 on the grounds that he refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On November 2, 1988 appellant, then a 39-year-old letter carrier, sustained injury to the right side of his neck right shoulder and upper arm while lifting his mail pouch in the performance of duty. The Office accepted his claim for cervical and right shoulder strains and a

herniated nucleus pulposus at C3-4. It authorized cervical surgery which was performed on June 16, 1989. The Office paid appellant appropriate compensation for total disability.

On June 15, 2005 appellant underwent a functional capacity evaluation. Based on this examination, Dr. Ronald G. Corley, an orthopedic surgeon, diagnosed postcervical strain with postcervical fusion and decompression. He stated that this condition was likely due to underlying degenerative disc disease. Dr. Corley indicated that appellant's continued difficulty was related to postsurgical changes and underlying degenerative disease. He opined that there was no objective evidence of any residuals of appellant's accepted employment-related conditions. Dr. Corley noted that appellant only had subjective complaints. He further opined that the accepted employment injuries had resolved and that appellant reached maximum medical improvement as of the date of his examination. Dr. Corley opined that appellant could work four hours per day with restrictions which included no overhead work or heavy pushing, pulling or lifting especially with the left arm.

In an August 10, 2005 medical report, Dr. Farooq I. Selod, an attending Board-certified orthopedic surgeon, opined that appellant could work two hours per day with restrictions. He stated that appellant could sit, walk, perform normal hand functions and use his feet to operate foot controls two hours per day. Appellant could not climb, perform fine manipulation, reach or work above his shoulder, operate a car, truck, tractor or other vehicle, perform repetitive activities and lift no more than 10 pounds. Dr. Selod stated that appellant could not work in the heat, cold or dampness.

On September 28, 2005 the employing establishment offered appellant a modified carrier position based on the restrictions set forth in Dr. Corley's June 15, 2005 report. The position involved assisting the lobby director with customers four hours per day, stocking supplies and forms in the lobby one hour per day, writing second notices for accountable mail, answering the telephone and filing "COA" two hours per day. The physical requirements included talking intermittently from two to four hours per day, sitting, standing and walking within restrictions intermittently up to four hours per day, fine manipulation and simple grasping intermittently four hours per day, and lifting no more than 10 pounds intermittently four hours per day.

By letter dated September 29, 2005, the Office informed appellant that a suitable position based on his medical limitations 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 advised 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 notified appellant that his compensation would be terminated based on his refusal to accept a suitable position pursuant to section 8106(c)(2).

By letter dated October 21, 2005, appellant rejected the offered position due to the difference in medical opinion between Dr. Selod and Dr. Corley regarding his ability to return to work. He stated that he had submitted paperwork to the employing establishment for retirement.

On November 15, 2005 the employing establishment offered appellant a revised modified carrier position based on Dr. Selod's August 10, 2005 restrictions. The position required appellant to work two hours per day. It also involved writing up accountable mail intermittently

two hours per day, stocking supplies and forms in the lobby one hour per day, answering the telephone and assisting customers and the lobby director with customers intermittently two hours per day. The physical requirements included lifting no more than 10 pounds and sitting, standing, walking, fine manipulation, simple grasping and talking intermittently up to two hours per day.

In a November 15, 2005 letter, the Office advised appellant that, based on his October 21, 2005 letter, the initial position had been modified by the employing establishment to conform to Dr. Selod's restrictions. It further advised him that he had 15 days to accept the position.

On November 30, 2005 the employing establishment advised the Office that appellant had rejected the job offer and that he had submitted paperwork for retirement. The employing establishment stated that the position was still available.

By decision dated November 30, 2005, the Office terminated appellant's compensation benefits effective that date on the grounds that he refused an offer of suitable work. It found that the employing establishment's November 15, 2005 revised job offer conformed to Dr. Selod's August 10, 2005 restrictions.[1]

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 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]

[1] On February 23, 2006 appellant filed a claim for a schedule award. By letter dated March 9, 2006, the Office advised him that he was not entitled to a schedule award based on its November 30, 2005 decision, which terminated his compensation. Appellant was further advised to exercise the appeal rights that accompanied this decision. The Office's March 9, 2006 correspondence to appellant is not a final decision. Section 10.126 of the Office's regulations provides that a decision shall contain findings of fact and a statement of reasons. 20 C.F.R. § 10.126. The letter did not identify itself as a final decision and the Office attached no appeal rights for appellant to pursue. Further, the content of the letter was informational in nature as a response to appellant's February 23, 2006 request for a schedule award.

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

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

[4] *Ronald M. Jones*, 52 ECAB 190 (200).

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

Section 10.517 of the regulations promulgating the Act 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 cervical and right shoulder strains and a herniated nucleus pulposus at C3-4, which required cervical surgery. It subsequently terminated his compensation benefits effective November 30, 2005 finding that he refused an offer of suitable work based on the medical opinion of Dr. Selod, 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. Selod opined in an August 10, 2005 report, that appellant could work two hours per day with restrictions. Appellant could sit, walk, perform normal hand functions and use his feet to operate foot controls two hours per day. He could not climb, perform fine manipulation, reach or work above his shoulder, operate a car, truck, tractor or other vehicle, perform repetitive activities and lift no more than 10 pounds. Dr. Selod stated that appellant could not work in the heat, cold or dampness.

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

On November 15, 2005 the employing establishment offered appellant a revised modified carrier position based on Dr. Selod's August 10, 2005 report. This position conformed to Dr. Selod's work restrictions. It required appellant to work two hours per day. The position involved writing up accountable mail intermittently two hours per day, stocking supplies and forms in the lobby one hour a day, answering the telephone and assisting customers and assisting the lobby director with customers intermittently two hours per day. The physical requirements included lifting no more than 10 pounds and sitting, standing, walking, fine manipulation, simple grasping and talking intermittently up to two hours per day. Although the offered position involved fine manipulation, it did not require appellant to do so for extended periods only intermittently up to two hours.

The Board finds that the Office properly found that the offered modified carrier position was suitable. The weight of the medical evidence establishes that appellant was no longer totally

[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).

disabled from work and has the physical capacity to perform the duties listed in the November 15, 2005 job offer.

The Board further finds that the Office complied with its procedural requirements in advising appellant that the position was found suitable, providing him with the opportunity to accept the position or provide his reasons for refusing the job offer and notifying him of the penalty provision of section 8106(c).[9] By letter dated September 29, 2005, 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 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] He also rejected the position on the grounds that Dr. Selod restricted his work hours more than Dr. Corley.

The Office, in its November 15, 2005 letter, advised appellant that it had determined that the revised offered position was suitable and based on Dr. Selod's restrictions. Appellant had 15 days to accept the position. However, he again rejected the position because he was seeking disability retirement. As noted, retirement is not considered an acceptable reason for refusing an offer of suitable work.[11] The Board finds that appellant has submitted no probative medical evidence providing support for his refusal of suitable work. There is no medical evidence establishing that he is totally disabled due to residuals of his accepted condition. Therefore, appellant has not established a reasonable basis for refusing the offered position. As the weight of the medical evidence established that he could perform the duties of the offered position, appellant did not offer sufficient justification for refusing the position. The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective November 30, 2005, as he refused an offer of suitable work.[12]

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation benefits effective November 30, 2005 on the grounds that he refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

[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).

[11] *Id.*

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

ORDER

IT IS HEREBY ORDERED THAT the November 30, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 17, 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