United States Department of Labor
Employees' Compensation Appeals Board

M.H., Appellant	)	
and	)	**Docket No. 07-580**
	)	**Issued: July 19, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Sarasota, FL, Employer	)	

Appearances:
Ronald S. Webster, 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 December 26, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' hearing representative's decision dated November 13, 2006 which affirmed a March 23, 2006 Office decision. 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 effective March 23, 2006 on the grounds that he refused an offer of suitable work.

FACTUAL HISTORY

On December 10, 2003 appellant, then a 43-year-old rural mail carrier, filed an occupational disease claim alleging that casing mail caused a chronic and severe dislocation of

his left shoulder.[1] He stopped work on July 30, 2003. The Office subsequently accepted appellant's claim for aggravation, chronic dislocation of the left shoulder and aggravation of left shoulder osteoarthritis and paid appropriate compensation benefits.

In an August 31, 2004 report, Dr. Donald J. Slevin, a Board-certified orthopedic surgeon and treating physician, opined that appellant injured his left shoulder in the late 1980's and underwent surgery in 1990. The combination of his injury and surgery left appellant with a condition that would naturally deteriorate over time. Dr. Slevin opined that the "repetitive use of appellant's left arm at the [employing establishment] accelerated this degeneration during the period of use from 1991 to 2002."

In a report dated December 29, 2004, Dr. Adam Bright, a Board-certified orthopedic surgeon and second opinion physician, reviewed appellant's history of injury and treatment and conducted a physical examination. He diagnosed chronic dislocation of the left shoulder with superimposed arthritis of the shoulder joint and determined that it was not caused by his employment but by a 1984 injury and a subsequent injury on April 9, 1990. Dr. Bright advised that appellant's work at the employing establishment exacerbated his condition. He opined that appellant was unable to use his left arm in a functional manner when elevated. Dr. Bright recommended a sedentary position where appellant could use his left arm in a desk-type position with no lifting or casing. In a June 6, 2005 addendum, he opined that it was difficult to ascertain whether appellant had sustained a temporary or permanent aggravation. Dr. Bright noted that the main cause of appellant's problems was a preexisting condition which would worsen with overhead work. The main cause of appellant's symptoms was his previous surgery, as well as arthritis and chronic dislocation of his shoulder which was permanent and would continue to progress due to degeneration and ongoing disease which was secondary. Dr. Bright indicated that appellant had a temporary aggravation which would continue to be aggravated as long as he worked overhead. He indicated that appellant's aggravation was ongoing but would resolve when he stopped overhead work. Dr. Bright listed work restrictions which included no lifting overhead of the left shoulder and no pushing, pulling or lifting over 10 pounds for more than four hours per day.

The Office determined that a medical conflict arose between Dr. Bright and Dr. Slevin.

On September 30, 2005 the Office referred appellant, together with a statement of accepted facts and the medical record, to Dr. Andrew M. Wolff, a Board-certified orthopedic

[1] The record reflects that appellant had undergone treatment for his left shoulder prior to and subsequent to beginning employment with the employing establishment related to a 1984 injury in the private sector.

surgeon, for an impartial medical evaluation regarding the nature and extent of residuals of his accepted condition and his work capacity.[2]

In an October 21, 2005 report, Dr. Wolff noted appellant's history of injury and treatment. He conducted an examination and determined that appellant had chronic left shoulder posterior subluxation/dislocation with resultant severe gleno-humeral osteoarthritis. Dr. Wolff opined that appellant's aggravation was permanent and would be aggravated by performing activities requiring reaching and lifting with his left arm, as required when his work duties were changed in July 2003. He noted that appellant's objective findings to support disability from the compensable aggravations included markedly restricted range of motion consistent with x-ray findings of a chronic left shoulder posterior dislocation and osteoarthritis. Dr. Wolff opined that appellant was capable of sedentary work that would not require him to move his left elbow away from his left side, to include no reaching or lifting with the left arm. He opined that appellant could work eight hours per day, that he had reached maximum medical improvement and that his current limitations were permanent with the exception of surgery to replace his left shoulder.

On December 16, 2005 the employing establishment offered appellant a modified clerk position for eight hours per day. The duties of the position included, boxing mail and other duties within his restrictions; custodial duties comprised of cleaning the swing room, rest rooms, trash cans, carrier cases and other duties in the custodial craft within his restrictions and intermittent walking, standing and sitting for eight hours per day. The offer and job analysis also included that the use of the left arm was not required and the physical requirements included that there was no reaching above the shoulder with the left arm, no reaching with the left arm and no climbing.

By letter dated December 19, 2005, appellant's attorney advised the Office that appellant would respond to the modified job offer. He requested that the Office provide the offer to a physician to review the physical requirements of the offered position.

On December 30, 2005 the Office received appellant's acceptance of the modified job offer. However, appellant indicated that he was accepting the offer subject to exceptions that would be provided by his attorney. The employing establishment contended that appellant's acceptance of the job offer was actually a rejection.

By letter dated January 23, 2006, the Office advised appellant that the modified clerk position had been found to be suitable to his work capabilities and was currently available. The Office indicated that the impartial medical examiner, Dr. Wolff, had examined appellant on October 21, 2005 and provided work restrictions that were consistent with the offered position.

[2] The Office originally referred appellant on July 15, 2005 to Dr. Mark B. Lonstein, a Board-certified orthopedic surgeon, for an impartial medical evaluation to resolve the conflict in opinion between Drs. Bright and Slevin. Dr. Lonstein provided an August 8, 2005 report and opined that appellant could perform work in a "light-duty position where he is not using his left arm for lifting." On August 19, 2005 the Office requested clarification and rationale related to his opinion regarding whether appellant's condition had worsened. While Dr. Lonstein responded with a one-sentence report on August 31, 2005 that appellant had an increase in his shoulder symptoms after working for the employing establishment and his aggravation was permanent, he did not provide objective findings. By letter dated September 19, 2005, the Office advised appellant that Dr. Lonstein failed to provide objective findings and that his report would not be taken into consideration. In a memorandum dated September 19, 2005, the Office determined that Dr. Lonstein's report was vague and lacked rationale.

Regarding a sling or harness device, appellant was advised that he should request a prescription from his physician. He was advised that he should accept the position or provide an explanation for refusing the position within 30 days. Finally, the Office informed appellant that, if he failed to accept the offered position and failed to demonstrate that the failure was justified, his compensation would be terminated.[3]

By letter dated January 27, 2006, appellant's representative enclosed reports dated February 3 and April 26, 2005 from Dr. Gary Shapiro, a Board-certified orthopedic surgeon, who advised that appellant's shoulder was a "long[-]term problem" until he proceeded with a shoulder replacement. He indicated that appellant had "extremely limited range of motion of his shoulder and basically he can use his wrist, fingers and elbow with the arm down at the side only. Appellant is unable to use his left shoulder for any significant work." In a letter dated February 14, 2006, counsel noted that appellant was attempting to obtain a prescription for a harness from an authorized treating physician and an opinion with regard to whether he could perform the modified position.

On March 3, 2005 in a memorandum of telephone call, the Office confirmed that appellant had not returned to work or accepted the job offer.

By letter dated March 3, 2006, the Office informed appellant that his reasons for refusing the position were not acceptable and allowed an additional 15 days for appellant to accept the position. Appellant was advised that the position remained available for him to perform and accept. He was advised that no further reason for refusal would be considered and his entitlement to wage loss and schedule award benefits would be terminated.

In a memorandum of telephone call dated March 8, 2006, the Office was advised by appellant's representative that appellant wanted to return to work but "working as a one arm man lifting 70 pounds is impossible." In a letter dated March 9, 2006, appellant's representative confirmed his telephone conversation and noted that a report from appellant's treating physician would be submitted "upon receipt." On March 15, 2006 the Office requested that appellant submit an updated narrative from his treating physician.

By decision dated March 23, 2006, the Office terminated appellant's entitlement to monetary compensation benefits, effective March 23, 2006 on the basis that he refused an offer of suitable work. The Office determined that the report of Dr. Wolff, the impartial medical examiner, represented the weight of the evidence.

On March 24, 2006 the Office received a March 21, 2006 letter from appellant's representative who informed the Office that appellant was scheduled for an initial examination on March 21, 2006 with Dr. Katulle K. Eaton, a Board-certified orthopedic surgeon. He noted that Dr. Eaton would evaluate appellant and prepare an opinion about his return to work.

By letter dated April 6, 2006, appellant's representative requested clarification as to why the employing establishment believed that appellant refused to return to work. He alleged that

[3] In a memorandum of telephone call dated January 23, 2006, the Office confirmed that the modified job offer was available.

appellant accepted the job offer and was in the process of obtaining a prescription for a harness-type device to secure his arm/shoulder. Counsel also contended that the job offer was not sedentary and would require appellant to reach and lift with both arms and shoulders and remove 70-pound tubs of mail from the tops of mail racks, which was outside his physical restrictions. He advised the Office that appellant had spoken with the postmaster, who informed him that "no further job assignment would be processed due to his severe medical condition.

By letter dated April 12, 2006, the Office authorized Dr. Eaton as a treating physician. In a letter of the same date, the Office advised appellant's representative that appellant had refused the job offer because he had not resumed working the modified clerk position, regardless of his "quasi-acceptance" of it in writing. The Office also indicated that it was unclear how counsel found the job to be outside appellant's restrictions or how the postmaster overruled a job assignment that was issued and available for appellant to accept since December 2005.

On April 13, 2006 counsel informed the Office that appellant would be electing retirement benefits. On that same date, he also requested a telephonic hearing, which was held on August 14, 2006.

On May 25, 2006 appellant's representative informed the Office that appellant was without an attending physician, as Dr. Eaton was not available to treat appellant. He requested that the Office authorize Dr. Bright as appellant's treating physician. On July 31, 2006 the Office authorized Dr. Bright as a treating physician.

On September 7, 2006 appellant's representative forwarded an August 11, 2006 report, in which Dr. Bright noted appellant's history of injury and treatment, which was unchanged since he last saw appellant on December 29, 2004. He conducted a physical examination and determined that appellant was unable to use his left arm to lift up objects over the waist or over the shoulder level or perform repetitive activities with the left arm. Dr. Bright noted that he had reviewed the work description and opined that "there would be no limitations beyond, no use of his left arm." He opined that appellant was not totally disabled, but that he was unable to use his left arm in any overhead manner. Dr. Bright noted that appellant could do work activities involving his right arm as well as his legs without any restrictions. His only restriction pertained to the left arm.

By decision dated November 13, 2006, the Office hearing representative affirmed the March 23, 2006 termination decision.

LEGAL PRECEDENT

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits.[4] This includes cases in which the Office terminates compensation under section 8106(c) (2) of the Federal Employees' Compensation Act for refusal to accept suitable work.

[4] *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

Section 8106(c)(2)[5] of the Act provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee is not entitled to compensation. Section 10.517(a)[6] of the Office's regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured for him or her has the burden to show that this refusal or failure to work was reasonable or justified. After providing the two notices described in section 10.516,[7] the Office will terminate the employee's entitlement to further compensation under 5 U.S.C. §§ 8105, 8106, and 8107, as provided by 5 U.S.C. § 8106(c)(2). However, the employee remains entitled to medical benefits as provided by 5 U.S.C. § 8103 or justified. To justify termination, the Office must show that the work offered was suitable[8] and must inform appellant of the consequences of refusal to accept such employment.[9] According to Office procedures, certain explanations for refusing an offer of suitable work are considered acceptable.[10] Unacceptable reasons include appellant's preference for the area in which he resides; personal dislike of the position offered or the work hours scheduled; lack of promotion potential or job security.[11]

ANALYSIS -- ISSUE 1

The Office properly found a conflict in medical opinion as Dr. Slevin disagreed with Dr. Bright as to whether appellant's aggravation had ceased as he was no longer exposed to employment factors and whether he sustained a permanent aggravation due to his surgeries, arthritis, progressive degeneration of disease and his work capacity. The Office properly referred appellant to an impartial medical specialist for evaluation. The Act provides in pertinent part: "If there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[12]

The Office referred appellant to Dr. Wolff for an impartial medical evaluation to resolve the conflict in opinion. Dr. Wolff performed a thorough evaluation of appellant. He provided a reasoned opinion that appellant's aggravation was permanent and caused by reaching and lifting with his left arm as required when his work duties were changed in July 2003. Dr. Wolff opined that appellant was capable of sedentary work for eight hours per day provided that he was not required to move his left elbow away from his left side or reach or lift with the left arm. He

[5] 5 U.S.C. § 8106(c)(2).

[6] 20 C.F.R. § 10.517(a).

[7] 20 C.F.R. § 10.516.

[8] *See Carl W. Putzier*, 37 ECAB 691 (1986); *Herbert R. Oldham*, 35 ECAB 339 (1983).

[9] *See Maggie L. Moore*, 42 ECAB 484 (1991); *reaff'd on recon*., 43 ECAB 818 (1992). *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(d)(1).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(1)-(5).

[11] *Arthur C. Reck*, 47 ECAB 339 (1996); Federal (FECA) Procedure Manual, Chapter 2.814.5(c) (July 1996).

[12] 5 U.S.C. § 8123(a).

indicated that appellant had reached maximum medical improvement and his condition was permanent. When a case is referred to an impartial medical specialist for the purpose of resolving a conflict in medical opinion, the opinion of such specialist, if sufficiently well rationalized and based on a proper background, must be given special weight.[13] Dr. Wolff's opinion represented the weight of the medical evidence on the issue of appellant's ability to work and establishes that appellant was capable of working in a sedentary position for eight hours per day, provided that it did not require the use of the left arm.

Subsequent to the evaluation by Dr. Wolff, the employing establishment offered appellant a sedentary position. The position conformed to the work restrictions set by Dr. Wolff and specified that the use of the left arm would not be required and there was no reaching with the left arm. The Office reviewed the position and found it to be suitable for appellant.

To properly terminate compensation under section 8106, the Office must provide appellant notice of its finding that an offered position is suitable and give him an opportunity to accept or provide reasons for declining the position.[14] The Office properly followed its procedural requirements in this case. By letter dated January 23, 2006, the Office advised appellant that the position was suitable and provided him 30 days to accept the position or provide reasons for his refusal.

On January 27, 2006 counsel enclosed reports from Dr. Shapiro dated February 3 and April 26, 2005. Dr. Shapiro stated that appellant had "extremely limited range of motion of his shoulder and basically he can use his wrist, fingers and elbow with the arm down at the side only. He is unable to use his left shoulder for any significant work." The Board notes that these reports confirm that appellant could not use his left shoulder. As noted above, this is not a requirement of the offered position. The findings of Dr. Shapiro do not vary from those of Dr. Wolff.

Appellant's representative stated on February 14, 2006 that he was attempting to obtain a prescription for a harness and further medical opinion with regard to whether appellant could perform the modified position. The Board notes that this is not an acceptable reason for refusing the offered position. The employing establishment noted that appellant could work within his restrictions. Appellant's efforts to obtain a harness do not invalidate the job offer or preclude him from returning to working without a harness for the left arm in the interim.

By letter dated March 3, 2006, the Office properly informed appellant that his reasons for refusing the offered position were unacceptable and provided him 15 days to accept the position. However, appellant did not accept the position. Rather, counsel contacted the Office, stating that appellant wanted to work, but "working as a one arm man lifting 70 pounds is impossible." However, as noted, Dr. Wolff opined that appellant could perform limited duties without using the left arm. The offered position did not require use of the left arm. The offered position did not contain any requirement that appellant lift 70 pounds or perform activities outside his restrictions. This argument is not an acceptable reason for refusing suitable work. While his

[13] *Kathryn Haggerty*, 45 ECAB 383, 389 (1994); *Jane B. Roanhaus*, 42 ECAB 288 (1990).

[14] *See supra* note 9.

representative informed the Office on March 9, 2006 that he would submit a report "upon receipt" this is not an acceptable reason for refusing suitable work.

The Office properly terminated appellant's wage-loss compensation for refusal of suitable work. At the time of the termination, the weight of the medical evidence established that appellant could perform the duties of the offered position. The burden of proof to establish entitlement to wage-loss compensation then shifted to appellant.

An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.[15] In the present case, appellant has not shown that his refusal to work was justified. The weight of the medical evidence established that appellant was not disabled from performing the job he was offered on December 16, 2005.

The medical reports received subsequent to the evaluation by Dr. Wolff, are insufficient to either overcome Dr. Wolff's opinion or create a new conflict in the medical evidence. An August 11, 2006 report from Dr. Bright opined that appellant's examination was basically unchanged since he saw him on December 29, 2004 and that his only restriction involved his left arm. The Board notes that this report supports that appellant could perform the duties of the modified position. The finding of Dr. Bright does not vary from that of Dr. Wolff.[16]

As noted, Dr. Wolff's report represents the weight of the medical evidence regarding appellant's work restrictions at the time the Office terminated his monetary benefits. After termination, appellant did not submit sufficient medical evidence to justify his refusal of suitable work.

The Board finds that the Office met its burden of proof in terminating appellant's compensation benefits on March 23, 2006 and that he did not, thereafter, establish that his refusal of suitable work was justified.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation effective March 23, 2006 on the grounds that he refused an offer of suitable work.

[15] 5 U.S.C. § 8106(c)(2).

[16] Submitting a report from a physician who was on one side of a medical conflict that an impartial specialist resolved is generally insufficient to overcome the weight accorded to the report of the impartial medical examiner or to create a new conflict. *Jaja K. Asaramo*, 55 ECAB 200 (2004).

ORDER

IT IS HEREBY ORDERED THAT the November 13, 2006 decision of the Office of Workers' Compensation Programs' hearing representative is affirmed.

Issued: July 19, 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