United States Department of Labor
Employees' Compensation Appeals Board

M.M., Appellant	)	
and	)	**Docket No. 07-1436**
	)	**Issued: October 17, 2007**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Boston, MA, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 2, 2007 appellant, through her attorney, filed a timely appeal of the Office of Workers' Compensation Programs' hearing representative's merit decision dated April 20, 2007 and an Office decision dated December 11, 2006 terminating her compensation benefits. 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 met its burden of proof to terminate appellant's compensation benefits on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

On February 13, 2004 appellant, then a 41-year-old mail processor, filed an occupational disease claim alleging that she developed right wrist tenosynovitis due to her employment duties

of lifting heavy tubs of mail and keying.[1] The Office accepted her claim for right de Quervains tenosynovitis on March 3, 2004. Appellant's attending physician, Dr. Bruce Leslie, a Board-certified surgeon, performed a surgical right de Quervain's release on October 22, 2004. The Office authorized this surgery on November 29, 2004. On June 15, 2005 the Office expanded appellant's claim to include right radial styloid tenosynovitis and osteoarthritis of the right thumb. The Office entered appellant on the periodic rolls on September 30, 2005. The Office authorized additional surgery on December 15, 2005. On January 13, 2006 Dr. Leslie performed arthroscopic shaving of appellant's right wrist due to right basal joint arthritis.

Dr. Leslie completed a work restriction evaluation on March 9, 2006 and indicated that appellant could work eight hours a day with restrictions on reaching, reaching above the shoulder and repetitive movements of the wrist for four to eight hours a day. He indicated that appellant could push, pull and lift less than 20 pounds and that she should type or key for no more than 30 minutes an hour. Dr. Leslie increased her lifting, pushing and pulling restriction to three to five pounds on March 28, 2006. Appellant requested a light-duty position comporting with these restrictions on March 31, 2006.

The employing establishment offered appellant a light-duty assignment of modification mail processing clerk on April 10, 2006 which complied with the work restrictions detailed by Dr. Leslie. The duties of the position including six hours of manual distribution at a letter case, less than one hour of sweeping full cells into tray rack, less than one hour of placing trays on the ledge. The job offer indicated that appellant would return to her date-of-injury location and duty hours from 22:30 to 07:00. The job offer indicated that she would not work on Tuesdays and Wednesdays. The employing establishment directed appellant to report to work immediately.

In a letter dated May 4, 2006, appellant declined this position. She stated that the position required repetitive use of her thumb and thumb joint which Dr. Leslie felt would exacerbate her pain. Appellant further stated that the repetitive motion of gripping could cause further damage to her thumb joint. She stated that she had difficulty gripping with her right thumb, decreased strength in that appendage and frequently dropped objects held with her right hand. Appellant opined that sweeping mail would be problematic.

Dr. Leslie completed a note on May 1, 2006 and stated that appellant described her offered light-duty position as requiring "taking mail between her thumb and index finger or between the thumb, index and middle fingers (key pinch\chuck pinch) and flipping mail into boxes." He noted that the job description did not contain a precise description of the motions involved, but that if frequent key pinch or chuck pinch were required then these motions would "probably exacerbate her symptoms" and this was not an appropriate position for appellant. Dr. Leslie stated that if appellant performed a position with key and chuck pinch then her need for additional surgery would be accelerated. He noted that the pictures appellant provided him demonstrated pinch between the thumb and the index or middle finger.[2]

[1] Appellant stated that her left hand was her dominate hand.

[2] Appellant provided Dr. Leslie with a general summary of the duties of manual distribution clerk with photographs illustrating the duties of casing letter mail, casing flat mail, pull down or sweeping.

The employing establishment responded on June 15, 2006 and alleged that appellant had provided Dr. Leslie with a position description of full-duty manual distribution clerk. The employing establishment further noted that appellant was not required to use her restricted right hand to perform the duties of the offered position and that she had no restrictions regarding her dominant left hand or wrist. The employing establishment stated: "Employee would be able to work at her own pace and could grip the mail and sweep the cells with her LEFT hand, hence eliminating her 'concern' that returning to work … would require repetitive use of RIGHT thumb and thumb joint."

In a letter dated August 3, 2006, the Office informed appellant that the offered position was suitable and was still available. The Office allowed her 30 days to accept the position or to offer her reasons for refusal. Appellant declined the position on August 26, 2006 noting a name change for the position of manual distribution clerk to mail processing clerk in 2002. She referred to Dr. Leslie's report regarding the hand motions involved in the position as the basis for her decision.

In a note dated August 30, 2006, Dr. Leslie addressed the light-duty position indicating that he was not clear why the employing establishment felt the position was appropriate. He stated: "It would not be unreasonable to have her return to this job if they think it is appropriate, understanding, however, that if she is having pain she will contact me and that I will have to give her a note that may take her out of work."

In a letter dated November 21, 2006, the Office informed appellant that her reasons for refusing the position were not considered acceptable. The Office allowed appellant 15 days to accept and "make arrangements to report to work in the light-duty position."[3] The Office stated: "If you have not accepted the position and arranged for a report date within 15 days of the date of this letter your entitlement to wage loss and schedule award benefits will be terminated." The Office did not inform appellant that the position was still available. Appellant's attorney responded to the Office and the employing establishment on December 4, 2006 and accepted the position on appellant's behalf. He noted that appellant had not yet received the November 21, 2006 letter and requested instructions regarding when and where appellant should report to work. On December 6, 2006 appellant's attorney again advised the employing establishment and the Office that appellant agreed to return to work and again requested reporting instructions.

By decision dated December 11, 2006, the Office terminated appellant's compensation benefits effective that date finding that she had refused to accept suitable work. The Office again stated that appellant's initial reasons for refusing the position were not acceptable and found that the original position offer dated April 10, 2006 provided her with the necessary information regarding the location and shift of the offered position. The Office concluded that the November 21, 2006 letter was properly addressed to appellant and, therefore, presumed to have been received by her.

[3] The Office addressed this letter to appellant at: xxxx. This is her address of record. The Office provided copies of this letter to appellant's attorney and to the employing establishment.

Appellant, through her attorney, requested a review of the written records on January 9, 2007. The record indicates that appellant's attorney telephoned the Office on December 13, 2006 and that the Office confirmed that the employing establishment would not discuss appellant's return to work with him as there was no signed release to communicate with him. In his January 9, 2007 letter, appellant's attorney alleged that the position was not suitable, that nevertheless she had accepted the position and had requested return to work instructions by telephone and facsimile within the 15-day period. He argued that the Office improperly required that appellant actually report for work or make arrangements to report for work within that 15-day period.[4]

In a letter dated February 16, 2007, appellant's attorney informed the hearing representative that appellant had received the November 21, 2006 letter from the Office on February 9, 2007 in an envelope which "did not bear any postage nor any postmark." On March 28, 2007 appellant's attorney again argued that the Office had improperly required appellant to make arrangements to return to work rather than merely to accept the offered position and cited Board authority.[5]

By decision dated April 20, 2007, the hearing representative affirmed the Office's December 11, 2006 decision finding that appellant had refused an offer of suitable work. The hearing representative found that appellant's initial reasons for refusing the job offer were not acceptable as Dr. Leslie did not explain why she could not use her left hand to perform the manual distribution duty. The hearing representative further found that as appellant's attorney received the November 21, 2006 letter and accepted of the position on her behalf within 15 days the issue of appropriate notice to appellant was moot. The hearing representative concluded that appellant was aware of the time, location and day to report to work via the April 10, 2006 job offer and that as neither appellant's shift nor work location had changed from her date-of-injury position she did not require any further information or instructions in order to report to work. The hearing representative concluded: "[H]er refusal to report for work at the time and location of which she had been fully informed, constitutes in effect a refusal of the job offer."

LEGAL PRECEDENT

It is well settled that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[6] As the Office in this case terminated appellant's compensation under 5 U.S.C. § 8106(c), the Office must establish that appellant refused an offer of suitable work. Section 8106(c) of the Federal Employees' Compensation Act[7] 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 of the applicable regulations[8] provides that an employee who refuses or neglects

[4] The record indicates that appellant returned to work on January 11, 2007.

[5] *Lenice M. Mitchell*, Docket No. 04-2037 (issued April 1, 2005).

[6] *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[7] 5 U.S.C. § 8106(c)(2).

[8] 20 C.F.R. § 10.517(a).

to work after suitable work has been offered or secured for the employee, has the burden of showing that such refusal or failure to work was reasonable or justified and shall be provided with the opportunity to make such showing before a determination is made with respect to termination of entitlement to compensation. To justify termination of compensation, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[9]

The Office's regulations also state:

> "[The Office] shall advise the employee that it has found the offered work to be suitable and afford the employee 30 days to accept the job or present any reasons to counter [the Office's] finding of suitability. If the employee presents such reasons and [the Office] determines that the reasons are unacceptable, it will notify the employee of that determination and that he or she has 15 days in which to accept the offered work without penalty. At that point in time, [the Office's] notification need not state the reasons for finding that the employee's reasons are not acceptable."[10]

ANALYSIS

The employing establishment offered appellant a position on April 10, 2006 which comported with the work restrictions set out by her attending physician. Appellant declined this position on May 4, 2006 and submitted additional medical evidence addressing her ability to pinch and grip with her right hand. Her attending physician, Dr. Leslie, a Board-certified surgeon, indicated that pinch and grip movements would aggravate appellant's employment-related conditions and that he could not approve a position which required her to use her right hand in this manner.

The employing establishment responded and stated that appellant did not have any restrictions regarding her dominant left hand and that the light-duty position did not require that appellant utilize her right hand to pinch and grip mail. Dr. Leslie stated on August 30, 2006 that appellant could reasonably return to the offered position. The Office, therefore, properly found that appellant's reasons for refusing the light-duty position were not acceptable as there was no reasoned medical evidence establishing that appellant could not perform the duties of the suitable work position.

On November 21, 2006 the Office informed appellant that she had 15 days to accept the offered position and to "make arrangements to report to work in the light-duty position." The Office stated: "If you have not accepted the position and arranged for a report date within 15 days of the date of this letter your entitlement to wage loss and schedule award benefits will be terminated." The Office did not inform appellant that the suitable work position was still available. In a letter dated December 4, 2006, within 15 days from the November 21, 2006 letter, appellant's attorney informed the Office and the employing establishment that she

[9] *Arthur C. Reck*, 47 ECAB 339, 341-42 (1995).

[10] 20 C.F.R. § 10.516.

accepted the position. He further requested instructions regarding how and when she should report to work. The Board finds that this letter from appellant's attorney constitutes a timely acceptance. While appellant's attorney requested information regarding when and where to report to work, he did not make the acceptance contingent on any event.[11]

There is no requirement in Board precedent, the Office's regulations[12] or the Office's procedure manual[13] that a claimant must make arrangements to report to work within the 15-day period following the Office's notification. The only requirement is that she accepted the suitable work position. Appellant, through her attorney, accepted the position and further indicated her willingness to report to work by requesting additional information regarding her return to work date.

The Board notes that the facts in this case are such that appellant could reasonably require additional information regarding her return to work before simply appearing at the employing establishment in December 2006. In April 2006, the employing establishment requested that appellant report to work "immediately." The employing establishment did not provide any further written information regarding appellant's return to work date within the six-month period during which the Office was considering the suitability of the position. The Office did not inform appellant on November 21, 2006 that the offered position was still available. The most recent notification that the position was still available came in the Office's August 3, 2006 letter, four months before appellant's final opportunity to accept the position. Appellant, through her attorney, clearly and timely accepted the suitable work position and reasonably requested information from the employing establishment and the Office regarding the date that she should report to work. As she accepted the suitable work position and as there is no legal basis for the Office's requirement in the November 21, 2006 letter that she must secure a return to work date, the Office improperly terminated her compensation on the grounds that she refused an offer of suitable work.

CONCLUSION

The Board finds that the Office failed to meet its burden of proof to terminate appellant's compensation benefits on the grounds that she refused an offer of suitable work.

[11] *Lenice M. Mitchell*, Docket No.04-2037 (issued April 1, 2005).

[12] 20 C.F.R. §§ 10.516; 10.517.

[13] "If a claimant's refusal of the offered job is not deemed justified, the [claims examiner] must so advise the claimant and allow 15 additional days for him or her to *accept* the job." (Emphasis added.) Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, 2.814.5.d.(1) (July 1997); *Compare* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, 2.814.10.e (1) (July 1996). (This section of the procedure manual pertains to situations in which a claimant has abandoned or neglected to work after suitable work and states: "*If the abandonment of the job* is not deemed justified, the [claims examiner] must so advise the claimant and allow him or her 15 additional days *to return to work.*") (Emphasis added.)

ORDER

IT IS HEREBY ORDERED THAT the April 20, 2007 and December 11, 2006 decision of the Office of Workers' Compensation Programs are reversed.

Issued: October 17, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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