

**United States Department of Labor
Employees' Compensation Appeals Board**

J.P., Appellant

and

**DEPARTMENT OF THE ARMY, CORPS OF
ENGINEERS, Pittsburgh, PA, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 07-1291
Issued: September 25, 2007**

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 April 11, 2007 appellant filed a timely appeal from a March 13, 2007 Office of Workers' Compensation Programs' merit decision, denying waiver of recovery of an overpayment of compensation. The Board also has jurisdiction to review a December 19, 2006 decision terminating his compensation for refusing 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.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation on the grounds that he refused an offer of suitable work; and (2) whether the Office properly denied waiver of recovery of an overpayment of compensation.

FACTUAL HISTORY

On February 3, 2005 appellant, then a 57-year-old operations project manager, filed a traumatic injury claim for a back injury when he slipped on ice in a parking lot. The Office accepted his claim for thoracic and lumbosacral sprains and strains. On October 30, 2006 the

Office also accepted aggravation of lumbar spinal stenosis. Effective March 19, 2006, appellant was placed on the periodic compensation rolls to receive compensation for temporary total disability.

In a March 21, 2006 report, Dr. Stephen R. Bailey, a Board-certified orthopedic surgeon and an Office referral physician, reviewed appellant's medical history and provided findings on physical examination. He found that appellant had no residuals from his employment injury and could perform his normal work duties.

On April 11, 2006 Dr. Robert A. Crossey, an attending Board-certified family practitioner, opined that appellant had not recovered from his February 3, 2005 employment injury. He provided a list of work restrictions.

Due to the conflict in the medical opinion evidence between Dr. Bailey and Dr. Crossey, the Office referred appellant to Dr. George S. Kappakas, a Board-certified orthopedic surgeon, for an impartial medical examination.

On May 30, 2006 Dr. Kappakas reviewed appellant's medical history and provided detailed findings on physical examination. He stated that appellant's current physical limitations were related to his underlying lumbar spinal stenosis and not the accepted thoracic and lumbar sprains and strains sustained on February 3, 2005. Dr. Kappakas stated that appellant could perform a primarily sedentary to light-duty position due to his spinal stenosis. He provided a list of work restrictions. In a supplemental report dated August 2, 2006, Dr. Kappakas stated:

"It is my opinion that [appellant's] injury accelerated the underlying lumbar spinal stenosis. The initial diagnosis provided by his treating physicians was a thoracic and lumbar strain. This indicates [that] there is a soft tissue injury to either the tendinous, ligamentous or the muscle units around the involved structures. This heals within six to eight weeks. Certainly, by three to six months this has resolved. Symptoms beyond six months would lead me to look for other causes of the pain. In this particular instance, I feel that the spinal stenosis is causing the continued symptomatology which [appellant] experiences.

"I do not believe that [appellant] is suffering from any residual impairment from the aggravation of the spinal stenosis from the work[-]related injury.... I do again feel that he is experiencing symptoms related to the underlying spinal stenosis and not the thoracic and lumbar strains which were experienced at the time of his initial injury."

On September 6, 2006 Richard Lockwood, chief of the operations division, offered appellant his previous position as operations project manager. He noted that appellant could perform sedentary to light-duty work with options to sit or stand during the eight-hour workday and with certain other restrictions. Mr. Lockwood stated that appellant would be able to plan and schedule his work assignments within the physical restrictions provided by Dr. Kappakas. Appellant would be able to sit, stand or walk at his convenience and minimize activities that required reaching, twisting, bending or lifting light loads. Driving a motor vehicle while on the job would be limited to no more than the two-hour limitation. On September 20, 2006 appellant

accepted the job offer. However, on the day he was to return to work, he presented the employing establishment with a sick leave request and a request to retire effective November 3, 2006. Appellant retired on that date.

On November 2, 2006 the Office advised appellant that the operations project manager position was suitable and it conformed to his physical limitations. It noted that the position remained available. The Office allowed appellant 30 days in which to accept the position or provide his reasons for refusal. The Office advised appellant that an employee who refuses an offer of suitable work without reasonable cause is not entitled to compensation. There was no response from appellant.

By decision dated December 19, 2006, the Office terminated appellant's compensation on the grounds that he refused an offer of suitable work.

On February 6, 2007 the Office advised appellant of its preliminary determination that there was an overpayment of compensation in the amount of \$5,068.12 because he had returned to a pay status for sick leave on October 2, 2006 but continued to receive compensation benefits on the periodic compensation rolls through October 28, 2006. The Office found that appellant was without fault in the creation of the overpayment. Appellant was advised to submit evidence or argument if he disagreed with the fact or amount of the overpayment or if he wished to request a waiver of recovery of the overpayment. The Office asked appellant to submit a completed copy of the enclosed overpayment recovery questionnaire and attach supporting financial documentation of income and expenses, if he was unable to pay the full amount, so that the Office could determine a fair repayment method. The Office advised that, if he did not reply within 30 days, it would issue a final decision based on the information of record. There was no response from appellant.

By decision dated March 13, 2007, the Office advised appellant of its determination that waiver of recovery of the \$5,068.12 overpayment of compensation was not warranted by the evidence of record. It noted that appellant had not responded to the February 6, 2007 preliminary overpayment determination. Appellant was instructed to repay the overpayment by payment of \$500.00 each month until the overpayment was recovered.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.¹ Section 8106(c)(2) of the Federal Employees' Compensation Act² 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.³ To justify termination of compensation, the Office must establish that the work

¹ *Richard P. Cortes*, 56 ECAB ____ (Docket No. 04—1561, issued December 21, 2004); *Melvin James*, 55 ECAB (2004).

² 5 U.S.C. §§ 8101-8193.

³ 5 U.S.C. § 8106(c)(2); *see also Linda D. Guerrero*, 54 ECAB 556 (2003).

offered was suitable and must inform the employee of the consequences of refusal to accept such employment.⁴

Section 10.517(a) of the Act's implementing regulation provides that an employee who refuses to work after suitable work has been offered to or secured for the employee, has the burden of showing that such refusal or failure to work was reasonable or justified.⁵ 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.⁶

The Office's procedures⁷ provide unacceptable reasons for refusing an offer of suitable work include the claimant's preference for the area in which he or she currently resides, personal dislike of the position offered or the work hours scheduled, lack of potential for promotion, lack of job security, retirement and previous rating for loss of wage-earning capacity based on a constructed position.

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained thoracic and lumbosacral sprains and strains and aggravation of lumbar spinal stenosis as a result of February 3, 2005 employment injury. The Office terminated appellant's compensation by decision dated December 19, 2006 on the grounds that he refused an offer of suitable work. The initial question is whether the Office properly determined that the position was suitable.

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 medical evidence.⁸

In this case, the Office relied on the reports of Dr. Kappakas in finding that the operations project manager position offered by the employing establishment was within appellant's work limitations. Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.⁹

Dr. Kappakas reviewed appellant's medical history and provided detailed findings on physical examination. He stated that appellant's current physical limitations were related to his underlying lumbar spinal stenosis and not the accepted thoracic and lumbar sprains and strains

⁴ *Ronald M. Jones*, 52 ECAB 190 (2000); *Arthur C. Reck*, 47 ECAB 339 (1995).

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

⁶ 20 C.F.R. § 10.516; *see Kathy E. Murray*, 55 ECAB 288 (2004).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(c) (July 1997).

⁸ *Kathy E. Murray*, *supra* note 6.

⁹ *See Roger Dingess*, 47 ECAB 123 (1995); *Glenn C. Chasteen*, 42 ECAB 493 (1991).

sustained on February 3, 2005. Dr. Kappakas stated that appellant could perform a primarily sedentary to light-duty position due to his spinal stenosis. In a supplemental report dated August 2, 2006, he advised that appellant's injury accelerated the underlying lumbar spinal stenosis. Dr. Kappakas noted that appellant was diagnosed with thoracic and lumbar strains soft tissue injuries which healed within six to eight weeks. He opinion that spinal stenosis was causing appellant's continued symptomatology.

The Board finds that the reports of Dr. Kappakas are based on a complete and accurate factual and medical background. Dr. Kappakas provided thorough medical rationale such that his opinion is entitled to special weight. The job restrictions provided by him were utilized in making the modified-duty job offer. Therefore, the Office properly determined that the modified position offered to appellant constituted suitable work within his physical limitations.

The Board notes that while appellant "accepted" the position, he advised the employing establishment on the day that he was to return to work that he was retiring. However, retirement is not in and of itself and acceptable reason for refusing a suitable work job offer. Consequently, the Office met its burden of proof to terminate appellant's compensation based on his refusal to accept an offer of suitable work.

LEGAL PRECEDENT -- ISSUE 2

Under section 8129 of the Federal Employees' Compensation Act and the implementing regulations, an overpayment must be recovered unless incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience.¹⁰ Section 10.433 of the implementing regulations provides that the Office may consider waiving an overpayment if the individual to whom it was made was not at fault in accepting or creating the overpayment.¹¹ Section 10.434 provides that, if the Office finds the recipient of an overpayment was not at fault, repayment will be required unless:

“(a) Adjustment or recovery of the overpayment would defeat the purpose of the [Act], or

“(b) Adjustment or recovery of the overpayment would be against equity and good conscience.”¹²

The implementing regulations at 10.438¹³ further provide:

“The individual who received the overpayment is responsible for providing information about income, expense and assets as specified by [the Office.] This

¹⁰ 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

¹¹ 20 C.F.R. § 10.433(a).

¹² *Id.* at 10.434.

¹³ *Id.* at 10.438.

information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the [Act] or be against equity and good conscience. This information will be used to determine the repayment schedule, if necessary.

(b) Failure to submit the requested information within 30 days or the request shall result in denial of waiver and no further request for waiver shall be considered until he equated information is provided.”

ANALYSIS -- ISSUE 2

The Office determined that an overpayment occurred in this case for the period October 2 to 28, 2006 in the amount of \$5,068.12. The record establishes that appellant received an overpayment of compensation because he had returned to a pay status for sick leave on October 2, 2006 but continued to receive compensation for wage loss through October 28, 2006. Appellant does not dispute the fact or the amount of the overpayment.

Regarding waiver of the overpayment of compensation, appellant did not respond to the Office’s request for financial information. The Office’s regulations provide that the individual who received the overpayment is responsible for proving financial information as requested.¹⁴ The failure to submit the requested information shall result in a denial of wavier of recovery.¹⁵ As appellant did not provide the requested financial information the Office properly determined that he was not entitled to wavier of the overpayment and directed recovery.¹⁶

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant’s compensation benefits for refusing an offer of suitable work. The Board further finds that that the Office did not abuse its discretion in denying waiver of recovery of the overpayment or in the method it chose for repayment.

¹⁴ See 20 C.F.R. § 10.438(a).

¹⁵ *Id.* at 10.438(b).

¹⁶ As the Office is not seeking recovery from continuing, the Board does not have jurisdiction to review the matter. See *Miguel A. Muniz*, 54 ECAB 217 (2002).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 13, 2007 and December 19, 2006 are affirmed.

Issued: September 25, 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