United States Department of Labor
Employees' Compensation Appeals Board

A.L., Appellant	)	
and	)	**Docket No. 07-534**
	)	**Issued: August 14, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, PA, Employer	)	

Appearances:
Robert D. Singleton, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 18, 2006 appellant, through his representative, filed a timely appeal from an October 12, 2006 merit decision of the Office of Workers' Compensation Programs terminating his compensation for refusing suitable work, denying his claim for a schedule award and finding that he did not establish a recurrence of disability. 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 properly terminated appellant's compensation effective June 12, 2005 because he refused an offer of suitable work under 5 U.S.C. § 8106; (2) whether appellant has established entitlement to a schedule award; and (3) whether he sustained a recurrence of disability beginning June 11, 2005 causally related to his November 4, 1996 employment injury.

FACTUAL HISTORY

On November 5, 1996 appellant, then a 61-year-old mail handler, filed a claim alleging that he sustained an injury to both knees on November 4, 1996 when he tripped and fell on plastic wrap. He had a history of bilateral total knee replacements in 1995. The Office accepted the claim for contusions of the leg and other sites. Appellant performed light duty from November 4 to 8, 1996, when he resumed his usual employment.

The Office accepted that appellant sustained a recurrence of disability beginning January 7, 1997. Appellant returned to work on February 24, 2007 but stopped work again on September 16, 1997. On February 9, 1998 the Office accepted that he sustained a recurrence of disability and authorized a revision of the left knee arthroplasty. Appellant returned to work on September 12, 1998 for four hours per day but stopped on December 3, 1998. The Office accepted that he sustained a recurrence of disability. On December 6, 1998 appellant underwent a removal of the left total knee arthroplasty and an insertion of a spacer. On January 24, 2000 he underwent a reimplantation of the left total knee arthroplasty.

On March 18, 2003 Dr. Bruce Vannett, a Board-certified orthopedic surgeon, discussed appellant's history of injury and noted that his condition did not improve after the January 24, 2000 revision of the left knee arthroplasty. He diagnosed a painful left total knee revision of arthroplasty and opined that he was disabled from working at the employing establishment due to his knee condition and age.

On April 17, 2003 Dr. Richard J. Mandel, a Board-certified orthopedic surgeon and Office referral physician, diagnosed a "loosening of the revision left total knee arthroplasty, probably asceptic, although low-graded sepsis cannot be ruled out." He found that appellant could work full time in a sedentary capacity.

The Office determined that the record contained a conflict in medical opinion and referred appellant to Dr. Menachem M. Meller, a Board-certified orthopedic surgeon, for an impartial medical examination. Based on Dr. Meller's report, the employing establishment offered appellant modified duty working in the robot area. He returned to work on November 29, 2003 but stopped work and filed a claim for a traumatic injury occurring on December 5, 2003.[1]

The Office obtained an additional report from Dr. Meller on June 16, 2004. On September 16, 2004 it noted that Dr. Meller could not service as a referee physician as he had previously examined appellant.

Appellant filed a claim for a schedule award on September 29, 2004. By letter dated October 8, 2004, the Office requested that his attending physician evaluate the extent of his

[1] Appellant also filed a notice of recurrence of disability on December 5, 2003 due to his November 4, 1996 work injury. On January 21, 2004 he specified that he wanted to claim a new work injury on December 5, 2003.

permanent impairment in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001).[2]

On January 31, 2005 the Office referred appellant to Dr. Herbert Stein, a Board-certified orthopedic surgeon, for an impartial medical examination. In a report dated March 9, 2005, Dr. Stein diagnosed a history of bilateral knee advanced degenerative osteoarthritis and bilateral total knee replacements, a contusion and sprain of the knees due to his November 4, 1996 work injury and status post multiple revisions of the left knee arthroplasty. In an accompanying work restriction evaluation, he found that objectively appellant could work eight hours per day. Dr. Stein determined that he could walk and stand two hours per day intermittently, operate a motor vehicle for one hour, push and pull 20 pounds for two hours intermittently, lift 25 pounds, occasionally climb but not squat or kneel. He noted symptom magnification, obesity and deconditioning as complicating factors.

By decision dated April 7, 2005, the Office denied appellant's claim for a schedule award. It noted that he had not submitted any medical evidence showing that he had a permanent impairment.

On March 31, 2005 the employing establishment offered appellant a full-time sedentary position as a modified regular mail handler. The job required lifting less than 20 pounds up to 8 hours per day in rewrap and lifting 1 to 5 ounces up to 8 hours in debris.

On April 13, 2005 appellant requested an oral hearing. By letter dated April 18, 2005, the Office advised her of its determination that the offered position of modified regular mail handler was suitable. The Office provided him 30 days to accept the position or provide reasons for his refusal.

On April 26, 2005 the Office referred appellant to Robert J. Chaikin, a rehabilitation counselor, for assistance placing him in a position with the employing establishment.

In a report dated April 12, 2005, received by the Office on May 9, 2005, Dr. Matthew P. Lorei, a Board-certified orthopedic surgeon, diagnosed a painful right knee due to malposition and loosening of the tibial component. He noted that appellant's pain had increased and that "over the past year the pain has really become disabling." Dr. Lorei referred him for diagnostic studies.

On May 17, 2005 the employing establishment again offered appellant the position of modified mail handler and specified a return to work date of June 4, 2005. The position required sitting, lifting packages not over 20 pounds and lifting 1 to 5 ounces in debris.

On May 24, 2005 appellant sent the Office medical evidence from Dr. Vanett which he alleged established that he was unable to work. By letter dated May 24, 2005, the Office advised appellant that his reasons for refusing the position were unacceptable. It stated, "You have a period of 15 additional days to accept, and make arrangements to report to, this position in light

[2] In a February 22, 2005 progress report, Dr. Vanett related that he did not perform impairment evaluations and discharged appellant from care.

of this finding. 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 notified appellant that it would not consider any further reasons for refusing the position. It instructed him to advise the employing establishment if he accepted the position.

On June 7, 2005 the Office received an April 12, 2005 impairment evaluation from Dr. Lorei who determined that appellant had a 40 percent impairment of the left lower extremity. Dr. Lorei opined that appellant reached maximum medical improvement on January 1, 2001. The Office also received a May 16, 2005 report from Dr. Lorei, who described appellant's continued complaints of severe left knee pain and some right knee pain. Dr. Lorei diagnosed a painful left knee arthroplasty due to a loosening of the tibial component. He interpreted a bone scan as showing increased uptake about the tibial component of the left knee arthoplasty. Dr. Lorei opined that appellant was "totally and permanently disabled from any kind of work on the basis of the multiple problems he has had with his knees. He cannot stand for any length of time. [Appellant] cannot sit for any length of time and he is unable to drive a car."

On June 7, 9 and 10, 2005 the Office confirmed from the employing establishment that appellant had not reported for work. On June 9, 2005 appellant sent the Office medical reports which he indicated established that he was unable to work. By decision dated June 10, 2005, the Office terminated appellant's wage-loss compensation and entitlement to a schedule award effective June 12, 2005 on the grounds that he refused suitable work under section 8105(c).

Appellant returned to work on June 11, 2005. In a report dated June 15, 2005, Mr. Chaikin the rehabilitation counselor, related that he spoke with the employing establishment on May 27, 2005 regarding the job offer and appellant's anticipated return to work. On May 30, 2005 Mr. Chaikin telephoned appellant to discuss his decision regarding his "return to work on the anticipated date of June 11, 2005." On June 5, 2005 the rehabilitation counselor telephoned the employing establishment regarding its expectation that appellant would accept "an offer that it being made to him at this time." On June 9, 2005 Mr. Chaikin discussed appellant's complaints that he was being forced to resume work. He explained that it was in appellant's interest to resume work and noted that appellant expressed a willingness to cooperate with him. Mr. Chaikin stated, "Further contact will be made with the [injured worker] subsequent to June 11, 2005, which is the anticipated return to work date." On June 11, 2005 he telephoned appellant, who indicated that he believed that he was unable to work from a medical standpoint but would "comply with this request for the [employing establishment] with the job offer." On June 13, 2005 Mr. Chaikin noted that appellant had returned to work on June 11, 2005 for eight hours. He was unable to resume work on June 13, 2005 due to pain.

On June 18, 2005 appellant filed a recurrence of disability claim due to his November 4, 1996 employment injury. He stopped work on June 12, 2005. By decision dated July 8, 2005, the Office found that appellant did not establish a recurrence of disability as it had terminated his compensation for refusing suitable work.

A hearing was held on July 21, 2005. Appellant described his difficulties performing his modified duty after his return to work on June 11, 2005. In a report dated October 7, 2005, Dr. Lorei diagnosed dysfunctional bilateral knee arthoscopies and recommended against further

surgery. By decision dated November 3, 2005, the Office hearing representative affirmed the April 7, June 9 and July 8, 2005 decisions. She found that appellant was not entitled to a schedule award based on the termination of his compensation for refusing suitable work and as he had not submitted medical evidence showing a permanent impairment. The hearing representative further determined that the evidence did not show that he sustained an employment-related recurrence of disability.

Appellant again requested a hearing, which the Office denied on November 21, 2005 as he had previously received a hearing on the same issues. He submitted a report dated November 30, 2005 from Dr. Lorei, who opined that he was totally and permanently disabled from employment due to his knee conditions.

Appellant appealed to the Board. On August 28, 2006 the Board remanded the case for reconstruction of the record.[3] On October 12, 2006 the Office reissued its November 3, 2005 decision.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[4] Section 8106(c)(2) of the Federal Employees' Compensation Act,[5] 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.[6] 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.[7] 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.[8]

Section 10.516 of the Code of Federal Regulations states that the Office will advise the employee that the work offered is suitable and provide 30 days for the employee to accept the job or present any reasons to counter the Office's finding of suitability.[9] Thus, before terminating compensation, the Office must review the employee's proffered reasons for refusing or neglecting to work.[10] If the employee presents such reasons and the Office finds them

[3] Order Remanding Case, Docket No. 06-742 (issued August 28, 2006).

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

[5] 5 U.S.C. §§ 8101-8193.

[6] 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

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

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

[9] 20 C.F.R. § 10.516.

[10] *See Sandra K. Cummings*, 54 ECAB 493 (2003); *see also Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992) and 20 C.F.R. § 10.516 which codifies the procedures set forth in *Moore*.

unreasonable, the Office will offer the employee an additional 15 days to accept the job without penalty.[11]

ANALYSIS -- ISSUE 1

On March 31, 2005 the employing establishment offered appellant a full-time position as a modified regular mail handler. The duties of the position were in accordance with the work restrictions set forth by Dr. Stein, the impartial medical examiner. On April 18, 2005 the Office notified appellant that the position was suitable and that he had 30 days to accept the position or provide reasons for his refusal. On April 26, 2005 it referred appellant to Mr. Chaikin, a rehabilitation counselor, for assistance placing him with his previous employer. On May 17, 2005 the employing establishment again offered him the position of modified regular mail handler and informed him that he should begin work on June 4, 2005. Appellant submitted medical evidence which he alleged showed that he was unable to work. In a May 24, 2005 letter, the Office advised him that his reasons for refusing the position were not acceptable and that he had 15 days to make arrangements with the employing establishment to return to work. It terminated appellant's compensation in a June 10, 2005 decision after finding that he refused an offer of suitable work under section 8106(c).

The Board finds that the Office has not established that appellant refused an offer of suitable work as of the date that it issued its June 10, 2005 termination decision. It appears from Mr. Chaikin's June 15, 2005 report that he arranged for appellant to return to work with the employing establishment on June 11, 2005.[12] On May 27, 2005 he telephoned the employing establishment to discuss appellant's return to work. On May 30, 2005 Mr. Chaikin discussed with appellant his decision whether to return to work on the anticipated date of June 11, 2005. On June 5, 2005 he spoke with the employing establishment regarding the job offer and its expectations. On June 7, 2005 Mr. Chaikin discussed appellant's concerns about returning to work and noted that he would again speak with him after June 11, 2005, his anticipated date to return to work. On June 7, 9 and 10, 2005 the Office confirmed that appellant had not resumed work. It did not, however, address whether he had refused the position or whether he had a return to work date. On June 11, 2005 Mr. Chaikin telephoned appellant to "discuss the expectation of his returning to work on this date…." Appellant returned to work on June 11, 2005. It thus appears that he arranged with the employing establishment to return to work on June 11, 2005. Consequently, the Office has not established that appellant refused an offer of suitable work at the time it issued its June 10, 2005 termination decision.

[11] *Id*.

[12] The Office's procedure manual provides that a rehabilitation counselor "will work with the agency to modify the claimant's job or identify another position within the agency which the claimant can perform." Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.6(b) (December 1993).

CONCLUSION

The Board finds that the Office improperly terminated appellant compensation effective June 12, 2005 because he refused an offer of suitable work under 5 U.S.C. § 8106.[13]

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 12, 2006 is reversed.

Issued: August 14, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[13] In view of the Board's disposition of the suitable work issue, the issues of whether appellant has established that he sustained a recurrence of disability and whether he is entitled to a schedule award are moot.