

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

H.J., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Missouri City, TX, Employer**

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**Docket No. 08-629
Issued: December 5, 2008**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 31, 2007 appellant filed a timely appeal from an Office of Workers' Compensation Programs' October 1, 2007 merit decision terminating her compensation. 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 compensation effective August 15, 2006 pursuant to 5 U.S.C. § 8106(c).

FACTUAL HISTORY

On November 9, 2001 appellant, then a 46-year-old postmaster, filed a traumatic injury claim (Form CA-1) alleging he sustained left shoulder and low back injuries while loading a parcel into a vehicle. The Office accepted the following conditions: lumbar intervetebral displacement; brachial neuritis/radiculitis; ulnar nerve lesion; thoracic/lumbosacral neuritis and insomnia.

By decision dated July 25, 2003, the Office reduced appellant's compensation pursuant to 5 U.S.C. § 8115. It determined that his actual earnings since February 3, 2003 as a modified mail flow coordinator fairly and reasonable represented his wage-earning capacity. Appellant stopped working in May 2003.

On December 1, 2005 the employing establishment offered appellant a position as a postmaster with modified duties. The offer stated that the position required intermittent sitting or standing two to four hours, writing and word processing one to two hours and eight hours interaction with staff.

In a duty status report (Form CA-17) dated January 18, 2006, Dr. Lubor Jarolimek, the attending orthopedic surgeon, referred to the December 1, 2005 job offer and indicated "yes" that appellant could perform the position. He noted that the position did not involve lifting, pushing, pulling or climbing, and was mostly sitting work with intermittent walking.

By letter dated January 26, 2006, the Office advised appellant that it found the offered position to be suitable employment. It advised appellant to accept the position or provide a written explanation of reasons for not accepting the position within 30 days. Appellant was advised his compensation would be terminated if he did not justify his failure to accept the position.

On January 26, 2006 the Office received a February 3, 2003 report from Dr. Jarolimek, who reported appellant continued to complain of low back discomfort. Dr. Jarolimek noted that he had seen a videotape of appellant, made pursuant to an employing establishment investigation, showing him picking up chairs without any signs of discomfort. He again noted the duties of the offered position. Dr. Jarolimek stated, "Based on the above physical exam[ination], [appellant's] symptoms and documentation provided by [the employing establishment investigator], I recommend for [appellant] to return to work with the above restrictions of no lifting, pushing, pulling or climbing." The Office also received a January 3, 2006 report from Dr. Boris Payan, a pain management specialist. Dr. Payan stated that appellant complained of back pain radiating into the legs, but he was not interested in surgery.

In a report dated February 15, 2006, Dr. Jarolimek provided results on examination and stated that he had discussed appellant's future treatment plan. He advised that there was no objective evidence for keeping appellant off work.

On February 27, 2006 the Office received a February 23, 2006 letter from appellant's representative. He contended that Dr. Jarolimek was not a pain specialist and his opinion should not be given great weight. The representative also argued his report was issued "due to coercion" as he was visited by an employing establishment investigator and subsequently dropped appellant as a patient.

By letter dated February 28, 2006, the Office advised appellant that the reasons provided for refusing the offered position were not acceptable. It provided appellant an additional 15 days to accept the offered position. If he did not accept the position, the Office stated that his compensation for wage loss would be terminated. On March 9, 2006 it received a February 3,

2006 letter from appellant to the employing establishment. Appellant stated that he had no documentation from his physician releasing him to work.

By decision dated March 15, 2006, the Office terminated appellant's compensation for wage-loss and entitlement to schedule award benefits. It found that pursuant to 5 U.S.C. § 8106(c), appellant had refused to accept suitable work and he was not entitled to compensation.

In a letter dated April 18, 2006, appellant requested reconsideration. He argued that Dr. Jarolimek did support his ability to return to work. Appellant submitted a report dated March 14, 2006 from Dr. Rezik Saqer, an anesthesiologist. He provided results on examination and stated that he did not believe appellant would be able to return to work at full capacity without risking aggravation of his injury and he recommended a functional capacity evaluation.

By decision dated July 10, 2006, the Office reviewed the case on its merits and denied modification.

On August 8, 2006 appellant requested reconsideration. He submitted an August 24, 2006 report from Dr. Saqer, stating that after five months of invasive treatment appellant was at the light physical demand level. Dr. Saqer stated that this confirmed his belief on the initial evaluation that appellant was not fit to go back to work and certainly was not fit before that examination. He disagreed with Dr. Jarolimek as to appellant's work capacity because there was no indication that appellant's condition had improved and Dr. Jarolimek did not base his opinion on a functional capacity evaluation.

In a decision dated March 30, 2007, the Office reviewed the case on its merits and denied modification of the July 10, 2006 decisions.

Appellant again requested reconsideration and submitted a July 3, 2007 report from Dr. Saqer, who stated that an August 10, 2006 functional capacity evaluation showed appellant was at the light physical demand level. Dr. Saqer also stated that appellant had been on a narcotic oral medication (Oxycontin) that might interfere with his current light-duty job description.

By decision dated October 1, 2007, the Office denied modification of the March 30, 2007 decision.

LEGAL PRECEDENT

5 U.S.C. § 8106(c) provides in pertinent part, "A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation." It is the Office's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.¹ To justify such a termination, it must show that the work offered was suitable.² An employee who refuses or neglects to work after

¹ *Henry P. Gilmore*, 46 ECAB 709 (1995).

² *John E. Lemker*, 45 ECAB 258 (1993).

suitable work has been offered to him has the burden of showing that such refusal to work was justified.³

With respect to the procedural requirements of termination under section 8106(c), the Board has held that the Office must inform appellant of the consequences of refusal to accept suitable work and allow appellant an opportunity to provide reasons for refusing the offered position.⁴ If appellant presents reasons for refusing the offered position, it must inform the employee if it finds the reasons inadequate to justify the refusal of the offered position and afford appellant a final opportunity to accept the position.⁵

ANALYSIS

The initial question presented is whether the offered position was medically suitable. Appellant was offered work as a modified postmaster that required intermittent sitting or standing. There was no lifting or other specific physical requirement beyond sitting, standing or walking. The attending orthopedic surgeon, Dr. Jarolimek, clearly found in his reports that appellant could perform the duties of the offered job. He noted in a January 18, 2006 duty status report that the position did not involve lifting, pushing, pulling or climbing. On January 26, 2006 Dr. Jarolimek advised that appellant could return to work with no lifting, pushing, pulling or climbing, citing the results of physical examinations, appellant's symptoms and a videotape of appellant engaged in physical activity without discomfort. He stated in a February 15, 2006 report that there was no objective basis to keep appellant off work.

The medical evidence from Dr. Jarolimek constitutes probative medical evidence from an attending physician that found the offered position to be medically suitable. Appellant argued that Dr. Jarolimek was "coerced" into his opinion after being visited by an employing establishment investigator. However, Dr. Jarolimek provided rationalized medical opinion that was based on knowledge of the offered position and appellant's medical condition. His reports are probative medical evidence on the issue presented.

Following the March 15, 2006 termination decision, appellant submitted reports from Dr. Saqer. In a March 14, 2006 report, Dr. Saqer indicated that appellant could not work at full capacity, without discussing the offered position. On August 24, 2006 he opined that appellant had not been fit "to go back to work" prior to his initial examination. Again, Dr. Saqer did not discuss the offered position. He referred to a functional capacity evaluation in August 2006, but this showed appellant could work at the light physical level. Dr. Saqer did not explain how this supported the inability to work at the offered position in March 2006. In the July 3, 2007 report, Dr. Saqer noted a narcotic medication, Oxycontin, might interfere with performance of the job duties, without further explanation. He noted in his March 14, 2006 report that appellant had been prescribed Oxycontin, but the medications currently prescribed did not include Oxycontin. Dr. Saqer did not provide a rationalized, unequivocal opinion that appellant could not perform

³ *Catherine G. Hammond*, 41 ECAB 375, 385 (1990); 20 C.F.R. § 10.517(a).

⁴ *Maggie L. Moore*, 42 ECAB 484 (1991); *reaff'd on recon.*, 43 ECAB 818 (1992).

⁵ *Id.*

the offered position as of March 15, 2006 due to a medication necessary for treatment of an employment-related condition. The Board finds that the weight of the evidence established that the offered position was medically suitable.

In accord with the procedural requirements of 5 U.S.C. § 8106(c), the Office advised appellant that it found the job to be suitable and gave appellant an opportunity to provide reasons for refusing the position. In a February 28, 2006 letter, it advised appellant that the offered reasons were unacceptable and appellant had an additional opportunity to accept the position. The Office followed established procedures prior to the termination of compensation pursuant to 5 U.S.C. § 8106(c).

The evidence of record establishes that the position offered was medically and vocationally suitable, and the Office complied with the procedural requirements of 5 U.S.C. § 8106(c). The Board finds that the Office met its burden of proof to terminate compensation in this case.

CONCLUSION

The Office met its burden of proof to terminate compensation for refusal of suitable work under 5 U.S.C. § 8106(c).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 1 and March 30, 2007 are affirmed.

Issued: December 5, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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