United States Department of Labor
Employees' Compensation Appeals Board

K.H., Appellant	)	
and	)	**Docket No. 07-2022**
	)	**Issued: February 25, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Houston, TX, Employer	)	

Appearances:
Appellant, pro se
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 July 30, 2007 appellant timely appealed a June 14, 2007 merit decision of the Office of Workers' Compensation Programs denying modification of the termination of his wage-loss and schedule award benefits effective June 2, 2006. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation benefits effective June 2, 2006 pursuant to 5 U.S.C. § 8106(c)(2) on the grounds that he refused an offer of suitable work; and (2) whether the Office properly terminated appellant's entitlement to schedule award benefits effective June 2, 2006 on the grounds that he refused an offer of suitable work.

FACTUAL HISTORY

On December 11, 2004 appellant, then a 54-year-old letter carrier, filed a claim for a right shoulder and spinal conditions caused by his job. The Office accepted his claim for right

shoulder strain and impingement with partial tear and arthritis and authorized appropriate surgery, which he underwent on August 25, 2005. Appellant stopped work on December 8, 2004 and did not return. The Office placed him on the periodic rolls. Appellant retired on medical disability in April 2006.

In an April 5, 2006 work capacity evaluation, Dr. Allen Deutsch, a Board-certified orthopedic surgeon and appellant's treating physician, indicated that appellant was able to work eight hours a day with lifting restrictions of no more than 20 pounds. He advised that such restrictions were permanent.

On April 6, 2006 the employing establishment offered appellant a modified position as a city letter carrier effective April 12, 2006. The position required appellant to case mail one to two hours a day while standing/bending to lift tubs of flats/trays of letters at carrier case up to 20 pounds and drive a government vehicle to deliver mail four to six hours a day.

Appellant declined the position on April 11, 2006, asserting that he had high blood pressure and diabetes. He also noted that he had elected retirement under the Civil Service Retirement System effective April 18, 2006.[1]

In an April 21, 2006 telephone conference regarding appellant's return to work, the Office noted that Dr. Deutsch found that appellant was able to work eight hours with restrictions and described the employing establishment's April 6, 2006 job offer. Appellant advised that his application for disability retirement had been approved the Office of Personnel Management (OPM) and he was not going to accept the job offer. The Office noted that the job offer was still available and, if appellant was not going to accept the job offer, the Office could terminate his right to receive compensation for wage loss and a schedule award.

In an April 21, 2006 letter, the Office advised appellant that the offered position was suitable work within his medical restrictions and the employing establishment confirmed that the position remained available to him. The Office afforded him 30 days to either accept the offer or provide good cause for refusal. The Office further advised appellant that he would lose his entitlement to compensation if he refused suitable work.

In a response, appellant contended that he had medically retired. He stated that Dr. Deutsch had found him permanently disabled and submitted a May 3, 2006 report by Dr. Deutsch. Appellant asserted that he could not work because of his other medical conditions. In his May 3, 2006 report, Dr. Deutsch advised that appellant was released to retirement but not released to work. He advised that appellant was unable to perform the duties which were required of him at the employing establishment. Dr. Deutsch stated that appellant was on permanent restrictions of no lifting, pulling, pushing or reaching which prevented him from returning to his previous employment.

On May 12, 2006 appellant filed a claim for a schedule award.

[1] Appellant's application was dated April 7, 2006.

In a letter dated May 16, 2006, the Office informed appellant that his reasons for refusing the position were unacceptable. It allotted him 15 days to accept the position or have his entitlement to wage-loss and schedule award benefits terminated. Appellant did not accept the position. On June 2, 2006 the employing establishment verified that the offered position remained available.

By decision dated June 2, 2006, the Office terminated appellant's entitlement to wage-loss and schedule award benefits effective June 2, 2006 on the grounds that he refused an offer of suitable work under 5 U.S.C. § 8106(c)(2). It found that the weight of the medical evidence rested with Dr. Deutsch's April 5, 2006 examination and that appellant did not provide good cause for refusing the position, which remained open and available to him.

In an August 29, 2006 letter, appellant requested reconsideration. He advised that he wanted to receive Federal Employees' Compensation Act benefits and taken off OPM (retirement) benefits. Appellant also stated that the Office did not address Dr. Deutsch's May 3, 2006 letter stating that he could not work, or discuss the issue of permanent impairment and his schedule award claim. He submitted duplicative copies of evidence already of record, including Dr. Deutsch's May 3, 2006 letter.

By decision dated June 14, 2007, the Office denied modification of its June 2, 2006 decision.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. In this case, the Office terminated appellant's compensation under section 8106(c)(2) of the Act, which 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.[2] 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.[3] 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.[4]

Office regulations provide that, in determining what constitutes suitable work for a particular disabled employee, the Office should consider the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work and other relevant factors.[5] It is well established that the Office must consider preexisting and subsequently acquired conditions in

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

[3] *Ronald M. Jones*, 52 ECAB 190 (2000); *Arthur C. Reck*, 47 ECAB 339, 341-42 (1995).

[4] *Joan F. Burke*, 54 ECAB 406 (2003); *see Robert Dickerson*, 46 ECAB 1002 (1995).

[5] 20 C.F.R. § 10.500(b).

the evaluation of suitability of an offered position.[6] 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 the medical evidence.[7]

In assessing medical evidence, the number of physicians supporting one position or another is not controlling, the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for and the thoroughness of physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[8] Office procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer, medical evidence of inability to do the work or travel to the job or the claimant found other work which fairly and reasonably represents his or her earning capacity (in which case compensation would be adjusted or terminated based on actual earnings). Furthermore, if medical reports document a condition which has arisen since the compensable injury and the condition disables the employee, the job will be considered unsuitable.[9]

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.[10] Thus, before terminating compensation, the Office must review the employee's proffered reasons for refusing or neglecting to work.[11] If the employee presents such reasons and the Office finds them unreasonable, the Office will offer the employee an additional 15 days to accept the job without penalty.[12]

[6] *Richard P. Cortes*, 56 ECAB 200 (2004).

[7] *Id.; Bryant F. Blackmon*, 56 ECAB 752 (2005).

[8] *See Connie Johns*, 44 ECAB 560 (1993).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(4) (July 1997).

[10] 20 C.F.R. § 10.516.

[11] *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*.

[12] *Id.*

ANALYSIS -- ISSUE 1

The Office terminated appellant's entitlement to wage-loss compensation benefits effective June 2, 2006 on the grounds that he refused an April 6, 2006 offer of suitable work. The Office found that the weight of the medical evidence, as represented by Dr. Deutsch's April 5, 2006 report, established that the position was within appellant's physical capabilities. In an April 5, 2006 report, Dr. Deutsch found that appellant required permanent restrictions of lifting no more than 20 pounds.

The employing establishment's April 6, 2006 modified city letter carrier job offer involved duties of casing mail and driving and delivering the mail. The listed restrictions limited lifting to one to two hours a day of no more than 20 pounds. The Board notes that these restrictions are within those set forth by Dr. Deutsch in his April 5, 2006 report. Therefore, the Board finds that the position offered appellant on April 6, 2006 was suitable work within his physical restrictions.

The Board further finds that the Office complied with its procedural requirements in advising appellant that the position was found suitable, providing him with the opportunity to accept the position or provide his reasons for refusing the job offer and notifying him of the penalty provision of section 8106(c).[13] In its April 21, 2006 letter, the Office notified appellant of its finding that the modified city letter carrier position was suitable and of the consequences for not accepting a suitable offer. The Office additionally confirmed that the position remained available. Appellant rejected the offered position on April 11, 2006 and, during the April 21, 2006 teleconference, asserted that his retirement application had been approved. Retirement, however, is not considered an acceptable reason for refusing an offer of suitable work.[14] Appellant also rejected the position on the grounds that he could not work due to his various medical conditions (which are presumably preexisting and/or subsequently acquired). However, he submitted no medical evidence which found him to be totally disabled from his various medical conditions.

The Office, in its May 16, 2006 letter, advised appellant that it had determined that the offered position was suitable and based on Dr. Deutsch's April 5, 2006 restrictions. He had 15 days to accept the position. However, appellant again rejected the position because he had retired on disability. As noted, retirement is not considered an acceptable reason for refusing an offer of suitable work.[15] Appellant also contended that he could not perform the offered position as it was not within the restrictions given by Dr. Deutsch in his May 3, 2006 report. In his May 3, 2006 report, Dr. Deutsch opined that appellant had permanent restrictions of no lifting, pulling, pushing or reaching and he could not return to his previous employment. He also stated that appellant was only released to retirement. This report, however, does not address appellant's ability to perform the April 6, 2006 offered modified position or provide a sufficient

[13] *See Bruce Sanborn*, 49 ECAB 176 (1997).

[14] *Robert P. Mitchell*, 52 ECAB 116 (2000) (where the claimant chose to receive disability retirement benefits rather than accept a position offered by the employing establishment).

[15] *Id.*

explanation with objective evidence to explain why the physician had changed his mind with regard to appellant's lifting restriction to show that the April 6, 2006 position was now unsuitable. Therefore, this report is insufficient to establish appellant's assertion that the offered position was beyond his physical capacities. The record is also devoid of any evidence that appellant is totally disabled from his various other medical conditions. Therefore, appellant has not established a reasonable basis for refusing the offered position. As the weight of the medical evidence established that he could perform the duties of the offered position, appellant did not offer sufficient justification for refusing the position. The Board finds that the Office met its burden of proof to terminate appellant's compensation for wage loss effective June 2, 2006, as he refused an offer of suitable work.[16]

LEGAL PRECEDENT -- ISSUE 2

Office regulations provide that in a termination under section 8106(c) of the Act a claimant has no further entitlement to compensation under sections 8105, 8106 and 8107 of the Act which includes payment of continuing compensation for permanent impairment of a scheduled member.[17] The Board has found that a refusal to accept suitable work constitutes a bar to receipt of a schedule award for any impairment which may be related to the accepted employment injury.[18]

ANALYSIS -- ISSUE 2

Appellant filed a claim for a schedule award on May 12, 2006. The Office terminated appellant's entitlement to schedule award compensation benefits effective June 2, 2006 on the grounds that he refused an offer of suitable work.

In this case, the Office properly found that appellant was not entitled to a schedule award under 5 U.S.C. § 8107 as he refused an offer of suitable work. With regard to schedule awards, the Board has held that monetary compensation payable to an employee under section 8107 are payments made from the Employees' Compensation Fund and are, therefore, subject to the penalty provision of section 8106(c).[19] The Board, therefore, finds that appellant's refusal to accept suitable work constitutes a bar to his receipt of a schedule award for any impairment which may be related to the accepted employment injuries following the June 2, 2006 termination decision. Additionally, contrary to appellant's assertions, the Office properly advised him of the penalty provision of section 8106(c) in its April 21, 2006 letter and teleconference and in its May 16, 2006 letter.

[16] *Karen L. Yaeger*, 54 ECAB 323 (2003).

[17] *See* 20 C.F.R. § 10.517.

[18] *Stephen R. Lubin*, 43 ECAB 564 (1992).

[19] *Id. See Sandra A. Sutphen*, 49 ECAB 174 (1997).

CONCLUSION

The Board finds that the Office met its burden of proof in terminating appellant's disability compensation under 5 U.S.C. § 8106(c)(2) for refusal of suitable employment. The Board also finds that the Office properly denied appellant's entitlement to schedule award compensation as section 8106(c) of the Act serves as a bar to further compensation for disability arising from the accepted employment injuries.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated June 14, 2007 is affirmed.

Issued: February 25, 2008
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