United States Department of Labor
Employees' Compensation Appeals Board

G.G., Appellant	)	
and	)	**Docket No. 08-31**
	)	**Issued: June 13, 2008**
DEPARTMENT OF THE INTERIOR, LASSEN VOLCANIC NATIONAL PARK, Mineral, CA, Employer	)	

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 October 1, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated June 27, 2007 which denied modification of termination of his compensation on the grounds that he refused 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.

ISSUE

The issue is whether the Office properly terminated appellant's wage-loss compensation effective March 19, 2005 on the grounds that he refused an offer of suitable work.

FACTUAL HISTORY

This case has previously been on appeal before the Board.[1] In a June 8, 2007 decision, the Board set aside and remanded the Office's May 19, 2006 decision. The Board found that

[1] Docket No. 06-1977 (issued June 8, 2007).

appellant's February 12, 2006 letter constituted a timely request for reconsideration from the Office's February 15, 2005 decision. The Board remanded the case for review of the evidence under the proper standard of review for a timely reconsideration request. The facts and history contained in the prior appeal are incorporated by reference.

Appellant injured his left shoulder on April 10, 1999. The Office accepted his claim for left shoulder derangement, left shoulder acromioclavicular joint separation and subacromial impingement syndrome. The Office authorized left shoulder anterior glenoid labral debridement on May 17, 2000 and a left shoulder arthroscopy on August 13, 2003. Appellant stopped working on August 30, 2003 and did not return. He was cleared by his treating physician, Dr. Thomas E. Daniel, an orthopedic surgeon, on December 5, 2003 to return to work with restrictions on overhead lifting, pulling, pushing or carrying no more than 20 pounds. In a February 27, 2004 report, Dr. Daniel advised that appellant was permanent and stationary as of March 1, 2004 and had restrictions as noted in his December 5, 2003 report; he also restricted appellant from climbing ladders or working at heights. In a May 20, 2004 report, he noted that appellant's activity restrictions remained the same. On May 25, 2004 the employing establishment offered appellant a permanent position as an automation assistant starting on June 13, 2004 in Mineral, California.[2] In a February 15, 2005 decision, the Office terminated appellant's compensation benefits effective March 19, 2005 on the grounds that he refused an offer of suitable work under section 8106(c)(2) of the Act.

By letter dated February 12, 2006, appellant requested reconsideration. He alleged that the employing establishment misrepresented the "commute distance issue." Appellant alleged that he was told that no relocation expenses would be allowed based on their analysis of mileage distance. He also alleged that the proposed route was not a viable option as it was unpaved, and was not passable during winter and spring, and was closed approximately five to six months of the year. Appellant alleged that the route used to travel during that time was at least 69 miles away, and took a minimum of 90 to 120 minutes. In an August 16, 2006 letter, he indicated that his request for reconsideration was timely and that the distance issue was relevant to his claim. The Office subsequently received several physical therapy notes and an order for physical therapy.

The Office received the April 26 and June 28, 2005 reports of Dr. Daniel who noted that appellant's condition remained essentially unchanged. On August 25, 2005 Dr. Daniel noted that appellant's problem had improved post injection and that his left shoulder was normal in appearance. He also indicated that appellant had retired. On October 28, 2004 Dr. Daniel noted that appellant's problem had improved but that he could not use a bow or bird hunt with a gun. He continued to treat appellant and submit reports, noting that appellant's condition remained unchanged.

[2] On August 23, 2004 the Office advised appellant that the offered position was suitable, remained available and that he had 30 days to accept the position or explain his reasons for refusal. After appellant offered reasons for refusal of the position, the Office, on June 6, 2005, advised appellant that his refusal was not justified and that he had 15 days in which to accept the position or his benefits would be terminated. The contents of these letters are more fully set forth in the Board's prior decision. *Id.*

By decision dated June 27, 2007, the Office denied modification of its February 15, 2005 decision.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits.[3] This includes cases in which the Office terminates compensation under section 8106(c)(2) of the Federal Employees' Compensation Act for refusal to accept suitable work.

Section 8106(c)(2)[4] of the Act 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(a)[5] of the Office's regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured for him or her has the burden to show that this refusal or failure to work was reasonable or justified After providing the two notices described in section 10.516,[6] the Office will terminate the employee's entitlement to further compensation under 5 U.S.C. §§ 8105, 8106 and 8107, as provided by 5 U.S.C. § 8106(c)(2). However, the employee remains entitled to medical benefits as provided by 5 U.S.C. § 8103 or justified. To justify termination, the Office must show that the work offered was suitable,[7] and must inform appellant of the consequences of refusal to accept such employment.[8] According to Office procedures, certain explanations for refusing an offer of suitable work are considered acceptable.[9]

Office procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.[10]

ANALYSIS -- ISSUE 1

In the present case, the record demonstrates that the office automation assistant position was developed by the employing establishment in conformance with work restrictions set forth

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[3] *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

[4] 5 U.S.C. § 8106(c)(2).

[5] 20 C.F.R. § 10.517(a).

[6] 20 C.F.R. § 10.516.

[7] *See Carl W. Putzier*, 37 ECAB 691 (1986); *Herbert R. Oldham*, 35 ECAB 339 (1983).

[8] *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992). *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(d)(1) (July 1997).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(5) (July 1997).

[10] *Id; see T.M.*, 58 ECAB ___ (Docket No. 06-1764, issued January 30, 2007); *Lorraine C. Hall*, 51 ECAB 477 (2000).

by Dr. Daniel, his attending physician. Appellant was cleared to work with restrictions on overhead lifting and lifting, pulling, pushing or carrying more than 20 pounds. The employing establishment, in its May 25, 2004 letter, offered him a position in accordance with Dr. Daniels's restrictions. The job was listed as sedentary in an office environment with physical requirements consistent with Dr. Daniel's restrictions. The Board notes that Dr. Daniel's opinion is unrefuted and represents the weight of the medical opinion. The Board finds that appellant's refusal of the offered employment was not justified based on physical or medical grounds.

On August 23, 2004 the Office complied with the procedural requirements by advising appellant of the suitability of the position offered and the penalty for refusing the offered position under section 8106(c) of the Act. The Office advised appellant that the job remained available and provided him with 30 days to either accept the position or provide an explanation for his refusal.[11] The Office further notified him that a partially disabled employee who refused suitable work without reasonable cause was not entitled to compensation.

Appellant did not submit any medical evidence to establish that his condition would prevent him from performing the sedentary position. Rather, by letter dated September 19, 2004, he refused the position because of the commute. Appellant alleged that the offered position was in Mineral, California, whereas his former duty station was in Manzanita Lake, California. He alleged that the distance from Mineral, California to Manzanita Lake was 42 miles. Appellant also alleged that in order to get to the destination he would have to travel through a park road which was closed to the public from November to May. He noted that he could take an alternate route which was comprised of a 60-mile commute and alleged that it would take him approximately one and a half hours or up to two hours on the longer route. Appellant also indicated that this would require fuel costs of $200.00 plus additional maintenance for added wear and tear to his car. He also alleged that he would not be able to attend his medical appointments and physical therapy sessions due to commuting distance. The Board notes that the offered job is further from appellant's home than the job he held when he was injured. As noted above, an inability to travel to work because of residuals of the employment injury is an acceptable reason for rejecting an offer of suitable work, if supported by the medical evidence.[12] However, appellant's arguments do not establish that he was unable to commute to the offered position because of residuals of his employment injury. Appellant provided no medical evidence to support his inability to commute to work.

Additionally, the employing establishment controverted appellant's contentions and alleged that his current commuting distance was 14.5 miles with a 25 minute commute, and that the new commuting distance was 25.3 miles with a commuting time of 53 minutes. The employing establishment noted that the distance to the new station was 10.8 miles farther and that it would take appellant 28 minute longer to get to than his previous duty station. The employing establishment also indicated that neither commute was through park lands and provided documentation comprised of maps to document the roads, distances and travel times.

[11] *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[12] *See supra* notes 9 & 10.

By letter dated January 6, 2006, the Office properly informed appellant that his reasons for refusing the offered position were unacceptable and provided him 15 days to accept the position. Appellant did not respond. Thus, the Office properly terminated his wage-loss compensation for refusal of suitable work. At the time of the termination, the weight of the medical evidence established that appellant could perform the duties of the offered position.

An employee who refuses or neglects to work after suitable work has been offered to him or her has the burden of showing that such refusal to work was justified.[13] In the present case, appellant has not shown that his refusal to work was justified. The weight of the medical evidence continues to support that appellant's accepted conditions did not prevent him from performing the job he was offered on May 25, 2004.

Following the termination of his benefits, appellant has not established that the offered position was outside of his physical recommendations.

Subsequent to the Office's termination of benefits, appellant requested reconsideration. In his February 12, 2006 request, appellant alleged that the employing establishment misrepresented the "commute distance issue." However, he did not fully explain and present evidence supporting his assertions about discrepancies in the commuting distance and time. The Board notes that, while the new position may be farther away, it does not appear to be outside the general commuting area. Furthermore, appellant presented no medical evidence supporting that that he was unable to commute when his wage-loss compensation was terminated. The Board notes that Dr. Daniels, continued to treat appellant and opine that his condition remained unchanged. However, he did not offer any opinion regarding appellant's ability to commute. Without medical evidence establishing that appellant is unable to commute to work, appellant has failed to establish that the position offered by the employing establishment is unsuitable.

The record also contains physical therapy reports. However, healthcare providers such as physical therapists are not physicians under the Act. Thus, their opinions on causal relationship do not constitute rationalized medical opinions and have no weight or probative value.[14]

Appellant also raised the issue of relocation expenses, however, this would not be relevant to his ability to perform the offered position, or arrive at the destination.

The Board finds that the Office met its burden of proof in terminating appellant's compensation benefits effective March 19, 2005 and that appellant did not, thereafter, establish that his refusal of suitable work was justified.[15]

[13] 5 U.S.C. § 8106(c)(2).

[14] *Jane A. White*, 34 ECAB 515, 518 (1983).

[15] The Board notes that appellant submitted evidence subsequent to the June 27, 2007 Office decision. The Board cannot consider this evidence, however, as its review of the case is limited to the evidence of record which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation effective March 19, 2005 on the grounds that he refused an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the June 27, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 13, 2008
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