United States Department of Labor
Employees' Compensation Appeals Board

R.L., Appellant	)	
	)	
and	)	**Docket No. 08-509**
	)	**Issued: September 5, 2008**
U.S. POSTAL SERVICE, Bedford Park, IL, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 1, 2007 appellant timely filed an appeal from the Office of Workers' Compensation Programs' November 21, 2007 merit decision terminating his compensation for refusal of suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether the Office properly terminated appellant's compensation benefits effective May 31, 2007 on the grounds that he refused an offer of suitable work.

FACTUAL HISTORY

On June 8, 2005 appellant, then a 54-year-old tools and parts clerk, filed a traumatic injury claim alleging that he sustained a hernia in the lower part of his stomach after lifting and rolling over tires to put in the stockroom on June 2, 2005. The Office accepted his claim for a ventral hernia.

On July 28, 2005 appellant filed a recurrence of disability claim stating that he sustained a recurrence of disability on July 23, 2005. On January 17, 2006 the Office accepted appellant's recurrence claim that he was totally disabled from work as of July 23, 2005. Appellant was paid wage-loss compensation from July 28, 2005 to May 31, 2007.

On January 26, 2006 the Office requested a medical report from appellant's physician, Dr. Nadar Beshay, Board-certified in internal medicine, addressing appellant's current disability. It asked that Dr. Beshay address which appellant was able to return to his regular work or light-duty work, with restrictions. Visit notes from Dr. Beshay were submitted. In a February 13, 2006 note, he stated that appellant continued to suffer from groin pain due to bilateral inguinal and ventral hernia and recommended that he stay off work until his surgery was completed. In an April 19, 2006 note, Dr. Beshay stated that appellant should stay off work for the next four weeks due to pain from his left inguinal hernia and small paraumbilical hernia. In a May 19, 2006 note, he stated that appellant continued to suffer from pain in the left groin and his hernia was unchanged. Dr. Beshay recommended that appellant stay off work for another month. In a September 8, 2006 note, he opined that appellant's hernias were unchanged, but that he may be able to do clerical work if available. In an October 6, 2006 note, Dr. Beshay noted that appellant's condition was unchanged and that he could perform clerical work. In a November 3, 2006 note, Dr. Beshay stated that appellant's condition had not changed and he should remain off work due to inguinal and paraumbilical hernias. In a December 6, 2006 note, he stated that appellant has been off work because no light duty was available, that his condition has not changed and he should remain off work for another month.

On February 8, 2006 the Office informed appellant that a second opinion evaluation was necessary. The second opinion examination was scheduled for March 29, 2006.

In a March 31, 2006 note, the Office informed appellant of a notice of proposed suspension of compensation as he failed to attend the scheduled second opinion examination on March 29, 2006. On August 9, 2006 it informed appellant that he was scheduled for a second opinion examination on August 24, 2006.

In an August 24, 2006 report, Dr. Keith W. Millikan, the second opinion physician, a Board-certified surgeon, opined that both ventral hernia and inguinal hernia "can be related to lifting" during the June 2, 2005 incident. He opined that appellant had residuals from his injury which rendered him disabled from his job as a tool and parts clerk as he could not lift more than 10 pounds and had difficulty standing and walking for extended periods of time. Dr. Millikan stated that appellant had not recovered from his work-related condition and was not able to return to his position because the hernias had not been repaired.

In an August 24, 2006 work capacity evaluation, Dr. Millikan restricted appellant's lifting, pulling or pushing up to 10 pounds and standing or continuous walking for up to one hour. He allowed sitting, reaching, twisting, bending and stooping for eight hours.

On September 27, 2006 the Office informed appellant that he was being sent for a referee examination on October 23, 2006 as the second opinion report conflicted with his physician's opinion regarding the extent of his work restrictions.

On November 13, 2006 appellant was informed of his impartial medical examination on December 12, 2006.

In a December 12, 2006 work capacity evaluation, Dr. Scott A. Kale, Board-certified in internal medicine, opined that appellant would have work restrictions until after he recovered from surgery. He restricted appellant to a maximum of 10 pounds for pushing, pulling and lifting, walking and standing for one to two hours, and sitting for up to eight hours.

In a December 14, 2006 report, Dr. Kale opined that there was no basis for a finding that appellant should not return to light duty. He opined that appellant required surgery of the left inguinal hernia but that he could return to work on light duty in the meantime.

In a January 4, 2007 letter, the Office requested that the employing establishment offer appellant a permanent job complying with the restrictions provided by Dr. Kale.

In a February 6, 2007 letter, the employing establishment offered a permanent rehabilitation reassignment effective February 6, 2007 with restrictions of one to two hours of walking, bending and twisting, and a weight restriction of 10 pounds for pushing and pulling.

In a February 14, 2007 note, Dr. Beshay stated that appellant was unable to work due to his pain from the hernias.

In a March 2, 2007 letter, the employing establishment offered a revised permanent rehabilitation reassignment effective February 6, 2007 with restrictions of walking, standing, bending, stooping, and twisting of no more than one to two hours and weight restriction of 10 pounds for lifting, pushing, pulling as well as a limit of 10 to 15 pounds for repetitive wrist movement. The job offer also included two 15-minute breaks per hour.

In a March 6, 2007 letter, the Office informed appellant that it found the modified tool and parts clerk position offered to him to be suitable and within his work restrictions. It also informed appellant that he had 30 days from the date of the letter to either accept the position or provide an explanation of the reasons for refusing it. No response was received.

In an April 24, 2007 letter, the Office stated that it received notice of appellant's refusal to accept or report to the job he was offered. It informed appellant that he had an additional 15 days to accept the position or his entitlement to wage-loss and schedule award benefits would be terminated.

In a May 31, 2007 telephone memorandum, the employing establishment stated that appellant had not returned to work or accepted the modified position but it was still available to him.

In a May 31, 2007 decision, the Office terminated appellant's entitlement to wage-loss and schedule award compensation benefits effective May 31, 2007 due to his refusal to accept suitable work. It noted that appellant's job offer was suitable to his medical limitations as identified by the referee examiner, Dr. Kale.

On June 2, 2007 appellant requested a review of the written record. He submitted additional information from Dr. Beshay. In a June 21, 2007 work capacity evaluation, Dr. Beshay advised appellant to resume work on June 21, 2007 and provided restrictions of standing and walking up to two hours a day, lifting up to four hours a day and sitting up to eight hours a day. In a July 27, 2007 letter, he recommended that appellant return to work with limitations on August 7, 2007. In an August 17, 2007 note, Dr. Beshay stated that appellant had pain and spasms in his back and requested that he be provided a chair with back support while at work.

In a November 21, 2007 decision, the Branch of Hearings and Review found that the Office properly terminated appellant's compensation based on his refusal to return to work after suitable work was made available. It also found that the additional medical records from Dr. Beshay failed to provide a medical rationale as to why appellant was incapable of performing the modified position.

LEGAL PRECEDENT

It is well settled that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. As the Office in this case terminated appellant's compensation under 5 U.S.C. § 8106(c), the Office must establish that she refused an offer of suitable work. Section 8106(c) of the Federal Employees' Compensation 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 of the applicable regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee, has the burden of showing that such refusal or failure to work was reasonable or justified and shall be provided with the opportunity to make such showing before a determination is made with respect to termination of entitlement to compensation. 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.

The Office's regulations also state:

> "[The Office] shall advise the employee that it has found the offered work to be suitable and afford the employee 30 days to accept the job or present any reasons to counter [the Office s] finding of suitability. If the employee presents such reasons and [the Office] determines that the reasons are unacceptable, it will notify the employee of that determination and that he or she has 15 days in which to accept the offered work without penalty. At that point in time, [the Office's] notification need not state the reasons for finding that the employee's reasons are not acceptable."

Section 8123(a) of the Act provides in pertinent part: If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[1] When there are

[1] 5 U.S.C. § 8123(a).

opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.[2] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[3]

ANALYSIS

The Board finds that the Office properly terminated appellant's entitlement to wage-loss compensation on the grounds that appellant refused an offer of suitable work.

In a December 14, 2006 report, Dr. Kale, the impartial medical specialist, advised that appellant was capable of performing light-duty work. He restricted appellant to one to two hours of walking, standing, twisting and bending and up to eight hours of sitting with a weight restriction of 10 pounds for pushing, pulling and lifting. The employing establishment's February 22, 2006 limited-duty job offer restricted appellant to walking, standing, bending, stooping, and twisting for one to two hours, as well as a weight restriction of 10 pounds for lifting, pushing, and pulling and 10 to 15 pounds for repetitive wrist movement. The job included two 15-minute breaks per hour. After receipt of Dr. Kale's December 14, 2006 report, the Office informed appellant on March 6, 2007, that it had found the employing establishment's offered position to be suitable. The Office properly determined that the limited-duty job offer was within the restrictions provided by Dr. Kale, the impartial medical specialist.

The Board further notes that appellant's physician, Dr. Beshay, submitted reports wherein he concluded that appellant was capable of performing light-duty work. There is no medical evidence of record indicating that appellant could not perform the duties of the offered position as of the date of termination, May 31, 2007. In his reports pertaining to examinations after May 31, 2007, Dr. Beshay again opined that appellant perform light-duty work within the restrictions of the job offer.

To properly terminate compensation under section 8106(c)(2), the Office must provide appellant notice of its finding that an offered position is suitable and give him an opportunity to accept or provide reasons for declining the position.[4] It properly followed its procedural requirements in this case. By letter dated March 6, 2007, the Office advised appellant that it found that the modified position offered by the employing establishment was suitable and within his physical restrictions as provided by Dr. Kale. It informed appellant that a partially disabled employee who refused suitable work was not entitled to compensation, and allotted him 30 days to either accept or provide reasons for refusing the position.[5] Appellant did not respond. Thereafter, on April 24, 2007 the Office informed appellant that it had received notice of

[2] *William C. Bush*, 40 ECAB 1064, 1975 (1989).

[3] *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

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

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

appellant's refusal to report to the job he was offered. It provided appellant 15 days to accept the position without penalty before all entitlement to wage-loss compensation and schedule award benefits would be terminated. Appellant did not respond. On May 31, 2007 the Office confirmed with the employing establishment that appellant had not reported to work. On May 31, 2007 it terminated appellant's entitlement to wage-loss and schedule award benefits effective May 31, 2007. On November 21, 2007 the Office affirmed that the previous decision properly terminated appellant's compensation.

The Board finds that the Office met its burden of proof to terminate appellant's entitlement to wage-loss compensation effective May 31, 2007. Therefore the burden has shifted to appellant to show that his refusal of the offered position was justified.[6] However, as noted, appellant submitted no medical evidence supporting that he was incapable of performing the duties of the offered position.

CONCLUSION

The Board finds that the Office properly terminated appellant's entitlement to compensation on the grounds that appellant refused an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT November 21, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 5, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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