United States Department of Labor
Employees' Compensation Appeals Board

M.B., Appellant	)	
	)	**Docket No. 08-1859**
and	)	**Issued: April 1, 2009**
	)	
DEPARTMENT OF THE NAVY, NAVAL AMPHIBIOUS BASE, Norfolk, VA, Employer	)	

Appearances:
Douglas Sughrue, 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 June 23, 2008 appellant filed a timely appeal from September 11, 2007 and March 24, 2008 decisions of the Office of Workers' Compensation Programs terminating his compensation for refusing 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 met its burden of proof to terminate appellant's compensation on the grounds that he refused an offer of suitable work.

FACTUAL HISTORY

On May 6, 2002 appellant, then a 44-year-old police officer, filed a traumatic injury claim alleging that on November 6, 2001 he injured his left arm and shoulder while participating in physical training at the police academy. On July 2, 2002 the Office accepted his claim for a left shoulder rotator cuff tear. On September 23, 2002 appellant advised that he had moved to Greenville, Pennsylvania. On April 8, 2003 he underwent arthroscopic surgery to repair his torn

rotator cuff. Effective April 18, 2004, appellant was placed on the periodic compensation rolls for temporary total disability. On July 16, 2004 the Office granted him a schedule award based on 10 percent impairment of his left arm for 31.2 weeks.[1]

In a work capacity evaluation dated March 11, 2005, Dr. John P. Scullin, an attending physician, indicated that appellant could work eight hours a day. Appellant's permanent work restrictions included no lifting over 50 pounds at any one time and no frequent lifting of objects over 25 pounds.

On June 21, 2007 Vikki Marshall-Barnes, an employing establishment human resources supervisor, offered appellant a modified position as a security clerk in Philadelphia, Pennsylvania beginning July 9, 2007. The physical requirements of the position conformed to the limitations provided in Dr. Scullin's March 11, 2005 report. On June 4, 2007 Dr. Scullin approved the security clerk position as suitable for appellant.

By letter dated June 29, 2007, appellant declined the security clerk position. He stated that his current residence was 400 miles west of Philadelphia, his family was established in local activities, his wife had just received a job promotion and had no guarantee of finding a job in the new location. Appellant stated that he had insufficient time to sell his home and find a new one. The cost of living was higher in Philadelphia and it was not as safe a community. Appellant noted that no relocation expenses had been authorized by the employing establishment and moving would be a financial hardship.

On July 19, 2007 the employing establishment advised appellant that the job offer was amended to include relocation expenses. It stated that the job remained available and was the best position available within his work limitations.

On July 24, 2007 the Office advised appellant that the modified security clerk position offered by the employing establishment was suitable and conformed to the work limitations provided by Dr. Scullin. The employing establishment confirmed that the position remained available. The Office allowed appellant 30 days to accept the position or provide his reasons for refusal. It advised that an employee who refuses an offer of suitable work without reasonable cause is not entitled to compensation.

On July 27, 2007 appellant requested 90 days in which to decide whether to accept the security clerk position. He acknowledged that the employing establishment had authorized relocation expenses. However, appellant was still concerned about his wife finding a job in the new location, the cost of living was higher in Philadelphia, he had insufficient time to make relocation preparations, no satisfactory explanation of entitlements had been provided by the employing establishment and he had recently been diagnosed with depression.

On August 9, 2007 Ms. Marshall-Barnes noted that, on or about July 25, 2007, Alma Cassidy, a staffing specialist, had a telephone conference with appellant. Ms. Cassidy answered his questions concerning the pay and grade level of the offered position, relocation expenses and the sale of his house, Permanent Change of Station (PCS) entitlements and employment for his

[1] The period of time covered by the schedule award was noted as "to be determined."

wife in the new location. Ms. Marshall-Barnes stated that the position offered to appellant was the closest available vacancy.

By letter dated August 23, 2007, the Office advised appellant that his reasons for refusing the offered position were not determined to be reasonable. It noted that the August 9, 2007 letter from the employing establishment indicated that his issues regarding the offered position were addressed. The Office stated that appellant had not provided documentation of his claimed depression or explained why the condition rendered the offered security clerk job unsuitable. It advised that appellant's compensation and schedule award benefits would be terminated if he did not accept the position within 15 days.

By decision September 11, 2007, the Office terminated appellant's compensation effective September 29, 2007 on the grounds that he refused an offer of suitable work.

Appellant requested reconsideration. He argued that it was unreasonable to require him to move 400 miles and the employing establishment did not attempt to find a job closer to his home. Appellant submitted copies of demographic studies including such information as cost-of-living data about various areas in the country, including Pennsylvania. By decision dated March 24, 2008, the Office denied modification of the September 11, 2007 termination decision.

LEGAL PRECEDENT

Section 8106(c)(2) of the Federal Employees' Compensation Act[2] states that a partially disabled employee who refuses to seek suitable work, or refuses or neglects to work after suitable work is offered to, procured by or secured for him is not entitled to compensation.[3] The Office has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects suitable work when offered. Before compensation can be terminated, however, the Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work, and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.[4] In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused or neglected by the employee was suitable.[5]

If possible, the employing establishment should offer suitable reemployment in the location where the employee currently resides. If this is not practical, the employing

[2] 5 U.S.C. §§ 8101-8193.

[3] 5 U.S.C. § 8106(c)(2).

[4] *M.L.*, 57 ECAB 746, 750 (2006); *Frank J. Sell, Jr.*, 34 ECAB 547, 552 (1983).

[5] *M.L., supra* note 4; *Albert Pineiro*, 51 ECAB 310, 312 (2000).

establishment may offer suitable reemployment at the employee's former duty station or other location.[6]

ANALYSIS

The Office terminated appellant's compensation for wage loss on the grounds that he refused the employing establishment's June 21, 2007 job offer of a modified security clerk position in Philadelphia. The Board has previously held in *Sharon L. Dean*[7] that it is reversible error for the Office to terminate appellant's compensation benefits without positive evidence showing that such an offer was not possible or practical. However, the record does not provide any evidence that the employing establishment attempted to find suitable work where he resided, Greenville, Pennsylvania, which is 400 miles from Philadelphia. The Office did not obtain evidence from the employing establishment documenting attempts to find appellant suitable work in his location. As noted, it bears the burden of proof to establish the suitability of the position offered to appellant. Because the Office found that the modified security clerk position in Philadelphia was suitable, without taking into consideration whether there was suitable reemployment available in the location where appellant resided, it did not meet its burden of proof in terminating his compensation for refusing suitable work. The Board will reverse the Office's March 24, 2008 and September 11, 2007 decisions.

CONCLUSION

The Board finds that the Office has not met its burden of proof to terminate appellant's compensation benefits for refusing an offer of suitable work.

[6] 20 C.F.R. § 10.508.

[7] 56 ECAB 175 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 24, 2008 and September 11, 2007 are reversed.

Issued: April 1, 2009
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