

This case is before the Board for the third time. In a decision dated May 16, 2006, the Board reversed the Office's September 28, 2005 decision terminating appellant's wage-loss benefits for refusing an offer of suitable employment.¹ In an August 16, 2007 decision, the Board reversed the Office's November 3, 2006 decision terminating appellant's wage-loss benefits for refusing an offer of suitable employment on procedural grounds.² The findings of fact and conclusions of law from the prior decisions are incorporated herein by reference.

Relevant medical evidence includes a September 9, 2005 report from appellant's treating physician, Dr. H. Clark Deriso, a Board-certified orthopedic surgeon, who stated that appellant exhibited no evidence of recurrent disc disease and that he should return to employment. On May 31, 2006 Dr. Deriso indicated that he found no evidence of recurrent disc disease on a recent magnetic resonance imaging (MRI) scan, and expressed surprise that appellant was not engaged in productive employment. On October 5, 2006 he opined that appellant was able to return to employment that would not require lifting over 50 pounds. Dr. Deriso indicated that recent examinations revealed no clinical evidence of recurrent disc disease. In a September 11, 2007 work capacity evaluation, he opined that appellant was capable of performing the full-time duties of his date-of-injury position, provided that he should be restricted from lifting more than 40 pounds.

On March 26, 2008 the employing establishment made a limited-duty job offer to appellant. The position of motor vehicle operator was a temporary full-time position, and was available immediately. The employing establishment specified that the position required only driving a vehicle and did not require loading or unloading materials or performing any bending, stooping, squatting or lifting more than 10 pounds. The employing establishment further advised appellant that the position paid an hourly wage of \$13.60 and was still available. A tentative in-processing date was scheduled for April 28, 2008. The employing establishment indicated that appellant's failure to accept the offer within the designated period would be considered a declination of the offer. On April 4, 2008 appellant rejected the job offer.

The record contains a description of the position of motor vehicle operator. Duties included operating a pick-up truck. Physical requirements included use of the feet, arms, legs and hands to operate the vehicle. No lifting over 10 pounds was required. The position was described as light duty.

By letter dated May 16, 2008, the Office advised appellant that it found the position of motor vehicle operator suitable and in accordance with his medical limitations. It confirmed that the position remained available to appellant and that he had 30 days to either report to duty or provide a written explanation of his reasons for refusing to do so. Appellant was informed that, if he failed to accept the offer and failed to demonstrate that the failure was justified, then his compensation would be terminated.

¹ Docket No. 06-319 (issued May 16, 2006).

² Docket No. 07-848 (issued August 16, 2007).

In a letter dated April 4, 2008, appellant stated that he was experiencing increased back pain, which had spread to both legs and hindered his ability to walk. He noted that his physician would no longer prescribe medication.

By letter dated June 20, 2008, the Office advised appellant that the reasons provided for refusing the offered position were not acceptable, and that the medical evidence of record did not support his inability to perform the duties of the job of motor vehicle operator. It informed appellant that, if he did not accept the position within 15 days, his compensation for wage loss would be terminated. The record does not contain a response to the Office's June 20, 2008 letter.

By decision dated July 11, 2008, the Office terminated appellant's compensation benefits and entitlement to schedule award benefits effective July 18, 2008, on the grounds that he refused an offer of suitable work.

LEGAL PRECEDENT

Once the Office accepts a claim it has the burden of proving that the employee's disability has ceased or lessened before it may terminate or modify compensation benefits.³ Section 8106(c)(2) of the Federal Employees' Compensation Act⁴ provides that the Office may terminate the compensation of a disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.⁵

The Board has held that due process and elementary fairness require that the Office observe certain procedures before terminating a claimant's monetary benefits under section 8106(c)(2) of the Act.⁶ Section 10.516 of the Office's regulations state 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.⁷ Thus, before terminating compensation, the Office must review the employee's proffered reasons for refusing or neglecting to work.⁸ 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.⁹

³ *Karen L. Mayewski*, 45 ECAB 219, 221 (1993); *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

⁴ 5 U.S.C. §§ 8101-8193; 5 U.S.C. § 8106(c)(2).

⁵ *Camillo R. DeArcangelis*, 42 ECAB 941, 943 (1991).

⁶ *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992); *see also Linda Hilton*, 52 ECAB 476 (2001).

⁷ 20 C.F.R. § 10.516.

⁸ *See Maggie L. Moore*, *supra* note 6.

⁹ 20 C.F.R. § 10.516; *see Sandra K. Cummings*, 54 ECAB 493 (2003).

An employee who refuses suitable work must show that such refusal or failure to work was reasonable or justified.¹⁰ The determination of whether an employee is physically capable of performing a modified position is a medical question that must be resolved by medical evidence.¹¹ Office procedures state that acceptable reasons for refusing an offered position include medical evidence of inability to do the work or travel to the job.¹²

ANALYSIS

The Board finds that the Office met its burden of proof to terminate compensation for appellant's refusal to accept suitable employment. 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).

Appellant was offered work as a motor vehicle operator, which involved operating a pick-up truck. Physical requirements included use of the feet, arms, legs and hands to operate the vehicle. No lifting over 10 pounds was required. The position was described as light duty. Appellant's attending orthopedic surgeon, Dr. Deriso, found no clinical evidence of recurrent disc disease. In a September 11, 2007 work capacity evaluation, he opined that appellant was capable of performing the full-time duties of his date-of-injury position, provided that he should be restricted from lifting more than 40 pounds. The required duties of the motor vehicle position were within appellant's medical capabilities, as outlined by Dr. Deriso. Moreover, there is no medical evidence of record supporting appellant's contention that he is unable to perform the duties of the position. Accordingly, the Board finds that the position was medically suitable.

There is no dispute that the offered position is vocationally suitable. Additionally, the Board notes that the temporary nature of the position does not render it unsuitable, as the record reflects that appellant was a temporary employee on the date he was injured, and the position was designed to continue up to 180 days.¹³

In accord with the procedural requirements of 5 U.S.C. § 8106(c), the Office advised appellant on May 16, 2008 that it found the job to be suitable and gave appellant an opportunity to provide reasons for refusing the position. Appellant did not submit any additional medical evidence, but rather merely argued his inability to perform the duties of the position offered.¹⁴ In

¹⁰ 20 C.F.R. § 10.517(a); *Deborah Hancock*, 49 ECAB 606, 608 (1998).

¹¹ *See Robert Dickerson*, 46 ECAB 1002 (1995).

¹² *Id.*

¹³ The Office procedure manual provides that a temporary job will be considered unsuitable unless the claimant was a temporary employee when injured and the temporary job reasonably represents the claimant's wage-earning capacity. Even if these conditions are met, a job which will terminate in less than 90 days will be considered unsuitable. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4.b(3) (October 2005).

¹⁴ *See id.* at Chapter 2.814.5(a)(3) (acceptable reasons for refusing to accept suitable employment include medical evidence establishing that a claimant is disabled due to a worsening of an accepted condition). Appellant's personal dislike for the position offered is not an acceptable reason for refusal of the position offered. *Id.* at Chapter 2.814.5.c.

a June 20, 2008 letter, the Office advised appellant that the offered reasons were unacceptable and provided him an additional 15 days to accept the position without penalty. Appellant failed to comply with the Office's instructions. The Board finds that 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 and entitlement to schedule award benefits in this case.

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation and schedule award benefits effective July 18, 2008 on the grounds that he refused a suitable offer of work.

ORDER

IT IS HEREBY ORDERED THAT the July 11, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 18, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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