United States Department of Labor
Employees' Compensation Appeals Board

D.S., Appellant	)	
and	)	**Docket No. 08-885**
	)	**Issued: March 17, 2009**
U.S. POSTAL SERVICE, POST OFFICE, St. Louis, MO, 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 February 5, 2008 appellant filed a timely appeal from a November 8, 2007 merit decision of the Office of Workers' Compensation Programs granting him a schedule award and a January 10, 2008 nonmerit decision denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly granted appellant an increased schedule award subsequent to the termination of his compensation under 5 U.S.C. § 8106(c) for refusing suitable work; and (2) whether the Office properly denied reopening his case for further review of the merits under 5 U.S.C. § 8128.

FACTUAL HISTORY

On August 5, 2003 appellant, then a 40-year-old modified mail processor, filed an occupational disease claim alleging that he sustained impingement and tears of both shoulders due to factors of his federal employment. He stopped work on October 14, 2003 and did not return. The Office accepted his claim for bilateral carpal tunnel syndrome and left shoulder

impingement.[1] Appellant underwent a left carpal tunnel release and left shoulder debridement on December 1, 2003 and a right carpal tunnel release on May 5, 2004.

On November 17, 2004 the employing establishment offered appellant the position of modified mail handler. By letter dated December 7, 2004, the Office notified him that the position was suitable and provided him 30 days to accept the position or provide reasons for his refusal. It informed appellant that if he did not accept the position or provide adequate reasons for his refusal, his compensation would be terminated.

By decision dated January 18, 2005, the Office terminated appellant's compensation effective that date as he refused the appropriate light-duty offer from the employing establishment.[2] It noted that he did not respond to its December 7, 2004 letter informing him to accept the position or provide reasons for his refusal.[3]

Appellant retired from the employing establishment on disability effective January 21, 2005. On October 10, 2005 an Office medical adviser noted that the last medical evidence addressing the extent of his permanent impairment was dated March 12, 2001, before his surgery. On November 4, 2005 the Office referred appellant to Dr. Anthony Margherita, a Board-certified physiatrist, for a second opinion examination. An Office medical adviser reviewed the evidence on January 17, 2006 and found that he had 17 percent right upper extremity impairment and 19 percent left upper extremity impairment. He determined that appellant reached maximum medical improvement on November 5, 2004.

By decision dated February 10, 2006, the Office granted appellant a schedule award for 17 percent permanent impairment of the right upper extremity and 19 percent permanent impairment of the left upper extremity. The period of the award ran from the date of maximum medical improvement, November 5, 2004, until December 31, 2006.

On May 16, 2007 appellant filed a claim for an increased schedule award due to carpal tunnel syndrome. The Office referred him to Dr. Robert W. Elkins, a Board-certified orthopedic surgery, to determine the extent of his permanent impairment of the bilateral upper extremities.[4]

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[1] The Office previously accepted that appellant sustained a left shoulder strain and repair and upper back strain on February 8, 1991, assigned file number xxxxxx558, a left shoulder impingement and repair on May 21, 1992, assigned file number xxxxxx254, right groin strain on February 17, 2001, assigned file number xxxxxx944 and a right shoulder strain and right rotator cuff tear on February 21, 2002, assigned file number xxxxxx928.

[2] The Office indicated in its decision that it had terminated compensation effective January 11, 2005; however, in its cover letter, it stated that it was terminating compensation on January 18, 2005.

[3] On January 20, 2005 the Office notified appellant of its proposed suspension of his compensation for failing to attend a medical appointment. The employing establishment questioned the proposed suspension in view of the prior termination of his compensation for refusing suitable work. On February 3, 2005 the Office notified the employing establishment that it could not invoke further penalties at this time.

[4] The Office indicated that a conflict existed between Dr. Margherita and the Office medical adviser; however, Dr. Margherita was an Office referral physician and thus his report could not create a conflict in opinion with the Office medical adviser.

In a report dated September 28, 2007, Dr. Elkins determined that appellant reached maximum medical improvement on November 2, 2005.

By decision dated November 8, 2007, the Office granted appellant a schedule award for an additional three percent permanent impairment of the right upper extremity and an additional eight percent permanent impairment of the left upper extremity. It found that he reached maximum medical improvement on November 2, 2005. The schedule award ran from January 1 to August 29, 2007.

On December 8, 2007 appellant requested reconsideration. In a decision dated January 10, 2008, the Office denied his request for reconsideration on the grounds that he did not submit sufficient evidence or argument to warrant further review of the merits under section 8128 of the Federal Employees' Compensation Act.

LEGAL PRECEDENT -- ISSUE 1

Section 8106(c) of the Act[5] provides that a partially disabled employee who refuses suitable work or neglects to work after suitable work is offered is not entitled to compensation. Office regulations provide that in a termination under section 8106(c) the 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.[6] 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.[7]

Although section 8106(c) of the Act serves as a bar to compensation for the period after the termination of compensation for refusal of suitable work, if appellant reached maximum medical improvement prior to the refusal of suitable employment, he would be entitled to payment of any portion of a schedule award due prior to the termination of monetary compensation benefits.[8]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained bilateral carpal tunnel syndrome and left shoulder impingement syndrome due to factors of his federal employment. By decision dated January 18, 2005, it terminated his compensation effective that date as he refused the employing establishment's offer of suitable work. In a decision dated February 10, 2006, the Office granted appellant a schedule award for a 17 percent permanent impairment of the right upper extremity and a 19 percent permanent impairment of the left upper extremity. It determined that he reached maximum medical improvement on November 5, 2004. The period of the award ran from November 5, 2004 until December 31, 2006. The Board notes, however, that the Office

[5] 5 U.S.C. §§ 8107-8193.

[6] *See* 20 C.F.R. § 10.517.

[7] *Sandra A. Sutphen*, 49 ECAB 174 (1997); *Stephen R. Lubin*, 43 ECAB 564 (1992).

[8] *Id*.

erred in finding appellant entitled to receive a schedule award after January 18, 2005, the date it terminated his compensation for refusal of suitable work. A claimant who refuses an offer of suitable work is not entitled to further compensation, including payment of a schedule award for the permanent impairment of a scheduled member.[9] If, however, a claimant reached maximum medical improvement prior to the refusal of suitable employment, he is entitled to payment of any portion of the schedule award due prior to the termination of monetary compensation benefits. As appellant reached maximum medical improvement on November 5, 2004, he was entitled to payment of the portion of the schedule award due prior to the termination of monetary compensation benefits from November 5, 2004 until January 18, 2005.[10]

By decision dated November 8, 2007, the Office granted appellant an increased schedule award for an additional three percent right upper extremity impairment and an additional eight percent left upper extremity impairment. It determined that he reached maximum medical improvement on November 2, 2005. The period of the award ran from January 1 to August 29, 2007. The Office based its finding of maximum medical improvement on the opinion of Dr. Elkin, the Office referral physician. There is no evidence of record suggesting an earlier date of maximum medical improvement.[11] Thus, the Board finds that the Office improperly determined that appellant was entitled to a schedule award for an increased bilateral upper extremity impairment. As discussed, the penalty provision of section 8106(c) of the Act bars his claim for a schedule award for the period after the termination of compensation based on his refusal to accept an offer of employment. The Office terminated appellant's compensation on January 18, 2005; consequently, he was not entitled to compensation for a schedule award after that date.

Based on the Board's holding that the Office's decision of November 8, 2007 was in error, appellant's request for reconsideration and the January 10, 2008 denial of that request are moot. The question of an increased schedule award, for periods subsequent to termination of benefits should never have arisen.

CONCLUSION

The Board finds that the Office improperly granted appellant an increased schedule award subsequent to its termination of his compensation under 5 U.S.C. § 8106.[12]

[9] 20 C.F.R. § 10.517.

[10] *Id*.

[11] It is well established that a schedule award cannot be paid until a claimant has reached maximum medical improvement. *D.R.*, 57 ECAB 720 (2006).

[12] In view of the Board's disposition of the merits, the issue of whether the Office properly denied his request for reconsideration under section 8128 is moot.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 10, 2008 is moot and the decision of November 8, 2007 is reversed.

Issued: March 17, 2009
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