United States Department of Labor
Employees' Compensation Appeals Board

S.R., Appellant	)	
and	)	**Docket No. 08-2285**
	)	**Issued: September 23, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Birmingham, AL, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 19, 2008 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated October 16, 2007 and a nonmerit decision dated March 21, 2008. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit and nonmerit issues of this case.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation benefits effective November 27, 2005 on the grounds that he refused an offer of suitable work; and (2) whether the Office properly refused to reopen appellant's case for further consideration of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On March 12, 2002 appellant, then a 35-year-old part-time flexible city carrier in Birmingham, Alabama, sustained injury to his lower back while unwrapping mail. The Office

accepted his claim for aggravation of lumbar radiculopathy and for a post-anterior L5-S1 fusion with chronic radicular symptoms.

Appellant's attending physician, Dr. Don Cornelius, a specialist in physical medicine and rehabilitation, completed a form report on November 22, 2004. He found that appellant was capable of working eight hours a day with restrictions. Appellant could alternate standing, sitting and walking for eight hours a day, but not bend, stoop or twist. He should limit repetitive movements of his right wrist and elbow and not push with his left foot. Dr. Cornelius indicated that appellant should not lift from the floor, squat, kneel or climb. He recommended a functional capacity evaluation on December 9, 2004.

In reports dated January 11 and February 3, 2005, Dr. Roland Rivard, an orthopedic surgeon, agreed that appellant could perform sedentary work eight hours a day with restrictions based on a functional capacity evaluation. Appellant could stand and walk for two and a half hours a day, could not bend or operate a motor vehicle at work and could not push, pull, squat kneel or climb. Dr. Rivard advised that he could lift up to 10 pounds.

The Office referred appellant for vocational rehabilitation services on February 23, 2005. On March 15, 2005 the vocational rehabilitation counselor noted that the employing establishment had offered appellant a position in Birmingham, Alabama. She noted that this was approximately 55 miles from appellant's present home in Tuscaloosa. The vocational rehabilitation counselor stated, "It is understood from the [employing establishment] that no jobs are available for [appellant] in the Tuscaloosa area." In a status report, she stated that the employing establishment noted, "[E]mployment located closer to [appellant's] home will not be offered unless Dr. Rivard specifically requests this accommodation based on clear medical rationale." In a letter dated April 20, 2005, the claims examiner informed the employing establishment that the position in Birmingham was not suitable because of the amount of travel time.

The employing establishment offered appellant the position of modified part-time flexible mail processing clerk located at the Cahaba Heights Station in Birmingham, Alabama. Appellant, through his attorney, refused this position on March 15, 2005 stating that Dr. Rivard did not clearly provide that appellant was capable of driving to work, although he indicated that he could not operate a motor vehicle as an employment activity. Dr. Rivard stated that the offered position would require appellant to relocate to Birmingham from Tuscaloosa, Alabama.

Appellant's vocational rehabilitation counselor requested clarification from Dr. Rivard on April 11, 2005 regarding his ability to operate a motor vehicle. Dr. Rivard responded on April 12, 2005. He stated that appellant could drive or travel at least 30 minutes and following a 5-to 10-minute break travel another 30 minutes not to exceed 1 hour of travel each way within a day.

On June 13, 2005 the employing establishment offered appellant a position as a modified part-time flexible mail processing clerk at Hoover Station in Hoover, Alabama. Appellant would be required to lift up to 10 pounds to walk 2.5 hours a day, stand 2.5 hours a day and sit up to 5.5 hours a day. The employing establishment informed him on August 16, 2005 that his commute

to the Hoover Station from Tuscaloosa would be approximately 45 minutes.[1] It offered to pay appellant's relocation expenses to move to Hoover to reduce his commute.

By letter dated August 25, 2005, the Office informed appellant that the offered position was suitable. It allowed him 30 days to accept the position or offer his reasons for refusal. On October 12, 2005 it noted that appellant had not responded to the August 25, 2005 letter and allowed an additional 15 days for him to accept the offered position. Appellant did not respond.

By decision dated November 8, 2005, the Office terminated appellant's compensation benefits effective November 27, 2005 on the grounds that he refused an offer of suitable work.

On December 1, 2005 appellant, through his attorney, requested an oral hearing. Appellant testified on July 27, 2006, contending that the positions were not suitable due to his commute and the sitting required. He noted that at the time of his injury on March 12, 2002, he lived and worked in Birmingham, Alabama, but due to his injury he moved to live with his mother and grandmother in Tuscaloosa, Alabama.

By decision dated October 2, 2006, the hearing representative affirmed the November 8, 2005 decision.

Appellant, through his attorney, requested reconsideration on July 13, 2007. In reports dated June 18 and 29, 2007, Dr. Reginald Motley, an osteopath, listed multiple medications which effected appellant's driving. Appellant also submitted a September 10, 2007 report from Dr. Motley. By decision dated October 16, 2007, the Office reviewed the merits of appellant's claim and denied modification of its prior decisions.

On February 8, 2008 appellant, through his attorney, requested reconsideration and submitted additional medical evidence. Dr. Daniel M. Doleys, a psychologist, completed a report on January 11, 2008 advising that appellant could sit for up to 60 minutes at a time and that no formal testing addressed his ability to drive. In a report dated January 10, 2008, Dr. Motley stated that he examined appellant in April 2005 and November 2005, but did not recall discussing his ability to drive. He opined that appellant's medications had not changed since 2005.

By decision dated March 21, 2008, the Office denied further review of the merits, finding that the evidence submitted was cumulative and repetitious.

LEGAL PRECEDENT -- ISSUE 1

It is well settled that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[2] As the Office in this case terminated the claimant's compensation under 5 U.S.C. § 8106(c), the Office must establish that the claimant refused an offer of suitable work. Section 8106(c) of the Federal Employees' Compensation

[1] The record indicates that the distance was approximately 50 miles.

[2] *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

Act[3] 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[4] provide 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 the claimant of the consequences of refusal to accept such employment.[5]

If possible, the employer should offer suitable reemployment in the location where the employee currently resides. If this is not practical, the employer may offer suitable reemployment at the employee's former duty station or other location. Where the distance between the location of the offered job and the location where the employee currently resides is at least 50 miles, the Office may pay such relocation expenses as are considered reasonable and necessary if the employee has been terminated from the agency's employment rolls and would incur relocation expenses by accepting the offered reemployment. The Office may also pay such relocation expenses when the new employer is other than a federal employer. It will notify the employee that relocation expenses are payable if it makes a finding that the job is suitable. To determine whether a relocation expense is reasonable and necessary, the Office shall use as a guide the federal travel regulations for permanent changes of duty station.[6] The Board has held that to terminate compensation based on section 8106(c), the Office must establish that an offer located at the current residence was not possible or practical.[7]

ANALYSIS -- ISSUE 1

On June 13, 2005 the employing establishment offered appellant a position as a modified part-time flexible mail processing clerk at Hoover Station in Hoover, Alabama. On August 25, 2005 the Office notified appellant that the offered position was found suitable and allowed 30 days for a response. Appellant did not respond. By letter dated October 12, 2005, it allowed an additional 15 days for him to accept the offered position or have his benefits terminated. Appellant did not respond to the second notice. By decision dated November 8, 2005, the Office terminated his compensation benefits effective November 27, 2005 on the grounds that he refused an offer of suitable work.

Appellant testified at his July 27, 2006 oral hearing that the positions were not suitable due to the commute and the sitting required. At the time of his injury on March 12, 2002, he lived and worked in Birmingham, Alabama; but he subsequently moved to live with his mother

[3] 5 U.S.C. § 8106(c)(2).

[4] 20 C.F.R. § 10.517(a).

[5] *Arthur C. Reck*, 47 ECAB 339, 341-42 (1995).

[6] *M.L.*, 57 ECAB 746, (2006); 20 C.F.R. § 10.508.

[7] *Sharon L. Dean*, 56 ECAB 175, 179-80 (2004).

and grandmother in Tuscaloosa, Alabama. Appellant was first offered employment in Birmingham, Alabama after the vocational rehabilitation counselor determined that no jobs were available for him in Tuscaloosa. Subsequently, the vocational rehabilitation counselor obtained clarification from Dr. Rivard regarding appellant's capacity to commuting by car. Based on appellant's restrictions a new job offer was made in Hoover, Alabama, closer to his home.

Dr. Rivard, an orthopedic surgeon, listed appellant's work restrictions as sedentary work eight hours a day, standing and walking for two and a half hours a day. He found that appellant could not bend or operate a motor vehicle at work and could not push, pull, squat kneel or climb. Dr. Rivard restricted appellant's lifting to 10 pounds. On April 12, 2005 he advised that appellant could drive or travel for an hour each way, allowing for a 5- to 10-minute travel break. The offered position required appellant to lift up to 10 pounds to walk 2.5 hours a day, to stand 2.5 hours a day and to sit up to 5.5 hours a day. These restrictions are within the limitations set by Dr. Rivard. The employing establishment informed appellant on August 16, 2005 that his commute to the Hoover Station from Tuscaloosa would be approximately 45 minutes.

The Board finds that the offered position was within appellant's work restrictions, that he was capable of driving 45 minutes each way to reach Hoover, that the Office followed the appropriate procedures in notifying him on the provisions of section 8106(c). Appellant failed to accept suitable work or to respond to the Office after notification of such. The Office properly terminated his wage-loss benefits.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[8] the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[9] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[10]

ANALYSIS -- ISSUE 2

The Office terminated appellant's compensation benefits on the grounds that he was capable of commuting to and performing the duties of the suitable work position. In support of his request for reconsideration, appellant submitted a January 11, 2008 report from Dr. Doleys, who stated that he could sit for up to 60 minutes at a time and that no formal testing had addressed his ability to drive. Dr. Doleys did not address the position offered appellant in 2005, or whether he was precluded from performing the dates of the position. The Board finds that this report is not relevant to the basis in which benefits were terminated by the Office.

[8] 5 U.S.C. §§ 8101-8193, § 8128(a).

[9] 20 C.F.R. § 10.606(b)(2).

[10] *Id*. at § 10.608(b).

In a report dated January 10, 2008, Dr. Motley stated that he had previously examined appellant in April 2005 and November 2005, but did not recall discussing his ability to drive. He noted that appellant's medications had not changed. The Board finds that Dr. Motley also failed to address the duties of the offered position or whether appellant was precluded from driving at the time benefits were terminated. Appellant failed to submit relevant and pertinent new evidence. The Office properly denied reopening his claim for further reconsideration of the merits.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective November 27, 2005 on the grounds that he refused an offer of suitable work. The Board further finds that the Office properly declined to reopen appellant's claim for consideration of the merits on March 21, 2008.

ORDER

IT IS HEREBY ORDERED THAT the March 21, 2008 and October 16, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 23, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board