United States Department of Labor
Employees' Compensation Appeals Board

J.J., Appellant	)	
and	)	**Docket No. 09-75**
	)	**Issued: September 22, 2009**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORATION SECURITY ADMINISTRATION, El Paso, TX, Employer	)	

Appearances:
Gordon Reiselt, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 15, 2008 appellant filed a timely appeal from a September 24, 2008 decision of an Office of Workers' Compensation Programs' hearing representative, who affirmed the termination of his compensation on the grounds that he refused an offer of suitable work. Pursuant to 20 C.F.R. §§ 501.2 and 501.3(c), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation effective February 16, 2008 on the grounds that he refused an offer of suitable work.

FACTUAL HISTORY

On September 29, 2003 appellant, then a 44-year-old security screener, sustained injury to his right elbow while lifting a heavy box. He stopped work that day. The Office accepted the claim for rupture of the right biceps tendon and authorized surgical repair, which was performed on September 30, 2003. Appellant returned to regular duty on April 12, 2004. However, he

developed wrist pain and was taken off work on April 16, 2004. Appellant underwent surgery to remove a right ganglion cyst on June 24, 2004 and was released to restricted duty on July 13, 2004.

The record reflects that appellant developed a recurrent ganglion cyst and surgery was performed on September 29, 2005 by Dr. Michael DiDonna, a Board-certified orthopedic surgeon and treating physician. Appellant underwent surgery again on April 12, 2006 to repair a partial right triceps tear, which was not work related. On June 16, 2006 he had surgery on the right wrist for a recurrence of the ganglion cyst.

A functional capacity evaluation (FCE) was performed on August 24, 2006. It revealed that appellant was unable to return to full-duty work as a security screener. Appellant demonstrated the ability to perform at the medium physical demand level for lifting from all levels both occasionally and frequently. It also revealed that he demonstrated a heavy physical demand level for carrying. Based upon the FCE, Dr. DiDonna placed appellant on permanent work restrictions. Appellant stopped work on October 7, 2005 as the employing establishment was unable to accommodate his medical limitations. He received wage-loss compensation.

By letter dated March 15, 2007, the Office referred appellant, together with a statement of accepted facts, a set of questions and the medical record, to Dr. Randy Pollet, a Board-certified orthopedic surgeon. In an April 12, 2007 report, Dr. Pollet reviewed appellant's history of injury and treatment. He noted findings on examination which included no significant atrophy, well-healed scars in the antecubital fossa and the posterior aspect of the elbow and dorsum of the right wrist. Dr. Pollet found that appellant was not able to return to regular duty; however, he determined that appellant was capable of working eight hours per day with restrictions. Appellant could sit, walk and stand for eight hours; reach above the shoulder, twist, operate a motor vehicle for eight hours a day, and do repetitive movements with the wrists and elbows for eight hours a day with restrictions; push, pull and lift no more than 5 to 10 pounds, and "careful" climbing. Dr. Pollet recommended vocational rehabilitation and that appellant could work in an administrative position.

By letter dated April 26, 2007, the Office provided Dr. DiDonna with a copy of Dr. Pollet's report requested an opinion as to whether appellant was capable of working an eight-hour day with restrictions. On a May 9, 2007 Dr. DiDonna concurred with Dr. Pollet that appellant could work an eight-hour day within the specified restrictions. He also agreed that appellant could benefit from repeat surgery.

On August 7, 2007 appellant underwent a right wrist extensor tenosynovectomy surgery performed by Dr. DiDonna. On November 16, 2007 Dr. DiDonna advised that appellant was capable of limited duty with no use of the right hand.

By letter dated November 29, 2007, the Office requested that Dr. DiDonna provide an updated opinion regarding appellant's capacity to perform limited duty.

On December 12, 2007 the employing establishment offered appellant a limited-duty position as a travel document checker beginning on December 23, 2007, based upon Dr. DiDonna's restrictions. The modified position required appellant to check the identification

of travelers, a layered security program which included identification challenges and visibility functions, working at the coordination center answering telephones during peak periods and providing telephonic support. The position also required that appellant make calls to prospective candidates and read job offers from a script. Appellant did not have to use his right arm or hand. On that same date, he rejected the position, stating that he no longer trusted the employing establishment.

By letter dated December 13, 2007, the Office advised appellant that the modified position had been found suitable to his medical restrictions and was currently available. It noted that Dr. Pollet had examined him on April 12, 2007 and provided work restrictions that were consistent with the offered position. Dr. DiDonna also found that he could perform the position with no use of his right hand. Appellant was advised that he should accept the position or provide an explanation for refusing it within 30 days. If he failed to accept the offered position or to demonstrate that such failure was justified, his compensation would be terminated. Appellant did not respond to the Office's December 13, 2007 letter.

In a December 7, 2007 report, Dr. DiDonna stated that appellant remained with restrictions on no use of the right hand. In a January 4, 2008 report and a work restriction evaluation, he reiterated the limitation on use of the right hand.

On January 7, 2008 Dr. DiDonna noted that appellant was not able to perform his regular duties as a transportation and security screener due to ongoing pain and swelling in his right hand. He advised that appellant would be able to "perform sedentary and light-duty activities (administrative) within the constraints of the current work-related restriction of no use of the right hand."

By decision dated February 11, 2008, the Office terminated appellant's entitlement to monetary compensation benefits, effective February 16, 2008, on the basis that he refused an offer of suitable work. It determined that the position was suitable and in accordance with the restrictions of both Dr. Pollet and Dr. DiDonna.

On February 25, 2008 appellant requested a hearing, which was held on July 9, 2008. He submitted additional medical reports noting his work status. On July 22, 2008 appellant's representative contended that appellant never received the December 13, 2007 letter notifying him of the suitable work determination. He contended that, when appellant returned to work on March 8, 2008, he was requested to use his right hand.

By decision dated September 24, 2008, the Office hearing representative affirmed the Office's February 11, 2008 decision.

LEGAL PRECEDENT

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits.[1] This includes cases in which the Office terminates compensation under section 8106(c)(2) of the Act for refusal to accept suitable work.

[1] *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

Section 8106(c)(2)[2] of the 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(a)[3] of the Office's regulations provide that an employee who refuses or neglects to work after suitable work has been offered or secured for him or her has the burden to show that this refusal or failure to work was reasonable or justified After providing the two notices described in section 10.516,[4] the Office will terminate the employee's entitlement to further compensation under 5 U.S.C. §§ 8105, 8106 and 8107, as provided by 5 U.S.C. § 8106(c)(2). However, the employee remains entitled to medical benefits as provided by 5 U.S.C. § 8103 or justified. To justify termination, the Office must show that the work offered was suitable[5] and must inform appellant of the consequences of refusal to accept such employment.[6] According to Office procedures, certain explanations for refusing an offer of suitable work are considered acceptable.[7] Unacceptable reasons include appellant's preference for the area in which he resides; personal dislike of the position offered or the work hours scheduled; lack of promotion potential or job security.[8]

ANALYSIS

The Board finds that the Office properly terminated appellant's compensation effective February 16, 2008 on the grounds that he refused an offer of suitable work.

The medical evidence establishes that the requirements of the offered position were within appellant's physical limitations. In an April 12, 2007 report, Dr. Pollet provided restrictions advising that appellant could work an eight-hour day with limitations on the use of his right hand. He advised that appellant was presently capable of working in an administrative position with lifting limited from 5 to 10 pounds. The Office requested that appellant's treating physician Dr. DiDonna review the work restrictions. On May 9, 2007 Dr. DiDonna concurred with Dr. Pollet. On November 19, 2007 following surgery, he reiterated that appellant could return to full-time limited duty with no use of the right hand. On December 12, 2007 the employing establishment offered appellant a limited-duty position as a travel document checker based upon Dr. DiDonna's restrictions. It provided that no use of the right hand was required. Subsequent reports from Dr. DiDonna advised that appellant could perform light duty with no

[2] 5 U.S.C. § 8106(c)(2).

[3] 20 C.F.R. § 10.517(a).

[4] *Id.* at § 10.516.

[5] *See Carl W. Putzier*, 37 ECAB 691 (1986); *Herbert R. Oldham*, 35 ECAB 339 (1983).

[6] *See Maggie L. Moore*, 42 ECAB 484, 488 (1991), *reaff'd on recon.*, 43 ECAB 818, 824 (1992). *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(d)(1) (July 1997).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(1)-(5) (July 1997).

[8] *Arthur C. Reck*, 47 ECAB 339 (1996); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(c) (July 1997).

use of the right hand. The Board finds that the duties of the offered position were consistent with the medical restrictions of Dr. DiDonna. Therefore, appellant was medically capable of doing the modified job.[9]

The Board also finds that appellant was properly informed by the Office that the job was available and provided him with the opportunity either to accept the position or explain his refusal within 30 days. To properly terminate compensation under section 8106(c), 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.[10] The Office followed its procedural requirements in this case. By letter dated December 13, 2007, it advised appellant that the position was suitable and provided him 30 days to accept the position or provide reasons for his refusal. The Office further notified him that the position remained open and that a partially disabled employee who refused suitable work was not entitled to compensation. The Board notes that appellant did not respond to the Office's December 13, 2007 letter. As such, the Office properly issued a decision terminating appellant's entitlement to monetary benefits.[11] Appellant contends that he never received the December 13, 2007 notice letter. The Board notes that the letter was properly addressed to appellant's address of record and there is no evidence it was returned as undeliverable. Under the mailbox rule, it is presumed that appellant received the letter notifying him of the Office's suitability determination.[12]

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation effective February 16, 2008 on the grounds that he refused an offer of suitable work.

[9] *See Edward P. Carroll*, 44 ECAB 331, 341 (1992) (finding that appellant's assertion of inability to work is not reasonable grounds for refusing suitable work absent supporting medical evidence).

[10] *See Maggie L. Moore*, *supra* note 6.

[11] *See Rosie E. Garner*, 48 ECAB 220 (1996) (finding that, if an employee submits reasons for refusing an offer of suitable work, the Office must inform appellant if it finds that the reasons are inadequate or unjustified and afford appellant one final opportunity to accept the offered position); *Carl N. Curts*, 45 ECAB 374 (1994) (where appellant did not respond to the Office's letter advising that he had 30 days in which to accept the offered position, the Office properly terminated benefits where the evidence showed the offered position to be suitable); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(d)(2) (July 1997) (where the claimant does not respond to the Office's 30-day letter, the Office should prepare a formal decision which terminates any further compensation for wage loss or permanent impairment of a scheduled member).

[12] *See Kenneth E. Harris*, 54 ECAB 502 (2003); *A.C. Clyburn*, 47 ECAB 153 (1995).

ORDER

IT IS HEREBY ORDERED THAT the September 24, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 22, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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