

**United States Department of Labor
Employees' Compensation Appeals Board**

J.N., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Manhasset, NY, Employer**

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**Docket No. 09-1621
Issued: July 14, 2010**

Appearances:
Paul Kalker, 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 June 10, 2009 appellant filed a timely appeal of the May 10, 2009 merit decision of the Office of Workers' Compensation Programs, which terminated his compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.¹

ISSUE

The issue is whether the Office properly terminated appellant's monetary compensation benefits for refusing an offer of suitable work.

¹ The record on appeal contains evidence received after the Office issued its May 10, 2009 decision. The Board may not consider evidence that was not in the case record when the Office rendered its final decision. 20 C.F.R. § 501.2(c)(1) (2009).

FACTUAL HISTORY

Appellant, a 60-year-old custodian, has an accepted claim for lumbar sprain and left shoulder sprain, which arose on February 22, 2006.² He received continuation of pay following his injury and thereafter, the Office paid appropriate wage-loss compensation. Appellant was eventually placed on the periodic compensation rolls effective June 10, 2007.

In a report dated August 18, 2008, Dr. Peter R. Langan, a Board-certified orthopedic surgeon and impartial medical examiner, found that appellant suffered from bilateral shoulder calcification and possible partial rotator cuff tears.³ He also diagnosed herniated lumbar disc. Dr. Langan stated that appellant could not perform his duties as a custodian. Regarding appellant's shoulder, he noted a loss of motion and some weakness at extreme abduction, which he indicated was not likely to improve. Dr. Langan imposed permanent work restrictions of four hours per day. Appellant could perform four hours of walking, standing and reaching. He could also sit for two hours. Dr. Langan precluded all bending, stooping, squatting, kneeling and climbing. Additionally, he restricted appellant to three hours of pushing and pulling, with a 20-pound weight limitation and two hours lifting, with a 10-pound restriction.

Appellant's treating physician, Dr. Enker, noted his disagreement with both Dr. Langan and Dr. Varriale regarding appellant's ability to perform part-time, limited-duty work. In a report dated December 19, 2008, Dr. Enker stated that appellant should be considered for "permanent retirement."

On February 11, 2009 the employing establishment offered appellant a permanent part-time, limited-duty assignment as a modified custodian.⁴ Appellant was expected to work four hours a day collecting garbage and sweeping. The job description also noted that "[a]ll custodial duties of standing, bending [and] stretching" were not to exceed four hours. Additionally, the job offer identified appellant's physical limitations as "No bending, stooping, squatting, kneeling [and] climbing." It also noted that walking, standing and reaching above shoulder were limited to four hours per day. Sitting and lifting were each limited to two hours per day, with a lifting restriction of 10 pounds. The offered position also included a three-hour daily limitation on pushing and pulling, with a 20-pound weight restriction.

² Appellant was injured while lifting a carrier case that had fallen to the floor. He had a preexisting lumbar condition for which he received service-connected disability compensation from the Department of Veterans Affairs.

³ The Office selected Dr. Langan to resolve a conflict in medical opinion between appellant's treating physician, Dr. I. Paul Enker, a Board-certified orthopedic surgeon, and Dr. P. Leo Varriale, a Board-certified orthopedic surgeon and Office referral physician. Whereas Dr. Enker continued to find appellant totally and permanently disabled, Dr. Varriale's April 12, 2007 report indicated that appellant could work part-time six hours per day with restrictions.

⁴ The employing establishment initially extended an offer of employment on January 22, 2009. The Office, however, found the position unsuitable because the "physical limitations" section of the January 22, 2009 offer did not include a restriction on climbing and did not accurately reflect appellant's weight limitations with respect to pushing and pulling. By letter dated February 4, 2009, it asked the employing establishment to revise its job offer.

On February 19, 2009 the Office advised appellant that the part-time, modified custodian position was considered suitable based on Dr. Langan's August 18, 2008 report. It acknowledged a discrepancy in the latest job offer regarding whether there was bending or no bending, but did not find the discrepancy sufficient grounds to declare the job offer unsuitable.⁵ The Office stated, "It should be ... noted that your agency has specified no bending under your physical limitation and therefore the addition of bending in the job description does not nullify their commitment to accommodating your position or the suitability of the job offered." After declaring the offered position suitable, it advised appellant of the consequences of refusing an offer of suitable work. Appellant was afforded 30 days to either accept the position or submit a written explanation for his refusal.

By letter dated February 24, 2009, appellant's counsel acknowledged receipt of both the February 11, 2009 job offer and the Office's February 19, 2009 suitability determination. Counsel advised the Office that appellant was unable to accept the offered position because the duties were "inconsistent" with his "medical restrictions and disabilities."

On April 3, 2009 the Office received a March 31, 2009 form report from Dr. Christopher D. Skurka, appellant's chiropractor, who had been providing chiropractic treatment since March 20, 2006, as recommended by appellant's orthopedist, Dr. Enker. Dr. Skurka's diagnoses included lumbar sprain, lumbar facet syndrome, sacroiliac joint sprain, sciatica and spinal segmental joint dysfunction -- lumbar/sacral region. The March 31, 2009 report identified February 22, 2006 as the date of injury and noted that the injury occurred when appellant was lifting a carrier sorting case to an upright position. Dr. Skurka checked the appropriate boxes on the form indicating that appellant was not currently working and was totally disabled.

On April 14, 2009 the Office advised appellant that he had not provided any valid reasons for rejecting the February 11, 2009 job offer. It afforded him an additional 15 days to accept the position and make arrangements to report for duty. Appellant was further advised that no additional reasons for refusal would be considered. The Office also indicated that his failure to accept the position within the allotted timeframe would result in the termination of entitlement to both schedule award benefits and future wage-loss compensation.

On April 29, 2009 the employing establishment advised the Office that appellant had visited the facility and provided medical documentation indicating that he was unable to work until June 1, 2009. Appellant reportedly did not state that he would accept the job offer. The employing establishment forwarded to the Office an April 24, 2009 prescription pad note from Dr. Kevin E. Harrison, a Board-certified surgeon, who advised that appellant "may not perform physical labor until June 1."

By decision dated May 10, 2009, the Office terminated appellant's entitlement to wage-loss compensation and potential schedule award benefits.

⁵ The same bending/no bending discrepancy existed with respect to the January 22, 2009 job offer, but the Office did not ask the employing establishment to correct this particular problem when it requested a revised job offer on February 4, 2009.

LEGAL PRECEDENT

A partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for him is not entitled to compensation.⁶ An employee who refuses or neglects to work after suitable work has been offered or secured for him has the burden to show that this refusal or failure to work was reasonable or justified.⁷ Whether an employee has the ability to perform an offered position is primarily a medical question that must be resolved by the medical evidence.⁸ In evaluating the suitability of a particular position, the Office must consider preexisting and subsequently acquired medical conditions.⁹

When the employing establishment extends an offer of modified-duty work, the offer must be in writing and must include the following information: (1) a description of the duties to be performed; (2) the specific physical requirements of the position and any special demands of the workload or unusual working conditions; (3) the organizational and geographical location of the job; (4) the date on which the job will first be available; and (5) the date by which a response to the job offer is required.¹⁰ The employing establishment should also provide pay rate information for the offered job.¹¹

When the Office considers a job to be suitable, it shall advise the employee of its finding and afford him 30 days to either accept the job or present any reasons to counter the Office's finding of suitability.¹² If the employee presents such reasons and the Office determines that the reasons are unacceptable, it will notify the employee of that determination and further inform the employee that he has 15 days in which to accept the offered work without penalty.¹³ If an employee refuses to accept the offered position after being provided both the 30-day and 15-day notices, the Office will terminate the employee's entitlement to further compensation.¹⁴ However, the employee remains entitled to medical benefits.¹⁵

⁶ 5 U.S.C. § 8106(c)(2) (2006); 20 C.F.R. § 10.517.

⁷ 20 C.F.R. § 10.517.

⁸ *Gayle Harris*, 52 ECAB 319, 321 (2001).

⁹ *Id.*; *Martha A. McConnell*, 50 ECAB 129, 132 (1998).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-earning Capacity*, Chapter 2.814.4a (July 1997).

¹¹ *Id.*

¹² 20 C.F.R. § 10.516.

¹³ *Id.* The 15-day notification need not explain why the Office found the employee's reasons for refusal unacceptable. *Id.*

¹⁴ 20 C.F.R. § 10.517(b). This includes compensation for lost wages as well as compensation for any permanent loss of use of a scheduled member. *Id.*; see 5 U.S.C. §§ 8105, 8106 and 8107.

¹⁵ 20 C.F.R. § 10.517(b).

ANALYSIS

The Board finds that the Office improperly terminated appellant's entitlement to monetary compensation benefits. Section 8106(c) is a penalty provision and shall be narrowly construed.¹⁶ The Board finds that the February 11, 2009 job offer is not suitable. According to the employing establishment, the February 11, 2009 job offer was based on Dr. Langan's August 18, 2008 medical findings, which included a limitation on bending.¹⁷ The February 11, 2009 job offer, however, contained a discrepancy as to whether bending was required while working as a part-time, modified custodian. The job description section noted that appellant was expected to perform all custodial duties including "bending," but the physical limitations section of the offer indicated, "No bending...."

The February 19, 2009 30-day notice indicated that the employing establishment's inclusion of "bending" under the job description heading did not nullify its commitment to accommodating appellant's position or the suitability of the job offered. The Office may have relied on the employing establishment's representation that it would accommodate appellant's "No bending" limitation; however, section 8106 is a penalty provision and will be narrowly construed. The job description provided appellant does not confirm to all the noted physical limitations.

The February 18, 2009 job offer clearly indicates that bending is required while performing custodial duties. Although the physical limitations section of the offer essentially mirrored the limitations imposed by Dr. Langan, the inclusion of bending in the job description is inconsistent with his August 18, 2008 work restrictions. Accordingly, the Board finds that the February 18, 2009 job offer is not medically suitable to appellant's current condition. As such, the Office improperly terminated his benefits for refusing to accept the offered position.

Appellant's counsel raised arguments on appeal. He claimed that the Office had unjustifiably limited its characterization of appellant's work-related condition. Whether appellant's claim should be accepted for additional medical conditions is an issue not currently before the Board. The Office's May 10, 2009 decision did not address this specific issue. When evaluating the suitability of a particular position under section 8106 the Office must consider appellant's accepted condition(s) as well as any preexisting and subsequently acquired medical conditions.¹⁸

CONCLUSION

The Board finds that the Office improperly terminated appellant's monetary compensation benefits.

¹⁶ *Stephen A. Pasquale*, 57 ECAB 396, 402 (2006).

¹⁷ The Board assumes for illustration purposes only that Dr. Langan's August 18, 2008 medical report represents the weight of the medical evidence regarding appellant's current condition.

¹⁸ *Gayle Harris*, *supra* note 8; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-earning Capacity*, Chapter 2.814.3 (December 1993).

ORDER

IT IS HEREBY ORDERED THAT the May 10, 2009 decision of the Office of Workers' Compensation Programs be reversed.

Issued: July 14, 2010
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