

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

P.P., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
TRANSPORTATION SECURITY)
ADMINISTRATION, Aurora, CO, Employer)

Docket No. 09-2370
Issued: June 21, 2010

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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 14, 2009 appellant filed a timely appeal from the September 15, 2009 merit decision of the Office of Workers' Compensation Programs concerning the termination of his compensation benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.¹

ISSUE

The issue is whether the Office properly terminated appellant's compensation effective April 13, 2008 on the grounds that he refused an offer of suitable work under section 8106(c)(2).

¹ The record also contains a November 18, 2008 nonmerit decision denying appellant's request for a hearing. Appellant has not appealed this decision to the Board and the matter is not currently before the Board.

FACTUAL HISTORY

The Office accepted that on January 3, 2003 appellant, then a 49-year-old screener, sustained several left knee injuries, including a Baker's cyst, contusion, popliteal synovial cyst, chondromalacia patellae and anterior cruciate ligament sprain, when a chair was slammed into his left knee at work. Appellant received compensation from the Office for periods of disability.

On October 12, 2007 Dr. Rick Artist, an attending Board-certified family practitioner, stated that appellant could work on a full-time basis subject to specific restrictions. Appellant could lift, pull or push up to 10 pounds, but could not engage in any repetitive motions. Dr. Artist indicated that appellant would need to be able to alternate between sitting, standing and walking. He made note of appellant's persistent left knee and right wrist pain.

On November 5, 2007 the employing establishment offered appellant a position as a modified transportation screener. The position involved assisting with the security screening of passengers, including checking identification and manning security checkpoints. The physical duties of the modified transportation screener position required lifting, pushing and pulling up to 10 pounds, but did not allow any repetitive motions. The position allowed alternating between sitting, standing and walking.

In a November 7, 2007 letter, the Office advised appellant of its determination that the modified transportation screener position offered by the employing establishment was suitable. It informed him that his compensation would be terminated if he did not accept the position or provide good cause for not doing so within 30 days of the date of the letter.

Appellant expressed concerns that he had to take strong medications during the day to control his pain, including Tramadol and Hydrocodone. He was directed to take these medications as needed up to four times a day and that the medications had such serious side effects as drowsiness and dizziness. Appellant also claimed that he was unable to obtain the proper security clearance to perform the modified transportation screener position in part due to problems he had with his credit. In a November 20, 2007 report, Dr. Artist indicated that appellant was suffering from chronic left knee and right wrist pain, but reiterated that he could perform the modified transportation screener position offered by the employing establishment.

In a January 15, 2008 letter, the Office advised appellant that his reasons for not accepting the modified transportation screener position offer were unjustified. It stated that his problems with his credit and with obtaining a security clearance were administrative matters that were not relevant to the assessment of whether the offered position was suitable.² The Office advised appellant that his compensation would be terminated if he did not accept the position within 15 days of the date of the letter.³

² The Office also indicated that there was no prohibition against working at the employing establishment while appropriately using prescription drugs. Ruth Antosik, a human resources specialist at the employing establishment, asserted that Tramadol was not a narcotic and that several employees used Tramadol at work. She indicated that Hydrocone was only intended to be taken shortly before bedtime.

³ Appellant did not accept the position within the allotted period. Ms. Antosik advised that the position remained available and that appellant had not rectified his problems with obtaining a security clearance.

In a January 22, 2008 letter to the Office, appellant again expressed concern that he could not obtain a security clearance. In a January 23, 2008 e-mail, Ms. Antosik advised appellant how to obtain further information about his failed attempts to obtain security clearance. She indicated that failing a clearance screening was considered to be a conduct and administrative matter that would solely be remedied at the employing establishment's discretion and which did not affect the suitability of the offered position.

In an April 8, 2008 decision, the Office terminated appellant's monetary compensation effective April 13, 2008 on the grounds that he refused an offer of suitable work. It found that the medical evidence of record, including the opinion of Dr. Artist, established that the modified transportation screener position was suitable.

In a January 3 and March 17, 2008 reports, Dr. Artist again stated that appellant was experiencing chronic left knee and right wrist pain. He indicated that appellant was using Vicodin primarily at night to help him sleep and used Tramadol during the day, as needed, to alleviate pain and allow him to continue to function.

In a January 13, 2009 report, Dr. Lori Szczukowski, an attending Board-certified internist, stated that she had not advised appellant that Hydrocone was only intended to be taken shortly before bedtime. She stated that both Tramadol and Hydrocone were to be taken as needed for pain up to four times per day. Both drugs could have side effects such as drowsiness or dizziness.

Appellant requested a review of the written record by an Office hearing representative. He submitted additional statements addressing his reasons for not accepting the offered position. Appellant asserted that employing establishment regulations prevented him from using his medications while at work.⁴

In a September 15, 2009 decision, the Office hearing representative affirmed the April 8, 2008 decision finding that the employing establishment only prohibited use of illegal substances and inappropriate use of legal substances.

LEGAL PRECEDENT

Section 8106(c)(2) of the Federal Employees' Compensation Act provides in pertinent part, "A partially disabled employee who -- (2) refuses or neglects to work after suitable work is offered is not entitled to compensation."⁵ However, to justify such termination, the Office must show that the work offered was suitable.⁶ An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.⁷

⁴ Appellant submitted copies of management directives regarding these matters.

⁵ 5 U.S.C. § 8106(c)(2).

⁶ *David P. Camacho*, 40 ECAB 267, 275 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341, 345 (1981).

⁷ 20 C.F.R. § 10.517; see *Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

ANALYSIS

The Office accepted that appellant sustained several left knee injuries on January 3, 2003 and paid him compensation for periods of disability. It later terminated appellant's compensation effective April 13, 2008 on the grounds that he refused an offer of suitable work. The employing establishment had offered appellant a job as a modified transportation security screener on November 5, 2007 and the Office determined that it was suitable on November 7, 2007. The position involved assisting with the security screening of passengers, including checking identification and manning security checkpoints. The physical duties of the modified transportation screener position required lifting, pushing and pulling up to 10 pounds, but did not allow any repetitive motions. The position allowed alternating between sitting, standing and walking. In finding the offered position suitable, the Office relied on the opinion of Dr. Artist, an attending Board-certified family practitioner.

The Board finds that the medical evidence is not sufficient to show that appellant was capable of performing the modified transportation security position. While the reports of Dr. Artist generally are in accordance with the work duties required by the offered position, he did not adequately explain why appellant could perform the level of work he recommended. Dr. Artist noted that appellant had chronic left knee and right wrist pain, but he did not provide medical rationale explaining how these conditions allowed him to be able to lift, push and pull up to 10 pounds.⁸

Before the Office and on appeal to the Board, appellant made several arguments why he felt that he could not perform the modified transportation security position. Appellant expressed concerns that he had to take strong medications during the day to control his pain, including Tramadol and Hydrocodone. He asserted that he was directed to take these medications as needed up to four times per day and stated that the medications had such serious side effects as drowsiness and dizziness. Appellant also claimed that he was unable to obtain the proper security clearance to perform the modified transportation screener position in part due to problems he had with his credit.

The Board notes that the Office has not adequately addressed these matters and their effect on the suitability of the modified transportation screener position. Moreover, it is unclear whether Dr. Artist and other physicians of record had adequately evaluated the possible effect of appellant's use of medications on his ability to perform the offered position. In a January 13, 2009 report, Dr. Szczukowski, an attending Board-certified internist, stated that she had not advised appellant that Hydrocone was only intended to be taken shortly before bedtime. She stated that both Tramadol and Hydrocone were to be taken as needed for pain up to four times per day.⁹ For these reasons, the Office did not meet its burden of proof to show that the modified transportation screener position was suitable.

⁸ The Board further notes that Dr. Artist indicated that appellant could not engage in any repetitive motions, but it is not entirely clear that appellant would be able to perform the duties of the modified transportation security position without engaging in any repetitive motions.

⁹ Dr. Szczukowski indicated that both drugs could have side effects such as drowsiness or dizziness.

CONCLUSION

The Board finds that the Office improperly terminated appellant's monetary compensation effective April 13, 2008 on the grounds that he refused an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the September 15, 2009 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 21, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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