

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

R.J., Appellant

and

**DEPARTMENT OF DEFENSE, DEFENSE
LOGISTICS AGENCY, DISTRIBUTION
REGION WEST, Stockton, CA, Employer**

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**Docket No. 11-994
Issued: December 23, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On March 15, 2001 appellant filed a timely appeal of an Office of Workers' Compensation Programs' (OWCP) September 27, 2010 decision affirming the termination of his wage-loss compensation on the grounds that he refused an offer of suitable work. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly terminated appellant's compensation benefits effective March 14, 2010 pursuant to 5 U.S.C. § 8106(c).

On appeal appellant contends that the position offered by the employing establishment was not appropriate because it required computer knowledge and he was not computer literate.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On July 8, 1997 appellant, then a 46-year-old material handler/forklift operator, filed a traumatic injury claim alleging that he suffered an injury to his back while unloading cases of battery terminal lugs that had fallen from pallets. OWCP accepted his claim for lumbar strain, left lumbar radiculopathy and lumbar disc disease. Appellant returned to work for the employing establishment light duty; however, he stopped work on August 5, 2005 as the employing establishment could no longer accommodate his work restrictions. He was referred to vocational rehabilitation services. On April 8, 2008 OWCP issued a schedule award for a 15 percent impairment of the left leg and 4 percent of the right leg.

On June 19, 2009 the employing establishment offered appellant a permanent position as a supply technician. The physical demands of the position were: “[m]ay sit, stand and move at will to accomplish duties. Occasional periods of walking and carrying of light items, such as paper or small parts may be required. No special physical demands are required to perform the work.” The job assignments were listed as receiving documentation, correspondence, *etc.*; producing shipping labels, entering data, extracting information from an automated supply system and distributing a variety of supply-related documents. The work may also include general office clerical support. The job required appellant to utilize various automated systems including using a computer terminal/personal computer and associated devices.

Dr. Susan Scholey, an attending Board-certified physiatrist, addressed appellant’s physical limitations. By letter dated July 23, 2009, she stated that she reviewed the job offer for supply technician and that, based on that description, the job of supply technician does not require physical demands that would be contrary to the permanent work restrictions that she recommended on June 24, 2009. Dr. Scholey concluded that appellant was capable of working in this full-time modified-duty position of supply technician.

By letter dated August 25, 2009, the employing establishment indicated that the position of supply technician was available to appellant starting August 31, 2009. Appellant did not report for duty nor call the employing establishment to explain his absence.

By letter dated October 5, 2009, OWCP informed appellant that he had 30 days to accept the position or provide an explanation of the reasons for refusing it. It informed him that, if he failed to accept the position, any explanation or evidence which he provided will be considered prior to determining whether or not his reasons for refusing the job were justified. OWCP informed appellant that, if he failed to establish that his refusal was justified, his compensation would be terminated.

In an October 30, 2009 report, Dr. Scholey listed diagnoses of lumbar strain, probable lumbar stenosis, worsened. She reiterated work restrictions from her previous report of June 24, 2009.

Appellant responded by letter dated October 31, 2009, wherein he stated that the commute to employment was 90 minutes each way, and that with factors such as his use of Vicodin and severe pain this would make a tragedy waiting to happen and that he requested a letter from OWCP to give to the department of motor vehicles that would exempt him from

prosecution if he was in an accident or is detained for driving under the influence of prescription narcotics.

By letter dated February 11, 2010, OWCP informed appellant that it did not find his reasons for refusal to accept the position valid and gave appellant 15 days to make arrangements to report to the offered position. It informed him that, as he had not accepted the position, he must arrange for a report date within 15 days from the date of the letter or his entitlement to wage loss and schedule awards will be terminated.

By decision dated March 1, 2010, OWCP terminated appellant's wage loss and schedule award compensation effective March 14, 2010 because the evidence established that he refused to accept suitable work.

On March 25, 2010 appellant requested an oral hearing before an OWCP hearing representative. At the hearing held on July 9, 2010, he testified that his physician decreased his pain medicine but his pain increased so she had to increase it. Appellant testified that this medication has a sedative and it makes him drowsy. He stated that his physician sent him a letter which recommended that he refrain from driving or doing anything because this medication caused him to fall asleep, which could cause serious injury if he drove. Appellant testified that the offered position was an hour and a half drive, and that his prior position was closer and that he was in a carpool. He contended that vocational rehabilitation was stopped before he could develop skills. Appellant testified that he would not be able to perform the job duties because he was not familiar with the rules and requirements for the job, that he did not have a clerical background and that he was computer illiterate.

After the hearing, appellant submitted a June 17, 2010 note wherein Dr. Scholey stated that he required the use of opioid pain medication, and that, although he was on a stable dose, he complained of sedation while taking the medication, and that she recommended that he refrain from driving while he was taking the medication.

By decision dated September 27, 2010, OWCP's hearing representative found that OWCP met its burden of proof in terminating compensation benefits under 5 U.S.C. § 8106(c) and affirmed the termination of compensation benefits. However, he found that appellant had presented additional evidence that required additional development to determine whether his benefits should be reinstated. Accordingly, the hearing representative remanded the case for further consideration of whether appellant should have his benefits reinstated.²

LEGAL PRECEDENT

OWCP has authority under section 8106(c)(2) of FECA to terminate compensation for any partially disabled employee who refuses or neglects suitable work when it is offered.³ The

² As the issue of continuing employment-related disability is under further development by OWCP, this issue is in an interlocutory posture and, thus, the Board has no jurisdiction to review it on this appeal. *See* 20 C.F.R. § 501.2(c)(2).

³ 5 U.S.C. §§ 8101-8193, 8106.

Board has recognized that section 8106(c) serves as a penalty provision as it may bar an employee's entitlement to future compensation and, for this reason, will be narrowly construed.⁴ Before compensation can be terminated, OWCP has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work, and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position. In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), OWCP has the burden of showing that the work offered to and refused by appellant was suitable.⁵

Section 10.517(a) of FECA's implementing regulations provide that an employee who refused to work after suitable work has been offered to or secured for the employee, has the burden of showing that such refusal or failure to work was reasonable or justified.⁶ Pursuant to section 10.516, the employee shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.⁷

OWCP regulations provide that in determining what constitutes suitable work for a particular disabled employee, it should consider the employee's current physical limitations whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work and other relevant factors.⁸ It is well established that OWCP must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.⁹ The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by the medical evidence.¹⁰

ANALYSIS

OWCP accepted appellant's claim for lumbar strain, left radiculopathy and lumbar disc disease. Appellant stopped work on August 5, 2005 when the employing establishment could no longer accommodate his restrictions. However, on June 19, 2009 the employing establishment offered him a permanent position as a supply technician. By letter dated August 25, 2009, it indicated that the position of supply technician was available to appellant starting August 31, 2009. Appellant did not report for duty. After following proper notification and procedural requirements, OWCP terminated his compensation for failure to accept suitable employment.

⁴ *Stephen A. Pasquale*, 57 ECAB 396 (2006).

⁵ *M.L.*, 57 ECAB 746 (2006).

⁶ 20 C.F.R. § 10.517(a); *see Ronald M. Jones*, 52 ECAB 190 (2000).

⁷ *Id.* at 10.516; *see Kathy E. Murray*, 55 ECAB 288 (2004).

⁸ 20 C.F.R. § 10.500(b).

⁹ *Richard P. Cortes*, 56 ECAB 200 (2004).

¹⁰ *Id.*, *Bryant F. Blackmon*, 56 ECAB 752 (2005).

Appellant's treating physician, Dr. Scholey, reviewed the work restrictions and determined that appellant was capable of working in the full-time, modified-duty position of supply technician. As the offered position was found to be within appellant's restrictions by his treating physician, and as there was no medical evidence to the contrary, the Board finds that OWCP established that the position was medically suitable. Appellant contended that the position was not medically suitable because he was on medication that made him sleepy and that, accordingly, he could not drive the 90-minute commute each way to and from work. However, at the time OWCP terminated benefits there was no medical evidence that he had restrictions on his ability to drive.

Appellant argued that the position required computer skills and that he was not computer literate. The employing establishment offered him the position despite his lack of computer skills. The fact that appellant does not currently have the computer skills to perform the position does not mean that he cannot develop the skills with on-the-job training.

The evidence of record establishes that the position offered was medically and vocationally suitable and that OWCP complied with the procedural requirements of 5 U.S.C. § 8106(c). The Board finds that OWCP met its burden of proof to terminate benefits in this case.

CONCLUSION

The Board finds that OWCP properly terminated appellant's compensation benefits effective March 14, 2010 pursuant to 5 U.S.C. § 8106(c).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 27, 2010 is affirmed.

Issued: December 23, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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