

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

R.W., Appellant)	
)	
and)	Docket No. 13-428
)	Issued: January 8, 2014
DEPARTMENT OF AGRICULTURE, U.S.)	
FOREST SERVICE, Albuquerque, NM,)	
Employer)	
)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On December 19, 2012 appellant, through his attorney, filed a timely appeal from a September 10, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). 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.²

ISSUE

The issue is whether OWCP properly terminated appellant's compensation effective March 12, 2012 on the grounds that he refused suitable work under 5 U.S.C. § 8106(c)(2).

On appeal, counsel contends that OWCP's decision is contrary to fact and law.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the issuance of the September 10, 2012 OWCP decision, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

OWCP accepted that appellant, then a 55-year-old temporary seasonal forestry technician, sustained injuries to his neck and left upper extremity in the performance of duty due to a slip and fall while changing a tire on July 11, 2006. His duty station was located in Susanville, California, approximately 140 miles from his residence. OWCP authorized cervical and left elbow surgeries. Appellant was placed on the periodic rolls and received compensation benefits. In a January 25, 2011 report, Dr. James D. Tate, a Board-certified neurosurgeon and appellant's attending physician, indicated that appellant had generalized pain, cramps, left arm pain, hand pain, hand numbness, back pain and shoulder pain. He reported that a December 20, 2010 magnetic resonance imaging (MRI) scan showed degenerative changes and small anterior extradural bulges but no immediately surgically significant lesion.

On February 17, 2011 the employing establishment offered appellant a full-time modified forestry technician (lookout) position in Susanville, California, which was a temporary seasonal appointment available at 9:30 a.m. on May 22, 2011. The position required some walking, standing, bending and moderate exertion involved on maintenance tasks and restricted use of the left arm.

On March 22, 2011 Dr. Tate opined that appellant continued to deteriorate. Appellant stated that he was not willing to accept the offer to return to work, for a number of reasons and indicated that he would like to be retrained as a range master so that he could instruct the local police community in firearms proficiency.

OWCP referred appellant to Dr. Mohinder Nijjar, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a May 6, 2011 report, Dr. Nijjar took a detailed medical history, reviewed appellant's medical records and performed a physical examination. He concluded that appellant was capable of performing full-time, light-duty work as a forestry technician lookout with the provision of changing positions every 30 minutes and the following restrictions: walking, standing and reaching for 4 hours a day; no repetitive use of the left wrist or elbow; pushing, pulling and lifting no more than five pounds.

In a report dated June 14, 2011, Dr. Tate indicated that appellant had no significant change in his pathology and remained disabled. Appellant stated that he was unable to hold binoculars with the left hand and dropped things on occasion. Dr. Tate opined that appellant's left arm difficulties would limit his ability to work as a fire lookout technician in terms of climbing to the top of the fire lookout tower as well as holding binoculars for extended lengths of time. He stated that it was reasonable for appellant to be rehabilitated to be a range master and teach firearm safety and accuracy. On August 8, 2011 Dr. Tate indicated that appellant's symptoms were unchanged and experienced some upper back pain, bilateral hand tingling and numbness, as well as bilateral arm and shoulder pain. On September 23, 2011 he indicated that appellant's left ulnar neuropathy and weakness had not seemed to change.

On October 28, 2011 the employing establishment offered appellant a full-time modified position as an information receptionist in Susanville, California with the following restrictions: walking, standing and reaching for four hours a day; no use of the left arm; 5-minute breaks every 30 minutes. The position was available at 8:00 a.m. on November 28, 2011 as a temporary seasonal appointment, which was the same type of appointment that appellant previously held.

By letter dated November 9, 2011, OWCP advised appellant that the modified information receptionist position had been found to be suitable and conformed to the work limitations provided by Dr. Nijjar in his May 6, 2011 report. The employing establishment confirmed that the position remained available. OWCP allowed appellant 30 days to accept the position or provide his reasons for refusal and advised that an employee who refuses an offer of suitable work without reasonable cause is not entitled to compensation.

In a November 28, 2011 letter, counsel stated that appellant accepted the job offer, but the job was at a time and place where there was no housing paid for by the employing establishment. He indicated that the employing establishment had provided free housing at the time of injury. Appellant only worked during the fire season and, therefore, lived in the barracks without any cost. Counsel argued that since appellant was provided with housing at the time of injury and had no money to rent and furnish an apartment, the employing establishment should provide him with housing or postpone the job offer until the fire season when free housing would be provided.

On December 6, 2011 Dr. Tate indicated that appellant had an exacerbation of pain and Dr. Nijjar's opinion on appellant's ability to sit, stand and move was beyond what he felt his capacities were.

By letter dated December 15, 2011, OWCP indicated that appellant had accepted the job offer and reported to work on November 28, 2011, but did not stay once he was informed that housing was not available. It advised him that his reasons for refusing the offered position were not determined to be reasonable and his compensation benefits would be terminated if he did not accept the position within 15 days. The employing establishment confirmed that the position remained available and indicated that quarters in the barracks at the work center were available but not mandatory for the offered position. The barracks were open from May through October each year depending on snow conditions, as it was not feasible to keep them open year-round.

In a letter dated December 15, 2011, appellant indicated that he accepted the job offer and met with his supervisor on November 28, 2011. He stated that the employing establishment had provided housing for his seasonal employment during the 2005 and 2006 fire seasons at no cost. At the time appellant was offered the modified position, the barracks were closed for the winter and housing available for rent in the town of Susanville was very limited due to the winter season. He received disability checks in the amount of \$1,240.00 each month and indicated that this was substantially less than what was required to obtain housing, which would cost \$1,500.00 for the first and last month's rent and security deposit, plus additional costs for utilities and furniture. Appellant requested financial assistance to help him acquire housing in order to accept the modified job offer as soon as possible.

By decision dated March 12, 2012, OWCP terminated appellant's compensation benefits effective that day on the basis that he refused suitable employment.

On March 19, 2012 appellant, through his attorney, requested an oral hearing before an OWCP hearing representative, which was held *via* telephone on June 12, 2012. He provided testimony and OWCP's hearing representative held the case record open for 30 days for the submission of additional evidence.

Subsequently, appellant submitted a July 11, 2006 document cosigned by him and his supervisors, David Ramirez and David Trussell, stipulating the terms of agreement for his duties as the relief fire lookout. The agreement stated that he would not be charged for the quarters provided to him. Appellant also submitted a July 12, 2012 report from Dr. Tate and diagnostic studies dated September 21, 2010 and August 8, 2012.

By decision dated September 10, 2012, OWCP's hearing representative affirmed the March 13, 2012 decision.

LEGAL PRECEDENT

It is well settled that, once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.³ Section 8106(c)(2) of FECA 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.⁴ Section 8106(c)(2) will be narrowly construed as it serves as a penalty provision, which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.⁵

Section 10.517(a) of FECA's implementing regulations provide that an employee who refuses or neglects to work after suitable work has been offered or secured by 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

To justify termination, OWCP must show that the work offered was suitable and that appellant was informed of the consequences of his or her refusal to accept such employment.⁸ Determining what constitutes suitable work for a particular disabled employee, it considers the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area and the employee's qualifications to perform such work.⁹ OWPC procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.¹⁰

³ See *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

⁴ 5 U.S.C. § 8106(c)(2); see also *Geraldine Foster*, 54 ECAB 435 (2003).

⁵ See *Joan F. Burke*, 54 ECAB 406 (2003).

⁶ 20 C.F.R. § 10.517(a).

⁷ *Id.* at § 10.516.

⁸ See *Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

⁹ 20 C.F.R. § 10.500(b).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work, Job Offer Refusal*, Chapter 2.814.5a (June 2013); see *E.B.*, Docket No. 13-319 (issued May 14, 2013).

ANALYSIS

To justify termination of compensation, OWCP must show that the work offered was suitable. The Board finds that it properly terminated appellant's compensation on the grounds that he refused suitable work under 5 U.S.C. § 8106(c)(2).

OWCP accepted that appellant sustained injuries to his neck and left upper extremity in the performance of duty on July 11, 2006. On October 28, 2011 the employing establishment offered him a temporary, seasonal full-time information receptionist position in Susanville, California which required walking, standing and reaching for 4 hours a day; no use of the left arm; 5-minute breaks every 30 minutes. OWCP found the position to be suitable work. Appellant accepted the offer and reported to work on November 28, 2011, but did not stay once he was informed that housing was not available. OWCP terminated his compensation benefits effective March 12, 2012 on the grounds that he had refused an offer of suitable work.

The Board finds that the offered modified information receptionist position was within appellant's physical limitation as set forth by Dr. Nijjar on May 6, 2011, who also concluded that he was capable of performing the duties of the selected position.¹¹ There is no indication in the job offer as written that any of the described sedentary duties exceeded Dr. Nijjar's restrictions. The Board further finds that the October 28, 2011 job offer was procedurally correct, as it was made in writing, provided a detailed description of the assigned duties and physical requirements and instructed appellant when to report for work.¹² OWCP must also consider whether the work is available within the employee's commuting area and the employee's qualifications to perform such job.¹³ There is no dispute that appellant meets the qualifications of the position. Further, the Board notes that the offered job is located at the same facility as his date-of-injury job in Susanville, California. The facts of this case are in contrast to situations where appellant is required to relocate to accept suitable work.¹⁴

Appellant argued that the modified information receptionist position was not suitable because housing was not provided by the employing establishment as it had been for his date of injury position. In support of this contention, he submitted a July 11, 2006 document, cosigned by his supervisors, stipulating that appellant would not be charged for the quarters provided to him. The Board finds the July 11, 2006 document suspect in that it was created on appellant's date of injury. Furthermore, the Board notes that the document does not guarantee that housing would be available to him; rather, it simply reflects that he would not be charged if he chose to live in the barracks. As the employing establishment noted, the barracks were only open from May through October each year depending on snow conditions. It was not feasible to keep them open in the winter. Appellant had been allowed to stay in the barracks when they were open. However, the offered modified information specialist position was available on November 28, 2011 when the barracks were closed.

¹¹ See *Richard P. Cortes*, 56 ECAB 200 (2004).

¹² See 20 C.F.R. § 10.507.

¹³ *Supra* note 9.

¹⁴ *Howard Y. Miyashiro*, 51 ECAB 253 (1999); *Allen W. Hermes*, 41 ECAB 838 (1990).

As no requirement to provide housing existed as a condition of employment for the date-of-injury position, the Board finds that appellant's reasons for refusing the offered modified information receptionist position were not acceptable.

On appeal, counsel contends that OWCP's decision is contrary to fact and law. For the reasons stated above, the Board finds that his argument is not substantiated.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP properly terminated appellant's compensation effective March 12, 2012 on the grounds that he refused suitable work under 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the September 10, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 8, 2014 Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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