United States Department of Labor
Employees' Compensation Appeals Board

WILLIAM D. WELCH, Appellant	)	
and	)	**Docket No. 05-127**
	)	**Issued: January 18, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Guthrie, OK, Employer	)	

Appearances:
William D. Welch, pro se
Office of the Solicitor, for the Director

Case Submitted on the record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 8, 2004 appellant filed a timely appeal from a September 17, 2004 Office of Workers' Compensation Programs' decision denying reconsideration of its August 17, 2004 decision terminating appellant's compensation for refusal to accept suitable employment. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation benefits on the grounds that he refused an offer of suitable work; (2) whether the Office properly refused to reopen appellant's case for reconsideration of her claim under 5 U.S.C. § 8128.

FACTUAL HISTORY

This is the second appeal before the Board. On April 24, 1993 a 60-year-old letter carrier, filed a claim for benefits, alleging that he sustained a chronic elbow tendinitis condition causally related to factors of his employment. The Office accepted the claim for bilateral epicondylitis. The Office paid appellant appropriate compensation for total disability as of

July 29, 1993. Appellant returned to a light-duty position on March 19, 1994. By decision dated April 5, 1994, the Office terminated appellant's compensation. Appellant stopped working on April 29, 1994 and filed a claim for a recurrence of disability. By decision dated January 17, 1995, an Office hearing representative found that the Office had improperly terminated appellant's compensation as of April 5, 1994, but found that he had failed to establish that a change in the nature and extent of his injury-related condition had occurred as of April 29, 1994 which disabled him from performing the duties of his light-duty position.[1] By decision dated December 14, 1995, the Office denied modification of the January 17, 1995 Office decision. In an April 2, 1998 decision,[2] the Board set aside the Office's January 17, 1995 decision, finding that appellant had submitted factual evidence indicating there had been a change in the nature and extent of his light-duty assignment and medical evidence sufficient to require further development of the record. The Board remanded the case for referral of appellant for examination by an appropriate specialist. The complete facts of this case are set forth in the Board's April 2, 1998 decision and are incorporated herein by reference.

The Office referred appellant, the statement of accepted facts and the case record to Dr. Tom W. Ewing, an osteopath, who stated in a June 9, 1998 report that appellant had medial and lateral epicondylitis at both elbows and a possible left ulnar nerve compression neuropathy at the cubital tunnel in the left elbow. He recommended that appellant undergo further diagnostic testing, including an electromyogram (EMG). In a report dated July 7, 1998, Dr. Ewing advised that the results of the June 23, 1998 EMG demonstrated mild right median nerve entrapment at the wrist and borderline right ulnar nerve entrapment at the elbow. He stated that these findings were consistent with a previous EMG appellant underwent and recommended that he undergo a magnetic resonance imaging (MRI) scan of the cervical spine.

In a report dated July 21, 1998, Dr. Ewing stated that the MRI scan showed significant degenerative changes at C3-4, C4-5, C5-6 and C6-7, with considerable encroachment on the intervertebral foramen. He noted that the diameter of the spinal cord at C6-7 was 0.8 centimeters, which could be the cause of a large number of appellant's symptoms. In an August 6, 1998 report, Dr. Ewing stated:

> "[Appellant] does have current disability secondary to bilateral epicondylitis. Based on his history, his symptoms have never resolved since there has only been intermittent diminution of his symptoms since he first suffered them. When he returned to work, he returned to work that once more caused them to flare. Based on his history, he states he is unable to work more than 15 or 20 minutes at home in any type of capacity with any repetitive gripping without severe pain emanating from the elbows, both on the medical and lateral aspect. He does have exquisite tenderness in the right elbow, both the lateral and medial condyle, to palpation. I think, most likely, this was his problem always. I don't see any evidence of any ulnar nerve compression neuropathy.... His left elbow is similar but the physical findings are not as profound with deep palpation. He also has pain with resisted dorsiflexion of the wrist bilaterally also relating to his epicondylitis.... I think he

[1] Appellant retired from the employing establishment on January 12, 1995.

[2] Docket No. 96-1235 (issued April 2, 1998).

> does remain disabled from his bilateral medial lateral epicondylitis after April 29, 1994. I would state, however, that it is hard to differentiate all of his symptoms from his elbows, which I think are probably occurring from his neck. It is quiet possible that once he has treatment for his cervical spine condition, that his epicondylitis may resolve. I would recommend rechecking after he has been treated for his cervical spine injury."

In an August 25, 1998 report, Dr. Ewing reiterated that appellant had current disability secondary to bilateral epicondylitis, with exquisite pain with valgus stressing of his elbow and with resisted dorsiflexion of his wrist bilaterally. He stated that this condition prevented him from lifting any weight with grip. Dr. Ewing further advised that appellant was unable to reach above his shoulders and could lift five pounds with either hand as long it was below his shoulders, but for only three times per hour. He reiterated that appellant was disabled due to bilateral epicondylitis.

In a report dated October 27, 1998, Dr. Jeffrey H. Schimandle, a Board-certified orthopedic surgeon, stated that a significant component of appellant's arm symptoms was the result of his multilevel degenerative disc disease, spondylosis and stenosis. He also opined that appellant exhibited symptoms of epicondylitis, greater on the right than on the left. Dr. Schimandle advised that appellant's job duties at the employing establishment resulted in aggravation and exacerbation of his upper extremity symptoms.

In a report dated September 4, 2003, Dr. Richard Ruffin, a Board-certified orthopedic surgeon, stated that appellant had bilateral upper extremity pain with numbness and significant shoulder and proximal arm pain. He advised that appellant had limited range of motion of the cervical spine, positive impingement sign bilaterally and significant weakness of the rotator cuffs. Dr. Ruffin reported that x-rays of the shoulders showed moderate high riding humeral heads with degenerative changes bilaterally, indicating chronic rotator cuff disease. He diagnosed chronic, severe cervical spondylosis and bilateral shoulder impingement. Dr. Ruffin concluded that appellant could not return to his former position as a rural route carrier. He noted that appellant was 70 years old and had been treated for a heart attack in July 2002.

In a report dated January 27, 2004, Dr. Ruffin stated that appellant had objective findings of rotational and range of motion limitations of the shoulders with point tenderness over both medial epicondyles, with a mild-to-moderate ulnar neuropathy and intrinsic atrophy of the right hand. He advised that the effects of the work injury did not appear to have ceased at that time. Dr. Ruffin concluded that, while appellant could never be released to full duty, he could perform modified work with limitations of overhead work, no high force of high repetition pinch and grasp and no use of vibrating or motorized equipment. He stated that vocational assistance might also be an issue as appellant was 71 years old.

On June 10, 2004 the employing establishment offered appellant a job as a modified distribution clerk based on the restrictions outlined by the attending physician, Dr. Ruffin. The job description stated that appellant would monitor the back dock and parking lot; check to ensure that parked vehicles had parking permits and that vehicle doors were locked; and ring the door bell when drop shipments arrived and report any violations to his supervisor or the postmaster. The physical requirements of the position included: (a) sitting up to 8 hours per

day; (b) standing as desired; (c) walking approximately 2 hours per day; (d) intermittent ringing of the door bell, 5 to 10 times per day; (e) no reaching above the shoulder; (f) no use of vibrating or motorized equipment; (g) no driving a vehicle while at work; (h) most work would be performed outside the building while sitting under a covered porch, although the duties of parking lot monitor did require walking in the parking lot. The employing establishment stated that the job was available immediately.

On June 17, 2004 appellant rejected the position, stating that he was physically unable to work at any job due to his neck and elbow conditions.

In a work capacity evaluation dated June 24, 2004, Dr. Ruffin indicated that appellant could reach for two hours per day but could not reach above his shoulder. He advised that appellant could perform repetitive movements of his wrists and elbows for two hours per day each. Dr. Ruffin indicated that appellant could push, pull and lift 10 pounds for 2 hours per day, but restricted him from kneeling or climbing.

By letter dated July 2, 2004, the employing establishment reiterated that the June 10, 2004 job offer was still available.

By letter dated July 2, 2004, the Office advised appellant that a suitable position was available and that, pursuant to section 8106(c)(2), he had 30 days to either accept the job or provide an acceptable explanation for refusing the job offer. The Office advised appellant that it could terminate his compensation based on his refusal to accept a suitable position which reflected his ability to work as a modified clerk for eight hours per day. The Office noted that, as of that date, appellant had not responded to the employing establishment's offer. The Office stated that, if appellant refused the job or failed to report to work within 30 days without reasonable cause, it would terminate her compensation pursuant to 5 U.S.C. § 8106(c)(2).[3]

By letter to the employing establishment dated July 19, 2004, appellant declined the offered position. He stated that he had previously tried to work at a modified clerk position but had been unable to do so. Appellant stated that physicians had told him the only way to possibly fix his condition would be to undergo neck surgery, a procedure which would be lengthy and dangerous. Appellant volunteered to undergo further medical tests in order to demonstrate his inability to work.

By letter dated August 2, 2004, the Office advised appellant that he had 15 days in which to accept the position, or it would terminate his compensation.

By decision dated August 17, 2004, the Office terminated appellant's compensation benefits on the grounds that he refused an offer of suitable work.

By letter dated September 1, 2004, appellant requested reconsideration. Appellant submitted an August 25, 1998 report from Dr. Ewing who stated that appellant had current disability secondary to his bilateral epicondylitis. He stated that appellant's pain prohibited

[3] 5 U.S.C. § 8106(c)(2).

lifting any weight with any grip. Dr. Ewing further stated that appellant could not reach above his shoulder but could lift up to five pounds as long as it was below his shoulder.

By decision dated September 17, 2004, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its prior decision.

LEGAL PRECEDENT

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits. Under section 8106(c)(2) of the Federal Employees' Compensation Act[4] the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[5] Section 10.517 of the Office's regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured has the burden of showing that such refusal or failure to work was reasonable or justified and shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.[6]

Before compensation can be terminated, however, the Office has the burden of demonstrating that the employee can work; setting for 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.[7] However, all of appellant's medical conditions, whether work related or not, must be considered in assessing the suitability of the position.[8]

To justify termination, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[9] This burden of proof is applicable if the Office terminates compensation under 5 U.S.C. § 8106(c) for refusal to accept suitable work.

ANALYSIS

The determination 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

[4] 5 U.S.C. § 8101 *et seq*.

[5] *Patrick A. Santucci*, 40 ECAB 151 (1988); *Donald M. Parker*, 39 ECAB 289 (1987).

[6] 20 C.F.R. § 10.517; *see also Catherine G. Hammond*, 41 ECAB 375 (1990).

[7] *Linda Hilton*, 52 ECAB 476, 481 (2001).

[8] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(4) (December 1993).

[9] *See John E. Lemker*, 45 ECAB 258 (1993).

resolved by the medical evidence.[10] In the instant case, the employing establishment identified a job as a modified clerk for eight hours per day. The Office determined that this position was suitable for appellant. The Office based its conclusion on the reports of Dr. Ruffin who indicated that appellant would was capable of performing modified work, with limitations on lifting more than 10 pounds, pushing and pulling 10 pounds for 2 hours a day, and performing repetitive motions with his wrist and elbows for 2 hours a day. While work restrictions exceeded the earlier work restrictions set by Dr. Ewing who indicated that appellant could not lift more than 5 pounds and was unable to work more than 15 or 20 minutes at home in any activity involving repetitive gripping, as this would result in severe elbow pain, the restrictions set forth by Dr. Ewing were given in 1998 and had not been reviewed in six years.

The Board finds however that Dr. Ruffin indicated that appellant sustained a heart attack in July 2002. He did not discuss whether the effects of appellant's heart attack would affect his ability to work, and if so, what limitations had to be made due to appellant's cardiac condition. The Board notes that the suitable work position was not sedentary in nature and appears to require constant mobility. The Office is required to include those conditions, regardless of etiology, which existed prior to the job offer.[11] The Office, however, failed to consider the effects of a preexisting medical condition in determining whether the position it offered to appellant was suitable. Accordingly, the Board affirms the Office's August 17, 2004 decision terminating appellant's compensation on the grounds that he refused an offer of suitable work.[12]

CONCLUSION

The Board finds that the Office did not meet its burden to terminate appellant's compensation benefits pursuant to 5 U.S.C. § 8106.

[10] *Robert Dickinson*, 46 ECAB 1002 (1995).

[11] *See* 20 C.F.R. § 10.124(c).

[12] As the Board has reversed the August 17, 2004 Office decision terminating appellant's compensation, it need not consider the issue of whether the Office properly refused to reopen the case for reconsideration of his claim under 5 U.S.C. § 8128 in its September 17, 2004 decision.

ORDER

IT IS HEREBY ORDERED THAT the August 17, 2004 decision of the Office of Workers' Compensation Programs be reversed.

Issued: January 18, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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