United States Department of Labor
Employees' Compensation Appeals Board

J.S., Appellant	)	
and	)	**Docket No. 06-1931**
	)	**Issued: April 11, 2007**
DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, Los Angeles, CA, Employer	)	

Appearances:
Martin Kaplan, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 16, 2006 appellant filed a timely appeal from a July 11, 2006 decision of the Office of Workers' Compensation Programs which denied modification of a prior Office decision terminating his compensation benefits on the basis that he abandoned suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation on the grounds that he abandoned suitable work.

FACTUAL HISTORY

On April 28, 1999 appellant, then a 46-year-old special agent, filed a traumatic injury claim alleging that on April 26, 1999 he slipped and injured his left knee. The Office accepted the claim for left knee and leg sprain and tear, and expanded this to include consequential right

knee tear and authorized a total left knee replacement on May 31, 2000, arthroscopic surgery on the right knee on January 22, 2002 and a total right knee replacement on October 5, 2002. Appellant stopped work on April 29, 1999 and returned to a light-duty position on March 21, 2005 and retired on April 2, 2005.

Appellant was under the care of Dr. Todd J. Molnar, a Board-certified orthopedic surgeon, who noted in reports dated May 28 and July 23, 1999 a history of injury and diagnosed degenerative joint disease of the left knee. Dr. Molnar recommended conservative treatment and on July 23, 1999 determined that appellant's condition was permanent and stationary. Appellant was also treated by Dr. Thomas P. Knapp, a Board-certified orthopedist, who noted on October 27, 1999 that appellant sustained a work-related left knee injury 15 years earlier and reinjured his knee at work on April 26, 1999. Dr. Knapp recommended a total left knee replacement. In reports dated August 24, 2001 to March 6, 2002, he noted that appellant underwent a left knee replacement and experienced right knee pain. Dr. Knapp advised that an x-ray of the right knee revealed degenerative changes and a magnetic resonance imaging (MRI) scan of the right knee revealed a complex tear of the medial meniscus and deep articular cartilage damage. On January 22, 2002 he performed a right knee diagnostic arthroscopy and debridement and loose body removal and diagnosed diffuse Grade 3 and 4 chondromalacia of the right knee with multiple loose bodies. Appellant was also treated by Dr. John R. Moreland, a Board-certified orthopedist, who noted in reports dated March 31 to July 26, 2000 that appellant was treated for a work-related left knee injury and diagnosed osteoarthritis of the left knee. In an operative report dated June 1, 2001, Dr. Moreland performed a left total knee replacement and diagnosed osteoarthritis of the left knee. An MRI scan of the right knee dated October 17, 2001 revealed a complex tear of the medial meniscus with horizontal and vertical components, a radial tear as well as a small flap tear of the posterior horn, deep areas of articular cartilage damage over both the medial femur and medial tibial plateau, the lateral tibial plateau and the anterior compartment.

Appellant continued to submit reports from Dr. Moreland dated April 29 to October 28, 2002, who noted that a right knee x-ray revealed patellofemoral disease and severe osteoarthritis. In an operative report dated October 1, 2002, Dr. Moreland performed a right total knee replacement and diagnosed right knee osteoarthritis. On January 10, 2003 he noted that appellant underwent bilateral total knee replacements and opined that appellant's current position as a special agent was incompatible with his physical limitations. In an attending physician's report dated January 23, 2003, Dr. Moreland diagnosed osteoarthritis of the right knee and noted with a check mark "yes" that appellant's condition was caused or aggravated by his employment activity. He noted that appellant was totally disabled from March 31, 2000 to June 30, 2003 and could never return to full duty.

In a July 21, 2003 letter, the employing establishment noted that Dr. Moreland's January 23, 2003 report indicated that appellant could return to work with certain restrictions. The employing establishment offered appellant a temporary position as a special agent which would be in a sedentary capacity until a permanent position could be identified.

In a report dated July 20, 2003, Dr. Moreland opined that appellant would be unable to return to work for the employing establishment in any capacity. He noted that appellant remained physically limited and unable to perform many of the routine tasks of his job for any

period of time including standing, walking, driving and stooping. Dr. Moreland advised appellant to discontinue working to preserve the life of his knee replacements and to prevent future knee problems. On July 16, 2003 Dr. Moreland noted that he treated appellant on July 2, 2003 and advised appellant that he was unable to work as a special agent and recommended referring appellant to a physician who was an expert in vocational rehabilitation to determine appellant's work capacity.

On July 23, 2003 appellant refused the position as a temporary light-duty special agent.

On April 22, 2004 the Office referred appellant for a second opinion to Dr. Joseph C. Campbell, Jr., a Board-certified orthopedic surgeon, to determine whether appellant had residuals of his work-related condition and whether he could return to work. The Office provided Dr. Campbell with appellant's medical records, a statement of accepted facts as well as a detailed description of appellant's employment duties. In a May 24, 2004 report, Dr. Campbell indicated that he reviewed the records provided to him, noted appellant's history and examined appellant. He diagnosed left medial meniscus tear, left total knee replacement on October 31, 2001 and right total right knee replacement on October 5, 2002. Dr. Campbell noted that appellant was permanently and partially disabled. He indicated that appellant had flexion contractures of both knees and lacked range of motion past 90 degrees which would make it difficult for him to stand for long periods of time and impossible to kneel and climb stairs. Dr. Campbell prepared a work capacity evaluation and opined that appellant could work 8 hours per day subject to limitations on sitting for 4 hours, standing and reaching for 1 hour, pushing and pulling for 1 hour limited to 20 pounds, lifting limited to 1 hour and 30 pounds, no squatting, kneeling or climbing and 15-minute breaks every 2 hours.

On July 12, 2004 and January 26, 2005 appellant was referred for vocational rehabilitation.

On February 17, 2005 the employing establishment offered appellant a full-time position as a financial analyst. The position entailed providing financial analysis for a variety of white collar crimes and other investigations. The physical requirements of the sedentary position included some walking, bending, stooping, lifting and carrying of light items. The work environment was usually in an office but appellant would be periodically required to assist in search and seizures or travel to other areas to obtain documents. The position was a GS-12, step 10, with a salary of $85,744.00. The employing establishment attached a copy of Dr. Campbell's work restrictions.

In a February 24, 2005 letter, the Office advised appellant that the job offer constituted suitable work. Appellant was informed that he had 30 days to either accept the position or provide an explanation of the reasons for refusing it; otherwise, he risked termination of his compensation benefits.

On March 3, 2005 appellant accepted the offered position and returned to work on March 21, 2005. In a letter dated March 9, 2005, the employing establishment informed appellant that his position would be in Los Angeles and his report date would be March 21, 2005. The tour of duty would be 8:15 a.m. to 5:00 p.m.

In a vocational rehabilitation report dated April 26, 2005, the counselor noted that appellant returned to work at the employing establishment for a brief period before opting to retire.

On April 28, 2005 the employing establishment notified the Office that appellant returned to work on March 21, 2005 and voluntarily retired under the Civil Service Retirement Act on April 1, 2005.

In a letter dated May 4, 2005, the Office advised appellant that he recently stopped working and opted to voluntarily retire effective April 1, 2005. The Office indicated that the medical and factual evidence demonstrated that appellant was able to perform the duties of a financial analyst and that, while he accepted the position, he subsequently abandoned the position after working for a brief period. The Office allowed appellant 30 days to either return to work or provide an explanation for abandoning the position. Additionally, the Office advised appellant of the consequences under 5 U.S.C. § 8106(c)(2) of refusing an offer of suitable work.

On May 31, 2005 appellant indicated that he accepted the position of financial analyst and returned to work effective March 21, 2005. He noted that after careful consideration he decided to retire effective April 2, 2005. Appellant indicated that he had over 29 years of service and earned the right to be able to retire at any time after meeting the requirements set by the Federal Government for employees. He noted that he did not abandon the financial analyst position.

In a decision dated June 6, 2005, the Office terminated appellant's compensation under section 8106(c) on the grounds that appellant abandoned suitable work. The Office noted that appellant reported for work on March 21, 2005 and stopped to voluntarily retire on April 2, 2005 without providing a valid reason for abandoning the offered position.[1]

In a letter October 17, 2005, appellant, through his representative, requested reconsideration. He indicated that appellant was medically unable to perform the duties of the offered position and justifiably refused the unsuitable position. Appellant indicated that Dr. Moreland's report dated July 23, 2003 advised that he was unable to perform many of the routine tasks of his job for any period of time. He asserted that there was a conflict in medical opinion between Dr. Moreland and Dr. Campbell with regard to appellant's ability to return to work. Appellant submitted an election of benefits form dated April 2, 2005, in which he elected Office of Personnel Management retirement benefits.

In a decision dated July 11, 2006, the Office denied modification of the decision dated June 6, 2005.

[1] On September 29, 2005 the Office made a preliminary finding that appellant received an overpayment of compensation for the period March 21 to April 16, 2005 in the amount of $4,022.53 for which he was at fault in creating. The Office indicated that appellant continued to receive compensation for total disability through April 16, 2005 when he had returned to a modified light-duty position on March 21, 2005. On November 8, 2005 the Office finalized the decision. Appellant did not dispute the overpayment of compensation and paid the amount in full on December 5, 2005.

LEGAL PRECEDENT

Once the Office accepts a claim it has the burden of proving that the employee's disability has ceased or lessened before it may terminate or modify compensation benefits.[2] Section 8106(c)(2) of the Federal Employees' Compensation Act[3] provides that the Office may terminate the compensation of a disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[4] The Board has recognized that section 8106(c) is a penalty provision which must be narrowly construed.[5]

The Board has held that due process and elementary fairness require that the Office observe certain procedures before terminating a claimant's monetary benefits under section 8106(c)(2) of the Act.[6] Section 10.516 of the Office's regulations states that the Office will advise the employee that the work offered is suitable and provide 30 days for the employee to accept the job or present any reasons to counter the Office's finding of suitability.[7] Thus, before terminating compensation, the Office must review the employee's proffered reasons for refusing or neglecting to work.[8] If the employee presents such reasons and the Office finds them unreasonable, the Office will offer the employee an additional 15 days to accept the job without penalty.[9]

Once the Office establishes that the work offered was suitable, the burden of proof shifts to the employee who refuses to work to show that such refusal or failure to work was reasonable or justified.[10] The determination of whether an employee is physically capable of performing a modified position is a medical question that must be resolved by medical evidence.[11] Office procedures state that acceptable reasons for refusing an offered position include medical evidence of inability to do the work or travel to the job.[12] Furthermore, if medical reports

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[2] *Karen L. Mayewski*, 45 ECAB 219, 221 (1993); *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

[3] 5 U.S.C. §§ 8101-8193 (1974); 5 U.S.C. § 8106(c)(2).

[4] *Camillo R. DeArcangelis*, 42 ECAB 941, 943 (1991).

[5] *Steven R. Lubin*, 43 ECAB 564, 573 (1992).

[6] *Supra* note 3; *see also Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992); *see also Linda Hilton*, 52 ECAB 476 (2001).

[7] 20 C.F.R. § 10.516.

[8] *See Maggie L. Moore*, *supra* note 6.

[9] 20 C.F.R. § 10.516; *see Sandra K. Cummings*, 54 ECAB 493 (2003).

[10] 20 C.F.R. § 10.517(a); *Deborah Hancock*, 49 ECAB 606, 608 (1998).

[11] *See Robert Dickerson*, 46 ECAB 1002 (1995).

[12] *Id.*

document a condition which has arisen since the compensable injury and the condition disables the employee, the job will be considered unsuitable.[13]

ANALYSIS

The Office failed to provide appellant proper notice prior to terminating compensation pursuant to 5 U.S.C. § 8106(c)(2). The Office advised appellant on February 24, 2005 that the offered position of financial analyst was deemed suitable for his work capabilities. Additionally, the Office informed appellant of the consequences under 5 U.S.C. § 8106(c)(2) of refusing an offer of suitable work.

Appellant returned to work on March 21, 2005 and stopped work April 1, 2005 after working less than two weeks. In a letter dated May 4, 2005, the Office allowed him 30 days to either return to work or provide an explanation for abandoning the position. In a May 31, 2005 letter, appellant stated that he stopped work because he decided to retire effective April 2, 2005. He noted that he did not abandon the financial analyst position, rather he earned the right to decide when it was in his best interest to retire. In a decision dated June 6, 2005, the Office terminated appellant's compensation under section 8106(c) on the grounds that he abandoned suitable work. However, the Office did not make a determination that the reasons were unacceptable, prior to terminating compensation, nor did it notify appellant that he had 15 days in which to accept the offered work without penalty.

Appellant's April 1, 2005 work stoppage does not constitute an abandonment of suitable work. The Office failed to provide the appropriate notice to appellant prior to terminating compensation.[14] While the Office followed proper procedures in offering the suitable work position to appellant,[15] it did not complete the procedures necessary to establish that appellant abandoned suitable work.[16] After its May 4, 2005 letter advising him that he had 30 days to either return to work or provide an explanation for abandoning the position, the Office, after receiving appellant's reasons for stopping work, did not allow him 15 days in which to return to work before terminating his monetary benefits. The Office's procedure manual provides that, if the abandonment of the job is not deemed justified, the Office must so advise the claimant "and allow him or her 15 additional days to return to work."[17] After appellant submitted a statement dated May 31, 2005 in support of his work stoppage on April 2, 2005, the Office did not determine whether the reasons were unacceptable nor did it notify appellant that he had 15 days in which to accept or refuse the position prior to terminating compensation.[18] On June 6, 2005,

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(5) (July 1996); *see Susan L. Dunnigan*, 49 ECAB 267 (1998).

[14] *William M. Bailey*, 51 ECAB 197, 200 (1999).

[15] *See* 20 C.F.R. § 10.516 (1999).

[16] *Mary G. Allen*, 50 ECAB 103, 106 (1998).

[17] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.10(e)(1) (July 1996); *see also Sandra K. Cummings*, *supra* note 9.

[18] *Id.*

without additional prior notice, the Office terminated compensation under 5 U.S.C. § 8106(c)(2). Accordingly, the Office improperly terminated appellant's compensation.

CONCLUSION

The Board finds that the Office improperly terminated appellant's compensation on the grounds that he abandoned suitable work.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 11, 2006 is reversed.

Issued: April 11, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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