United States Department of Labor
Employees' Compensation Appeals Board

J.B., Appellant	)	
and	)	**Docket No. 08-684**
	)	**Issued: September 11, 2008**
DEPARTMENT OF THE NAVY, CAMP LEGEUNE MARINE CORPS BASE, Camp LeJeune, NC, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 31, 2007 appellant filed a timely appeal of the decision of the Office of Workers' Compensation Programs dated March 7, 2007 terminating his compensation benefits on the grounds that he refused to accept suitable work and the December 13, 2007 decision denying modification of this decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2) the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation benefits on the grounds that he refused to accept suitable work, pursuant to 5 U.S.C. § 8106(c).

FACTUAL HISTORY

On April 30, 2003 appellant, then a 46-year-old plumber, filed a traumatic injury claim alleging that on April 29, 2003, while rodding a drain with the sewer machine, the cable kinked around his left hand causing a wrist sprain. By letter dated August 11, 2003, the Office accepted

appellant's claim for left wrist sprain. It later accepted appellant's claim for left radial styloid tenosynovitis, contracture of upper joint (left shoulder) and lesion of ulnar nerve (left elbow).

In an April 16, 2004 progress note, Dr. Richard S. Moore, appellant's treating Board-certified orthopedic surgeon, listed his impressions as status post left olecranon bursectomy, status post left ulnar nerve submuscular transposition, status post left ulnar and median nerve decompression at the wrist and subacromial bursitis.

By letter dated June 25, 2004, the Office referred appellant to Dr. Noel Rogers, a Board-certified orthopedic surgeon, for a second opinion. In a report dated July 12, 2004, Dr. Rogers diagnosed appellant with sprain of the left wrist, work related; status post ulnar nerve transposition left elbow, work related; carpal tunnel syndrome status post release left; and bilateral Dupuytren's contracture. He opined that appellant was unable to return to his position as a plumber due to limited motion of the wrist and bilateral Dupuytren's contracture. Dr. Rogers further noted that appellant had residuals from the ulnar nerve transfer in that he has residual discomfort along the ulnar border of the forearm due to the elbow problem. He noted that appellant had reached maximum medical improvement. Dr. Rogers noted that appellant needed treatment for other conditions that were not accepted work conditions. Also on July 12, 2004, he completed a work capacity form indicating that appellant could reach above his shoulder limited to 2 to 4 hours. Dr. Rogers limited appellant to 1 to 2 hours each for operating a motor vehicle at work; operating a motor vehicle to and from work; repetitive motions of wrists and elbows; and pushing, pulling and lifting of up to 15 pounds. Appellant was prohibited from climbing. Dr. Rogers noted that these limitations were based on appellant's wrist and elbow problem only and that since he had other nonwork-related conditions he was probably permanently restricted from returning to work.

By letter dated February 1, 2005, the Office sent Dr. Roger's report to Dr. Moore and asked if he concurred with Dr. Roger's evaluation and work tolerance report. In a response dated March 7, 2005, Dr. Moore indicated that he reviewed the report and that he thought "the responses and restrictions are appropriate."

On June 29, 2006 the Office received a duplicate of the July 12, 2004 work capacity evaluation. The only difference from the prior evaluation was that the date June 22, 2006 was added near the diagnosis of left ulnar and left wrist sprain. However, this addition was not signed or initialed.

In a September 26, 2006 report, Dr. Moore indicated that appellant was status post right shoulder arthroscopy, subacromial decompression and arthroscopic rotator cuff repair, left submuscular ulnar nerve transposition/olecranon bursectomy and left median and ulnar nerve decompression at the wrist. He opined that appellant would be unable to tolerate a job in which pushing and pulling were a significant component and further noted that this restriction was permanent.

On November 8, 2006 the employing establishment offered appellant a position as a desk clerk.[1] The Office indicated the location of the position, the rate of pay, hours of work and supervisor. On November 15, 2005 appellant declined this position.

By letter dated January 5, 2007, the Office found the position of desk clerk suitable and advised appellant that he had 30 days from the date of the letter to either accept the position or provide an explanation of the reasons for refusing it. By letter dated January 11, 2007, appellant declined the job offer. He noted that he elected to exercise his option of retiring on regular retirement.

On February 12, 2007 the Office verified that the position was still available.

By letter dated February 12, 2007, the Office informed appellant that the reason given for refusing the position was unacceptable and gave him 15 additional days to accept the position. In a form dated February 20, 2007, appellant accepted the position of desk clerk. However, he did not report for work.

By decision dated March 7, 2007, the Office terminated appellant's compensation benefits effective that date, but retained appellant's entitlement to medical expenses for treatment of the accepted condition.

By letter dated October 11, 2007 appellant, through his representative, requested reconsideration. His representative argued that the November 8, 2006 job offer failed to meet the regulatory requirements of 5 U.S.C. § 8106 as it did not contain the specific physical requirements of the position and any special demands of the workload or working conditions. She further argued that a copy of the job offer was not sent to his treating physician for approval. Finally, appellant's representative argued that he was not sent a certified letter from the employing establishment stating the date and time he should report to work.

By decision dated December 13, 2007, the Office denied modification of the prior decision.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[2] Under section 8106(c)(2) of the Federal Employees' Compensation Act, the Office may terminate the compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.[3] To justify termination, it must show that the work offered was suitable and must

[1] The duties of this position included receiving and controlling all incident complaint reports submitted by military policeman, retrieving case control numbers from the Consolidated Law Enforcement Center; completing morning blotter report; inspecting and preparing traffic citations and receiving and controlling all identification cards seized by the military police; and handling and screening telephone calls.

[2] *Linda D. Guerrero*, 54 ECAB 556 (2003).

[3] 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

inform appellant of the consequences of refusal to accept such employment.[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]

Office regulations provide that, in determining what constitutes suitable work for a particular disabled employee, the Office 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.[6] It is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.[7] 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.[8]

Office procedures state that acceptable reasons for refusing an offered position include the withdrawal of the offer, medical evidence of inability to do the work or travel to the job or the claimant found other work which fairly and reasonably represents his or her earning capacity (in which case compensation would be adjusted or terminated based on actual earnings). Furthermore, if medical reports document a condition which has arisen since the compensable injury and the condition disables the employee, the job will be considered unsuitable.[9]

Section 10.516 of the Code of Federal 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.[10] Thus, before terminating compensation, the Office must review the employee's proffered reasons for refusing or neglecting to work.[11] 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.[12]

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[4] *Ronald M. Jones*, 52 ECAB 190 (2000).

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

[6] 20 C.F.R. § 10.500(b).

[7] *Richard P. Cortes*, 56 ECAB 200 (2004).

[8] *Id.; Bryant F. Blackmon,* 56 ECAB 752 (2005).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(4) (July 1997).

[10] 20 C.F.R. § 10.516.

[11] *See Sandra K. Cummings*, 54 ECAB 493 (2003); *see also Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992) and 20 C.F.R. § 10.516 which codifies the procedures set forth in *Moore*.

[12] *Id.*

ANALYSIS

The Office accepted that appellant sustained the following conditions as a result of his April 29, 2003 employment injury: left wrist sprain, left radial styloid tenosynovitis, contracture of the upper joint (left shoulder) and lesion of the ulnar nerve (left elbow). It determined that the position offered to appellant of desk clerk, was suitable, and that appellant did not report to work and therefore refused to accept a suitable position. However, a review of the evidence in the record indicates that there is insufficient evidence to support a finding that the offered position constituted suitable work.

Before compensation can be terminated, the Office 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.[13] In other words, to justify termination of compensation, the Office has the burden of showing that the work offered to and refused by appellant was suitable.[14]

In making the offer of employment, the employing establishment indicated the specific duties of the job. However, in order for the offer to be valid, the Office's regulations indicate that the offer must list "[t]he specific physical requirements of the position and any special demands on the workload or unusual working conditions."[15] The Board finds that the job offer did not include a list of the physical demands of the position of desk clerk. Accordingly, the offer was deficient and cannot constitute an offer of suitable employment.

Furthermore, when determining if a job offer constitutes suitable employment, all of appellant's medical conditions, whether work related or not, must be considered in assessing the suitability of the position.[16] In finding that appellant rejected suitable employment, the Office found that the position was within the work limitation provided by the second opinion physician, Dr. Rogers and agreed upon by appellant's treating physician, Dr. Moore. However, Dr. Rogers clearly indicated, in completing the work capacity evaluation upon which the Office based its opinion, that the limitations were based on appellant's wrist and elbow problem only and that since he had other nonwork-related conditions he was probably permanently restricted from returning to work." Accordingly, Dr. Roger's opinion, as well as Dr. Moore's note that he agreed with this opinion, are not sufficient to establish appellant's limitations because they do not include all of appellant's medical conditions.

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

[14] *Id.*

[15] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(a)(1)(b).

[16] *Id.;* Chapter 2.814.4(b)(4).

As it is the Office's burden of proof to establish that appellant refused a suitable position, the Office did not meet its burden of proof in this case to terminate appellant's compensation benefits pursuant to 5 U.S.C. § 8106.[17]

CONCLUSION

The Board finds the Office did not properly terminate appellant's compensation benefits on the grounds that he refused to accept suitable work.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 31 and March 7, 2007 are reversed.

Issued: September 11, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[17] *Barbara R. Bryant*, 47 ECAB 715 (1996).