United States Department of Labor
Employees' Compensation Appeals Board

LEON JARRETT, Appellant	)	
and	)	**Docket No. 03-1979**
	)	**Issued: April 27, 2004**
U.S. POSTAL SERVICE, MAIN POST OFFICE, Oakland, CA, Employer	)	

Mark Coby, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On August 8, 2003 appellant filed a timely appeal of the Office of Workers' Compensation Programs' hearing representative's decision dated June 5, 2003, which affirmed the termination of his compensation on the grounds that he refused an offer of suitable employment. Under 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 the Office properly terminated appellant's compensation on the grounds that he refused an offer of suitable work.

FACTUAL HISTORY

On November 14, 1999 appellant, then a 48-year-old mail handler, filed a traumatic injury claim alleging that on October 14, 1999 he injured his neck and shoulder when a bulk mail

cart hit him.[1] On the back of the form the employing establishment noted that appellant did not lose any time due to this injury. The Office accepted the claim for right shoulder sprain and cervical strain and authorized arthroscopic acromioplasty and open Mumford surgery, which was performed on September 28, 2000. Appellant stopped work on September 28, 2000 and has not returned.

On December 12, 2001 the Office referred appellant to Dr. Robert R. McIvor, a Board-certified orthopedic surgeon, to resolve a conflict in the medical opinion evidence between Dr. James B. Reynolds, an attending Board-certified orthopedic surgeon, and Dr. Jerrold M. Sherman, a Board-certified orthopedic surgeon and Office referral physician, on the issue of appellant's continuing disability. Dr. Reynolds opined that appellant was totally disabled from working for the employing establishment while Dr. Sherman concluded that he was capable of working four hours a day with restrictions. The Office requested Dr. McIvor to review a limited-duty video coding system technician job position description to determine whether it was within appellant's physical restrictions.[2] The duties of this position involved reading addresses into a microphone and being able to sit or stand as needed. The position description noted appellant would receive on-the-job training during the first two weeks. Physical requirements of the position included ability to see and read text on a computer screen, the ability to speak and no use of any hands is required. The position description also noted appellant would be given a 30-minute lunch during an 8-hour work period and 5-minute breaks every hour.

In a report dated February 11, 2002, Dr. McIvor diagnosed multi-level cervical disc degeneration, right should impingement syndrome and lumbar disc rupture with subsequent foraminotomy, spinal fusion and laminectomy. Based upon a review of the medical evidence, history of employment injuries, statement of accepted facts, the limited-duty job description for a video coding system technician and physical examination, the physician concluded that appellant was capable of working four hours a day with restrictions. Dr. McIvor noted that appellant had complaints of frequent migraine headaches involving the right side of his head and face and constant pain radiating from his neck to right arm. Regarding appellant's ability to perform the position of video coding system technician, Dr. McIvor stated that the position did not require any physical activity other than standing and sitting. Appellant's restrictions included no more than a ½ hour sitting, ½ hour standing and walking, no strong pulling or pushing over 10 pounds, nor overhead reaching and no lifting more than 1 pound. The physician stated that appellant's commuting ability was not restricted and he saw "no reason he could not take public transportation or actually drive to his job."

[1] This was assigned claim number 13-1203173. Appellant had filed a previous claim for an injury sustained on July 5, 1983 which was assigned claim number 13-0711273. The Office accepted the claim for right sacroiliac sprain, lumbar myositis, herniated disc at L4-5, S1-2 and authorized a lumbar discetomy fusion. Appellant sustained recurrences of disability beginning November 21, 1988 and April 12, 1991, which the Office accepted. He returned to a limited-duty position on June 1, 1999. The Office doubled claim numbers 13-1203173 and 13-0711273 with the former as the master number.

[2] On September 27, 2001 the employing establishment sent a copy of the position description to appellant's physician, requesting the physician to review the position description and advised if appellant was capable of performing the duties of the position. Dr. Reynolds indicated that appellant was unable to perform the position on October 2, 2001.

On March 27, 2002 the employing establishment offered appellant the position of video coding system technician with a start date of April 8, 2002. The duties in the position description included using a headset microphone to record addresses for mail which were displayed on a computer screen. Appellant would be able to stand or sit as needed, take 5-minute breaks every hour and a 30-minute lunch. The physical requirements for the position were the ability to sit or stand as required and a five-minute break every hour. The offer stated that appellant would have on-the-job training during his first two weeks. The position was permanent with work hours of 3:30 p.m. to 7:30 p.m.

On March 29, 2002 the Office informed appellant that the offered position was suitable and allowed him 30 days to accept the position or offer his reasons for refusal. The Office informed appellant of the penalty provisions of the Federal Employees' Compensation Act.

In an April 5, 2000 memorandum, it was noted that appellant had not received the job offer as it was sent to an incorrect address. He contended his medical issues had not been adequately addressed and the claims examiner advised him to submit any medical evidence for consideration.

On April 5, 2002 the employing establishment offered appellant the position of video coding system technician with a start date of April 15, 2002. The duties included in the position description included using a headset microphone to record addresses for mail which were displayed on a computer screen, the ability to sit or stand as required and a five-minute break every hour. The offer noted that appellant would have on-the-job training during his first two weeks.

On April 8, 2002 the Office informed appellant that the offered position for 4 hours a day was suitable and allowed him 30 days to accept the position or offer his reasons for refusal. The Office informed appellant of the penalty provisions of the Act.

In an April 10, 2002 letter, appellant requested a copy of his file.

By letter dated May 9, 2002, the Office advised appellant that it appeared he was refusing the offered position as no response had been received. The Office informed appellant that he had an additional 15 days to accept the position. Appellant accepted the position on May 26, 2002 and returned to work on May 28, 2002. On May 30, 2002 appellant stopped work.

On May 31, 2002 appellant filed a claim for compensation (Form CA-7) and an accompanying attending physician's report (Form CA-20), dated May 30, 2000 from Dr. Reynolds.[3]

In a letter dated June 4, 2002, the Office advised appellant that it had reviewed the offer of employment, compared it with the medical evidence concerning his ability to work and found the offer suitable. The Office noted that appellant had formally accepted the job offer on May 26, 2002, returned to work on May 28, 2002 and stopped work on May 30, 2002.[4] The

[3] The Board notes that this report is illegible.

[4] Appellant informed the employing establishment that his work stoppage was due to a new injury.

Office informed him that it appeared he was refusing an offer of suitable work and advised appellant that his refusal was not justified. Appellant was reminded of the penalty provisions for refusing suitable work and afforded 15 days in which to accept the position or his benefits would be terminated pursuant to 5 U.S.C. § 8106(c).

In a memorandum of a telephone call on June 11, 2002, appellant informed the claims examiner that his condition was aggravated by working on May 28 and 29, 2002. The claims examiner advised him to file a CA-2, as this would be considered a new injury.

In a June 13, 2002 letter, the Office noted that appellant had stopped work on May 30, 2002 and that he had informed the employing establishment that he had sustained a new injury. The Office informed appellant that the CA-7 and CA-20 forms he submitted were insufficient to explain why he should be paid compensation or why he had stopped work. The Office then advised him of the information needed to support a claim for a recurrence of disability.

In a June 20, 2002 letter, appellant's counsel enclosed a copy of a June 17, 2002 report from Dr. Reynolds. Appellant argued he was totally disabled due to "his multiple herniated discs in his lumbar and cervical spine with radiculopathy." He also argued that both Drs. Sherman and McIvor failed to consider all of his complaints due to his two work injuries.

In the June 17, 2002 report, Dr. Reynolds stated that he had reviewed the reports of Dr. McIvor and Dr. Sherman and disagreed with their conclusion that appellant was capable of working four hours a day with restrictions. The physician concluded that appellant remained totally disabled and required pain management treatment. He noted that neither physician reviewed the "reports and imaging studies of the m[agnetic] r[esonance] i[maging] tests of the lumbar and cervical spine available to them or did not choose to include them in their reports."

By decision dated July 18, 2002, the Office terminated appellant's compensation benefits on the basis that he had refused an offer of suitable work.

Appellant's counsel requested a hearing which was held on March 24, 2003 at which appellant was represented by counsel.

By decision dated June 5, 2003, an Office hearing representative affirmed the July 18, 2002 termination of appellant's compensation.

LEGAL PRECEDENT

Section 8106(c) provides in pertinent part: "A partially disabled employee who … refuses or neglects to work after suitable work is offered ... is not entitled to compensation." It is the Office's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.[5] To justify such a termination, the Office must show that the work offered was suitable.[6] An employee who refuses or neglects to work

[5] *Henry P. Gilmore*, 46 ECAB 709 (1995).

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

after suitable work has been offered to him has the burden of showing that such refusal to work was justified.[7]

It is well established that there are procedural requirements that are attached to the provisions of section 8106(c). Essential due process principles require that a claimant have notice and an opportunity to respond prior to termination under section 8106(c).[8] These requirements apply to both refusal of suitable work determinations and to abandonment of suitable work determinations.[9]

The Office's procedure manual provides guidelines pertaining to the development of claims where a claimant stops work after reemployment. If no formal wage-earning capacity determination is issued following reemployment, the Office is to consider whether the reasons for stopping work amount to a recurrence of disability.[8] Where a claimant returns to a light-duty job, the employee must thereafter show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements to support continuing disability.[9]

To determine whether a claimant has abandoned suitable work, the procedure manual notes that the claims examiner is to make a finding of suitability, advise the claimant that the job is suitable and allow 30 days for submission of evidence or reasons for abandoning the job.[10] Following the submission of a claimant's response, the procedure manual directs that the claims examiner is to determine whether the reasons for stopping work are valid. If the reasons for abandoning the job are not deemed justified, the claimant must be so advised and allowed 15 additional days to return to work.[11] The imposition of section 8106(c), a penalty provision, is premised on the fact that suitable work remains available and the job held open during the required notice period.

ANALYSIS

In the instant case, appellant accepted the limited-duty position of video coding system technician on May 26, 2002 and returned to work on May 28, 2002. On May 30, 2002 he stopped work and subsequently filed a claim for compensation along with medical evidence.

Subsequent to appellant's work stoppage, the Office advised him on June 4, 2002 that the offered position of video coding system technician was deemed suitable for his work capabilities. In addition, the Office also informed appellant that it appeared he was refusing an offer of suitable work and that his refusal was not justified. The Office informed him of the consequences under 5 U.S.C. § 8106(c)(2) of refusing an offer of suitable work. The Office

[7] *Catherine G. Hammond*, 41 ECAB 375, 385 (1990); 20 C.F.R. § 10.517(a).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9 (December 1995).

[9] *See Terry R. Hedman*, 38 ECAB 222 (1986).

[10] Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 2.814.10.

[11] *Id.* at Chapter 2.814.10(e)(1).

afforded appellant an additional 15 days to return to work and advised him that any further reasons for refusal would not be considered. Appellant, in a June 11, 2002 memorandum of a telephone call, informed the Office that his condition had been aggravated by work on May 28 and 29, 2002 and that he did not sustain a new injury. In a June 13, 2002 letter, the Office informed appellant of the information required to support a claim for a recurrence of disability. He subsequently submitted additional medical evidence and argument by a June 20, 2002 letter from his counsel.

The Board finds that appellant's May 30, 2002 work stoppage does not constitute a refusal of suitable work. He accepted the position, returned to work and thereafter, stopped work on May 30, 2002 based on a claimed recurrence of disability. The Office, in a June 13, 2002 letter, informed him of the information required for a recurrence claim, but failed to provide the appropriate notice to appellant prior to terminating compensation.[12] While the Office followed proper procedures in offering the suitable work position to appellant,[13] it did not complete the procedures necessary to establish that he abandoned suitable work.[14] The Office's procedure manual provides that the Office must advise appellant that the job is suitable and that refusal of it may result in application of the penalty provision of 5 U.S.C. 8106(c)(2) and allow the claimant 30 days to submit his reasons for abandoning the job.[15] In addition, if appellant submits evidence or reasons for his abandonment, the Office must determine whether his reason for abandoning the job is valid. The Office, while noting that appellant had worked two days, informed him that he was refusing an offer of suitable work, that his refusal was not justified and afforded him 15 days to accept the job without penalty. As appellant had returned to work and then stopped, he did not refuse an offer of suitable work. Upon notification that he stopped work, the Office, under its procedures, was required to consider his reasons including whether appellant's work stoppage amounted to a recurrence of disability.

The record contains no evidence that the Office followed established procedures prior to the termination of benefits on July 18, 2002. Appellant was not provided 30 days to submit evidence or rationale for abandoning the job and the Office failed to consider whether his reasons for abandoning the job were valid. Thus, appellant was not provided with notice or an opportunity to respond with respect to a determination that he neglected suitable work.[16]

CONCLUSION

Accordingly, the Office improperly terminated appellant's compensation as the Office's July 18, 2002 and June 5, 2003 decisions do not comport with the above procedural requirements nor properly invoke the penalty provision of section 8106(c).

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

[13] *See* 20 C.F.R. § 10.516 (1999).

[14] *Mary G. Allen*, 49 ECAB 103, 106 (1998).

[15] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.10 (July 1996).

[16] *See Terry R. Hedman*, *supra* note 9.

ORDER

IT IS ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 5, 2003 be and is hereby reversed.

Issued: April 27, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member