United States Department of Labor
Employees' Compensation Appeals Board

MELVIN JAMES, Appellant	)	
and	)	**Docket No. 03-2140**
	)	**Issued: March 25, 2004**
U.S. POSTAL SERVICE, VEHICLE MAINTENANCE FACILITY, Bedford Park, IL, Employer	)	

Appearances:
Melvin James, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On September 4, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions dated November 26, 2002 and July 2, 2003 terminating his compensation benefits on the grounds that he refused an offer of suitable work. Pursuant to 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 met its burden of proof to terminate appellant's compensation benefits effective November 25, 2002 on the grounds that he refused an offer of suitable work; and (2) whether appellant has established entitlement to continuing compensation benefits on or after November 25, 2002.

FACTUAL HISTORY

On December 20, 1990 appellant, then a 32-year-old tool and parts clerk, filed a traumatic injury claim alleging that on December 18, 1990 he injured his left shoulder, left hip and lower back when he was pinned between a cabinet and a desk. The Office accepted appellant's claim for lumbar strain and left shoulder contusion on February 7, 1991. The Office later expanded appellant's claim to include left shoulder capsulitis and permanent aggravation of degenerative disc disease at L4-5. The Office granted appellant a schedule award for an 8 percent permanent impairment of his left upper extremity on May 18, 1994 and a schedule award for a 29 percent permanent impairment of his left lower extremity on January 22, 1998.

In a decision dated December 7, 2001, the Office reduced appellant's compensation benefits to zero based on his return to work on September 4, 2001. The Office then accepted that appellant sustained a recurrence of disability due to his accepted employment injuries on February 11, 2002.

On July 24, 2002 the employing establishment offered appellant a limited-duty position as a tool and parts clerk. Appellant refused the position. In a letter dated August 29, 2002, the Office informed appellant that the position was suitable and that he had 30 days to accept the position or to offer his reasons for refusal. Appellant responded on September 23, 2002 and offered reasons for his refusal. By letter dated October 2, 2002, the Office informed appellant that the reasons for refusing the position were not acceptable and granted an additional 15 days to accept the suitable work position. Appellant declined the position and argued that the offered position was not within his current work restrictions.

On November 6, 2002 the Office referred appellant, a statement of accepted facts, a copy of his offered position description and a list of questions to Dr. Leonard R. Smith, a Board-certified orthopedic surgeon, for a second opinion evaluation.[1]

By decision dated November 26, 2002, the Office terminated appellant's compensation benefits effective November 25, 2002 on the grounds that he refused an offer of suitable work.

Appellant requested an oral hearing on December 12, 2002. He later withdrew this request and requested reconsideration from the Office on April 2, 2003. By decision dated July 2, 2003, the Office reviewed appellant's claim on the merits and denied modification of its November 26, 2002 decision.

LEGAL PRECEDENT -- ISSUE 1

It is well settled that, once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[2] Section 8106(c) of the Federal

[1] The second opinion physician examined appellant on December 2, 2002.

[2] *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

Employees' Compensation Act[3] 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. Section 10.516 of the applicable regulations states:

> "[The Office] shall advise the employee that it has found the offered work to be suitable and afford the employee 30 days to accept the job or present any reasons to counter [the Office's] finding of suitability. If the employee presents such reasons, and [the Office] determines that the reasons are unacceptable, it will notify the employee of that determination and that he or she has 15 days in which to accept the offered work without penalty. At that point in time, [the Office's] notification need not state the reasons for finding that the employee's reasons are not acceptable."[4]

The Board has further found that, although the Office cannot ignore evidence submitted after the period allotted for submitting reasons for not accepting on offered position, submission of such belated evidence does not require the Office to afford appellant another 15 days to accept or reject the position. Otherwise an appellant could postpone indefinitely the termination of his compensation for refusal of suitable work by offering new reasons each time the Office advises appellant that he must accept the position or have his compensation terminated.

Once the Office advises a claimant that his or her reasons for refusing an offered position are unacceptable and that he or she has 15 days to accept the position or have compensation terminated, the claimant submits further reasons and supporting evidence at his or her own risk. Nevertheless, the Office must consider the reasons and evidence and can then concurrently reject them as unacceptable and terminate compensation.[5]

ANALYSIS -- ISSUE 1

In a report dated July 23, 2002, appellant's attending physician, Dr. Noam Y. Stadlan, a Board-certified neurosurgeon, stated that appellant could work at a sedentary level. The employing establishment offered appellant a limited-duty position of tool and parts clerk on July 24, 2002. This position required appellant to stand, walk and sit for a maximum of 60 to 90 minutes at a time. The position also required him to lift, pull and carry 5 to 10 pounds frequently with occasional twisting, reaching and bending.

In a letter dated July 25, 2002, the Office asked Dr. Stadlan if appellant could perform the duties of the offered position. On August 19, 2002 Dr. Stadlan resubmitted previously completed reports from August 2001 and indicated that appellant could lift, carry and pull from 5 to 10 pounds frequently and lift up to 15 pounds occasionally within the light to medium work capacity. He further found that appellant could sit, stand and walk from 60 to 90 minutes at a time with occasional bending, twisting and turning.

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[3] 5 U.S.C. § 8106(c)(2).

[4] 20 C.F.R. § 10.516.

[5] *Kenneth R. Love*, 50 ECAB 193, 198 (1998).

The Office found that the position was suitable on August 29, 2002 and allowed appellant 30 days to present acceptable reasons for refusing the position.

In a narrative report dated September 19, 2002, Dr. Stadlan stated that appellant was capable of working at a sedentary level. Appellant objected to the offered position on September 23, 2002 and argued that the job offer was not correctly coded as it was a modified position rather than a "rehab[ilitation] employee." The Board has previously held that refusing an offered job because of lack of job security is unacceptable.[6]

Following the Office's October 2, 2002 letter informing him that the reason offered was unacceptable and allowing appellant 15 days to accept the offered position, appellant submitted an additional reason for refusing the position, that although his attending physician, Dr. Stadlan, provided work restrictions within the light/medium level in a narrative report dated August 29, 2001 on September 19, 2002 Dr. Stadlan stated that appellant could only perform sedentary work.

In a letter dated November 6, 2002, the Office informed appellant that it had received the September 19, 2002 report regarding sedentary work restrictions and a referral to a pain clinic. The Office stated that referral to a second opinion physician was necessary to determine whether appellant required further medical treatment. The Office provided the second opinion physician with a copy of the job description and a list of questions including a request for a comment on appellant's ability to work, completion of a work restriction form report and response to whether appellant could return to work in a sedentary position. The Office, therefore, undertook additional development of appellant's claim regarding whether the offered position was suitable after the expiration of the October 17, 2002 deadline as provided in the October 2, 2002 letter to appellant.[7]

Prior to appellant's examination by the second opinion physician, the Office issued its November 26, 2002 decision finding that appellant refused an offer of suitable work. The Office did not address appellant's argument that Dr. Stadlan supported an increase of his work restrictions[8] in the November 26, 2002 decision. Furthermore, although the Office undertook additional development of appellant's claim including the determinative issue, obtaining medical evidence of whether appellant was capable of performing the offered position, the Office issued the November 26, 2002 decision prior to receiving the medical report requested from the second opinion physician. Proceedings before the Office are not adversarial in nature and the Office is not a disinterested arbiter; in a case where the Office "proceeds to develop the evidence and to procure medical evidence, it must do so in a fair and impartial manner."[9] The failure of the

[6] *C.W. Hopkins*, 47 ECAB 725, 727 (1996).

[7] *Cf. Adrienne L. Curry*, 53 ECAB ___ (Docket No. 01-1791, issued August 22, 2002)(where the Board found the Office may not find a position suitable and then obtain medical evidence to show it).

[8] *Kenneth R. Love*, 50 ECAB 193, 198 (1998); *C.W. Hopkins*, *supra* note 6 at 728 (1996).

[9] *Walter A. Fundinger, Jr.*, 37 ECAB 200, 204 (1985).

Office to consider appellant's additional argument and to obtain the report of the second opinion physician prior to issuing the November 26, 2002 decision requires reversal of that decision.[10]

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits effective November 25, 2002 as the Office failed to consider appellant's additional reasons for refusing the offered position and the Office failed to obtain the second opinion medical report prior to reaching a determination that the offered position was suitable.

ORDER

IT IS HEREBY ORDERED THAT the July 2, 2003 and November 26, 2002 decisions of the Office of Workers' Compensation Programs are hereby reversed.

Issued: March 25, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[10] Due to the Board disposition of this issue, the second issue is moot and will not be addressed by the Board.