United States Department of Labor
Employees' Compensation Appeals Board

DANNY R. ROWE, Appellant	)	
and	)	**Docket No. 04-2100**
	)	**Issued: April 8, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Oklahoma City, OK, Employer	)	

Appearances:
William H. Brawner, 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 25, 2004 appellant filed a timely appeal from a November 26, 2003 merit decision of the Office of Workers' Compensation Programs terminating his compensation benefits effective November 29, 2003 on the grounds that he refused an offer of suitable work. Appellant also appealed a May 27, 2004 decision denying modification. 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 met its burden of proof to terminate appellant's compensation on the grounds that he refused an offer of suitable work.

FACTUAL HISTORY

On July 9, 1992 appellant, then a 38-year-old letter carrier filed a traumatic injury claim alleging that he sustained a neck and shoulder injury when attacked by a dog on July 7, 1992. The Office accepted the claim for aggravation of a preexisting herniated nucleus pulposus and

authorized surgery on January 16 and November 13, 1997.[1] Appellant worked limited duty intermittently until stopping completely on April 28, 2001.

Appellant came under the care of Dr. Samuel G. Cornelius, an osteopath and Board-certified orthopedist, who noted treating appellant since March 1994. He noted a history of appellant's work-related injury of July 7, 1992 and subsequent treatment. On October 7, 1996 Dr. Cornelius referred appellant to Dr. Daniel Stough, a Board-certified orthopedist, for surgical intervention. Dr. Stough noted that a magnetic resonance imaging (MRI) scan dated October 22, 1996 revealed a moderate-sized left posterolateral disc extrusion at C6-7 causing moderate central canal stenosis, moderate to severe left foraminal stenosis and a mild annular disc bulge at C5-6 eccentric to the left causing mild central canal stenosis. In reports dated October 22 through December 12, 1996, he recommended surgical intervention. On January 3, 1997 the Office authorized anterior cervical disc removal and fusion at C5-6. In an operative report dated January 16, 1997, Dr. Stough noted performing an anterior cervical microdiscectomy at C5-6 and C6-7, interbody fusion at C5-6 and C6-7 and harvesting iliac graft. He diagnosed degenerative cervical disc disease with herniation and radiculopathy at C5-6 and C6-7. Appellant continued to experience neck and arm pain and Dr. Stough recommended a C6-7 decompression foraminotomy. The Office medical adviser concurred and the Office subsequently authorized surgery on October 29, 1997. In an operative report dated November 13, 1997 appellant underwent a posterior cervical laminectomy at C6-7, left with foraminotomy and diagnosed radiculopathy, left C7 secondary to severe foraminal stenosis left C6-7.

Appellant stopped working on April 28, 2001. In a report dated May 2, 2002, Dr. Cornelius advised that appellant had reached maximum medical improvement and could not return to work.

On May 23, 2002 the Office referred appellant to Dr. John B. Hughes, an osteopath and Board-certified orthopedist, for a second opinion evaluation. In a report dated June 17, 2002, Dr. Hughes discussed appellant's work history. He diagnosed status postoperative cervical spinal fusion with associated residual, chronic left-sided radiculitis. Dr. Hughes advised that appellant could return to work in a sedentary desk job for eight hours per day, with permanent restrictions of no repetitive lifting, pushing, pulling or any of the components of ordinary manual labor.

In a form dated October 22, 2002, Dr. Cornelius concurred with Dr. Hughes' opinion that appellant could work in a sedentary position eight hours per day with permanent restrictions. In a work capacity evaluation dated October 22, 2002, Dr. Cornelius advised that appellant could return to work eight hours per day with intermittent sitting, walking, standing or squatting for five hours per day, and no reaching, twisting, operating a vehicle, repetitive movements, pushing, pulling, lifting, kneeling and climbing.

[1] Appellant filed a traumatic injury claim on August 30, 1989 alleging that he was tossing mail and injured his upper neck and shoulder while in the performance of duty, file number 16-0209787. The Office accepted appellant's claim and consolidated that case with the current case on appeal before the Board.

On October 31, 2002 the employing establishment offered appellant a full-time position as a modified-duty city carrier. The physical requirements of the position included repairing damaged mail while sitting and using his hands intermittently for simple grasping and fine manipulation. The position was subject to the restrictions set forth by Dr. Cornelius in his report of October 22, 2002.

By letter dated November 8, 2002, the Office informed appellant that it had reviewed the position description and found the job offer suitable with his physical limitations. Appellant was advised that he had 30 days to accept the position or offer his reasons for refusing. He was apprised of the penalty provision of the Federal Employees' Compensation Act[2] if he did not return to suitable work.

Appellant, through his attorney, submitted a letter dated November 6, 2002 rejecting the job offer contending that the position duties were outside the restrictions as set forth by Dr. Cornelius. Appellant submitted a letter from Dr. Cornelius dated November 5, 2002, who advised that the job site was 14 miles from appellant's residence which was too far for appellant to commute. Additionally, he advised that the job required simple grasping with appellant's hands and required him to sit for extended periods of time; however, appellant had limited ability to use his left hand and could not sit for prolonged periods of time.

In a letter dated April 15, 2003, the Office requested that Dr. Cornelius obtain a work capacity evaluation. In a work capacity evaluation dated May 7, 2003, Dr. Cornelius advised that appellant could return to work four hours per day with permanent restrictions of intermittent sitting, walking, standing and squatting for four hours per day; however, he was prohibited from reaching, reaching above the shoulders, twisting, operating a motor vehicle, repetitive movements of the wrist and elbow, pushing, pulling, lifting, kneeling and climbing. In a report of the same date, he advised that appellant would need to take breaks every 30 to 45 minutes, required two consecutive days off from work, was prohibited from driving at night, could only work in a local area during the day and would require a contour chair.

Appellant submitted various reports from Dr. Cornelius dated March 4, 2002 to April 14, 2003 which noted appellant's complaints of persistent pain. On July 21 and 24, 2003 Dr. Cornelius noted that appellant was still symptomatic in the neck; however, his shoulder had improved.

In a letter dated July 16, 2003, the Office of Personnel Management (OPM) informed appellant that his application for disability retirement had been approved.

On September 26, 2003 the employing establishment forwarded appellant a part-time position four hours per day as a modified-duty city carrier. The requirements of the position included nixies, verifying change of address, forwards and returns for two to two and a half hours, verify carrier cases for mail left in a case for up to one hour per day, writing forms for accountable mail for up to one hour per day, monitoring that employees were wearing identification for .20 hours per day, door security monitor for up to one hour per day and vehicle

[2] 5 U.S.C. §§ 8108-8193.

security monitor for up to one hour per day. The job description noted that all work would be performed right handed with simple grasping and manipulation. The position did not require reaching, reaching above the shoulder, twisting, operating a motor vehicle, repetitive movements of the wrists or elbows, pushing, pulling, kneeling, climbing or lifting more than five pounds intermittently.

On September 30, 2003 appellant rejected the job offer and advised that he was approved for disability retirement and was accepting retirement.

In a letter dated October 10, 2003, 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.

Appellant submitted a new report from Dr. Cornelius dated June 18, 2003 which noted a detailed history of appellant's treatment and advised that appellant could not return to the work site in any capacity for physical and psychological reasons. In an attending physician's report of October 6, 2003, he diagnosed herniated cervical disc at C6-7 and C5-6 and impingement syndrome of the left shoulder. Dr. Cornelius noted with a checkmark "yes" that appellant's condition was caused or aggravated by an employment activity. He noted that appellant could not return to work.

By letter dated November 6, 2003, the Office advised appellant that it had reviewed appellant's reason for refusal of the offered position and the refusal not justified. The Office advised appellant that the modified position was suitable work and he would be given an additional 15 days to accept the job offer without penalty.

Appellant submitted duplicated medical records from Dr. Cornelius from February 9, 2001 to June 18, 2003.

By decision dated November 26, 2003, the Office terminated appellant's compensation, finding that he refused an offer of suitable work.

By letter dated May 19, 2004, appellant requested reconsideration and submitted a sworn statement from Dr. Cornelius. Appellant indicated that he rejected the job offer on the advice of his physician. In a sworn statement dated February 13, 2004, Dr. Cornelius advised that appellant was incapable of performing the job duties of the position offered and that they were medically unsuitable for him. Dr. Cornelius advised that he contacted the claims examiner on September 26, 2003 and informed her that the job offer of September 2003 was medically unsuitable for appellant and required the use of both hands for grasping and fine manipulation.

In a decision dated May 27, 2004, the Office denied modification of the prior decision.

LEGAL PRECEDENT

Section 8106(c)(2) of the Act states that a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or

secured for him is not entitled to compensation.[3] The Office has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects suitable work when it is offered. Before compensation can be terminated, however, 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.[4] In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused or neglected by appellant was suitable.[5]

Section 10.124(c) of the applicable regulations[6] provides that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee, 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 showing before a determination is made with respect to termination of entitlement to compensation. To justify termination of compensation, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[7]

ANALYSIS

The Board finds that the medical evidence does not establish that appellant was capable of performing the listed requirements of the offered position. The requirements of the position included working four hours per day with nixies, verifying change of address, forwards and returns for two to two and a half hours, verifying carrier cases for mail left in a case for up to one hour per day, writing forms for accountable mail for up to one hour per day, monitoring that employees were wearing identification for .20 hours per day, dock security monitor for up to one hour per day, door security monitor for up to one hour per day and vehicle security monitor for up to one hour per day. The position was subject to restrictions of intermittent sitting, walking, standing, and squatting for up to four hours per day and intermittent lifting of zero to five pounds, and noted that all work would be performed with the right hand with simple grasping and manipulation. The position did not require reaching, reaching above the shoulder, twisting, operating a motor vehicle, repetitive movements of the wrists or elbows, pushing, pulling, kneeling, climbing or lifting more than five pounds intermittently. The medical restrictions set forth by Dr. Cornelius on May 7, 2003 included working four hours per day with permanent restrictions of intermittent sitting, walking, standing and squatting for no more than four hours per day; and appellant was prohibited from reaching, reaching above the shoulders, twisting, operating a motor vehicle, repetitive movements of the wrist and elbow, pushing, pulling, lifting, kneeling and climbing.

[3] 5 U.S.C. § 8106(c)(2).

[4] *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

[5] *Glen L. Sinclair*, 36 ECAB 664 (1985).

[6] 20 C.F.R. § 10.124(c).

[7] *Arthur C. Reck*, 47 ECAB 339, 341-42 (1996).

As this position indicates that appellant is required to lift from zero to five pounds intermittently, the Board finds that the position is not suitable.[8] Dr. Cornelius indicated on June 18, 2003 that appellant could not return to work, moreover, the employing establishment and the Office relied upon the medical reports of Dr. Cornelius in formulating the modified job offer. The record is clear, however, that Dr. Cornelius changed his opinion as to appellant's capacity to perform the duties of the modified position. There is no indication that he approved the additional requirement of lifting zero to five pounds a day. As the position offered exceeds appellant's work restrictions, it is not suitable and the Office failed to meet its burden of proof to terminate appellant's compensation benefits. The medical evidence fails to establish that the job offered was suitable, and the Office improperly terminated his compensation on the grounds that he refused an offer of suitable work.[9]

CONCLUSION

The Board finds that the modified position offered to appellant was not suitable and outside his physical restrictions. Therefore, the Office improperly applied the penalty provision of section 8106(c)(2).[10]

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs decisions dated May 27, 2004 and November 26, 2003 are reversed.

Issued: April 8, 2005
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[8] *Cf. Gregory Apicos*, 51 ECAB 272 (2000) (where the Board found that a position was unsuitable where the job offer required appellant to twist up to four hours per day and the Office referral physicians restricted appellant to twisting only occasionally).

[9] *See Patrick A. Santucci*, 40 ECAB 151 (1988).

[10] With his appeal appellant submitted additional evidence. However, the Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c).