United States Department of Labor
Employees' Compensation Appeals Board

ERVINE E. RUMPH, Appellant	)	
and	)	**Docket No. 06-103**
	)	**Issued: April 17, 2006**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Atlanta, GA, Employer	)	

Appearances:
Ervine E. Rumph, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 20, 2005 appellant filed a timely appeal from an August 10, 2005 merit decision of the Office of Workers' Compensation Programs in which a hearing representative affirmed the termination of appellant's compensation 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 properly terminated appellant's compensation benefits effective October 30, 2004 on the grounds that he refused an offer of suitable work under 5 U.S.C. § 8106; (2) whether appellant has established entitlement to continuing compensation benefits on or after October 30, 2004; and (3) whether the Office properly found that appellant was not entitled to a schedule award because he refused an offer of suitable work under section 8106.

FACTUAL HISTORY

On February 16, 2004 appellant, then a 46-year-old part-time flexible mail handler, filed an occupational disease claim alleging that he sustained cervical spine disease with major neck surgery, the loss of use of his left arm and shoulder and a worsening low back condition due to factors of his federal employment. The Office accepted appellant's claim for adhesive capsulitis of the left shoulder and an aggravation of cervical spinal stenosis.

In a form report dated April 7, 2004, Dr. Ahmad Jingo, a Board-certified internist and an attending physician, diagnosed frozen shoulder and cervical spine disease and released appellant to return to work with restrictions on lifting over 15 pounds.

In an office visit note also dated April 7, 2004, Dr. Michael P. Bernot, a Board-certified orthopedic surgeon and an attending physician, noted that appellant underwent a cervical fusion on September 24, 2003 and currently experienced problems with his left shoulder. He indicated that a magnetic resonance imaging (MRI) study of the shoulder showed tendinopathy but no rotator cuff tear. Dr. Bernot recommended a functional capacity evaluation.

On April 15, 2004 appellant accepted a position as a modified part-time flexible mail handler with the employing establishment. The position was for 5 hours per day 6 days per week with no lifting over 15 pounds or strenuous physical activity and intermittent grasping, standing and walking. Dr. Jingo approved the job offer on May 3, 2004.

In a work restriction evaluation dated May 13, 2004, Dr. Bernot found that appellant could work full time with permanent restrictions against pushing, pulling or lifting over 10 pounds or reaching over the shoulder more than 1 hour per day.

In a letter dated May 27, 2004, the Office noted that appellant had returned to work on April 27, 2004 but stopped work a few days later. In another letter of the same date, the Office informed him that the position was suitable and provided 30 days in which to accept the position or provide reasons for his abandonment of the position.

In a progress note dated June 17, 2004, Dr. Bernot diagnosed improving rotator cuff tendinitis and C5 radiculopathy post cervical fusion. He found that appellant had no significant impairment from his shoulder and recommended a second opinion regarding his neck. He indicated that appellant's work restrictions should be based on a functional capacity evaluation.

By letter dated June 28, 2004, the Office informed appellant that the April 15, 2004 job offer was no longer valid based on the work restrictions provided on May 13, 2004.

On June 25, 2004 appellant filed a notice of recurrence of disability on April 22, 2004 due to his June 11, 2003 employment injury.

On June 28, 2004 the employing establishment offered appellant another position as a modified part-time flexible mail handler. The position was for 5 hours per day 6 days per week with no lifting, pulling or pushing over 10 pounds per day or reaching over the shoulder more than 1 hour per day.

Appellant signed the June 28, 2004 job offer on July 9, 2004 with the notation that it was accepted "under duress."

In a workers' compensation status form dated June 17, 2004, received by the Office on June 13, 2004, Dr. Bernot diagnosed rotator cuff tendinitis and cervical radiculopathy. He found that appellant could not return to his work pending the results of a functional capacity evaluation. Dr. Bernot released him to return to light-duty work effective that date in accordance with the limitations of the functional capacity evaluation.

By letter dated July 13, 2004, the Office informed appellant that it had determined that the position offered by the employing establishment on June 28, 2004 was suitable and provided 30 days within which to accept the position or provide reasons for his refusal.[1] The Office notified him that he would be paid for any difference in pay between the offered position and his date-of-injury position, that he could accept the job without penalty and that an employee who refused or neglected suitable work was not entitled to further compensation.

The functional capacity evaluation, performed on July 8 and 9, 2004 and received by the Office on July 19, 2004, indicated that appellant could work in a light- to medium-duty position with no lifting over 40 pounds occasionally, 35 pounds occasionally overhead or more than 10 to 25 pounds frequently.

On July 21, 2004 the Office informed appellant that it was not developing his notice of recurrence of disability as he had not returned work and was on the periodic rolls.

By letter dated August 26, 2004, the Office notified appellant that the evidence submitted was insufficient to show that he could not perform the duties of the June 28, 2004 job offer. The Office provided him 15 days to accept the position.

In a letter to the Office dated September 9, 2004, appellant stated that he was accepting the position but if his writings were found to be a refusal then he requested an oral hearing.

In a response dated September 15, 2004, the Office noted that, while appellant had indicated his acceptance of the position, he had not returned to work. The Office notified him that it viewed his "inaction as the equivalent to job abandonment." The Office informed appellant that the position was still available and provided him an additional 15 days to report to work or explain his abandonment of the position.

On September 30, 2004 appellant related that, while he had accepted the position, Dr. Bernot had "ordered [him] not to return to work." He stated that, because of Dr. Bernot's report, the employing establishment health clinic "refuses to return me back to work under any circumstances…."

[1] The Office placed appellant on the periodic rolls effective July 11, 2004.

By decision dated October 14, 2004, the Office terminated appellant's compensation effective October 30, 2004 on the grounds that he abandoned suitable work.[2] The Office verified that the position remained available as of that date.

In a note dated October 8, 2004, received by the Office on October 15, 2004, a nurse with the employing establishment indicated that she had received documentation that appellant was "to return to work" in accordance with the restrictions in the June 28, 2004 job offer. The note indicated that it was sent to appellant and his supervisor. In a note dated October 13, 2004, an official with the employing establishment informed appellant that the June 28, 2004 offer was found suitable by the Office and that he had been cleared to work by the health clinic.

On October 28, 2004 appellant requested an oral hearing on his claim.

In a report dated December 23, 2004, Dr. Bernot indicated that, when he last evaluated appellant on June 17, 2004, he took appellant off work pending the functional capacity evaluation and then released him to light-duty work after its completion. He found that the functional capacity evaluation demonstrated that appellant could perform a "light- to medium-duty type job" and noted that his chart contained documentation "showing that dating back to April 7, 2004 you were released to light duty with a restriction of no lifting over 25 pounds." Dr. Bernot informed appellant that he could "offer to extend the '[u]nable to return to work' status from June 17 to July 9, 2004."[3]

At the hearing, held on May 25, 2005, appellant argued that Dr. Bernot's restrictions of May 2004 were permanent. He noted that the job offer did not take his neck problems into consideration and stated, "I refused to go back to work based on those conditions…."

On May 31, 2005 appellant filed a claim for a schedule award. By letter dated June 10, 2005, the Office declined to develop the schedule award claim due to the termination of compensation under section 8106 in its October 14, 2004 decision.

In a progress report dated May 13, 2005, Dr. Abul Hasan, a Board-certified internist, noted appellant's history of a cervical fusion at C3 to C6 and weakness in his left arm and shoulder.[4] Dr. Hasan diagnosed an exacerbation of chronic neck pain and left shoulder pain and chronic low back pain with radiation into the right leg.[5]

By decision dated August 10, 2005, the hearing representative affirmed the October 14, 2004 decision after finding that the Office properly determined that appellant was not entitled to

[2] The Board notes that, as appellant did not return to work under the June 28, 2004 job offer, he refused rather than abandoned suitable work.

[3] Appellant filed an appeal with the Board but the Board dismissed the appeal at his request on March 17, 2005 in order for him to receive a hearing before an Office hearing representative. Order Dismissing Appeal, Docket No. 05-723 (issued March 17, 2005).

[4] An x-ray of appellant's cervical spine obtained on that date showed changes post surgery and cervical arthritis.

[5] The record also contains a finding by the Georgia Board of Medical Examiners informing appellant that it found that Dr. Bernot did not violate the Georgia Medical Practice Act.

further wage-loss compensation or schedule award benefits based on his failure to perform suitable work under section 8106.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[6] In this case, the Office terminated appellant's compensation under section 8106(c)(2) of the Act, which 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.[7] 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.[8] Section 8106(c) 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.[9]

Section 10.517(a) of the Act's implementing regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured by the employee, has the burden of showing that such refusal or failure to work was reasonable or justified.[10] Pursuant to section 10.516, the employee shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.[11]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained adhesive capsulitis of the left shoulder and an aggravation of cervical spinal stenosis due to factors of his federal employment. The Office terminated his compensation effective October 30, 2004 on the grounds that he refused a June 28, 2004 offer of suitable work by the employing establishment. The initial question in this case is whether the Office properly determined that the position was suitable. 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.[12] The medical evidence in this case establishes that the June 28, 2004 position offered by the employing establishment was suitable.

In a form report dated April 7, 2004, Dr. Jingo, appellant's attending physician, diagnosed a frozen shoulder and cervical spine disease. He released appellant to return to work

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

[7] 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

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

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

[10] 20 C.F.R. § 10.517(a); *see Ronald M. Jones*, *supra* note 8.

[11] 20 C.F.R. § 10.516.

[12] *See Gayle Harris*, 52 ECAB 319, 321 (2001); *Maurissa Mack*, 50 ECAB 498 (1999).

with restrictions on lifting over 15 pounds. In a work restriction evaluation dated May 13, 2004, Dr. Bernot, another attending physician, found that appellant could work full time with permanent restrictions against pushing, pulling or lifting over 10 pounds or reaching over his shoulder more than 1 hour per day.

On June 17, 2004 Dr. Bernot released appellant to perform light-duty employment pending the results of a functional capacity evaluation. A functional capacity evaluation, performed on July 8 and 9, 2004, revealed that appellant could perform light to medium work with no lifting over 40 pounds occasionally or 10 to 25 pounds frequently.

On June 28, 2004 the employing establishment offered appellant a position as a modified part-time flexible mail handler. The position conformed to Dr. Bernot's work restrictions as it was for five hours per day six days per week and required no lifting, pulling or pushing over 10 pounds per day or reaching over the shoulder more than 1 hour per day. The position further conformed to appellant's work limitations as determined by the functional capacity evaluation. The Office, therefore, properly found that the offered position was suitable as the weight of the medical evidence established that appellant was no longer totally disabled from work and had the physical capacity to perform the modified duties listed in the June 28, 2004 job offer.

To properly terminate compensation under section 8106, the Office must provide appellant notice of its finding that an offered position is suitable and give him an opportunity to accept or provide reasons for declining the position.[13] The Office properly followed its procedural requirements in this case. On July 9, 2004 appellant signed the job offer but indicated that it was "under duress." By letter dated July 13, 2004, the Office advised appellant that the position was suitable and provided him 30 days to accept the position or provide reasons for his refusal. The Office further notified appellant that he would be paid for any difference in pay between the offered position and his date-of-injury job, that he could still accept without penalty and that a partially disabled employee who refused suitable work was not entitled to compensation.

On August 26, 2004 the Office notified appellant that his reasons for refusing the position were not acceptable and that he had 15 days to accept the position. In a response dated September 9, 2004, appellant informed the Office that he accepted the position. On September 15, 2004 the Office noted that he had not returned to work and informed him that it viewed his "inaction as the equivalent to job abandonment." The Office notified him that the position remained available and provided him an additional 15 days to report to work or explain his reasons for not returning.

By letter dated September 30, 2004, appellant related that Dr. Bernot "ordered [him] not to return to work." He asserted that the employing establishment health clinic refused to allow him to work because of Dr. Bernot's report. Appellant, however, did not submit any evidence in support of his contention. The medical evidence from Dr. Bernot establishes that he was released to return to work with restrictions in accordance with the results of the functional

[13] *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

capacity evaluation.[14] The Office, consequently, properly terminated his compensation benefits based on his refusal of suitable work under section 8106.

LEGAL PRECEDENT -- ISSUE 2

As the Office met its burden of proof to terminate appellant's compensation based on his refusal of suitable work, the burden shifted to appellant to show that his refusal to work in that position was justified.[15]

ANALYSIS -- ISSUE 2

Where the Office shows that an offered limited-duty position was suitable based on a claimant's work restrictions at that time, the burden then shifts to the claimant to show that his or her refusal to work in that position was justified.[16] Appellant submitted a report dated December 23, 2004 from Dr. Bernot, who found that he could perform light to medium work based on the results of a functional capacity evaluation. His report, consequently, does not establish that appellant was unable to perform the duties of the June 28, 2004 offered position subsequent to October 30, 2004.

In a progress report dated May 13, 2005, Dr. Abul Hasan, a Board-certified internist, noted appellant's history of a cervical fusion at C3 to C6 and weakness in his left arm and shoulder and diagnosed an exacerbation of chronic neck pain and left shoulder pain and chronic low back pain with radiation into the right leg. Dr. Hasan, however, did not address the issue of whether appellant was unable to perform the part-time modified mail handler position and thus his opinion is of little probative value. Consequently, appellant has failed to meet his burden of proof to show that his refusal to accept the suitable work was justified.

On appeal appellant argues that Dr. Bernot's May 13, 2004 work restriction evaluation is insufficient as it predated the July 2004 functional capacity evaluation and as Dr. Bernot did not complete the entire form.[17] Dr. Bernot, however, reviewed the functional capacity evaluation in his December 23, 2004 report and again found that appellant could work light to medium work. His opinion, consequently, establishes that appellant could perform the duties required by the June 28, 2004 job offer.

Appellant additionally contends that the employing establishment did not take his preexisting low back condition into account in its job offer. He has not submitted any evidence,

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[14] In a note dated October 8, 2004, a nurse with the employing establishment indicated that it had received documentation that appellant was to return to work according to the Office. On October 13, 2004 an official with the employing establishment informed appellant that the June 28, 2004 offer was found suitable by the Office and that he had been cleared to work by the health clinic.

[15] *See Ronald M. Jones*, *supra* note 8; *Deborah Hancock*, 49 ECAB 606 (1998).

[16] *Id*.

[17] Appellant also maintained that Dr. Bernot was either an Office referral physician or an employing establishment physician; however, a review of the record indicates that the Office recognized Dr. Bernot as an attending physician.

however, showing that he was unable to perform the duties of the position due to a preexisting low back condition.[18]

LEGAL PRECEDENT -- ISSUE 3

The Office regulation provides that in termination under section 8106(c) of the Act[19] a claimant has no further entitlement to compensation under sections 8105, 8106 and 8107[20] of the Act, which includes payment of continuing compensation for permanent impairment of a scheduled member.[21] The Board has found that a refusal to accept suitable work constitutes a bar to the receipt of a schedule award for any impairment which may be related to the accepted employment injury.[22]

ANALYSIS -- ISSUE 3

In a decision dated October 13, 2004, the Office terminated appellant's compensation effective October 30, 2004 on the grounds that he neglected suitable work under section 8106. On May 31, 2005 appellant filed a claim for a schedule award. In a letter dated June 10, 2005, the Office informed him that it was not developing his schedule award claim due to its October 13, 2004 decision. By decision dated August 10, 2005, the hearing representative found that he was not entitled to a schedule award due to his failure to perform suitable work under section 8106.

The Board has held that termination of compensation under section 8106, for refusal of suitable work, serves as a bar to receipt of schedule award compensation for any period after the termination decision has been reached.[23] As the Office terminated appellant's compensation on the grounds that he refused an offer of suitable work, he is not entitled to a schedule award.

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation benefits effective October 30, 2004 on the grounds that he refused an offer of suitable work under 5 U.S.C. § 8106. The Board further finds that appellant has not established entitlement to continuing compensation benefits on or after October 30, 2004. He is also not entitled to a schedule award as he refused suitable work under section 8106.

[18] Appellant submitted new evidence with his appeal; however, the Board has no jurisdiction to review evidence not before the Office at the time of its final decision. *See* 20 C.F.R. § 501.2(c).

[19] 5 U.S.C. § 8106(c).

[20] 5 U.S.C. §§ 8105, 8106, 8107.

[21] 20 C.F.R. § 10.517.

[22] *See Stephen R. Lubin*, 43 ECAB 564, 573 (1992).

[23] *Id*.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 10, 2005 is affirmed.

Issued: April 17, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board