United States Department of Labor
Employees' Compensation Appeals Board

S.E., Appellant	)	
and	)	**Docket No. 06-1846**
	)	**Issued: February 6, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Phoenix, AZ, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 8, 2006 appellant filed a timely appeal from a May 19, 2006 merit decision of the Office of Workers' Compensation Programs, which terminated her wage-loss compensation benefits on the grounds that she 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.

ISSUE

The issue is whether the Office properly terminated appellant's wage-loss compensation effective June 11, 2006 on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

On May 7, 2003 appellant, a 48-year-old letter carrier, filed an occupational disease claim alleging that on May 6, 2003 she first realized her right knee pain was employment related.[1] The Office accepted the claim for right knee and meniscus internal derangement. It authorized a right

[1] This was assigned file number 13-2078278.

knee medial meniscectomy and synovectomy of the patellofemoral joint, which was performed on July 10, 2003. Appellant returned to light-duty work on October 21, 2003. Subsequently, the Office accepted that she sustained a consequential injury of a right eyebrow laceration and chin contusion.[2] Appellant was paid wage-loss compensation for the period May 10 to July 3, 2004 and returned to limited duty on June 28, 2004. She stopped work on November 23, 2004 and has not returned.[3]

Appellant came under the care of Dr. Dwight S. Keller, a treating Board-certified orthopedic surgeon, who performed a right knee arthroplasty on April 11, 2005.[4] In reports dated May 26 to August 25, 2005, Dr. Keller stated that appellant was undergoing physical therapy and was not capable of returning to work. On July 18, 2005 Dr. Keller performed right knee manipulation under anesthesia, which the Office authorized. In a December 27, 2005 report, he stated that appellant had "significant limitations" and was "not yet stationary."

On September 13, 2005 the Office received a May 3, 2005 job offer from the employing establishment. The position was a modified letter carrier working eight hours per day with duties including answering the telephone, greeting customers, assisting with customer service, preparing second notices and handling mail that cannot be delivered for various reasons. Appellant was informed that she had until August 22, 2005 to accept or refuse the job offer. Physical requirements of the position included lifting up to two pounds; intermittent to continuous sitting for up to eight hours per day; none to intermittent standing and walking; no climbing stairs, bending, kneeling, twisting, stooping, pulling/pushing, simple grasping and driving; and intermittent four to eight hours of fine manipulation and reaching above the shoulders. Appellant refused the position on September 17, 2005.

By report dated January 3, 2006, Dr. Boris Stojic, a second opinion Board-certified orthopedic surgeon, noted the history of injury and findings on examination. He advised that appellant was status post right knee total arthroplasty. Dr. Stojic reported that appellant ambulated without a limp or a cane. Range of motion of the right knee revealed 10 degrees of extension and 100 degrees of flexion. A physical examination revealed "no ligamentous instability on the varus and/or valgus stress," and "tenderness in the proximal course of the iliotibial bend." He opined that appellant's right knee range of motion remained unchanged. Dr. Stojic reviewed the job description of the modified letter carrier and opined that appellant was capable of performing the duties of the position. In an attached work capacity evaluation dated January 3, 2006, he advised that appellant could return to work eight hours per day with

[2] On May 8, 2004 appellant filed a traumatic injury claim alleging that on that date she sustained a cut above her eye and a scrape on her chin when her knee gave out and she fell. This was initially assigned file number 13-2104577. The Office accepted the claim as a consequential of file number 13-2078278 and combined all file numbers under 13-2078278.

[3] The record contains evidence that appellant's application for disability retirement was approved by the Office of Personnel Management as of June 16, 2005.

[4] In a March 31, 2004 letter, Dr. Marc I. Dinowitz, appellant's original treating Board-certified orthopedic surgeon, noted that appellant had been referred to Dr. Keller, a Board-certified orthopedic surgeon.

restrictions which included no stooping, squatting, operating a motor vehicle, kneeling and climbing. Walking and standing were limited to one-half hour at a time. Lifting was restricted to five pounds.

On January 8, 2006 appellant again refused the offered position on the grounds that it violated her physical restrictions. She noted that she was unable to lift more than two pounds.

In a report dated February 17, 2006, Dr. Keller reviewed Dr. Stojic's January 3, 2006 report and the position description for the modified letter carrier job. He disagreed with Dr. Stojic that appellant was capable of working eight hours a day with restrictions. With respect to the position description, Dr. Keller concluded that appellant was physically capable of performing the duties listed. However, he concluded: "she would have extreme difficulties working more than [three] or at most, [four] hours daily."

On March 16, 2006 the employing establishment revised the May 3, 2005 job offer based upon the three-hour per day restriction issued by Dr. Keller. The employing establishment offered appellant the position of modified job carrier with hours of 7:30 a.m. to 10:30 a.m. and the physical restrictions noted in the May 3, 2005 job offer. The position was available as of April 1, 2005. Appellant refused the offered position on March 18, 2006 contending that it was outside her physical limitations.

In a March 22, 2006 letter, the Office advised appellant that the position offered was found suitable. She was notified of the penalty provisions of section 8106 of the Federal Employees' Compensation Act[5] and given 30 days to respond. Appellant did not respond to the Office.

On April 24, 2006 the Office found that the offered position was still available and that appellant did not provide a valid reason for refusing the job offer. She was given an additional 15 days to respond. Appellant did not respond to the 15-day notice.

In a May 19, 2006 decision, the Office terminated appellant's wage-loss compensation effective June 11, 2006 on the grounds that she refused an offer of suitable work.

LEGAL PRECEDENT

The Act provides at section 8106(c)(2) that a partially disabled employee who refuses or neglects to work after suitable work is offered is not entitled to compensation.[6] Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits under section 8106 for refusing to accept or neglecting to perform suitable work.[7] The Board has recognized that section 8106(c) serves as a penalty provision as it may bar an

[5] 5 U.S.C. §§ 8101-8193.

[6] 5 U.S.C. § 8106(c)(2).

[7] *See Bryant F. Blackmon*, 56 ECAB ___ (Docket No. 04-564, issued September 23, 2005); *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

employee's entitlement to future compensation and, for this reason, will be narrowly construed.[8] To establish that a claimant has abandoned suitable work, the Office must substantiate that the position offered was consistent with the employee's physical limitations and that the reasons offered for stopping work were unjustified.[9] 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 of record.[10]

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.[11] 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.[12]

ANALYSIS

The Board finds that appellant refused an offer of suitable work. The employing establishment offered her a position as a modified letter carrier within the physical restrictions that were provided by Dr. Keller, her attending physician. In determining the daily work hours, the employing establishment used Dr. Keller's limitation of three hours. Both Dr. Keller and Dr. Stojic reviewed the offered position and concluded that appellant was capable of performing the duties of the position. The medical evidence of record, therefore, establishes that appellant could physically perform the duties of the offered position, particularly as appellant was only required to work for three hours.[13]

In order to properly terminate appellant's compensation under section 8106, the Office must provide notice of its finding that an offered position is suitable and give appellant an opportunity to accept or provide reasons for declining the position.[14] The record in this case establishes that the Office properly followed the procedural requirements. By letter dated March 22, 2006, the Office advised appellant that a partially disabled employee who refused suitable work was not entitled to compensation and that the offered position had been found suitable. She was notified of the penalty provisions of section 8106 and allotted 30 days to either accept or provide reasons for refusing the position. Appellant did not respond. In a letter dated April 24, 2006, the Office again advised appellant that she had not provided reasons for not

[8] *See Richard P. Cortes*, 56 ECAB ___ (Docket No. 04-1561, issued December 21, 2004); *H. Adrian Osborne*, 48 ECAB 556 (1997).

[9] *See Wayne E. Boyd*, 49 ECAB 202 (1997).

[10] *See John E. Lemker*, 45 ECAB 258 (1993); *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

[11] 20 C.F.R. § 10.517(a); *Richard P. Cortes*, 56 ECAB ___ (Docket No. 04-1561, issued December 21, 2004); *Ronald M. Jones*, 52 ECAB 190 (2000).

[12] 20 C.F.R. § 10.516; *Mary E. Woodard*, 57 ECAB ___ (Docket No. 05-1023, issued November 14, 2005).

[13] *Gayle Harris*, 52 ECAB 319 (2001).

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

accepting the job offer. Appellant was given an additional 15 days in which to accept the job. She did not respond. There is no evidence of a procedural defect in this case as the Office provided appellant with proper notice. She was offered a suitable position by the employing establishment and such offer was refused. Under section 8106 of the Act, her compensation was properly terminated effective June 11, 2006.[15]

Appellant generally contends that it was improper for the Office to terminate her compensation benefits because her physician stated that she could not perform the modified carrier position. She also alleged that she had been deemed totally disabled by the Social Security Administration. Contrary to her assertion Dr. Keller opined that the duties of the offered position were within her physical restrictions provided her work hours were no more than three hours per day. The employing establishment complied with this restriction by offering a job in which appellant was required to work three hours per day. As to her disability retirement, the Board has held that a finding of disability by another agency that appellant is unemployable is insufficient by itself to show that she could not perform the duties of the offered position.[16] Rather, she must submit medical evidence to establish that she was physically unable to perform the duties of the offered position and, as stated above, appellant has not provided such evidence in this case. The Office, therefore, properly terminated her wage-loss compensation effective June 11, 2006 on the grounds that she refused an offer of suitable work.[17]

CONCLUSION

The Board finds that the Office properly terminated appellant s wage-loss compensation effective June 11, 2006 pursuant to 5 U.S.C. § 8106(a).

[15] *Joyce M. Doll*, 53 ECAB 790 (2002).

[16] *See David Budzik*, 52 ECAB 339 (2001); *see also* Federal (FECA) Procedure Manual, Part 2, Claims, *Refusal of Job Offer*, Chapter 2.814.5(c) (July 1997).

[17] *Joyce M. Doll*, *supra* note 15.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 19, 2006 is affirmed.

Issued: February 6, 2007
Washington, DC

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

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

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