

Appellant underwent a second right median nerve release on December 9, 1994 and returned to light-duty work on March 8, 1995 as a mailing requirements clerk. By decision dated April 25, 1995, the Office determined that his actual earnings as a mailing requirements clerk, a sedentary clerical position, was representative of his wage-earning capacity.

By decision dated March 15, 1996, the Office awarded appellant a schedule award for a 10 percent permanent impairment of the right upper extremity.

On September 9, 1997 appellant underwent a left median nerve release. He returned to light-duty work for four hours a day on December 17, 1997. On October 26, 1998 appellant underwent right ulnar nerve decompression. He returned to full-time light duty on September 29, 1999, reducing his schedule to four hours a day as of October 4, 1999.

By decision dated October 16, 2000, the Office granted appellant a schedule award for a 19 percent impairment of the left upper extremity and an additional 19 percent impairment of the right upper extremity.

Appellant stopped work on September 8, 2002 and did not return. In an October 10, 2002 report, Dr. Hubert Kiefl, an attending Board-certified internist, opined that appellant was totally disabled for work due to severe ulnar neuropathy and spinal stenosis. He received compensation on the periodic rolls through January 24, 2004.

By decision dated February 13, 2004, the Office awarded appellant a schedule award for an additional 23 percent permanent impairment of the right upper extremity or a cumulative total of 42 percent. The period of the award ran from January 25, 2004 to June 9, 2005.

In a March 29, 2004 letter, appellant requested that the Office suspend payment of his schedule award until his planned retirement. He stated that he had planned to retire on April 1, 2004 but could not due to errors in his paperwork. In an April 12, 2004 letter, the Office advised appellant that it had suspended payment of the schedule award at his request. Appellant's case was replaced on the periodic compensation rolls through November 27, 2004.

The Office referred appellant to Dr. Timothy Jackson, a Board-certified orthopedic surgeon, for a second opinion examination. The Office requested that Dr. Jackson review a position description for a modified mail requirements clerk and opine whether appellant was medically able to perform the assigned tasks. Dr. Jackson submitted a June 7, 2004 report of an April 16, 2004 examination. He found pain over the surgical incisions from the right cubital tunnel release and bilateral median nerve releases, bilaterally restricted wrist motion and bilateral hand weakness. Dr. Jackson reviewed the report of a May 26, 2004 functional capacity evaluation performed at his request. He opined that appellant could perform full-time light to medium capacity work, encompassing the physical requirements of the modified mail requirements clerk position. The job required lifting 6 to 10 pounds, answering the telephone and cleaning file jackets. Appellant could perform repetitive upper extremity activities, but not for more than 30 minutes continuously "without rest of at least 10 minutes." Dr. Jackson limited pushing and pulling to 20 pounds and reaching above shoulder level to no more than 30 minutes.

On August 26, 2004 the employing establishment offered appellant a permanent, full-time, modified limited-duty job as a mailing requirements clerk. The position involved computer

data entry, filing, making and answering telephone calls, filling out forms and folding and stuffing envelopes. The job required lifting less than five pounds, no pulling, pushing or reaching above the shoulder. Appellant was “allowed to have a break every 30 minutes for 10 minutes.” The employing establishment noted that there was a break room and bathroom immediately adjacent to appellant’s work area.

Appellant refused the offer on September 14, 2004, asserting that his application for retirement was pending. In a September 23, 2004 letter, he stated that he submitted “paperwork to retire as of October 1, 2004, but after receiving [the job offer] requested” a date change to September 25, 2004. Appellant also contended that the offered position was not within the physical restrictions given by his physicians and that Dr. Jackson saw him for “less than an hour.” In a second September 23, 2004 letter, he requested to be removed from the compensation rolls as of September 25, 2004 as he “submitted [his] paperwork to retire that date.”

The record demonstrates that appellant elected retirement under the Civil Service Retirement System effective September 25, 2004. Appellant’s application was dated September 13, 2004.

In a September 29, 2004 letter, the Office advised appellant that the offered modified mailing requirements clerk position was suitable work within his medical restrictions. The Office afforded appellant 30 days in which to either accept the position or provide good cause for refusal. The Office advised appellant that under section 8106(c) of the Act, he would lose his entitlement to compensation if he refused suitable work.

In an October 4, 2004 letter, appellant contended that he retired before the job offer was made. In an October 5, 2004 telephone memorandum, the Office noted appellant’s contention that his physicians found him totally disabled for work as of 2002.

In an October 26, 2004 letter, the Office advised appellant that the offered position was suitable work and that he had until November 1, 2004 to accept or reject the job offer. In a November 3, 2004 letter, the Office advised appellant that the offered position was still found to be suitable work and remained available. The Office afforded appellant 15 days to accept the position or incur the termination of his compensation benefits. The Office stated that no further reasons for refusal would be considered.

On November 15, 2004 appellant submitted a November 2, 2004 report from Dr. Diane E. Ross, an attending neurologist, who discussed appellant’s upper extremity conditions, bulging lumbar discs and mild stenosis. Dr. Ross stated an impression of “chronic intractable pain and numbness in [the] upper extremities secondary to bilateral ulnar entrapment neuropathies as well as bilateral carpal tunnel syndrome status post several surgeries without resolution of symptoms.” She also noted muscle atrophy, significant motor and sensory loss in the right hand.

On November 18, 2004 the Office verified that the offered mailing requirements clerk position remained available.

By decision dated November 23, 2004, the Office terminated appellant's monetary compensation benefits effective November 27, 2004 under section 8106(c) of the Act on the grounds that he refused an offer of suitable work. The Office noted that the penalty provisions of section 8106(c) of the Act served as a bar to appellant's receipt of any additional schedule award compensation. The Office found that appellant received proper notice that the offered position was suitable work. The Office further found that appellant did not provide good cause for refusing the position, which remained open and available to him. The Office further found that the position was within the restrictions prescribed by Dr. Jackson on June 7, 2004. The Office noted that Dr. Ross did not indicate that appellant was medically unable to perform the offered position.

In a May 18, 2005 letter, appellant requested reconsideration. He submitted additional evidence. In a February 21, 2005 report, Dr. Ross noted sensory loss in both upper extremities below the forearm, left worse than right. She stated an impression of chronic, intractable upper extremity pain and paresthesias as well as lumbar abnormalities. Dr. Ross opined that appellant could not "lift, carry, bend, push, pull," sit or stand for extended periods or "use his hands for repetitive motion or manipulation ... because of his prior problems." She opined that appellant was disabled for work. Dr. Ross explained that writing, lifting or sorting mail "could cause further damage." In a March 3, 2005 report, she opined that appellant had possible cervical disc involvement superimposed on bilateral carpal tunnel syndrome.

By decision dated May 26, 2005, the Office denied reconsideration on the grounds that the evidence submitted was not relevant, cumulative and immaterial.

Appellant submitted a February 22, 2005 electromyography report from Dr. Ross, diagnosing "severe radial nerve, ulnar nerve and median nerve neuropathies on the right and severe ulnar and median neuropathies on the left."

In an August 17, 2005 telephone memorandum, the Office conceded that it did not consider all the evidence submitted in support of appellant's May 18, 2005 request for reconsideration. The Office noted appellant's contention that the employing establishment "refused to let him come back to work ... because he had submitted retirement papers."

By decision dated August 25, 2005, the Office affirmed the November 23, 2004 termination decision on the grounds that the medical evidence was insufficient to support that the mailing requirements clerk position was unsuitable at that time. The Office found that the reports of Dr. Ross did not establish that appellant was medically unable to perform the offered mail requirements clerk position as of November 23, 2004. Dr. Ross discussed appellant's work restrictions only as of February 21, 2005. The Office further found that an approved retirement application was not a valid reason for effusing the offered position. The Office also set aside the May 26, 2005 decision.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.¹ 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.² 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.³ 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.⁴

Section 10.517(a) of the Act's implementing regulation 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.⁵ 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.⁶

ANALYSIS

The Office terminated appellant's monetary compensation benefits effective November 27, 2004, on the grounds that he refused an August 26, 2004 offer of suitable work. The Office found that the weight of the medical evidence established that the position was within appellant's physical capabilities. This evidence included a May 26, 2004 functional capacity evaluation performed for and reviewed by Dr. Jackson, a Board-certified orthopedic surgeon and second opinion physician. He opined that appellant could perform the sedentary, clerical tasks required by the offered position on a full-time basis. Appellant required permanent restrictions against pushing or pulling more than 20 pounds, repetitive upper extremity motion for more than 30 minutes continuously, followed by a 10-minute break.

The employing establishment's August 26, 2004 modified mailing requirements clerk job offer involved sedentary, clerical duties. The listed restrictions limited lifting to less than five pounds, no reaching above the shoulder, pushing or pulling. Appellant was also allowed a 10-minute break every 30 minutes. The Board finds that these restrictions are within those set forth by Dr. Jackson, based on the abilities demonstrated by the May 26, 2004 functional capacity evaluation. Therefore, the Board finds that the position offered appellant on August 26, 2004 was suitable work within appellant's physical capabilities.

¹ *Linda D. Guerrero*, 54 ECAB 556 (2003); *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

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

³ *Ronald M. Jones*, 52 ECAB 190 (2000); *Arthur C. Reck*, 47 ECAB 339, 341-42 (1995).

⁴ *Joan F. Burke*, 54 ECAB 406 (2003); *see Robert Dickerson*, 46 ECAB 1002 (1995).

⁵ 20 C.F.R. § 10.517(a); *see Ronald M. Jones*, *supra* note 3.

⁶ *Id.* at § 10.516.

Appellant rejected the offered position on September 14, 2004, asserting that his retirement application was pending. He made similar assertions in an October 4, 2004 letter and October 5, 2004 telephone call. Retirement, however, is not considered an acceptable reason for refusing an offer of suitable work.⁷

Appellant also contended that the offered position was not within restrictions given by his physicians. However, he did not submit sufficient medical evidence supporting his assertion that he was totally disabled and could not perform the position. Appellant submitted a November 2, 2004 report from Dr. Ross, an attending neurologist, who diagnosed chronic pain and numbness in both upper extremities due to the accepted conditions. However, Dr. Ross did not opine that the position requirements were beyond his physical capabilities or that it was otherwise unsuitable as of November 23, 2004.

The Office properly advised appellant by November 3, 2004 letter that his reasons for refusing the offered position were not valid and that he must either accept the position within 15 days or face termination of his compensation benefits. However, appellant did not accept the position. As the weight of the competent medical evidence at the time of the November 23, 2004 decision established that appellant could perform the duties of the offered position, he did not offer sufficient justification for refusing the offered position. Therefore, the Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective November 27, 2004 as he refused an offer of suitable work.⁸

As the Office met its burden of proof to terminate appellant's compensation based on his refusal of suitable work, the burden shifted to him to show that his refusal was justified.⁹ In support of his May 18, 2005 request for reconsideration, appellant contended that the employing establishment barred him from accepting the offer of suitable work because he had applied for retirement. However, he did not submit factual evidence corroborating this assertion. Appellant did not provide correspondence from employing establishment officials, excerpts from personnel manuals or employing establishment regulations, coworker affidavits or other documentation substantiating that the employing establishment prohibited him from accepting the August 26, 2004 job offer.

Appellant submitted additional medical evidence on reconsideration. In a February 21, 2005 report, Dr. Ross opined that appellant was disabled for work. She found appellant unable to lift, carry, bend, push or pull, sit or stand for extended periods or perform repetitive hand motions. This report does not address appellant's ability to perform the offered modified position as of November 23, 2004. Dr. Ross' February 22 and March 3, 2005 reports do not address the offered position or the work restrictions recommended by Dr. Jackson. Therefore, they are insufficient to establish appellant's assertion that the offered position was beyond his physical capacities.

⁷ *Robert P. Mitchell*, 52 ECAB 116 (2000) (where the claimant chose to receive disability retirement benefits rather than accept a position offered by the employing establishment).

⁸ *Karen L. Yaeger*, 54 ECAB 323 (2003).

⁹ 20 C.F.R. § 10.500(b); *see Ozone J. Hagan*, 55 ECAB 681 (2004).

The Board finds that the Office met its burden of proof to terminate appellant's monetary compensation benefits as of November 27, 2004. The Board further finds that, when the burden of proof then shifted to appellant, he did not submit sufficient evidence to justify his refusal of the offered position. Thus, the Office's August 25, 2005 decision is correct under the law and facts of this case.¹⁰

CONCLUSION

The Board finds that the Office properly terminated appellant's monetary compensation benefits effective November 27, 2004 on the grounds that he refused an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 25, 2005 is affirmed.

Issued: May 9, 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

¹⁰ The Board notes that as the sanctions under section 8106(c)(2) of the Act were properly applied, appellant is not entitled to receive further compensation, including the remainder of the February 13, 2004 schedule award. *Stephen R. Lubin*, 43 ECAB 564 (1992).