United States Department of Labor
Employees' Compensation Appeals Board

R.B., Appellant	)	
and	)	**Docket No. 07-1958**
	)	**Issued: February 1, 2008**
U.S. POSTAL SERVICE, MEMPHIS BULK MAIL CENTER, Memphis, TN, 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
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 18, 2007 appellant filed a timely appeal from a May 15, 2007 decision of the Office of Workers' Compensation Programs hearing representative that affirmed an August 22, 2006 denial of his recurrence of disability claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether the Office properly denied appellant's claim for a recurrence of disability beginning June 14, 2004.

FACTUAL HISTORY

On August 20, 1992 appellant, then a 36-year-old distribution clerk, filed a traumatic injury claim stating that he injured his shoulders on June 10, 1992 while "working pallet mail." He initially stopped work on June 10, 1992 and returned on June 24, 1992. After appropriate development, the Office accepted appellant's claim for lumbar strain, bilateral shoulder strain and left shoulder tendinitis and paid compensation. On August 3, 1994 he filed a recurrence of

disability claim alleging that he experienced soreness and stiffness in both shoulders on June 29, 1994. Appellant stopped work on June 29, 1994 and returned to a limited-duty assignment on July 11, 1994. The Office accepted his recurrence of disability claim for left shoulder tendinitis.

Appellant provided several progress notes from Dr. Rommel Childress, a Board-certified orthopedic surgeon. On February 21, 1995 he stated that appellant continued to have symptoms, particularly in his left shoulder and arm even with his light-duty work. Appellant underwent a left shoulder arthroscopy on April 12, 1995. In a September 14, 1995 report, Dr. Childress noted that appellant preferred to take medical retirement rather than return to work. On October 6, 1995 he explained that appellant did not wish to push himself or stress himself and therefore he preferred medical retirement even though he could likely work a limited-duty job.

In a September 11, 1995 report, Dr. Jere M. Disney, a Board-certified orthopedic surgeon and second opinion physician, noted appellant's complaints of shoulder pain and limited range of motion. He reported that appellant felt that he could not use his left shoulder at all, although he took no medications. Dr. Disney concluded that appellant had chronic capsulitis of the left shoulder but could work with permanent restrictions on heavy lifting and reaching above shoulder level. On December 20, 1995 Dr. Childress stated that he agreed with Dr. Disney that appellant could perform light-duty work, but opined that medical retirement would be in appellant's best interest if he felt that he could not function productively due to shoulder pain.

On April 17, 1996 the employing establishment offered appellant a limited-duty assignment as a modified clerk. He rejected the offered position on May 2 and 14, 1996, stating that "the physical requirements do not include the right side." On August 7, 1996 appellant informed the Office that he had elected to retire through the Office of Personnel Management (OPM) and requested that the Office discontinue his compensation payments.[1]

On August 1, 1998 appellant informed the Office that he would like to "convert back to workers' compensation" effective August 3, 1998. He stated that he had requested that the OPM discontinue his benefits effective that date. On October 2, 1998 the Office informed appellant that it was unable to "offer [him] an election" because he had not provided medical evidence establishing that he was permanently disabled.

In an October 1, 1998 report, Dr. Childress noted that, although appellant was not working, he continued to experience shoulder pain with the activities of daily living and particularly with overhead reaching.

On December 16, 1998 the Office informed appellant that the previously offered modified clerk position remained open for him and that the Office had determined that the position was suitable for and commensurate with his physical restrictions. On December 28, 1998 he accepted the position. The employing establishment offered appellant a "temporary limited[-]duty job" on April 7, 1999. The job requirements included performing "duties within medical restrictions as directed by a supervisor" and assisting "in facilitating the efforts of the

[1] On September 11, 1997 the Office granted appellant a schedule award for 17 percent permanent impairment of the upper extremities, bilaterally.

[employing establishment] in the distribution and delivery of mail." The job offer noted "maximum physical requirements" of "limited reaching above left shoulder" and lifting restrictions "limited to 10 pounds left side" and indicated that appellant's duties may include casing of mail and "other job[-]related tasks in support of the basic duties that are within the prescribed medical restrictions." Appellant accepted the temporary limited-duty assignment on April 13, 1999. On August 10, 1999 the employing establishment offered him a new temporary-job assignment. The assignment noted physical restrictions of limited reaching above shoulder level on the left side and no lifting above 10 pounds. The position required appellant "to assist Human Resources in personnel functions."

By decision dated May 13, 1999, the Office denied appellant's claim for compensation benefits from September 1 to October 31, 1998. It found that he had rejected an offer of suitable work under 5 U.S.C. § 8106(c)(2) in 1998. On June 7, 1999 appellant requested an oral hearing. The hearing was held on October 27, 1999. By decision dated December 30, 1999, the hearing representative affirmed, as modified, the Office's prior decision finding that appellant refused an offer of suitable work pursuant to section 8106(c)(2) of the Act. He found that appellant refused the April 17, 1996 job offer by the employing establishment and consequently was not entitled to ongoing disability or schedule award benefits after May 14, 1996, the date of his refusal. Appellant did not appeal this decision.

On November 25, 2003 the employing establishment offered another temporary modified assignment. The position, as a modified clerk, required appellant to tray loose letters and flats, rate and time mail and perform "any clerk assignment within employee's current medical restrictions." The applicable physical requirements included lifting 10 to 20 pounds for four to eight hours per day, bending and stooping for one hour, twisting for two hours and simple grasping or fine manipulation for four to eight hours. After initially rejecting the position, explaining that he had "medical concerns and fears," appellant accepted the position on November 25, 2003. However, in a December 1, 2003 note, he rejected the assignment. Appellant explained that the offered assignment was "out of [his] limitations" and that his initial acceptance was influenced by "duress." On December 9, 2003 the Office informed him that it found the offered modified-clerk position to be commensurate with his physical abilities.

On June 10, 2004 appellant filed a recurrence of disability claim, stating that he experienced stress and depression as well as left wrist tendinitis, on the same day while working "in the same job that my original injury occurred." He stopped work on June 14, 2004. Appellant advised that he had the same job duties that "caused [his] permanent disability." He noted that he had permanent impairment due to chronic tendinitis and capsulitis in both shoulders.[2] In a duty status report prepared on the same day, Dr. Childress diagnosed bilateral shoulder tendinitis and capsulitis and stated that appellant would be disabled for six weeks. In an October 19, 2004 duty status report, he diagnosed bilateral shoulder tendinitis and advised that appellant was still disabled from work. In a September 8, 2005 report, Dr. Childress advised that

[2] The record reflects that on July 29, 2004 the Office informed appellant that his claim had been accepted for a back condition only and that it was unable to locate "evidence that we have extended coverage for a job-related shoulder problem under this claim." The record reflects, as noted above, that appellant's claim was accepted for bilateral shoulder strain and left shoulder tendinitis as well as lumbar strain.

appellant had continuing symptoms and difficulty with overhead reaching. However, he stated that appellant was "functional at home just taking care of him-self."

On January 27, 2006 appellant filed a claim for compensation for leave without pay taken on June 10, 2004 and continuing.

On May 16, 2006 Dr. Childress explained that appellant still had shoulder pain and difficulty with certain activities. He stated that appellant "thinks that he was offered a specific job activity and [the employing establishment] [did not] give and that, … he was officially on disability retirement and came back voluntarily, but he still has options regarding what he can do and what he's obligated to do."

In a July 8, 2006 conference memorandum, the Office noted that appellant was not entitled to temporary total disability benefits after his refusal of the employing establishment's April 17, 1996 job offer.

By decision dated August 22, 2006, the Office denied appellant's claim for recurrence of disability and for compensation benefits after June 10, 2004 on the grounds that the "factual and medical evidence provided does not establish that the claimed recurrence resulted from the accepted work injury."

On September 14, 2006 appellant requested an oral hearing. He provided a July 11, 2004 duty status report from Dr. Childress who diagnosed tendinitis and capsulitis in both shoulders. On February 15, 2007 Dr. Childress advised that appellant was "seen in follow-up today regarding his wrist."

An oral hearing was conducted on February 22, 2007. At the hearing, appellant testified that after returning to the employing establishment he was required to perform the same job duties that he performed at the time he was injured.

By decision dated May 15, 2007, the hearing representative affirmed the Office's August 22, 2006 denial of appellant's recurrence of disability claim. He found that appellant established a change in the nature and extent of his light-duty job requirements, but did not show that such change precipitated a worsening of his injury-related condition.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[3] Under section 8106(c)(2) of the Federal Employees' Compensation Act, the Office may terminate the compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[4] To justify termination, the Office must show that the work offered was suitable and

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

[4] 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

must inform appellant of the consequences of refusal to accept such employment.[5] Section 8106(c) serves as a penalty provision, barring an employee's future entitlement to compensation for the same injury based on a refusal to accept a suitable offer of employment.[6]

ANALYSIS

The Board finds that appellant's claim for recurrence of disability is precluded pursuant to section 8106(c)(2) of the Act, which bars entitlement to future wage-loss compensation after termination due to a claimant's refusal of an offer of suitable work.[7] The employing establishment offered appellant a limited-duty assignment on April 17, 1996. He rejected the offer on May 2, 1996 stating that "the physical requirements do not include the right side." Appellant elected to retire and collect benefits through OPM. In 1998, he informed the Office that he would like to "convert back to workers' compensation" and on December 16, 1998 the employing establishment offered him a limited-duty job which he accepted. However, on May 13, 1999 the Office denied appellant's claim for compensation benefits from September 1 to October 31, 1998 finding that he rejected an offer of suitable work in 1998 and thus, was barred from entitlement to future compensation benefits. Appellant requested an oral hearing and the hearing representative affirmed the Office's May 13, 1999 decision modifying it to find that appellant's rejection of an offer of suitable work took place in 1996 rather than 1998 and that he consequently was not entitled to compensation after May 14, 1996.[8]

Because the Office terminated appellant's compensation due to his refusal of an offer of suitable work under section 8106(c)(2), appellant is barred from future entitlement to wage-loss compensation for his 1992 employment injury, although he may still receive medical benefits for his employment-related condition.[9] Therefore, the Board finds that appellant's recurrence of disability claim is barred.[10]

CONCLUSION

The Board finds that appellant did not meet his burden of proof in establishing that on June 10, 2004 he sustained a recurrence of total disability causally related to his June 10, 1992 employment injury and therefore that the Office properly denied appellant's claim on the grounds that he was barred from receiving compensation under 5 U.S.C. § 8106(c)(2).

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

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

[7] 5 U.S.C. § 8106(c)(2).

[8] Because the hearing representative's December 30, 1999 decision was issued more than one year prior to the filing of this appeal on July 18, 2007 the Board does not have jurisdiction over the decision terminating appellant's compensation pursuant to section 8106(c)(2). *See* 20 C.F.R. §§ 501.2(c), 501.3.

[9] 20 C.F.R. § 10.517.

[10] *Id.*; *Merlind K. Cannon*, 46 ECAB 517 (1995).

ORDER

IT IS HEREBY ORDERED THAT the May 15, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 1, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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