United States Department of Labor
Employees' Compensation Appeals Board

F.R., Appellant	)	
and	)	**Docket No. 07-2134**
	)	**Issued: January 23, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Fort Worth, TX, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 16, 2007 appellant filed a timely appeal from an October 6, 2006 Office of Workers' Compensation Programs' decision terminating his compensation for refusing 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 met its burden of proof to terminate appellant's compensation on the grounds that he refused an offer of suitable work.

FACTUAL HISTORY

On September 9, 2005 appellant, then a 57-year-old letter carrier, filed a claim for compensation alleging that he injured his lower back on August 30, 2005 while lifting tubs of mail. The Office accepted his claim for a lumbar sprain and strain. Effective December 9, 2005, appellant was placed on the periodic compensation rolls for temporary total disability.

In a work capacity evaluation dated June 22, 2006, Dr. Bill Weldon, an attending physician specializing in pain management, indicated that appellant could work eight hours a day. Appellant's permanent work restrictions included lifting, pushing or pulling limited to 20 pounds for no more than one hour a day; no squatting, kneeling, climbing, twisting, bending, stooping or operating a motor vehicle; walking and standing limited to one hour a day; sitting limited to six hours a day and reaching above the shoulder limited to two hours a day. Breaks of 15 minutes were required every 2 hours.

On June 30, 2006 Denise Lisenbe, an employing establishment compensation specialist, offered appellant a modified letter carrier position. The physical requirements of the position conformed to the limitations provided in Dr. Weldon's June 22, 2006 report. Appellant retired effective July 1, 2006.

On July 5, 2006 the Office advised appellant that the modified letter carrier position was suitable and conformed to his physical limitations. The employing establishment confirmed that the position remained available. The Office allowed appellant 30 days in which to accept the position or provide his reasons for refusal. The Office advised appellant that an employee who refuses an offer of suitable work without reasonable cause is not entitled to compensation. There was no response from appellant and he did not return to work.

By decision dated August 8, 2006, the Office terminated appellant's compensation effective September 2, 2006 on the grounds that he refused an offer of suitable work.

On August 18, 2006 appellant submitted a July 10, 2006 permanent impairment evaluation from Dr. Weldon in support of a schedule award claim.

Appellant requested reconsideration of the August 8, 2006 termination decision. He indicated that he did not accept the modified job offer because he elected to retire effective July 1, 2006. By decision dated October 6, 2006, the Office denied modification of the August 8, 2006 termination decision.[1]

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[2] Section 8106(c)(2) of the Federal Employees' Compensation Act[3] 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.[4] To justify termination of compensation, the Office must establish that the work

[1] Subsequent to the October 6, 2006 Office decision, appellant submitted additional evidence. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

[2] *Richard P. Cortes*, 56 ECAB 200 (2004); *Melvin James*, 55 ECAB 406 (2004).

[3] 5 U.S.C. §§ 8101-8193.

[4] 5 U.S.C. § 8106(c)(2); *see also Linda D. Guerrero*, 54 ECAB 556 (2003).

offered was suitable and must inform the employee of the consequences of refusal to accept such employment.[5]

Section 10.517(a) of the Act's implementing regulations provides that an employee who refuses to work after suitable work has been offered to or secured for the employee, has the burden of showing that such refusal or failure to work was reasonable or justified.[6] Pursuant to 20 C.F.R. § 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.[7]

ANALYSIS

The Office accepted that appellant sustained a lumbar sprain and strain as a result of the August 30, 2005 employment injury. The Office terminated appellant's compensation by decision dated August 8, 2006 on the grounds that he refused an offer of suitable work. The initial question 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 medical evidence.[8]

In this case, the Office relied on the June 22, 2006 functional capacity evaluation of attending physician Dr. Weldon in finding that the modified letter carrier position offered by the employing establishment was within appellant's work limitations. The work restrictions provided by Dr. Weldon were utilized by the employing establishment in making the modified-duty job offer. The Board finds that the Office properly determined that the modified letter carrier position offered to appellant constituted suitable work within his physical limitations.

The record shows that appellant elected to retire on July 1, 2006. The Board has held that electing to receive disability retirement is not a justifiable reason to refuse an offer of suitable work. In *Robert P. Mitchell*,[9] the Board noted that the employee's election to receive retirement benefits was not a valid reason for refusing an offer of suitable work.[10] The relevant portion of the Office's procedure manual provides that electing to retire is not an acceptable reason for refusing an offer of suitable work.[11]

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[5] *Ronald M. Jones*, 52 ECAB 190 (2000); *Arthur C. Reck*, 47 ECAB 339 (1995).

[6] 20 C.F.R. § 10.517(a); *see Ronald M. Jones, supra* note 5; *Stephen R. Lubin*, 43 ECAB 564 (1992).

[7] *Id*. at § 10.516; *see Kathy E. Murray*, 55 ECAB 288 (2004).

[8] *Kathy E. Murray, supra* note 7.

[9] 52 ECAB 116 (2000).

[10] *See also Stephen R. Lubin, supra* note 6; *Roy E. Bankston* 38 ECAB 380 (1987).

[11] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5c (July 1996). This provision does not include electing to receive retirement benefits as an acceptable reason for refusing suitable work.

Upon consideration of all the evidence, the Board finds that the Office met its burden of proof to terminate appellant's compensation on the grounds that he refused an offer of suitable work.

Regarding appellant's claim for a schedule award, the Office's regulations provide that an employee who refuses an offer of suitable work is not entitled to compensation, including a schedule award for permanent impairment.[12]

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits for refusing an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 6, 2006 is affirmed.

Issued: January 23, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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

[12] *See* 20 C.F.R. § 10.517(b).