United States Department of Labor
Employees' Compensation Appeals Board

J.H., Appellant	)	
	)	**Docket No. 07-1202**
and	)	**Issued: July 2, 2008**
U.S. POSTAL SERVICE, MAIN POST OFFICE, Knoxville, TN, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 30, 2007 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decisions dated April 6, 2006 and April 16, 2007, terminating his wage-loss compensation benefits effective April 15, 2006 for refusing an offer of suitable work; a February 6, 2007 nonmerit decision, denying his request for a prerecoupment hearing as untimely filed; and a March 13, 2007 merit decision, finding him at fault in the creation of a $7,069.56 overpayment of compensation, thereby precluding waiver of the overpayment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction to review the merits of this appeal.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's wage-loss compensation benefits effective April 15, 2006 on the grounds that he refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2); (2) whether the Branch of Hearings and Review properly denied appellant's request for a prerecoupment hearing on the grounds that it was not timely filed; (3) whether appellant received an overpayment of compensation in the amount of $7,069.56 from April 16 to July 8, 2006; and (4) whether appellant was at fault in the creation of the overpayment and, therefore, ineligible for waiver of the recovery of the overpayment.

FACTUAL HISTORY

On June 23, 2003 appellant, then a 51-year-old self-service postal center technician, sustained injury to his lower back as a result of boxing mail, bending and twisting at work. He stated that the pain was worse in his right hip and leg. The Office accepted the claim for lumbar strain and right S1 radiculopathy. It paid appellant appropriate compensation. On November 2, 2004 appellant stopped work. He returned to full-time light-duty work on November 20, 2004. Appellant underwent back surgery on February 15, 2005 and has not returned to work.

In a June 27, 2005 medical report, Dr. David A. Wiles, an attending Board-certified neurologist, stated that appellant sustained a lumbar sprain/strain, thoracic or lumbosacral neuritis or radiculitis, aggravation of degeneration of the lumbosacral intervertebral disc and that he was post disc arthroplasty at L5-S1. He opined that appellant had reached maximum medical improvement. Dr. Wiles stated that appellant could return to work as a self-service postal clerk with restrictions which included lifting up to 25 pounds, pushing and pulling up to 30 pounds and no prolonged walking, standing, sitting and driving for more than tolerated.

On July 1, 2005 the employing establishment offered appellant a limited-duty clerk position based on the restrictions set forth in the June 27, 2007 report of Dr. Wiles. The position involved boxing mail, answering the telephone, claims and inquiries, dispatches and second notices. The physical requirements of the position included lifting 25 pounds, pushing and pulling intermittently, sitting, standing and walking as tolerated and climbing, kneeling, bending, stooping and twisting occasionally. There were no requirements with regard to simple grasping, fine manipulation, reaching above the shoulder and driving a vehicle. On July 6, 2005 appellant rejected the job offer. He stated that he was unable to work due to his retirement under the Office of Personnel Management (OPM).

In a letter dated October 13, 2005, the Office advised appellant that a suitable position was available and that he had 30 days to either accept the position or provide an explanation for refusing the position. It further advised him that he would be paid for any difference in salary between the offered position and his date-of-injury position and that he could accept the job without penalty. The Office informed appellant that his compensation would be terminated based on his refusal to accept a suitable position pursuant to 5 U.S.C. § 8106(c)(2).

By letter dated December 5, 2005, appellant stated that he never received the employing establishment's job offer due to problems with receiving mail based on his change of address. He stated that he continued to experience back problems. In a telephone conversation on December 8, 2005, appellant advised the Office that he had been instructed by the employing establishment to accept the offered position or to state that he was unable to work due to his OPM retirement. The Office informed him that retirement was not a valid reason for refusing the offered position.

On December 30, 2005 the Office advised appellant that his reason for refusing the offered position was not valid. It stated that the position was based on his release to return to work under the restrictions of Dr. Wiles and that the position was still available. Appellant was given 15 days to accept the position. On February 17, 2006 he again rejected the employing establishment's job offer.

By decision dated April 6, 2006, the Office terminated appellant's wage-loss compensation effective April 15, 2006. It found that the offered position was consistent with the restrictions set forth by Dr. Wiles. The decision was mailed to appellant's address of record. On May 4, 2006 appellant requested an oral hearing before an Office hearing representative.

Appellant submitted the April 26 and May 8, June 29 and November 13, 2006 reports of Dr. Wiles who found that he was status post artificial disc replacement at L5-S1 and had worsening back pain. The April 26, 2006 report noted that he had diabetes with right shoulder pain leading to his inability to exercise or perform any type of work. Dr. Wiles opined that, although appellant was retired, he could not return to his prior position at the employing establishment. On June 29, 2006 he recommended possible L5-S1 facet blocks for diagnostic and therapeutic benefit.

An August 8, 2006 report of Dr. German Z. Levin, a Board-certified physiatrist, stated that appellant suffered from chronic pain syndrome, post laminectomy syndrome and possible peripheral neuropathy. In a September 28, 2006 report, Dr. Levin noted appellant's back treatment with nerve blocks and his right arm pain. On November 27, 2006 he performed a diagnostic discogram at L3-4 and L4-5.

On December 5, 2006 the Office made a preliminary determination that appellant received an overpayment of compensation in the amount of $7,069.56 during the period April 16 through July 8, 2006, because he continued to receive wage-loss compensation even though his benefits had been terminated as of April 16, 2006. It found that appellant was at fault in the creation of the overpayment as he accepted payments that he knew or should have known to be incorrect based on the termination of his compensation benefits. Appellant was advised to request a telephone conference, a final decision based on the written evidence only or a hearing within 30 days if he disagreed that the overpayment occurred, with the amount of the overpayment or if he believed that recovery of the overpayment should be waived. The Office requested that appellant complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof within 30 days.

On January 7, 2007 appellant requested a prerecoupment hearing on the issues of fault and possible waiver. His request was postmarked January 8, 2007. In an overpayment recovery questionnaire also dated January 7, 2007, appellant's wife stated that she and appellant believed that they were not at fault in creating the overpayment. She contended that they had lost everything due to appellant's June 23, 2003 employment-related injury and had to file bankruptcy. Appellant's wife indicated that the only payments appellant received from the Office were during the period April through July 2006 and that he had no monthly income. Appellant's monthly expenses included $850.00 for rent, $500.00 for food, $300.00 for utilities, $650.00 for other expenses and $200.00 for a car loan, totaling $2,500.00. Appellant lost his house after sustaining his employment-related injury. He reported $200.00 cash on hand, $100.00 in a checking account and $50.00 in a savings account, totaling $350.00. Appellant submitted a credit union document which listed the deductions from his wife's account during the period July 26 through 31, 2005. He stated that no checks were deposited from OPM or the Office and that he did not receive any payment at the end of July.

By decision dated February 6, 2007, the Branch of Hearings and Review denied appellant's request for a prerecoupment hearing on the grounds that it was not timely filed.

In a March 13, 2007 decision, the Office finalized the December 5, 2006 overpayment, finding that appellant was at fault in the creation of an overpayment in the amount of $7,069.56. It directed him to repay the overpayment in the amount of $100.00 per month.

By decision dated April 16, 2007, an Office hearing representative affirmed the April 6, 2006 termination decision. The hearing representative found the evidence of record sufficient to establish that appellant could perform the duties of the offered position.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[1] 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.[2] To justify termination, 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]

Office regulations provide that, in determining what constitutes suitable work for a particular disabled employee, the Office should consider the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work and other relevant factors.[5] It is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.[6] 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.[7]

In assessing medical evidence, the number of physicians supporting one position or another is not controlling, the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors that comprise the evaluation of medical

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

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

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

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

[5] 20 C.F.R. § 10.500(b).

[6] *Richard P. Cortes*, 56 ECAB 200 (2004).

[7] *Id.*; *Bryant F. Blackmon*, 56 ECAB 752 (2005).

evidence include the opportunity for and the thoroughness of physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[8] Office procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer, medical evidence of inability to do the work or travel to the job or the claimant found other work which fairly and reasonably represents his or her earning capacity (in which case compensation would be adjusted or terminated based on actual earnings). Furthermore, if medical reports document a condition which has arisen since the compensable injury and the condition disables the employee, the job will be considered unsuitable.[9]

Section 10.516 of the Code of Federal Regulations states that the Office will advise the employee that the work offered is suitable and provide 30 days for the employee to accept the job or present any reasons to counter the Office's finding of suitability.[10] Thus, before terminating compensation, the Office must review the employee's proffered reasons for refusing or neglecting to work.[11] If the employee presents such reasons and the Office finds them unreasonable, the Office will offer the employee an additional 15 days to accept the job without penalty.[12]

ANALYSIS – ISSUE 1

The Office terminated appellant's entitlement to wage-loss compensation benefits effective April 15, 2006 on the grounds that he refused a July 1, 2005 offer of suitable work. The Office found that the weight of the medical evidence, as represented by the June 27, 2005 report of Dr. Wiles, his attending physician, established that the position was within appellant's physical capabilities. Dr. Wiles found that appellant required restrictions of lifting no more than 25 pounds, pushing and pulling no more than 30 pounds and no prolonged walking, standing, sitting and driving for more than tolerated.

The employing establishment's July 1, 2005 limited-duty clerk job offer involved duties of boxing mail, answering the telephone, claims and inquiries, dispatches and second notices. The listed restrictions limited lifting to 25 pounds, pushing and pulling intermittently, sitting, standing and walking as tolerated and climbing, kneeling, bending, stooping and twisting occasionally. There were no requirements for simple grasping, fine manipulation, reaching above the shoulder and driving a vehicle. The Board notes that these restrictions conform to those set by Dr. Wiles in his June 27, 2005 report. Therefore, the Board finds that the position offered appellant on July 1, 2005 was suitable work within his physical restrictions.

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[8] *See Connie Johns*, 44 ECAB 560 (1993).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(4) (July 1997).

[10] 20 C.F.R. § 10.516.

[11] *See Sandra K. Cummings*, 54 ECAB 493 (2003); *see also Maggie L. Moore*, 42 ECAB 484 (1991), *reaff d on recon.*, 43 ECAB 818 (1992) and 20 C.F.R. § 10.516 which codifies the procedures set forth in *Moore*.

[12] *Id.*

The April 26 to November 13, 2006 reports of Dr. Wiles advised that appellant continued to experience back pain. On April 26, 2006 he opined that appellant could not return to his prior position at the employing establishment. Dr. Levin's August 8 and September 28, 2006 reports stated that appellant had ongoing back problems and he performed surgery on November 27, 2006. Although this evidence demonstrates that appellant had ongoing back problems, it did not state that he was unable to perform the duties of the offered position. Dr. Wiles advised that appellant could not return to his former position but did not address the limited-duty job offer. The Board finds that the reports of Dr. Wiles and Dr. Levin are insufficient to establish that appellant remained totally disabled from work.

The Board finds that the Office complied with its procedural requirements in advising appellant that the position was found suitable, providing him with the opportunity to accept the position or provide his reasons for refusing the job offer and notifying him of the penalty provision of section 8106(c).[13] In the October 13, 2005 letter, the Office notified appellant of its finding that the limited-duty clerk position was suitable and of the consequences for not accepting a suitable offer. The Office confirmed that the position remained available. Appellant rejected the offered position on December 8, 2005 and, during a telephone conversation with the Office on that date, asserted that he had retired under OPM. Retirement, however, is not considered an acceptable reason for refusing an offer of suitable work.[14] Appellant also rejected the position on the grounds that he could not work due to his continuing back problems. However, as noted, he submitted no medical evidence to establish that he remained totally disabled from his employment-related back condition.

The Office's December 30, 2005 letter advised appellant that it had determined that the offered position was suitable and based on Dr. Wiles' June 27, 2005 restrictions. Appellant had 15 days to accept the position. However, he again rejected the position. Appellant did not submit any medical evidence to establish he was totally disabled from his back condition. Therefore, he has not established a reasonable basis for refusing the offered position. As the weight of the medical evidence established that appellant could perform the duties of the offered position, he did not offer sufficient justification for refusing the position. The Board finds that the Office met its burden of proof to terminate appellant's wage-loss compensation effective April 15, 2006, as he refused an offer of suitable work.[15]

LEGAL PRECEDENT -- ISSUE 2

Section 10.432 of the Office's regulations provides that, in response to a preliminary notice of an overpayment, a claimant may request a prerecoupment hearing within 30 days of the

[13] *See Bruce Sanborn*, 49 ECAB 176 (1997).

[14] *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).

[15] *Karen L. Yaeger*, 54 ECAB 323 (2003).

written notice of overpayment.[16] Failure to request the hearing within this 30-day time period shall constitute a waiver of that right.[17]

ANALYSIS -- ISSUE 2

The Office issued a preliminary finding of overpayment and fault in the creation of the overpayment on December 5, 2006. Appellant requested a prerecoupment hearing on this matter on January 7, 2007. As he did not request the prerecoupment hearing within the required 30-day time period, the Board finds that he waived his right to this hearing.

LEGAL PRECEDENT -- ISSUE 3

The Act[18] provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.[19] Section 8129(a) of the Act provides that, when an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Office, by decreasing later payments to which the individual is entitled.[20]

ANALYSIS -- ISSUE 3

As noted, the Office properly terminated appellant's entitlement to wage-loss compensation benefits effective April 15, 2006. However, the evidence reflects and appellant does not dispute, that he received wage-loss compensation from the Office in the amount of $7,069.56, for the period April 16 through July 8, 2006. As he was not entitled to receive any disability compensation as of April 15, 2006, the Board finds that the Office correctly determined that appellant received an overpayment of compensation in the amount $7,069.56, for the period in question.

LEGAL PRECEDENT -- ISSUE 4

Section 8129(b) of the Act[21] provides that an overpayment of compensation shall be recovered by the Office unless incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience.[22] Thus, the Office may not waive the overpayment of compensation

[16] 20 C.F.R. § 10.432; *see Willie C. Howard*, 55 ECAB 564 (2004).

[17] *M.B.*, (Docket No. 07-380, issued June 1, 2007).

[18] 5 U.S.C. §§ 8101-8193.

[19] *Id.* at § 8102(a).

[20] *Id.* at § 8129.

[21] *Id.* at § 8129(b).

[22] *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

unless appellant was without fault.[23] Adjustment or recovery must, therefore, be made when an incorrect payment has been made to an individual who is with fault.[24]

On the issue of fault, section 10.433 of the Office's regulations, provides that an individual will be found at fault if he or she has done any of the following:

> "(1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect;
>
> "(2) failed to provide information which he or she knew or should have known to be material; or
>
> "(3) accepted a payment which he or she knew or should have known was incorrect."[25]

With respect to whether an individual is without fault, section 10.433(b) of the Office's regulations provides in relevant part:

> "Whether or not [the Office] determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid."[26]

ANALYSIS -- ISSUE 4

By accepting payments after his entitlement to benefits was terminated, effective April 15, 2006, appellant accepted payments that he knew or should have known were incorrect. Therefore, he was at fault in the creation of the overpayment.[27] On April 5, 2006 the Office properly terminated appellant's compensation benefits effective April 15, 2006. The record reflects that a copy of the Office's decision was properly mailed to appellant at his address of record in the ordinary course of business and is thus presumed to have been received.[28] Appellant has not submitted evidence to rebut the presumption of receipt.[29] Accordingly, he was on notice that his wage-loss benefits had been terminated and that he was not entitled to receive any compensation payments subsequent to April 15, 2006. However, appellant accepted

[23] *Norman F. Bligh*, 41 ECAB 230 (1989).

[24] *Diana L. Booth*, 52 ECAB 370, 373 (2001); *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

[25] 20 C.F.R. § 10.433(a).

[26] *Id.* at § 10.433(b).

[27] *See D.R.*., 59 ECAB ___(Docket No. 07-823, issued November 1, 2007)*; Otha J. Brown*, 56 ECAB 228 (2004); *Karen K. Dixon*, 56 ECAB 145 (2004).

[28] *See Joseph R. Giallanza*, 55 ECAB 186 (2003); *Larry L. Hill*, 42 ECAB 596 (1991).

[29] *Id.*

compensation payments for the period April 16 through July 8, 2006, in the amount of $7,069.56. As he was aware that his entitlement to benefits had been terminated, he accepted payments that he knew or should have known to be incorrect. Accordingly, the Board finds that appellant was at fault in the creation of the overpayment.[30] The fact that the Office may have been negligent in issuing the payments does not mitigate this finding.[31]

As appellant was at fault in the creation of the overpayment, he is not eligible for waiver of recovery of the overpayment. The Office is required by law to recover this overpayment.[32]

CONCLUSION

The Board finds that the Office properly terminated appellant's wage-loss compensation benefits effective April 15, 2006 on the grounds that he refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2). The Board further finds that appellant did not request a prerecoupment hearing within 30 days from the Office's preliminary finding of overpayment and that he therefore waived the right to such a hearing. The Board also finds that appellant received an overpayment of compensation in the amount of $7,069.56 and that he was at fault in the creation of the overpayment, thereby precluding waiver of the recovery of the overpayment.

[30] *D.R., supra* note 27.

[31] 20 C.F.R. § 10.435(a); *William E. McCarty*, 54 ECAB 525 (2003).

[32] Recovery of the overpayment is not an issue in this case, as appellant is not in receipt of continuing total disability payments. With respect to the recovery of the overpayment, the Board's jurisdiction is limited to those cases where the Office seeks recovery from continuing compensation benefits under the Act. 20 C.F.R. § 10.441(a); *see also Bob R. Gilley*, 51 ECAB 377 (2000).

ORDER

IT IS HEREBY ORDERED THAT the March 13 and February 6, 2007 and April 16 and 6, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 2, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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