United States Department of Labor
Employees' Compensation Appeals Board

J.B., Appellant	)	
and	)	**Docket No. 08-1309**
	)	**Issued: October 24, 2008**
FEDERAL AVIATION ADMINISTRATION, FAA ATLANTA ARTCC, Hampton, GA, 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 26, 2008 appellant filed an appeal of decisions of the Office of Workers' Compensation Programs dated May 30, 2007 and February 5, 2008, which terminated his wage-loss compensation on the grounds that he 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 compensation benefits on May 20, 2007 pursuant to 5 U.S.C. § 8106(a).

FACTUAL HISTORY

On November 20, 2005 appellant, then a 43-year-old air traffic controller, sustained an employment-related injury when he tripped over a chair at work. He went to a local emergency room where a head computerized tomography scan was read as normal. Dr. Macon Core, III diagnosed closed head injury. Appellant stopped work that day and has not returned. The Office

accepted the conditions of aggravation of bilateral Eustachian tube dysfunction, concussion, vertigo, subarachnoid hemorrhage and dental fracture as employment related.

In a January 26, 2006 report, Dr. Joseph Weissman, Board-certified in neurology and neurophysiology, noted appellant's complaints of headaches, blackouts, confusion and memory loss following the fall at work. His impression was encephalopathy characterized by vertigo that was not evident on his examination and episodes of lost recall with differential diagnoses of migraine, seizures and possible fugue states. A February 9, 2006 electroencephalogram (EEG) recorded asleep and awake was normal. On March 3, 2006 Dr. Weissman reported that there was no objective data to substantiate appellant's claimed memory loss, blackouts or vertigo.

On March 16, 2006 appellant was placed on the periodic rolls. The letter instructed him to "please advise this Office immediately of any change in residence or mailing address...." In a March 24, 2006 report, Dr. John R. Coleman, Jr., Board-certified in otolaryngology, noted the history of injury. He advised that electronystagnogram (ENG) showed vestibular dysfunction and that appellant's symptoms of dysequilibrium and hearing loss continued until his examination on February 16, 2006 when the dysequilibrium had resolved and his hearing was within the normal range. Dr. Coleman opined that if appellant's dysequilibrium returned, he could not return to his regular job.

On March 31, 2006 Faye Ford, R.N. was assigned for medical management. A June 2, 2006 magnetic resonance imaging scan of the brain was normal and an awake EEG on June 2, 2006 was normal. On July 25, 2006 Steve Shindell, Ph.D. conducted neuropsychological evaluation. He noted appellant's complaints of headaches, tinnitus, worsening blurred vision, worsening hearing and balance problems, vertigo, dizziness, blackouts including one lasting two days, worsening sleep problems, low back pain and numbness radiating down both legs, a 20-pound weight loss, worsening memory and worsening problems with concentration. Dr. Shindell advised:

> "This patient failed all of the validity subtests on the neuropsychological instruments in such a profound manner it was clear that his neuropsychological evaluation produced inaccurate scores, and should be seen solely as a lower limit of his abilities. These scores on independent tests showed such poor effort that they could not be found on the basis of head injury, poor rapport, low education, language problems, or any affective disturbance. At times the responses were close to random performance. The rest of the evaluation was given, however it should be cautioned that any atypical finding should be corroborated by other sources."

He concluded that the results of the neuropsychological assessment were consistent with an individual with extreme embellishment of his situation and diagnosed distortion of results and personality disorder, not otherwise specified.

On August 8, 2006 Dr. Weissman released appellant to return to sedentary office work with no driving. In an October 5, 2006 report, he advised that appellant did not show for an appointment that day. Dr. Weissman advised that appellant had reached maximum medical improvement and could not perform his usual job, stating that the prognosis for recovery was

very poor given his failure to show for appointments and comorbidity with psychological problems. However, appellant could work with restrictions but could not drive for at least six months. In an attached work capacity evaluation, Dr. Weissman advised that appellant could work eight hours a day with one hour standing and one hour walking and could not operate a motor vehicle at work or to/from work.

On February 14, 2007 the employing establishment offered appellant a full-time light-duty position as administrative assistant at the Atlanta Technical Service Center. The job was entirely sedentary in an office environment and was not considered stressful. On March 8, 2007 the Office requested that the employing establishment provide specific restrictions in the physical requirements section of the job offer.

On March 8, 2007 the employing establishment offered appellant the position of administrative assistant. The physical/psychological requirements were described as sedentary work in an office environment with intermittent sitting for eight hours a day, intermittent walking and standing no more than one hour daily with sitting and standing at will and lifting and carrying of reports and papers of no more than 10 pounds. On March 22 and 26, 2007 the Office confirmed that appellant had not responded to the job offer.

By letter dated March 26, 2007, the Office advised appellant that the position offered was suitable to his physical limitations. He was notified that if he failed to report to work at the offered position or failed to demonstrate that the failure was justified, his right to compensation would be terminated pursuant to section 8106 of the Federal Employees' Compensation Act.[1] He was given 30 days to respond. The notice was mailed to appellant's address of record. On May 10, 2007 the employing establishment confirmed that the job remained available and that appellant had not been in contact or returned to work. The Office also verified that the notice had been sent to appellant's address of record. On May 29, 2007 the employing establishment confirmed that the job remained available and appellant had not accepted it or returned to work.

In a May 30, 2007 decision, the Office terminated appellant's wage-loss compensation on the grounds that he declined an offer of suitable work. It noted that he had not responded to the March 26, 2007 notice.

On June 5, 3007 appellant telephoned the Office and was advised to follow his appeal rights. By letter dated June 18, 2007, Cynthia D. Smallwood, a personnel management specialist, advised that around March 15, 2007 appellant contacted her with a new address after he received paperwork she had mailed to an old address. She reported that appellant provided a new address in Atlanta, Georgia. Ms. Smallwood stated that she telephoned the Office in Washington, DC with this information but did not recall who she contacted. On June 27, 2007 appellant requested a telephone hearing and advised that he was living with his brother in Florida but that his mail was being forwarded from Atlanta.

A telephonic hearing was held on November 7, 2007. Appellant testified that he had moved to Clermont, Florida and gave his address. He described his employment injury and stated that in October 2006 he moved in Atlanta and had informed the employing establishment

[1] 5 U.S.C. § 8106(a).

of his new address. Appellant contended that he did not receive either job offer and would have accepted either. He was being treated for post-traumatic stress disorder which he attributed to the November 20, 2005 employment injury. Appellant testified that he notified the employing establishment of his change of address in the fall of 2006 but did not inform the Office because Ms. Smallwood said she would do it. He stated that he had never received notification that he had to inform the Office of a change of address.

By decision dated February 5, 2008, an Office hearing representative affirmed the May 30, 2007 decision.[2]

LEGAL PRECEDENT

Section 8106(c) of the Act provides in pertinent part, "A partially disabled employee who (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation."[3] It is the Office's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.[4] The implementing regulation provides that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of showing that such refusal or failure to work was reasonable or justified and shall be provided with the opportunity to make such a showing before entitlement to compensation is terminated.[5] To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.[6] In determining what constitutes "suitable work" for a particular disabled employee, the Office considers 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.[7] Office procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.[8] 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.[9]

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[2] The February 5, 2008 decision contains a typographical error indicating that the Office decision was dated May 20, 2007.

[3] 5 U.S.C. § 8106(c).

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

[5] 20 C.F.R. § 10.517(a).

[6] *Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[7] 20 C.F.R. § 10.500(b); *see Ozine J. Hagan*, 55 ECAB 681 (2004).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment*: *Determining Wage-Earning Capacity*, *Refusal of Job Offer*, Chapter 2.814.5.a(1) (July 1997); *see Lorraine C. Hall*, 51 ECAB 477 (2000).

[9] *Gloria G. Godfrey*, 52 ECAB 486 (2001).

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.[10] It is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.[11] Section 8123(a) of the Act provides that if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[12] When the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[13]

ANALYSIS

The Board finds that the Office properly terminated appellant's compensation on May 30, 2007 because he refused an offer of suitable work. Dr. Weissman an attending neurologist, released appellant to sedentary duty with no driving on August 8, 2006. On October 5, 2006 he advised that appellant had reached maximum medical improvement and, while he could not return to his usual job, he could work eight hours a day with one hour standing and one hour walking and could not operate a motor vehicle at work or to/from work. On March 8, 2007 the employing establishment offered appellant a full-time light duty-position with physical restrictions that conformed to the restrictions provided by Dr. Weissman. There is no medical evidence of record advising that appellant could not perform the duties of the offered position. The medical evidence therefore established that appellant had the physical ability to perform the offered position.[14]

In order to properly terminate appellant's compensation under section 8106 of the Act, the Office must provide appellant notice of its finding that an offered position is suitable and give appellant an opportunity to accept or provide reasons for declining the position.[15] The record establishes that the Office properly followed the procedural requirements. By letter dated March 26, 2007, mailed to appellant's address of record, the Office advised him that the offered position was suitable. He was notified that if he failed to report to work or failed to demonstrate that the failure was justified, his right to compensation would be terminated, and was allotted 30 days to either accept or provide reasons for refusing the position. Appellant did not respond. By decision dated May 30, 2007, the Office terminated his compensation on the grounds that he refused an offer of suitable work.

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

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

[12] 5 U.S.C. § 8123(a); *see Geraldine Foster*, 54 ECAB 435 (2003).

[13] *Manuel Gill*, 52 ECAB 282 (2001).

[14] *Supra* note 7.

[15] *See Maggie L. Moore*, *supra* note 6.

On appeal, appellant contends that he did not receive either the March 26, 2007 notice or the May 30, 2007 final decision, asserting that the employing establishment did not properly notify the Office of his change of address in Atlanta. He, however, was notified on March 16, 2006 of his responsibility to notify the Office immediately of a change of address. It was therefore his responsibility to do so, not that of the employing establishment. While Ms. Smallwood indicated that she called the Office regarding appellant's change of address, she did not indicate when this took place. Appellant testified at the hearing that he did not receive either job offer which he would have accepted. The record, however, shows that the employing establishment received confirmation that he received the February 14, 2007 job offer. The Office spoke with appellant by telephone on February 28, 2007 and discussed the offered position, advising that it appeared suitable.

The Office mailed the March 26, 2007 letter and the May 30, 2007 decision to appellant's address of record. In the absence of evidence to the contrary, a letter properly addressed and mailed in the due course of business is presumed to have arrived at the mailing address in due course.[16] The Board finds that the Office provided appellant with proper notice. He was offered a suitable position by the employing establishment and such offer was refused. Thus, under section 8106 of the Act, his wage-loss compensation was properly terminated on May 30, 2007 on the grounds that he refused an offer of suitable work.[17]

CONCLUSION

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

[16] *W.P.*, 59 ECAB ____ (Docket No. 08-202, issued May 8, 2008).

[17] *Joyce M. Doll, supra* note 4.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 5, 2008 be affirmed.

Issued: October 24, 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