United States Department of Labor
Employees' Compensation Appeals Board

I.G., Appellant	)	
and	)	**Docket No. 09-400**
	)	**Issued: September 4, 2009**
DEPARTMENT OF HOMELAND SECURITY, CUSTOMS & BORDER PROTECTION, Edinburg, TX, Employer	)	

Appearances:
Lorenzo W. Tijerina, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 25, 2008 appellant filed a timely appeal from the August 27, 2008 merit decision of the Office of Workers' Compensation Programs that terminated his compensation benefits. 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 effective September 1, 2007 on the grounds that he refused an offer of suitable work.

FACTUAL HISTORY

The Office accepted that on October 12, 2004 appellant, then 38-year-old senior patrol officer, sustained a right clavicle fracture, brachial neuritis/radiculitis, right shoulder and right rotator cuff sprains, disorder of the bursae and tendons and degeneration of a cervical

intervertebral disc after his right arm was pulled during training. He stopped work and received wage-loss compensation.

In reports dated from late 2004 to mid 2006, Dr. Jorge E. Tijmes, an attending Board-certified orthopedic surgeon, determined that appellant was totally disabled for all work.[1] On March 10, 2005 appellant underwent right shoulder decompression and distal clavicle debridement surgery that was authorized by the Office. On December 21, 2005 Dr. Charles W. Kennedy, Jr., a Board-certified orthopedic surgeon and Office referral physician, determined that appellant could return to work within specified work restrictions.[2] He advised that appellant could not reach above his shoulders for more than two hours a day, could not lift more than 15 pounds and could not lift for more than two hours a day.

On June 12, 2006 the employing establishment offered appellant a job as a mission support assistant. The job was sedentary in nature and required some walking, standing, bending, and carrying of light items, such as books and papers. In a July 31, 2006 decision, the Office terminated appellant's compensation on the grounds that he refused an offer of suitable work. However, in a March 12, 2007 decision, an Office hearing representative set aside the July 31, 2006 termination decision finding that a conflict in medical opinion arose between Dr. Tijmes and Dr. Kennedy regarding appellant's capacity for work. The Office hearing representative remanded the case for the Office to refer appellant to an impartial medical specialist for an opinion on his ability to work.

On April 11, 2007 the employing establishment offered appellant a job as a mission support assistant. The job was sedentary in nature and required some walking, standing, bending and carrying light items such as books and papers. Appellant would not be required to reach above his shoulders for more than two hours per day, lift for more than two hours per day or lift, push or pull more than 10 pounds. The employing establishment notified him that the position was presently available as of April 23, 2007 and that he was to reply in writing to the job offer by May 14, 2007. In the event appellant failed to respond, the employing establishment would accept it as a declination of the job offer.

On June 14, 2007 appellant contacted the Office and advised that he had been terminated from the employing establishment.

The Office referred appellant to Dr. James F. Hood, a Board-certified orthopedic surgeon, for an impartial medical evaluation. Dr. Hood examined appellant on June 28, 2007. In a July 9, 2007 report, he reviewed appellant's October 12, 2004 employment injury and subsequent medical treatment. Dr. Hood noted that magnetic resonance imaging (MRI) scan testing of appellant's right shoulder showed that he had acromioclavicular arthrosis and bursitis in the subacromial area and MRI scan testing of his neck showed only a simple disc bulge at C5-6 with

[1] In a March 28, 2006 report, Dr. Tijmes indicated that appellant could not engage in lifting, pushing and pulling more than 10 pounds and should limit looking up and down with his neck. However, in other reports from this period, Dr. Tijmes advised that appellant could not perform any work.

[2] Dr. Kennedy diagnosed mild tendinitis of the right shoulder with some residual weakness and cervalgia without radiculopathy.

no significant canal stenosis, lateral recess stenosis, foraminal stenosis or focal nerve root compression. There was no evidence that appellant still had a right clavicle fracture. Dr. Hood advised that appellant complained of pain in the left side of his neck and left shoulder blade radiating into his left ring and little fingers; however, he noted that the accepted injury was to appellant's right arm. Physical examination showed no neck or upper extremity spasms and revealed normal strength and reflexes. Dr. Hood noted that appellant underwent a functional capacity evaluation that showed signs of symptom magnification. However, appellant could function in the light to medium category which allowed constant lifting of 1 to 7 pounds, frequent lifting of 7 to 20 pounds and occasional lifting of up to 35 pounds. Dr. Hood concluded that appellant did not have a herniated cervical disc or fracture of the clavicle or other pathology that required surgery.[3] He concluded that appellant could return to medium-duty work and then be transitioned to regular duty over six to eight weeks.

In a July 12, 2007 letter, the Office advised appellant of its determination that the position offered by the employing establishment was suitable. It stated, "On April 11, 2007 your employing establishment confirmed that this position remains available to you." The Office informed appellant that his compensation would be terminated if he did not accept the position or provide good cause for not doing so within 30 days of the date of the letter.

Appellant submitted a July 6, 2007 treatment note in which Dr. Tijmes indicated that he was to remain off work until further notice.

In an August 13, 2007 letter, the Office advised appellant that he had not provided sufficient reason for not accepting the job offered by the employing establishment. It advised him that his compensation would be terminated if he did not accept the position within 15 days. Appellant subsequently submitted a July 27, 2007 treatment record in which Dr. Tijmes reiterated that he was to remain off work. He did not accept the mission support assistant position.

In an August 29, 2007 decision, the Office terminated appellant's compensation effective September 1, 2007 on the grounds that he refused an offer of suitable work.

Appellant requested reconsideration and submitted notes from Dr. Tijmes dated August 2007 to August 20, 2008. Dr. Tijmes reported that appellant was symptomatic on examination with tenderness in his neck and left shoulder and restricted neck motion. He advised that appellant should stay off work. Dr. Tijmes indicated that cervical interbody fusion surgery at C5-6 and C6-7 was warranted by residuals of the October 12, 2004 injury.[4] In an October 16, 2007 report, Dr. Mohamed Y.I. Beck, an attending Board-certified neurosurgeon, indicated that appellant had radiculopathy in his left arm and entrapment symptoms in his left elbow. In a June 11, 2008 report, Dr. Ivan Melendez-Baez, an attending Board-certified family practitioner, diagnosed a herniated pulposus at C5-6 and C6-7.[5] In an August 21, 2008 letter,

[3] In a May 29, 2007 report, Dr. Tijmes stated that appellant was a candidate for a cervical interbody fusion at C5-C6 "since all conservative treatment has failed."

[4] This surgery was authorized by the Office and was performed by Dr. Tijmes on June 11, 2008.

[5] Appellant also submitted the results of diagnostic testing.

appellant's attorney contended that the weight of medical evidence established that residuals of the accepted employment injury prevented appellant from performing the mission support assistant position. He argued that the job offer was "disingenuous" because appellant had been terminated from the employing establishment effective May 1, 2007 and was not allowed on the employing establishment premises. Counsel submitted documents showing that, effective May 1, 2007, appellant was terminated from the employing establishment for cause (unrelated to his employment injuries).

In an August 27, 2008 decision, the Office denied modification of the August 29, 2007 decision, finding that appellant's compensation was properly terminated effective September 1, 2007.[6]

LEGAL PRECEDENT

Section 8106(c)(2) of the Federal Employees' Compensation 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."[7] Under this section, the Office may terminate the compensation of an employee who refuses to accept or who neglects to work after suitable work is offered to, procured by or secured for the employee.[8] An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.[9] The Board has recognized that section 8106(c) is a penalty provision and will be narrowly construed.[10]

The Office's procedure manual provides that, after assessing a given job offered by the employing establishment, the Office claims examiner must telephone the employing establishment to confirm that the job remains open to the claimant and document that in the file using a Form CA-110 before advising the claimant in writing about the determination of the suitability of the job.[11]

ANALYSIS

The Office accepted that on October 12, 2004 appellant sustained a right clavicle fracture, brachial neuritis and radiculitis, right shoulder and right rotator cuff sprains, disorders of bursae and tendons and degeneration of a cervical intervertebral disc after his right arm was

[6] Appellant submitted additional evidence after the Office's August 27, 2008 decision, but the Board cannot consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

[7] 5 U.S.C. § 8106(c)(2).

[8] *Mary E. Woodard*, 57 ECAB 211 (2005).

[9] 20 C.F.R. § 10.517; *see Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

[10] *Stephen A. Pasquale*, 57 ECAB 396 (2006).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4c (December 1993). The procedure manual provides that an acceptable reason for refusing a job offer is that the offered position is withdrawn. *Id.* at Chapter 2.814.5a(1) (July 1997).

pulled during training. He stopped work and received compensation benefits. On April 11, 2007 the employing establishment offered appellant a job as a mission support assistant. In an August 29, 2007 decision, the Office terminated his compensation effective September 1, 2007 on the grounds that he refused an offer of suitable work.

The Board finds that the Office did not meet its burden of proof to terminate appellant's wage-loss compensation. The evidence of record indicates that the job offer was withdrawn by the employing establishment prior to the Office's August 29, 2007 decision. The April 11, 2007 letter from the employer to appellant described the sedentary duties of the mission support assistant position and advised that the position was currently available as of April 23, 2007. However, in the event that appellant did not submit a written response to the job offer by May 14, 2007, it would be taken as a declination of the job offer. The record reflects that, as of May 1, 2007, appellant was terminated from employment. It is readily evident that the Office claims examiner did not telephone the employing establishment to confirm that the job remained open to appellant before advising him in writing about the suitability determination of the job on July 12, 2007.[12] The Office stated in its July 12, 2007 suitability letter, "On April 11, 2007 your employing [establishment] confirmed that this position remains available to you." However, April 11, 2007 was merely the date the employing establishment offered the position to appellant. There is no evidence that the Office contacted the employing establishment in the intervening months to confirm that the job offer remained available to him.

As the Office has not shown that the job offer remained available to appellant, it has not established that he refused an offer of suitable work.[13] The Office did not meet its burden or proof to justify termination of his compensation for refusing an offer of suitable work.

CONCLUSION

The Board finds that the Office improperly terminated appellant's compensation effective September 1, 2007 on the grounds that he refused an offer of suitable work.

[12] On June 14, 2008 appellant called the Office to advise that he had been terminated from the employing establishment. On appeal, appellant's attorney argued that appellant was terminated from the employing establishment on May 1, 2007 and was barred from returning to the employing establishment premises.

[13] For this reason, the Board need not address the medical evidence.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' August 27, 2008 decision is reversed.

Issued: September 4, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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