United States Department of Labor
Employees' Compensation Appeals Board

T.D., Appellant	)	
and	)	**Docket No. 14-646**
	)	**Issued: July 14, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Alexandria, VA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Acting Chief Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 29, 2014 appellant filed a timely appeal from a September 11, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case. The record also contains a January 9, 2014 OWCP decision denying merit review of the claim.[2]

ISSUES

The issues are: (1) whether OWCP properly terminated appellant's wage-loss compensation under 5 U.S.C. § 8106(c) for refusal of suitable work; and (2) whether it properly denied his application for reconsideration without merit review of the claim pursuant to 5 U.S.C. § 8128(a).

[1] 5 U.S.C. § 8101 *et seq.*

[2] Appellant requested oral argument before the Board. On February 28, 2014 the Clerk of the Board requested that appellant confirm whether he still sought an oral argument within 30 days. Appellant did not respond. The Board has proceeded on the case record.

FACTUAL HISTORY

On July 5, 2003 appellant, then a 31-year-old letter carrier, sustained injuries in a motor vehicle accident while in the performance of duty. OWCP accepted the claim on August 1, 2003 for cervical and lumbar strains. On April 20, 2009 it expanded the claim to include laceration to the forehead and recurrent headaches. Appellant returned to a light-duty position and worked until November 1, 2010, when his position was withdrawn pursuant to the National Reassessment Process (NRP). As of November 1, 2010, he received compensation for wage loss.

In a report dated April 18, 2012, Dr. Richard Meyer, an attending orthopedic surgeon, provided results on examination. He noted some tenderness and spasm in the cervical and lumbar areas. Dr. Meyer found that appellant was capable of working light duty with a 15-pound lifting restriction, no casing and no use of shoulder bag. In a report dated July 19, 2012, he provided results on examination and reiterated the work restrictions. By report dated February 20, 2013, Dr. Meyer again provided results on examination and indicated that the work restrictions remained: 15 pounds lifting, no casing and no shoulder bag carrying.

On March 18, 2013 the employing establishment offered appellant a modified letter carrier position. The limited-duty position was full time and the required lifting was less than 15 pounds, with no casing and no carrying with shoulder bag.

By letter dated May 10, 2013, OWCP advised appellant that it found the offered position to be a suitable job. Appellant was advised to accept the position or provide reasons for refusing within 30 days. OWCP notified him of the provisions of 5 U.S.C. § 8106(c)(2).

In a letter dated April 12, 2013, the employing establishment advised that appellant had stated he was not interested in returning to work. Appellant refused to accept a certified letter with the job offer, but the job offer had also been delivered by regular first class mail to his address of record.

The record contains a July 30, 2013 memorandum of telephone call (Form CA-110) with appellant, who was concerned as to the pretermination letter. Appellant refused to accept the job offer when it was mailed to him and did not understand the process. He was advised that he must review the job offer and accept or reject it. OWCP issued a letter dated July 17, 2013 advising appellant that he had an additional 15 days to accept the position or his compensation would be terminated pursuant to 5 U.S.C. § 8106(c)(2).[3] Appellant did not respond.

By decision dated August 19, 2013, OWCP terminated appellant's wage-loss compensation effective August 24, 2013. It found that he had refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

Appellant requested reconsideration on September 4, 2013. He stated that he had been injured since 2003 and did not feel he could perform the offered position. Appellant submitted an August 19, 2013 report from Dr. Meyer providing results on examination and repeating the

[3] Although dated July 17, 2013, the letter apparently was mailed July 30, 2013.

prior restrictions of 15-pound lifting, no casing and no shoulder bags. He also submitted a duty status report (Form CA-17) dated August 9, 2013 from Dr. Meyer, who diagnosed low back strain and listed restrictions such as six hours of sitting, one-hour standing and two hours walking. Dr. Meyer also stated that permanent restrictions were 15-pound lifting, no casing and no shoulder bags.

By decision dated September 11, 2013, OWCP denied modification of the August 19, 2013 decision. It found that the evidence established that the offered position was suitable.

On October 3, 2013 OWCP received an application for reconsideration. Appellant submitted a September 23, 2013 Form CA-17 from Dr. Meyer reiterating the prior work restrictions. In a narrative report dated September 23, 2013, Dr. Meyer provided results on examination and stated "Again, as far as the injuries of [July 5, 2003], [appellant] is capable of working light duty with a 15-pound lifting restriction, no casing and no shoulder bag."

By decision dated January 9, 2014, OWCP found the application for reconsideration was insufficient to warrant further merit review of the claim.

LEGAL PRECEDENT -- ISSUE 1

5 U.S.C. § 8106(c) 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." It is OWCP's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.[4] To justify such a termination, OWCP must show that the work offered was suitable.[5] An employee who refuses or neglects to work after suitable work has been offered to him or she has the burden of showing that such refusal to work was justified.[6]

With respect to the procedural requirements of termination under section 8106(c), the Board has held that OWCP must inform appellant of the consequences of refusal to accept suitable work and allow appellant an opportunity to provide reasons for refusing the offered position.[7] If appellant presents reasons for refusing the offered position, OWCP must inform the employee if it finds the reasons inadequate to justify the refusal of the offered position and afford appellant a final opportunity to accept the position.[8]

[4] *Henry P. Gilmore*, 46 ECAB 709 (1995).

[5] *John E. Lemker*, 45 ECAB 258 (1993).

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

[7] *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[8] *Id.*

ANALYSIS -- ISSUE 1

The employing establishment offered appellant a modified carrier position based on the physical restrictions recommended by Dr. Meyer, his attending physician. Appellant refused to accept a certified letter containing the job offer, but it was also mailed to his address of record. Although he stated that he did not believe he could perform the offered position, the issue is a medical one that must be resolved by probative medical evidence.

The attending physician, Dr. Meyer, provided specific work restrictions in reports dated April 18, July 19, 2012 and February 20, 2013: 15 pounds lifting, no casing mail and no shoulder bag use. The job offered to appellant was specifically tailored to these physical limitations, as it did not require more than 15 pounds lifting, it involved no casing of mail or shoulder bag use. Appellant had an opportunity to submit medical evidence prior to the August 19, 2013 decision as to his ability to perform the position. As noted, if suitable work is offered, he has the burden to show that his refusal is justified. After the suitable work termination, appellant submitted a Form CA-17 report from Dr. Meyer, who also noted additional restrictions such as six hours sitting. Dr. Meyer did not provide any results on examination, discuss the offered position or provide probative medical opinion to establish that the offered job was medically unsuitable.

The Board finds that the evidence establishes that the offered position was medically suitable. The question is whether OWCP followed its established procedures in terminating compensation. Appellant was advised of the consequences of a failure to accept suitable work, in a 30-day letter on May 10, 2013. He was provided an additional 15 days to accept the position on July 30, 2013. The Board finds that OWCP properly followed its procedures in terminating compensation under 5 U.S.C. § 8106(c)(2). Based on the evidence of record, OWCP properly terminated compensation based on appellant's failure to accept suitable work.

On appeal, appellant reiterated his belief that he could not perform the position and submitted a note from an attending physician. The Board can review only evidence that was before OWCP at the time of the September 11, 2013 decision on appeal.[9] The Board finds that OWCP properly terminated compensation for wage loss in this case.

Appellant can submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 607.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,[10] OWCP's regulations provide that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains

[9] 20 C.F.R. § 501.2(c)(1).

[10] 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application").

evidence that either: "(1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by it; or (3) constitutes relevant and pertinent evidence not previously considered by OWCP."[11] 20 C.F.R. § 10.608(b) states that any application for review that does not meet at least one of the requirements listed in 20 C.F.R. § 10.606(b)(3) will be denied by OWCP without review of the merits of the claim.[12]

ANALYSIS -- ISSUE 2

In the present case, appellant submitted an application for reconsideration on October 3, 2013. He did not establish that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP. As to new and relevant evidence, appellant did not meet this requirement. He submitted September 23, 2013 reports from Dr. Meyer, who reiterated his prior work restrictions. This does not constitute new, relevant and pertinent evidence with respect to the suitable work issues.

Appellant must meet one of the requirements of 20 C.F.R. § 10.606(b)(3) to require OWCP to review the merits of the claim. He did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP or constitute relevant and pertinent evidence not previously considered by OWCP. The Board therefore finds that OWCP properly denied merit review.

CONCLUSION

The Board finds that OWCP properly terminated compensation under 5 U.S.C. § 8106(c)(2) for refusal of suitable work. The Board further finds that OWCP properly determined that appellant's application for reconsideration was insufficient to warrant merit review of the claim.

[11] 20 C.F.R. § 10.606(b)(3).

[12] *Id.* at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 9, 2014 and September 11 and August 19, 2013 are affirmed.

Issued: July 14, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

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

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