

**United States Department of Labor
Employees' Compensation Appeals Board**

EUSEBIO P. ROMERO, JR., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Oakland, CA, Employer**

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**Docket No. 05-892
Issued: September 19, 2005**

Appearances:
Eusebio P. Romero, Jr., pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge

JURISDICTION

On March 8, 2005 appellant timely appealed merit decisions of the Office of Workers' Compensation Programs dated May 14 and October 6, 2004 and February 11, 2005, denying modification of an earlier Office decision terminating his wage-loss compensation benefits on the basis 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 the termination of wage-loss compensation benefits effective February 24, 2003.

ISSUE

The issue is whether the Office met its burden of proof to terminate appellant's wage-loss compensation benefits, effective February 24, 2003, on the grounds that he refused an offer of suitable work.

FACTUAL HISTORY

On September 6, 2000 appellant, then a 52-year-old distribution clerk, filed a traumatic injury claim alleging that he injured his left rib, right arm and back when he was struck by a mail

container. The Office accepted the claim for a left rib contusion and a right shoulder strain/sprain.

The record reflects that on October 11, 2001 the employing establishment placed appellant in a limited-duty position as a video coding systems technician. In a report of February 12, 2002, Dr. Carlton J. Wong, a Board-certified family practitioner, prescribed work restrictions for his right arm of no over-the-shoulder lifting and no lifting over two pounds. On October 24, 2002, when the employing establishment could no longer accommodate appellant in the video coding systems position, the employing establishment offered him a new limited-duty assignment as a scale monitor. The position called for appellant to monitor mail which was weighed on the scale. This entailed inserting a piece of paper weighing less than one ounce into a date stamper and waiting for a printout to be generated. The job required lifting and carrying two pounds with intermittent walking, sitting, stooping, climbing, standing, bending and driving for an eight-hour period with no reaching above the shoulder. Appellant could sit or stand as needed. On October 24, 2002 he refused the scale monitor position and stopped work. The employing establishment advised that it had no other work available.

By letter dated November 20, 2002, the Office advised appellant that the offered scale monitor position was medically suitable for his work capacities and was currently available. The Office allowed him 30 days to accept the position or provide an explanation for refusing the position. The Office also advised appellant of the consequences under 5 U.S.C. § 8106(c)(2) of refusing an offer of suitable work.

On December 2, 2002 appellant formally rejected the employing establishment's job offer. In a letter dated November 30, 2002, he set forth his explanation for rejecting the employing establishment's job offer. Appellant noted his satisfaction with the video coding position and his discontent with his supervisor's decision to offer him a new limited-duty assignment. He stated that he was assigned to the weight scale in September 2001 and that the assignment caused him psychological problems.¹ Appellant additionally asserted that his attending physician, Dr. Satish K. Sharma, a Board-certified internist, found that the position was not within his medical restrictions and stated that he was restricted to no repetitive movements at his shoulders. He submitted medical slips and prior job offers. On a copy of the current job offer, Dr. Sharma stated that the job offer was not within appellant's medical restrictions as repetitive use of his arm was required.

In a letter dated December 16, 2002, the Office requested that Dr. Sharma provide a rationalized medical opinion on the suitability of the job offer as it related to appellant's permanent restrictions. The Office stated that the medical documentation reflected that he reached permanent medical improvement on December 28, 2001 with restrictions on lifting over two pounds with the right arm and no overhead lifting. The Office noted that the employing establishment indicated that the offered position required appellant to insert a 1-ounce tag approximately 20 times in an 8-hour day and that he would be able to sit or stand as needed when not performing that task.

¹ Appellant stated that the Office had denied a claim regarding this on March 20, 2002 in File No. 132038847.

In a response dated January 15, 2003, Dr. Sharma advised that she reviewed the job duties offered to appellant and his restrictions and opined that he would be able to perform the offered job.

In a letter dated February 6, 2003, the Office informed appellant that his arguments for refusing the offered position were not justified. The Office advised that the prior determination regarding suitability remained unchanged and that it would not consider any further reasons for refusal. Appellant was reminded of the consequences of refusing an offer of suitable work and the Office afforded him an additional 15 days to accept the position.

By decision dated February 24, 2003, the Office terminated appellant's wage-loss compensation effective the same date for refusing an offer of suitable work.

In a March 21, 2003 letter, appellant requested a review of the written record. He argued that the offered position was not a "meaningful job, nonproductive, degrading, stressful and ... a means of punishment" and that the medication he was on would place him in an unsafe situation. Appellant stated that the position where the printout was generated on the scale machine required data punching and was located above his shoulder, which was not within his medical restrictions. He further stated that the offered position would require more frequent insertion of tags into the machine more than "approximately 20 times in an 8-hour day."

By decision dated July 2, 2003, an Office hearing representative affirmed the February 24, 2003 decision. The Office hearing representative found that the Office met its burden of proof to terminate appellant's wage-loss compensation based on the opinion of Dr. Sharma and that he failed to substantiate his other assertions.

In an August 5, 2003 letter, appellant requested reconsideration and alleged errors in the hearing representative's July 2, 2003 decision.² He also argued that the job description failed to mention the data punching step which was a crucial part of the weight scale job procedure. Appellant also submitted a July 18, 2003 statement in which he set forth the job duties of the scale monitor position which two coworkers, Robert Mix and Dan Dwan, signed.

In a May 14, 2004 telephone call report, the Office noted that the employing establishment confirmed that the job required appellant to insert a 1-ounce tag approximately 20 times in an 8-hour day. It further noted that the data punching step required him to press a button and advised that the button was not above shoulder height.

In a May 14, 2004 decision, the Office denied modification of its prior decision, finding that the evidence was insufficient. The Office confirmed that the weight scale process involved a data punching step, but found that the button to be pushed for data punching was not above appellant's shoulder level and was within his medical restrictions.

² These errors concerned the description of the job requirements set forth in the Office's December 16, 2002 letter to Dr. Sharma versus the Office's hearing representative's description and typographical errors regarding the actual dates of appellant's statement and review of the written record was requested.

In a July 16, 2004 letter, appellant requested reconsideration. He argued that his coworkers, who signed his statement of what the job entailed, should have been able to verify their knowledge of the offered job. Appellant claimed that since the job offer did not contain essential elements of the position (*i.e.*, the data punching step) it was not valid. He argued that his psychological condition should have been considered in making the job offer. Appellant asserted that the job offer was initiated by an attendance supervisor who did not have the authority to make an offer. He alleged that the main reason his benefits were terminated was due to the employing establishment's statement of "20 times in an 8-hour day" and referred to a May 20, 2004 email statement from Marilu Noseworthy, manager, in which she stated "20 to 30 times within the 8-hour shift." Appellant reiterated that the data punching buttons were above his shoulder.

In an August 12, 2004 letter, the Office requested further information from the employing establishment. In an August 13, 2004 letter, Ms. Noseworthy advised that Supervisor Charles Decluette had the authority to write and issue a limited-duty offer to appellant when it was written. She further stated that she was not aware that he had any mental condition which needed to be considered when offering limited duty.

In an October 6, 2004 decision, the Office denied modification of its prior decision.

In a December 6, 2004 letter, appellant requested reconsideration. He stated that he had established evidence of error in the interpretation and application of facts and had submitted documents which he asserted proved that the employing establishment's assertions concerning the offered job were erroneous.³ Appellant also contended that there were contrasting estimates provided regarding the amount of time required to insert the tag into the machine; that Dr. Sharma did not agree to the estimate of inserting the tag into the machine 20 to 30 times per day; that the job offer did not contain a valid description; that the highest button on the machine was one inch above his shoulder level and, thus, outside his medical restrictions; and that his coworkers' descriptions of the job should be used to show the actual job duties. Appellant argued that the employing establishment erred in the job offer process as the job offer did not comply with elements necessary for a valid job offer. He argued that the Office's reconsideration examiner's actions constituted a trick and her statements were false, fictitious and fraudulent. Lastly, appellant argued that Ms. Noseworthy was aware of his emotional condition and that it needed to be considered at the time of the job offer.

In a decision dated February 11, 2005, the Office denied modification of its prior decision.

³ These documents included a November 14, 2004 statement of the alleged wrongdoings at the employing establishment, a November 14, 2004 statement noting alleged wrongdoings by the Office in its October 6, 2004 decision, a November 25, 2002 letter from the employing establishment concerning appellant's failure to submit medical documentation and his failure to contact his supervisor, a December 17, 2001 Equal Employment Opportunity (EEO) Investigative Affidavit from Ms. Noseworthy, an October 15, 2004 letter from appellant to the employing establishment and a December 22, 2001 EEO Investigative Affidavit from appellant.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.⁴ The Office has authority under section 8106(c)(2) of the Federal Employees' Compensation Act to terminate compensation for any partially disabled employee who refuses or neglects to work after suitable work is offered.⁵ To justify termination, the Office must show that the work offered was suitable, that appellant was informed of the consequences of his refusal to accept such employment and that he was allowed a reasonable period to accept or reject the position or submit evidence or reasons why the position is not suitable and cannot be accepted.⁶ Office regulations provide that, 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

The implementing regulations provide 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.⁸

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.⁹ Additionally, it is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.¹⁰

ANALYSIS

The Office terminated appellant's wage-loss compensation on the grounds that he refused an offer of suitable work. Thereafter, the Office found that he did not provide sufficient evidence to modify its finding that he had refused an offer of suitable work.

⁴ *Willa M. Frazier*, 55 ECAB ____ (Docket No. 04-120, issued March 11, 2004); *see also Roberto Rodriguez*, 50 ECAB 124 (1998).

⁵ 5 U.S.C. § 8106(c).

⁶ *See Ronald M. Jones*, 52 ECAB 190, 191 (2000); *see also Maggie L. Moore*, 42 ECAB 484, 488 (1991), *reaff'd on recon.*, 43 ECAB 818, 824 (1992). *See also* 20 C.F.R. § 10.516 (the Office shall advise the employee that it has found the offered work to be suitable and afford the employee 30 days to accept the job or present any reasons to counter the Office's finding of suitability).

⁷ *Rebecca L. Eckert*, 54 ECAB ____ (Docket No. 01-2026, issued November 7, 2002).

⁸ 20 C.F.R. § 10.517(a).

⁹ *See Kathy E. Murray*, 55 ECAB ____ (Docket No. 03-1889, issued January 26, 2004); *see also Maurissa Mack*, 50 ECAB 498 (1999).

¹⁰ *See Gayle Harris*, 52 ECAB 319, 321 (2001).

The Board finds that the job offer for the position of scale monitor is suitable for appellant's physical condition consistent with the restrictions outlined by Dr. Wong, appellant's attending physician, at about the time the job offer was made. The physical requirements of the position was lifting and carrying no more than two pounds with no reaching above the shoulder. This complies with the February 12, 2002 work restrictions set forth by Dr. Wong.

On November 20, 2002 the Office advised appellant that the offered scale-monitor position was suitable and that he had 30 days in which to accept the offer. The Office also informed him of the penalty provisions of the Act. Appellant rejected the job offer and advised that he had previously been assigned to that position and that it had caused him psychological problems. He noted that his claim for an emotional condition had been denied. Appellant further asserted that Dr. Sharma, his current attending physician, found that the job offer was not within his medical restrictions. Upon further medical development, she opined that appellant was able to perform the offered job. Dr. Sharma, thus, approved the February 12, 2002 work restrictions set forth by Dr. Wong upon which the job offer was based. Appellant offered no medical evidence to support that he had a preexisting psychological condition or any psychological condition which prevented him from performing the duties of the offered position.¹¹

On February 6, 2003 the Office properly informed appellant that his reasons for refusing the offered position were unacceptable and that he had 15 days to accept the offered position or be subjected to termination of compensation benefits. He did not submit any additional evidence or raise any additional arguments for his refusal to accept the offered position and the Office followed its procedures in terminating appellant's compensation benefits. Thus, prior to the termination of his wage-loss compensation benefits, appellant was afforded all the procedural safeguards guaranteed under the regulations and Board precedent.¹² The Board finds that the Office properly terminated appellant's benefits based on a refusal of suitable work on February 24, 2003.

Following the termination, additional evidence was submitted by appellant. The burden shifts to him following the termination to show that his refusal to work in the offered position was justified.¹³ The Board has reviewed the additional evidence submitted by appellant and finds that it is not of sufficient probative value to establish that he cannot perform the offered position.

Appellant raised numerous arguments with respect to whether the offered job was medically suitable. He asserted that he had an additional restriction of repetitive movement; however, there is no medical evidence of file to support such a restriction. In his reconsideration requests, appellant argued about the terminology employed regarding the number of times the weight tab would need to be inserted in an eight-hour day. He contended that he would be required to insert the weight tab more than 20 times in an 8-hour day and referenced

¹¹ See *Gayle Harris, id; Maurissa Mack, supra* note 9.

¹² 20 C.F.R. §§ 10.516, 10.517; see *Linda Hilton*, 52 ECAB 476 (2001).

¹³ *Gloria J. Godfrey*, 52 ECAB 486, 488 (2001).

Ms. Noseworthy's email of May 20, 2004, which stated that the insertion would occur "20 to 30 times within the 8-hour shift." However, appellant has presented no evidence to substantiate that the duties of the position were outside of his work restrictions. The Board notes that Dr. Sharma had approved a job that required him to insert the 1-ounce weight tab "approximately 20 times in an 8-hour day." As Dr. Sharma reviewed the job offer knowing that the duties were approximate, her opinion that the offered position was medically suitable is still entitled to determinative weight. Appellant did not submit any other medical evidence to support his assertion that the job was not outside his medical restrictions.

Appellant has also raised numerous arguments concerning whether the employing establishment offered a legitimate job offer. In his reconsideration requests, appellant alleged that the person initiating the job offer did not have the authority to offer such a job. Contrary to his assertion, the employing establishment stated that the person who wrote the job offer had the authority to issue a limited-duty offer when it was written. There is no credible evidence that the job was not properly and validly offered by the employing establishment.

Appellant alleged that the job description failed to mention the data punching step and, thus, argued that the failure to mention this essential step rendered it an invalid offer. The Office procedure manual at section 28.14.4a(1) states that the job offer must include a description of the duties to be performed and the specific physical requirements of the position.¹⁴ Although the employing establishment confirmed that the weight scale process involved pushing a data punching button and appellant properly noted that the job offer did not specifically mention that pushing a data punching button was involved in the process, the Board notes that the job offer described the weight scale process with sufficient detail. Moreover, the employing establishment advised that the data punching button was not higher than appellant's shoulder level and, thus, was properly within his restrictions. He has not submitted any medical evidence to show that he is physically incapable of pushing such a button or unable to perform any of the other functions of the offered position. The Board further notes that, although appellant submitted a statement from coworkers regarding the job duties of the scale monitor position, this statement does not establish that the job offered to him required performance of any duties beyond the work restrictions imposed by his physicians.

Appellant alleged that he had a preexisting psychological condition which both the Office and the employing establishment knew about and that this should have been taken into consideration when the position was offered. The Office must consider preexisting and subsequently acquired conditions in determining the suitability of an offered position.¹⁵ However, appellant submitted no medical evidence to establish that he had any psychological condition, nor that it would prevent him from performing the duties of the offered position. Additionally, Ms. Noseworthy, in her August 13, 2004 letter, denied any knowledge of any mental condition he might have had that needed to be considered when the job offer was made. Accordingly, there is no evidence that appellant's alleged psychological condition precluded him from performing the scale monitor position that was offered on October 24, 2002.

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4.a(1)(a)(b)(December 1993).

¹⁵ See *Gayle Harris*, *supra* note 10; *Maurissa Mack*, *supra* note 9.

Appellant has also expressed his discontent over being assigned to a new limited-duty assignment from his video coding position and argued that the offered position was not a meaningful job, was nonproductive, degrading, stressful and some way a means of punishment. The record indicates that he was offered the scale monitor position when the employing establishment could no longer accommodate him in the video coding position. Frustration over not being able to work in a particular environment, however, is not considered in determining the suitability of an offered position.¹⁶

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation effective February 24, 2003 on the grounds that he refused an offer of suitable work. The subsequent evidence and arguments submitted by him were insufficient to modify the Office's decision.

ORDER

IT IS HEREBY ORDERED THAT the February 11, 2005, October 6 and May 14, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 19, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

¹⁶ Cf. *Lillian Cutler*, 28 ECAB 125 (1976) (frustration from desire to work in a particular position is not compensable).