United States Department of Labor
Employees' Compensation Appeals Board

RAMON M. LOPEZ, Appellant	)	
and	)	**Docket No. 05-1228**
	)	**Issued: September 19, 2005**
U.S. POSTAL SERVICE, POST OFFICE, San Antonio, TX, Employer	)	

Appearances:
Ramon M. Lopez, pro se
Office of the Solicitor, for the Director

Case Submitted on the record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 17, 2005 appellant filed a timely appeal from an Office of Workers' Compensation Programs' denial of reconsideration dated April 8, 2005 and a December 12, 2004 hearing representative decision affirming the denial of a schedule award and termination of compensation on the grounds that he refused an offer of suitable work. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issues are: (1) whether the Office properly terminated appellant's compensation on the grounds that he refused an offer of suitable work; (2) whether the termination of appellant's compensation under 5 U.S.C. § 8106(c) serves as a bar to further compensation under section 8107 arising from the accepted employment injury; and (3) whether the Office properly refused to reopen appellant's case for reconsideration of his claim under 5 U.S.C. § 8128.

FACTUAL HISTORY

On April 10, 2000, appellant, a 57-year-old letter carrier, filed a Form CA-2 claim alleging that he sustained a bilateral carpal tunnel condition causally related to factors of his employment. The Office accepted the claim for bilateral carpal tunnel syndrome. Appellant stopped work in September 2000 and returned to full duty on February 26, 2001. The Office paid appropriate compensation for temporary total disability and authorized carpal tunnel release surgeries on September 21 and December 7, 2000.

On April 18, 2002 the Office granted appellant a schedule award for 28 percent permanent impairment of both right and left upper extremities, for the period March 14, 2001 to November 15, 2002 or a total of 87.36 weeks of compensation.

On September 6, 2002 appellant filed a claim for benefits, alleging that he sustained a bilateral shoulder condition causally related to factors of his employment. The Office accepted the claim for bilateral shoulder impingement syndrome. On November 18, 2002 the Office combined the two claims. The Office paid appropriate compensation for total disability and placed appellant on the periodic rolls.

In a report dated August 14, 2003, Dr. Sanjay Misra, attending physician and a Board-certified orthopedic surgeon, stated that appellant could return to work as of September 2, 2003 with restrictions. He advised that appellant could do limited reaching above the shoulders with weights greater than 10 pounds; no pushing greater than 20 pounds; and no pulling greater than 20 pounds. Dr. Misra also stated that appellant should not do any ladder climbing. In a work capacity evaluation dated August 14, 2003, Dr. Misra indicated that appellant could work an eight-hour day within the restrictions listed above in addition to no reaching for more than 1 to 2 hours; no reaching above the shoulders for more than 1 hour; and limited lifting, squatting, and climbing with no more than 20 pounds.

In an Office memorandum dated August 28, 2003, it was noted that appellant had elected to retire on September 1, 2003.

On September 11, 2003 the employing establishment offered appellant a job as a modified letter carrier based on the restrictions outlined by Dr. Misra.[1] On September 14, 2003 appellant rejected the modified letter carrier position on the grounds that he was retiring.

By letter dated September 10, 2003, the Office advised appellant that a suitable position was available and, that pursuant to section 8106(c)(2), he had 30 days to either accept the job or provide an acceptable explanation for refusing the offer. The Office stated that if appellant refused the job or failed to report to work within 30 days without reasonable cause, it would terminate his compensation pursuant to 5 U.S.C. § 8106(c)(2).[2]

[1] The duties of the position included: Answering telephones; performing return to sender mail, delivering light items such as express mail, certified mail and additional duties as assigned by his supervisor, within his limitations.

[2] 5 U.S.C. § 8106(c)(2).

On September 29, 2003 appellant filed a Form CA-7 claim for a schedule award based on the partial impairment of his upper extremities.

By letter dated October 10, 2003, the Office advised appellant that he had 15 days to accept the position, or it would proceed to terminate his compensation. He did not respond.

By decision dated October 27, 2003, the Office terminated appellant's compensation benefits on the grounds that he refused an offer of suitable work.

By decision dated November 5, 2003, the Office denied appellant's request for a schedule award, finding that the October 27, 2003 decision terminating compensation pursuant to section 8106(c) precluded him from receiving any further compensation under the Federal Employees' Compensation Act.

On November 10, 2003 appellant requested an oral hearing, which was held on September 21, 2004. At the hearing, his representative contended that the Office's October 27, 2003 termination was improper because appellant had elected to retire on September 1, 2003, which was 10 days prior to the date he received the employing establishment's job offer. The representative also contended that appellant should be entitled to a schedule award.

By letter dated October 18, 2004, the employing establishment stated that appellant had requested a retirement date of September 1, 2003 although he was aware as of August 14, 2003 that he was being released to return to work. The employing establishment contended that his retirement was not a valid reason for refusing the modified job offer.

By decision dated December 12, 2004, an Office hearing representative affirmed the October 27, 2003 termination decision. The hearing representative further found that appellant's termination precluded him from receiving a schedule award.[3]

By letter dated February 1, 2005, appellant requested reconsideration and submitted a copy of his application for retirement, which he signed on August 12, 2003.

By decision dated April 8, 2005, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its prior decision.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits. Under section 8106(c)(2) of the Act[4] the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work

[3] The hearing representative noted that the employing establishment had faxed a copy of the job offer to the Office on September 10, 2003; however, the record contains a letter dated September 11, 2003 to appellant which contains a copy of the job offer. The date on the actual job offer to appellant was listed as September 2, 2003 and signed by a supervisor on September 3, 2003.

[4] 5 U.S.C. § 8101 *et seq.*

is offered to, procured by, or secured for the employee.[5] Section 10.517 of the Office's regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured 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 a determination is made with respect to termination of entitlement to compensation.[6] 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.[7] This burden of proof is applicable if the Office terminates compensation under 5 U.S.C. § 8106(c) for refusal to accept suitable work.

ANALYSIS -- ISSUE 1

The determination 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.[8] In the instant case, the employing establishment identified a job as a modified letter carrier for eight hours per day based on the physical restrictions outlined by Dr. Misra, the attending physician, who stated that appellant could do limited reaching above the shoulders with weights greater than 10 pounds; no pushing greater than 20 pounds; and no pulling greater than 20 pounds; no ladder climbing; no reaching for more than 1 to 2 hours; no reaching above the shoulder for more than 1 hour; and limited lifting, squatting, and climbing with more than 20 pounds. The Office found that the weight of the medical evidence rested with Dr. Misra's opinion, who found that appellant was capable of performing the modified job and returning to work within the indicated restrictions. The Board finds that Dr. Misra's opinion represents the weight of medical opinion.[9] Appellant's assertions that he was unable to accept the position because he retired from the employing establishment is excluded pursuant to Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(c) (July 1997), and is not a sufficient basis on which to decline the position.[10]

Thus, there was insufficient support for appellant's stated reasons in declining the job offer. Accordingly, appellant's refusal of the job offer was not reasonable or justified, and the

[5] *Patrick A. Santucci*, 40 ECAB 151 (1988); *Donald M. Parker*, 39 ECAB 289 (1987).

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

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

[8] *Robert Dickinson*, 46 ECAB 1002 (1995).

[9] *Barbara R. Bryant*, 47 ECAB 715 (1996).

[10] This section states: "Unacceptable reasons for refusal: Reasons which my be considered acceptable for refusing the offered job include (but are not limited to); the claimant's preference for the area in which he or she currently resides; personal dislike of the position offered or the work hours scheduled; lack of potential for promotion lack of job security; retirement; and previously-issued rating for loss of wage-earning capacity based on a constructed position where the claimant is not already working at a job which fairly and reasonably represents his or her wage-earning capacity. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(c) (July 1997). *See also Charles E. Nance*, 54 ECAB ___ Docket No. 01-1923, issued February 28, 2003).

Office properly terminated his compensation under section 8106. The Office met its burden of proof in this case to terminate appellant's compensation benefits pursuant to 5 U.S.C. § 8106.

Following the Office's termination of compensation, the burden of proof in this case shifted to appellant,[11] who requested an oral hearing but did not submit any additional factual or medical evidence in support of his request. The Board will affirm the Office's December 12, 2004 decision.

LEGAL PRECEDENT -- ISSUE 2

The Federal (FECA) Procedure Manual states at Chapter 2.814(c)(6), Claims, *Reemployment: Determining Wage-Earning Capacity*,[12] that a claimant who unreasonably refuses an offer of suitable employment is not entitled to any further compensation benefits, with the exception of medical expenses for treatment of the accepted condition. In addition, Chapter 2.814(d)(2) states:

> "If no reply is received from the claimant, the [claims examiner] should prepare a compensation order which terminates any further compensation for wage loss (effective as of the end of the roll period), as well as compensation for permanent partial impairment to a schedule member, under section 8106(c)(2) of the Act. The claimant's entitlement to payment of medical expenses for treatment of the accepted condition is not terminated."[13]

ANALYSIS -- ISSUE 2

In this case, the Office has properly exercised it authority as granted under the Act and implementing federal regulations. Section 8106(c) provides that an employee who refuses suitable work is not entitled to further compensation for total disability or permanent impairment.[14] With regard to schedule awards, the Board has held that monetary compensation payable to an employee under section 8107 are payments made from the Employees' Compensation Fund and are, therefore, subject to the penalty provision of section 8106(c).[15] The Board, therefore, finds that appellant's refusal to accept suitable work constitutes a bar to his receipt of a schedule award for any impairment which may be related to the April 10, 2000 and April 18, 2002 employment injuries, following the October 27, 2003 termination decision.

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[11] *Talmadge Miller*, 47 ECAB 673, 679 (1996); *see also George Servetas*, 43 ECAB 424 (1992).

[12] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814(c)(6) (December 1993).

[13] Chapter 2.814(d)(2).

[14] 20 C.F.R. § 10.124(e).

[15] *Stephen R. Lubin*, 43 ECAB 564 (1992).

LEGAL PRECEDENT -- ISSUE 3

Under 20 C.F.R. § 10.606(b), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law; by advancing a relevant legal argument not previously considered by the Office; or by submitting relevant and pertinent evidence not previously considered by the Office.[16] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[17]

ANALYSIS -- ISSUE 3

In the present case, appellant did not show that the Office erroneously applied or interpreted a specific point of law; he did not advance a relevant legal argument not previously considered by the Office; and he has not submitted relevant and pertinent medical evidence not previously considered by the Office. Appellant submitted a copy of his application for immediate retirement, which he signed on August 12, 2003. However, as noted, retirement is not a sufficient basis for refusing a suitable position. Appellant merely repeated his contentions that the termination of compensation due to his refusal to accept the job offer was not valid because he retired before the offer was made; however, this is an argument appellant presented previously to the Office. Thus, the request did not contain any new and relevant evidence for the Office to review. The Board finds that the Office properly refused to reopen appellant's claim for reconsideration.

CONCLUSION

The Board finds that the Office met its burden to terminate appellant's compensation benefits pursuant to 5 U.S.C. § 8106. The Board finds that the Office found that section 8106(c) of the Act serves as a bar to further compensation for disability arising from the accepted April 10, 2000 and April 18, 2002 employment injuries. The Office properly refused to reopen appellant's case for reconsideration on the merits of his claim under 5 U.S.C. § 8128(a).

[16] 20 C.F.R. § 10.606(b)(1); *see generally* 5 U.S.C. § 8128(a).

[17] *Howard A. Williams*, 45 ECAB 853 (1994).

ORDER

IT IS HEREBY ORDERED THAT the April 5, 2005 and December 12, 2004 decisions of the Office of Workers' Compensation Programs be affirmed.

Issued: September 19, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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