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U.S. DEPARTMENT OF LABOR

EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 50
LONDON, KY 40742-8300
Phone: (202) 693-0045

DEC 5 2006

Date of Injury: 02/22/1994
Employee: TED W. SHAW

TED W SHAW
10447 BIGTREE CIRCLE WEST
JACKSONVILLE, FL 32256

Dear Mr. SHAW:

This is in reference to your workers' compensation claim. Pursuant to your request for a hearing, the case file was transferred to the Branch of Hearings and Review.

A preliminary review was completed on the case. Based upon that review, it has been determined that the decision of the District Office should be reversed as outlined in the attached decision.

Since the enclosed order provides for the reinstatement of compensation for wage loss, you must forward a completed CA7 to the District Office cited below, through your employing agency.

Future correspondence should be addressed to: U.S. Department of Labor, Office of Workers' Compensation Programs:

US DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 6 JAC
LONDON, KY 40742-8300

Sincerely,



Christina Stark
Hearing Representative

US POSTAL SERVICE
NORTHERN FLORIDA PERF CLUSTER
INJURYB COMPENSATION OFFICE
1100 KINGS ROAD
JACKSONVILLE, FL 32203

PAUL H FELSER
ESQ.
POST OFFICE BOX 10267
SAVANNAH, GA 31401

U. S. DEPARTMENT OF LABOR
Office of Workers' Compensation Programs

DECISION OF THE HEARING REPRESENTATIVE

In the matter of the claim for compensation under Title 5, U. S. Code 8101 et. seq. of Ted Shaw, Claimant; Employed by the U. S. Postal Service in Jacksonville, Florida. Case No. 060590409.

Merit consideration of the case file was completed in Washington, D.C. Based on this review, the decision of the District Office dated September 5, 2006 is reversed for the reasons set forth below.

The issue for determination is whether the claimant refused suitable employment under Section 8106(c) of the Federal Employees' Compensation Act.

The claimant, born December 24, 1987, was employed as a Driver/Instructor for the U. S. Postal Service in Jacksonville, Florida. On February 22, 1994, he was injured in the performance of duty when he caught a box that was falling off a shelf at work and injured his neck.

The Office accepted the claim for a herniated disc C5-6, right shoulder strain, and right shoulder impingement syndrome.

On June 14, 1994, the claimant underwent a fusion at C5-6.¹

The claimant stopped work to undergo surgery and returned to part time work on October 24, 1994. He stopped work on May 6, 1995 and compensation for wage loss commenced. He returned to full time limited duty work on November 7, 1995 but stopped work again on November 15, 1995. Compensation for wage loss resumed.

He underwent open shoulder decompression and repair of the right rotator cuff in 1995.

¹Evidence of record indicates he had a prior fusion at C6-7 in 1982.

He returned to work on December 6, 1998 as a Clerk, working four hours per day.

He is under the care of Dr. Jacob Green.

He suffered a recurrence of total disability on October 24, 2000.

On August 10, 2004, the claimant underwent a second opinion examination with Dr. John Flinchbaugh, a board certified orthopedist. He examined the claimant and opined that he has ongoing residuals and could perform sedentary work.

On October 7, 2004, the Office submitted Dr. Flinchbaugh's report to Dr. Green for review and comment.

On October 20, 2004, Dr. Green stated that he reviewed the report and agreed with the findings.

On December 27, 2004, the employing agency offered the claimant a position as a Mail Processing Clerk. The agency modified the position and reoffered it to the claimant on February 24, 2005. The claimant refused.

On April 15, 2005, the Office declared the position suitable and allowed him thirty days to accept the position or offer valid reasons for refusal.

The claimant underwent a Functional Capacity Evaluation (FCE) and was found to be unable to perform the position.

On August 23, 2005, the agency offered the claimant another position as a Modified Tractor Trailer Operator which the claimant refused.

On April 18, 2006, the claimant underwent a second opinion examination with Dr. Brian Lotman, a board certified orthopedic surgeon. He opined that the impingement has partially resolved. He did not feel that the effects of the work injury were present at the time of his examination. He stated that the claimant has consequential symptoms from the cervical fusion.² He did not feel that the claimant could perform the modified position.

²An MRI of the cervical spine dated November 8, 2005 was abnormal with multiple areas of spinal stenosis, nerve root foraminal stenosis from C3 to C7.

On May 2, 2006, the Office submitted Dr. Lotman's report to Dr. Green for review and comment.

On May 22, 2006, the agency modified the offer and resubmitted it to the claimant.

On June 14, 2006, Dr. Green agreed that the claimant could greet customers and hand out forms. He recommended sitting, two hours per day; walking, reaching, one hour per day; and no overhead reaching, squatting, operating a motor vehicle, pushing, etc.

On June 27, 2006, the Office declared the position suitable and afforded the claimant thirty days to accept the job or offer valid reasons for refusal.

On July 20, 2006, the Office approved additional surgery for the claimant.

On August 1, 2006, the Office afforded the claimant an additional fifteen days to accept the job or offer valid reasons for refusal.

On August 3, 2006, Dr. Bryan Haycock stated that he explained the magnitude of the surgery to the claimant and his wife.

The claimant responded that he is scheduled for surgery on August 16, 2006 as approved by the Office.

On August 17, 2006, the Office noted that surgery was approved but not performed as scheduled. Therefore, the claimant was afforded an additional fifteen days to accept the position or offer valid reasons for refusal.

On August 31, 2006, Dr. Bryan Haycock stated that the claimant is in a no work status until his postoperative recovery.

On September 5, 2006, the Office terminated compensation for the reason that the claimant refused suitable employment.

The claimant disagreed with the decision and requested an oral hearing before an OWCP representative. I find that this case is not in posture for a hearing. Based on my review of the file, the decision of the District Office dated September 5, 2006 should be reversed. I do not find that the Office met its burden of proof in terminating benefits.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.³

Under Section 8106 (c)(2) of the Act, the Office may terminate the compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.⁴ To justify termination, the Office must show that the work offered was suitable⁵ and must inform the claimant of the consequences of refusal to accept such employment.⁶ The Employees' Compensation Appeals Board has held that due process principles apply in cases that fall under the provision of Sec.8106 (c) involving a refusal to accept suitable employment that has been secured for an individual.⁷

In the present case, the claimant refused the limited duty position since he was waiting to undergo surgery. In his report dated August 3, 2006, Dr. Haycock discussed that the surgery would be a salvage operation to decompress the stenotic cervical spine. He noted the magnitude of the operation and stated that surgery may do little to improve the claimant's symptoms. On August 31, 2006, Dr. Haycock recommended a no work status for the claimant pending surgery. On September 20, 2006, Dr. Haycock again stated that the claimant would be off work until recovery from his spinal fusion.

In the present case, the claimant has refused the offered position based on his physician's recommendation that he remain off work pending surgery. I find that the claimant has presented *prima facie* evidence to support that he refused the position based on his physician's recommendation. Dr. Haycock, the surgeon, has recommended no work pending surgery. The case file indicates that surgery was scheduled for October 4, 2006 but no records on file confirm that this took place.

Upon return of the file, the Office should restore compensation benefits retroactive to the date of termination. The Office should determine whether surgery has taken place. If it has not been performed, the Office should submit the job offer to Dr. Haycock and request his opinion on whether the claimant would be capable of performing the duties of a Modified Tractor Trailer Operator/Lobby Greeter pending his surgery. He should be asked to

³Bettye F. Wade, 37 ECAB 556 (1986).

⁴Camillo R. DeArcangelis, 42 ECAB 941 (1991).

⁵Carl W. Putzier, 37 ECAB 691, 700 (1986).

⁶Maggie L. Moore, 42 ECAB 484 (1991).

⁷Mary Howard, ECAB Docket No. 92-886 issued May 19, 1994.

provide his reasoned medical rationale for any opinion rendered since it has been months since surgery was approved.

Consistent with the above findings, the decision of the District Office dated September 5, 2006 is REVERSED and the case file is REMANDED for further action as described above.

DATED: DEC 5 2006
WASHINGTON, D.C.



CHRISTINA STARK
Hearing Representative
For
Director, Office of Workers'
Compensation Programs