U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES W. LOWERY and DEPARTMENT OF THE ARMY, DIRECTORATE OF PUBLIC WORKS, Fort Bragg, NC

Docket No. 00-1766; Submitted on the Record;
Issued June 1, 2001

DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective January 2, 2000 on the grounds that he refused an offer of suitable employment.

On January 18, 1996 appellant, a 59-year-old electrical equipment repairer, injured his lower back while in the performance of duty. The Office accepted appellant's claim for lumbar strain and herniated nucleus pulposus at L4-5. Additionally, the Office authorized surgical lumbar decompression at L3-5, which appellant underwent on September 25, 1998. Appellant received appropriate wage-loss compensation for his employment-related injury.

As a result of his injury, the employing establishment offered appellant a part-time, limited-duty position as a recreational clerk. In October 1999, appellant's treating physician, Dr. Menno Pennink, a Board-certified neurosurgeon, reviewed the job offer and advised that as of November 1, 1999 appellant was physically capable of performing the duties of a part-time recreational clerk. Additionally, the Office determined that the offered position was suitable for appellant's work capabilities and advised him accordingly.[1]

Although appellant had been released to return to work as a part-time recreational clerk, the employing establishment advised the Office that appellant had expressed reservations about his ability to return to work by November 15, 1999. In a letter dated November 9, 1999, the Office advised appellant that absent a valid reason for refusing to report for duty, he was expected to report to work as scheduled. The Office afforded appellant an additional 15 days within which to accept the offered position and further advised appellant that it would not accept any further reasons for refusal of the offered position.

[1] The Office also advised appellant of the consequences of failing to accept an offer of suitable employment.

Appellant provided the employing establishment with a handwritten note dated November 22, 1999 from Fayetteville Family Medical Care, excusing him from work from November 22, 1999 through January 1, 2000.[2] The note indicated "no work due to chronic back pain." Additionally, on the date appellant was scheduled to report for duty, he provided the employing establishment with a November 23, 1999 letter from Dr. Pennink, who indicated appellant was "not able to return to work." He noted that appellant remained under his care "for complaints of chronic low back pain," but Dr. Pennink did not otherwise provide an explanation for appellant's apparent total disability.

On November 24, 1999 the Office forwarded Dr. Pennink a detailed description of the offered position and asked him to review the information and provide an opinion as to whether appellant was capable of performing the described duties on a part-time basis. That same day, Dr. Pennink responded noting his approval.

In a letter dated December 9, 1999, the Office informed appellant that Dr. Pennink had once again reviewed and approved the offered position. Additionally, the Office advised appellant that he had 15 days within which to accept the offered position and that it would not accept any further reasons for refusal.

On December 14, 1999 appellant advised the Office that he recently filed for disability retirement, which if approved would become effective December 31, 1999. Appellant explained that he was unable to return to work due to continued pain and because his current medications altered his ability to drive or even stand unassisted.

Inasmuch as appellant did not accept the offered position within the allotted timeframe, the Office issued a decision dated December 30, 1999 terminating compensation effective January 2, 2000.

The Board finds that the Office met its burden of proof in terminating appellant's compensation for refusing suitable work.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.[3] Under section 8106(c)(2) of the Federal Employees' Compensation Act[4] the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for him.[5] To justify

[2] The author's signature is illegible.

[3] *Frank J. Mela, Jr.*, 41 ECAB 115 (1989); *Mary E. Jones*, 40 ECAB 1125 (1989).

[4] 5 U.S.C. § 8106(c)(2).

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

termination of compensation, the Office must show that the work offered was suitable,[6] and must inform appellant of the consequences of refusal to accept such employment.[7]

An employee who refuses or neglects to work after suitable work has been offered or secured for him has the burden of showing that such refusal or failure to work was reasonable or justified.[8] Additionally, the employee shall be provided the opportunity to make such a showing before entitlement to compensation is terminated.[9] Office procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.[10]

The determination of whether appellant is capable of performing the offered position is a medical question that must be resolved by medical evidence.[11] Appellant's treating neurosurgeon, Dr. Pennink, reviewed the position description as recently as November 24, 1999 and stated that appellant was capable of performing the duties as described. While appellant submitted a November 22, 1999 handwritten note excusing him from work "due to chronic back pain," it is not entirely clear who wrote this note.[12] Furthermore, the note does not provide any objective evidence to support a finding of total disability. Thus, while appellant contends he is unable to perform the duties of the offered position, he has not submitted any rationalized medical evidence calling into question Dr. Pennink's contrary opinion.

Accordingly, the Board finds that the Office properly relied on Dr. Pennink's November 24, 1999 opinion as a basis for concluding that the part-time, limited-duty position of recreational clerk represented suitable employment. Under these circumstances, appellant's failure to accept the offered position justified termination of his compensation in accordance with section 8106(c)(2) of the Act.[13]

[6] *Arthur C. Reck*, 47 ECAB 339 (1996).

[7] *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1972).

[8] 20 C.F.R. § 10.517(a) (1999).

[9] *John E. Lemker*, 45 ECAB 258, 263 (1993).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5 (May 1996); *see C.W. Hopkins*, 47 ECAB 725, 727 n. 5 (1996).

[11] *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

[12] While it has been suggested elsewhere in the record that the November 22, 1999 note was written by appellant's family physician, Dr. Heine, the Fayetteville Family Medical Care letterhead identifies James W. Heine as a certified physician assistant (PA-C) and not a medical doctor.

[13] 5 U.S.C. § 8106(c)(2).

The December 30, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
June 1, 2001

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member