United States Department of Labor
Employees' Compensation Appeals Board

L.C., Appellant	)	
	)	**Docket No. 08-2334**
and	)	**Issued: July 16, 2009**
	)	
U.S. POSTAL SERVICE, POST OFFICE, San Juan, PR, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On August 25, 2008 appellant filed a timely appeal from the July 3, 2008 decision of the Office of Workers' Compensation Programs terminating her compensation and schedule award benefits for abandoning suitable employment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether the Office properly terminated appellant's compensation and schedule award benefits effective April 7, 2008 on the grounds that she abandoned suitable work pursuant to 5 U.S.C. § 8106(c)(2).[1]

[1] By decision dated August 28, 2007, the Office denied appellant's claim for a recurrence of disability as of January 17, 2007. Appellant has not filed an appeal of the August 28, 2007 decision; therefore, the Board will not address the merits of the decision.

FACTUAL HISTORY

Appellant, then a 33-year-old acting supervisor and distribution window clerk, filed a traumatic injury claim alleging that, on April 15, 1999, she was a victim of death threats associated with a March 25, 1999 robbery, which occurred at the employing establishment. The Office accepted her claim for post-traumatic stress disorder (PTSD) and appellant was placed on the periodic rolls.

In a report dated June 4, 1999, appellant's attending physician, Dr. Vivian Charneco Llabres, a treating physician, released appellant to work full time, but recommended that she be restricted from exposure to window clerk duties and that she be placed in a low-noise, low-stress work area to avoid emotional deterioration.

On June 22, 1999 appellant accepted a job as a modified distribution clerk. Her duties included data input, filing, preparing reports, operating a computer and answering telephones. Physical requirements precluded exposure to noise, odors or fumes. On July 6, 2001 appellant accepted a position as distribution window clerk in the business service network. The position description specified that appellant would not be exposed to the window service area or to noise and would be placed in a low-stimulus work area, as required by her treating physician.

On January 14, 2008 the employing establishment made a limited-duty job offer to appellant. The position of modified sales/services/distribution associate was identified as a temporary rehabilitation position, which was effective January 5, 2008. The location of the position was the Main Office Window Services (MOWS). Job duties included processing certified, registered and express mail and performing other clerical duties. The offer provided that appellant would not be required to perform window services. The offer contained the following notation: "Please note, your [t]emporary [r]ehab[ilitation] [j]ob [o]ffer [a]ssignment will be reassessed again during the National Reassessment Process Phase Two in early 2008."

On February 18, 2008 appellant declined the limited-duty offer. She contended that the position offered was not medically suitable.

By letter dated March 5, 2008, the Office advised appellant that the modified sales/services/distribution associate position offered by the employing establishment was suitable and in accordance with her medical limitations. It stated that the only difference between the January 14, 2008 job offer and the July 6, 2001 offer, was the location of the position. The Office confirmed that the position remained available to appellant and that she had 30 days to respond.

In response, appellant submitted a letter dated April 1, 2008 contending that the offered position was not suitable. She stated that she would experience stress at the new location, due to the fact that the 1999 robbery occurred at that location and due to the high stimulus level.

Appellant submitted a February 13, 2008 report from Dr. Ernesto Marrera Lopez, a treating physician, who stated that she continued to experience symptoms of PTSD associated with the 1999 accepted employment incident. Dr. Lopez recommended that she avoid stimuli associated with the trauma and that she work in an environment with no noise or crowds that

might produce flashbacks. Appellant also submitted a copy of a November 19, 2007 Equal Employment Opportunity settlement agreement and a February 1, 2008 work excuse from Dr. Lopez.

By decision dated April 25, 2008, the Office finalized its termination of compensation and schedule award benefits effective April 7, 2008 on the grounds that appellant had abandoned suitable work. It stated that she did not respond to its March 5, 2008 letter within the required 30-day period.

On May 6, 2008 appellant requested reconsideration, contending that she did not abandon suitable work. She also stated that she had responded to the Office's March 5, 2008 letter and submitted additional evidence within the required 30-day period, as evidenced by an enclosed express mail receipt dated April 1, 2008. In support of appellant's request, she submitted a June 10, 2008 psychiatric report from Dr. Fernando J. Cabrera, Jr., a Board-certified psychiatrist, who diagnosed adjustment disorder and PTSD. Dr. Cabrera recommended that appellant be restricted from working at MOWS, where the accepted incident occurred and from working as a window clerk or in noisy, crowded areas.

By decision dated July 3, 2008, the Office denied modification of its April 25, 2008 decision terminating wage-loss and schedule award benefits.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation, including cases in which the Office terminates compensation under section 8106(c) for abandonment of suitable work.[2]

Under section 8106(c)(2) of the Federal Employees' Compensation Act,[3] the Office may terminate compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.[4] However, to justify such termination, the Office must show that the work offered was suitable[5] and must inform the employee of the consequences of a refusal to accept employment deemed suitable.[6] The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.[7]

[2] 5 U.S.C. § 8106(c); *Henry W. Sheperd, III*, 48 ECAB 382, 385 (1997); *Shirley B. Livingston*, 42 ECAB 855, 861 (1991).

[3] 5 U.S.C. § 8106(c)(2).

[4] *Martha A. McConnell*, 50 ECAB 129, 131 (1998).

[5] *Bryant F. Blackmon*, 56 ECAB 752 (2005); *Dale K. Nunner*, 53 ECAB 363 (2002); *Marie Fryer*, 50 ECAB 190, 191 (1998).

[6] *Ronald M. Jones*, 48 ECAB 600, 602 (1997).

[7] *Anna M. Delaney*, 53 ECAB 384 (2002).

Once the Office establishes that the work offered was suitable, the burden of proof shifts to the employee who refuses to work to show that such refusal was reasonable or justified.[8] An employee who returns to work but then abandons such employment must prove through reliable medical evidence that she is unable to continue working because of a work-related disability.[9] The issue of whether an employee has the physical ability to perform the duties of the position offered is a medical question that must be resolved by medical evidence.[10]

In initially assessing the suitability of the offered position, the Office utilizes the Office procedure manual,[11] which provides that a temporary position will be considered unsuitable unless the claimant was a temporary employee when injured and the temporary position reasonably represents the claimant's wage-earning capacity.[12] It must consider whether the type of appointment is at least equivalent to the date-of-injury position. If the employee's date-of-injury position was permanent, the Office may not find a temporary job to be suitable.[13]

ANALYSIS

The Board finds that the Office improperly terminated appellant's compensation benefits for abandoning suitable work. The employing establishment offered her a temporary position as a modified sales/services/distribution associate, which the Office found suitable. However, because there is no evidence of record that establishes that appellant was employed in a temporary position at the time of her original injury, the position offered was unsuitable.

The Office's procedure manual provides for review of the offered position to determine if the position is temporary. A temporary position will be considered unsuitable unless the claimant was a temporary employee when injured and the temporary position reasonably represents the claimant's wage-earning capacity. The procedure manual also states that a temporary job would be unsuitable if it would terminate in less than 90 days. The Office must consider whether the type of appointment is at least equivalent to the date-of-injury position. If the employee's date-of-injury position was permanent, the Office may not find a temporary job to be suitable.

In this case, there is no indication in the record that appellant's date-of-injury position was temporary, nor does the record reflect that the employing establishment offered her a permanent position. On the contrary, the employing establishment specifically stated, in its January 14, 2008 letter to appellant, that the "[t]emporary [r]ehab[ilitation] [j]ob [o]ffer [a]ssignment [would] be reassessed again during the National Reassessment Process Phase Two

[8] *Deborah Hancock*, 49 ECAB 606, 608 (1998).

[9] *Bryant F. Blackmon, supra* note 5; *Robert M. O Donnell*, 48 ECAB (1997).

[10] *Marilyn D. Polk*, 44 ECAB 673, 680 (1993).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment*: *Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(3) (April 2008).

[12] *Id.*

[13] FECA Bulletin No. 99-28 (issued August 30, 1999).

in early 2008." The Office did not address the temporary nature of the job in determining whether the offered position was suitable. It erred in terminating appellant's compensation benefits on the basis of her refusal of the temporary position, as such an offer did not conform with the Office's procedural requirements.[14]

Therefore, the Office failed to meet its burden of proof to terminate appellant's compensation benefits.

CONCLUSION

The Board finds that the Office failed to meet its burden of proof to terminate appellant's compensation and schedule award benefits effective April 7, 2008 for abandoning suitable work.

[14] The Board has held that due process and elementary fairness require that the Office observe certain procedures before terminating a claimant's monetary benefits under section 8106(c)(2) of the Act. *Linda Hilton*, 52 ECAB 476 (2001); *see also Maggie L. Moore*, 42 ECAB 484 (1991), *reaff d on recon*., 43 ECAB 818 (1992). Section 10.516 of the Office's regulations state that the Office will advise the employee that the work offered is suitable and provide 30 days for the employee to accept the job or present any reasons to counter the Office's finding of suitability. 20 C.F.R. § 10.516. Thus, before terminating compensation, the Office must review the employee's proffered reasons for refusing or neglecting to work. If the employee presents such reasons and the Office finds them unreasonable, the Office will offer the employee an additional 15 days to accept the job without penalty. 20 C.F.R. § 10.516; *see Sandra K. Cummings*, 54 ECAB 493 (2003). The Office must also consider all evidence submitted by appellant prior to issuance of its final decision. *C.W. Hopkins*, Docket No. 94-1025 (issued August 23, 1996); *William A. Couch*, 41 ECAB 548 (1990).

The Board notes that the July 3, 2008 decision did not consider documents submitted by appellant which were received on April 10, 2008 and issued its final termination decision without providing appellant an additional 15-day period to accept the position without penalty. There is no envelope in the file establishing the date the documents were mailed. Therefore, although they were received more than 30 days after the Office's March 5, 2008 letter, the date of the letters is controlling. However, in light of the Board's ruling, it is not necessary to address these procedural issues.

ORDER

IT IS HEREBY ORDERED THAT the July 3, 2008 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 16, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board