U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES STEELE and DEPARTMENT OF THE ARMY,
U.S. ARMY FORCES COMMAND, Fort Bragg, N.C.

Docket No. 99-89; Submitted on the Record;
Issued July 15, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation under 5 U.S.C. § 8106(c) based on his refusal to accept suitable employment as offered by the employing establishment.

On August 7, 1991 appellant twisted his right knee while in the performance of duty. The Office accepted the claim for the condition of right knee sprain, a total right knee replacement on August 8, 1994 and aggravation of degenerative arthritis. Appellant has been paid compensation on the periodic rolls.

On February 21, 1995 Dr. Douglas S. McFarlane, a Board-certified orthopedic surgeon and appellant's attending physician, opined that appellant was capable of sedentary employment.

On December 16, 1997 the employing establishment made a limited-duty job offer to appellant as a Work Order Clerk, which was based on the physical restrictions imposed by Dr. McFarlane.

On January 13, 1998 appellant was advised that the position of Work Order Clerk was found to be suitable by the Office and was provided 30 days, in which to accept or refuse the offered job. Appellant was specifically advised of the provisions of 5 U.S.C. § 8106(c)(2).

On December 29, 1997 appellant rejected the job offer stating that he had lack of office skills and a hearing loss problem.

In a January 14, 1998 statement, appellant reiterated his reasons for declining the position. He also provided a copy of a January 9, 1998 audiogram and tympanogram and a letter from James Stephens, M.A., a clinical audiologist. The audiologist provided a statement that because of appellant's degree of hearing loss, he would not advise that appellant be placed in the proposed employment setting.

The Office referred the case file to the Office medical adviser for an opinion as to whether appellant was capable of hearing conversations and using a phone with hearing aids. In a March 19, 1998 letter, the Office medical adviser reviewed the record and opined that "with hearing aid and use of telephone amplifier, I feel claimant should be able to handle conversation and use a phone, if so inclined." The Office medical adviser also stated that appellant's hearing loss was not work related.

In an April 7, 1998 memorandum to the file, the Office decided that the weight of the medical evidence in reference to appellant's hearing loss issue rests with the Office medical adviser who had access to appellant's entire case record. The Office noted that the audiologist was not a physician and as such his opinion does not carry any weight. The Office further noted that during a December 28, 1995 telephone conference, in which appellant participated, he did not indicate that he had any trouble hearing at the time of this conference.

On April 7, 1998 the Office referred appellant's case to the rehabilitation department to further evaluate appellant's specific needs and equipment devices in an effort to assist appellant in the performance of the offered job as a Work Order Clerk.

On May 6, 1998 the vocational rehabilitation counselor, Ms. Spivey, was able to determine that the modified job was "vocationally" appropriate. Ms. Spivey also noted that she assisted appellant with the proper devices necessary to perform the job.

On May 11, 1990 the Office received a February 13, 1998 report, from Dr. Ipbi Kim, a Board-certified otolaryngolist. Dr. Kim noted that she evaluated appellant for bilateral hearing loss on February 12, 1998. Dr. Kim noted that the audiograms revealed severe sensorineural hearing loss at 2000 -- 8000 hertz (Hz). She stated that appellant was not able to use hearing aids satisfactorily. Dr. Kim stated that appellant has great difficulty understanding people and will misinterupt many conversations because of the severe loss at 2000 Hz, which is essential in hearing and distinguishing the consonant sounds.

By letter of July 15, 1998, the Office advised appellant that the position was found suitable to his physical limitations. Appellant was afforded an additional 15 days within which to accept the offered position. Appellant was specifically advised that, "If you do not accept the job within the 15-day period, compensation payments, including schedule award payments, will be terminated under 5 U.S.C. § 8106."

In a July 23, 1998 statement, appellant again declined the job stating that he had recently moved to another state.

On July 28, 1998 the Office again advised appellant that the offered position was suitable and afforded appellant an additional 15 days within which to accept the offered position. Appellant was again advised of the provisions of 5 U.S.C. § 8106. Appellant did not provide any response of acceptance or refusal of the offered position.

By decision dated September 2, 1998, the Office terminated appellant's entitlement to compensation effective September 13, 1998 finding that he refused or failed to accept suitable work within his medical limitations after it was offered to him by his employing establishment.

The Board finds that the Office improperly terminated appellant's monetary compensation based on his refusal of suitable work.

Section 8106(c) of the Federal Employees' Compensation Act provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for him is not entitled to compensation.[1] Further, the Office has promulgated federal regulations under this section of the Act concerning an employee's obligation to return to work or to seek work when available. Section 10.124(c) provides:

> "Where an employee has been offered suitable employment (or reemployment) by the employing [establishment] (*i.e.*, employment or reemployment which the Office has found to be within the employee's educational and vocational capabilities, within any limitations and restrictions which preexisted the injury, and within the limitations and restrictions which resulted from the injury), or where an employee has been offered suitable employment as a result of job placement efforts made by or on behalf of the Office, the employee is obligated to return to such employment. 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 showing before a determination is made with respect to termination of entitlement to compensation as provided by 5 U.S.C. § 8106(c)(2) and paragraph (e) of this section."[2]

The Office's implementing regulations further provide, at subsection (e), as follows:

> "A partially disabled employee who, without showing sufficient reason or justification, refuses to seek suitable work or refuses or neglects to work after suitable work has been offered to, procured by, or secured for the employee, is not entitled to further compensation for total disability, partial disability, or permanent impairment as provided by sections 8105, 8106 and 8107 of the Act. An employee shall be provided with the opportunity to make such showing of sufficient reason or justification before a determination is made with respect to termination of entitlement to compensation as provided by 5 U.S.C. § 8106(c)."[3]

In the present case, the Office has improperly terminated appellant's benefits because a conflict in medical evidence exists concerning whether appellant's hearing loss renders the selected modified position suitable.[4] The record on appeal demonstrates that following the

[1] 5 U.S.C. § 8106(c)(2).

[2] 20 C.F.R. § 10.124(c).

[3] 20 C.F.R. § 10.124(e).

[4] It is well established that once the Office accepts a claim, it has the burden of proof of justifying termination or modification of compensation benefits. This includes cases in which the Office terminates compensation entitlement under section 8106(c) for refusal to accept suitable employment; *see Shirley B. Livingston*, 42 ECAB 855 (1991).

acceptance of appellant's claim for right knee strain, total right knee replacement and aggravation of degenerative arthritis causally related to his federal employment, the Office paid appropriate benefits and medical expenses. The employing establishment, consistent with the restrictions set forth by appellant's treating physician, identified the position of Work Order Clerk based on Dr. McFarlane's February 21, 1995 letter, which found appellant could work a full-time sedentary work activity. Appellant was properly notified by the Office that the selected position was found suitable and was advised that if he refused to accept the position his compensation benefits could be terminated. Appellant was provided with the opportunity to accept the position, but he declined the position stating his lack of office skills and a hearing loss. The Office found that the weight of the medical evidence in reference to appellant's hearing loss rested with the Office medical adviser. The Board has stated that an audiologist is not a "physician" within the meaning of the Act [5] and, as such, his opinion that appellant not be placed in the proposed employment setting can not be considered. Accordingly, the Office could properly credit the Office medical adviser's opinion that appellant was capable of hearing and handling conversations with the help of a hearing aid and a phone. However, subsequent to the Office medical adviser's opinion, the Office received Dr. Kim's February 13, 1998 report, in which she found appellant was unable to use Hearing Aids satisfactorily and has great difficulty understanding people due to his severe hearing loss at 2000 Hz. Thus, the Board finds that there is now an unresolved conflict between the Office medical adviser and Dr. Kim as to whether appellant is capable of hearing and handling conversations with the help of modified devices. Section 8123(a) of the Act provides in part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[6]

Because a conflict in medical opinion exists concerning whether the modified job offer fits within appellant's restrictions and appellant has presented medical evidence indicating a hearing problem, the Board finds that the weight of the medical evidence fails to establish that the position offered to appellant was suitable. For this reason, the Office improperly invoked the penalty provision of 5 U.S.C. § 8106(c)(2). The Board will, therefore, reverse the Office's September 2, 1998 decision, terminating monetary compensation.

[5] *See, e.g., Herman L. Nenson*, 40 ECAB 341 (1988); *Rubel R. Garcia*, 33 ECAB 1171 (1982). 5 U.S.C. § 8101(2) defines "physician" to include "surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law."

[6] 5 U.S.C. § 8123(a).

The September 2, 1998 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, D.C.
July 15, 1999

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member