U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARY JOSEPH and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Houston, TX

Docket No. 98-2072; Submitted on the Record;
Issued February 25, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation on the grounds that she had refused an offer of suitable work.

In the present case, the Office accepted that appellant, a nurse, sustained a fracture and contusion of the right foot in the performance of duty on April 2, 1997. By letter dated December 4, 1997, the Office advised appellant that an offer of a limited-duty nurse position from the employing establishment was suitable to her work capabilities. The Office advised appellant that she had 30 days to accept the offer or provide reasons for refusing the position, noting that 5 U.S.C. § 8106(c)(2) provides that a claimant who refuses suitable work is not entitled to compensation.

By decision dated January 15, 1998, the Office terminated appellant's compensation under 5 U.S.C. § 8106(c)(2). By decision dated June 8, 1998, the Office denied modification of the termination decision.

The Board has reviewed the record and finds that the Office properly terminated appellant's compensation pursuant to 5 U.S.C. § 8106(c)(2).

Section 8106(c) provides in pertinent part, "A partially disabled employee who … (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation." It is the Office's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.[1] To justify such a termination, the Office must show that the work offered was suitable.[2] An employee who refuses or neglects to work

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[1] *Henry P. Gilmore*, 46 ECAB 709 (1995).

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

after suitable work has been offered to him has the burden of showing that such refusal to work was justified.[3]

With respect to the procedural requirements of termination under section 8106(c), the Board has held that the Office must inform appellant of the consequences of refusal to accept suitable work, and allow appellant an opportunity to provide reasons for refusing the offered position.[4] If appellant presents reasons for refusing the offered position, the Office must inform the employee if it finds the reasons inadequate to justify the refusal of the offered position and afford appellant a final opportunity to accept the position.[5]

In the present case, the Office followed the procedural requirements of section 8106(c) in that they informed appellant of the consequences of refusing suitable work, allowed appellant an opportunity to provide reasons for refusing, and then allowed a final opportunity to accept the position. With regard to the Office's finding that the offered position was suitable, the Board finds that the record supports a finding of suitability in this case. In a report dated November 12, 1997, Dr. Jay Oates, an orthopedic surgeon, indicated that appellant could perform sedentary duties, noting that appellant would have difficulty transporting herself to and from the workplace due to her right foot. The Office sent a copy of the job offer and duties to Dr. Oates, who signed the offer on November 24, 1997 and indicated that he concurred with the light-duty assignment. This is in accord with Office procedure regarding the medical suitability of an offered position.[6] Since appellant's physician indicated that appellant could perform the offered position, the Board finds that the Office properly determined that the position was medically suitable.

Following the December 4, 1997 letter advising appellant that she had an opportunity to present reasons for not accepting the position, the Office received several letters that were addressed to the employing establishment, her congressional representative, and the Office of Inspector General. In a letter to her congressional representative dated December 5, 1997, appellant indicated that her father was ill and that she was leaving for India to take care of him. To the extent that appellant is offering, as a reason to refuse the position, the need to take care of her father, such a reason would not be deemed acceptable. Examples of acceptable reasons are that the position was withdrawn, the claimant found other work, or medical evidence establishes that appellant is disabled for the offered position.[7] As noted above, the medical evidence from Dr. Oates indicated that appellant could perform the position. In March 1998, appellant submitted a brief report dated November 24, 1997 from Dr. Gerald Busch, a psychiatrist, stating

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[3] *Catherine G. Hammond*, 41 ECAB 375, 385 (1990); 20 C.F.R. § 10.124(c).

[4] *Maggie L. Moore*, 42 ECAB 484 (1991); *reaff'd on recon.*, 43 ECAB 818 (1992).

[5] *Id.*

[6] *See Annette Quimby*, 49 ECAB __ (Docket No. 97-317, issued January 30, 1998); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.8(d) (December 1995), which provides that unless the medical evidence is "clear and unequivocal," the Office should seek medical advice from an appropriate physician as to the medical suitability of an offered position

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.5(a) (July 1997).

that appellant was "unable to perform her job duties as of November 24, 1997." The Board notes that this report was not submitted until after the January 15, 1998 decision; in addition, it does not discuss the job duties of the offered position, provide a complete medical background or otherwise provide a reasoned opinion that appellant was not able to perform the offered job. Appellant also submitted a brief May 18, 1998 report from Dr. Busch, who stated that the pain from appellant's employment injury had caused a major depressive disorder and appellant was disabled at that time. This report does not provide a complete background or discuss disability for the offered position at the time it was offered.[8]

Appellant did not submit a reason that is considered acceptable for refusing the offered position, nor did she submit probative medical evidence that the offered position was medically unsuitable. Accordingly, the Board finds that the Office properly found that appellant had refused an offer of suitable work. Under 5 U.S.C. § 8106(c)(2), appellant is not entitled to compensation and the Office properly terminated her compensation in this case.

The decisions of the Office of Workers' Compensation Programs dated June 8 and January 15, 1998 are affirmed.

Dated, Washington, D.C.
February 25, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

[8] On appeal, appellant submitted medical evidence that was not before the Office at the time of the June 8, 1998 decision. The Board's jurisdiction is limited to evidence that was before the Office at the time of its final decision, and it cannot consider new evidence on appeal. 20 C.F.R. § 501.2(c).