United States Department of Labor
Employees' Compensation Appeals Board

LENICE M. MITCHELL, Appellant	)	
and	)	**Docket No. 04-2037**
	)	**Issued: April 1, 2005**
DEPARTMENT OF THE ARMY, Aberdeen, MD, Employer	)	

Appearances:
Jeffrey Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On August 16, 2004 appellant filed a timely appeal of a decision of a hearing representative of the Office of Workers' Compensation Programs dated August 2, 2004, which affirmed a November 21, 2003 decision terminating her compensation for refusing an offer of suitable work. Pursuant to 20 C.F.R. § 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue on appeal is whether the Office met its burden of proof in terminating appellant's compensation effective November 21, 2003 on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

On February 13, 2002 appellant, then a 43-year-old secretary, filed an occupational disease claim alleging that she developed carpal tunnel syndrome in the performance of duty. She alleged that she first became aware of the disease in March 1993 and realized that it was

caused by her employment in March 1994. The Office accepted the claim for bilateral carpal tunnel syndrome.

In reports dated February 20 and March 27, 2003, Dr. David Dorin, a Board-certified orthopedic surgeon and appellant's attending physician, advised that appellant could return to work for no more than four hours a day, lifting of no more than five pounds, fine manipulation and typing of no more than one hour a day and driving no more than one-half hour a day.[1]

By letter dated May 7, 2003, Bruno Petruccelli, the Director of Epidemiology and Disease Surveillance at the employing establishment, provided appellant with a restructured job description complying with Dr. Dorin's recommendations. She was also advised that her position was restructured to part time until she was able to work full time to six hours of part time to include one-half hour breaks for a total of four working hours and no lifting. Appellant was advised that she would be provided with voice activated software to eliminate the typing requirement as well as repetitive motions of the wrists and fingers. The employing establishment noted that her inability to drive was not a workplace barrier and indicated that there were other modes of transportation available. Appellant was advised to report to work on June 2, 2003 at 8:00 a.m.[2]

By letter dated June 9, 2003, the employing establishment advised appellant that a suitable return to work position had been developed for her return to work and referenced the May 7, 2003 letter from Mr. Petruccelli. She was advised that her physician approved the return to work position and advised appellant to report to work on June 16, 2003 at 9:00 a.m.

By letter dated July 2, 2003, the employing establishment advised appellant that she was being provided with a job offer as previously outlined in the May 7 and June 9, 2003 correspondence. She was again advised that the position met with her physician's restrictions and that she should report to building 1570 in the Edgewood area of the employing establishment. Appellant was further advised to advise the employing establishment of her return to work by July 18, 2003 and that training for the voice activated software needed to be scheduled. She was informed that she needed to report to work on Monday, July 28, 2003 and given the report to work location.

On July 15, 2003 the Office advised appellant that the position of secretary at the employing establishment was suitable and in accordance with her medical conditions and that she had 30 days to accept the position. The Office also advised appellant that, if she failed to report to the offered position and failed to demonstrate that the failure was justified, her right to compensation would be terminated.

By letter dated July 18, 2003, the employing establishment repeated that it always had the ability to accommodate appellant's restrictions from February 28, 2002. It also repeated that the modified position for her was still available.

[1] Dr. Dorin also provided these limitations in a July 25, 2002 duty status report.

[2] A position description of the regular secretarial duties was also provided.

By letters dated July 28, 2003, appellant responded that she was declining the offered position because she was unable to travel to work and explained that commuting by public transportation was not an option for her due to safety and health concerns and the additional costs of commuting.

By letter dated August 18, 2003, the employing establishment advised appellant that she had abandoned her position and that she was terminated from her employment due to her failure to report as directed.

By letter dated September 30, 2003, the employing establishment advised the Office that a safety specialist had traveled the public transportation route that appellant would utilize in lieu of driving to work and provided directions and delivery confirmation to appellant.

In an October 3, 2003 letter, the Office advised appellant that her reasons for refusing the offered position were insufficient. The Office afforded her 15 days in which to accept the position without penalty, noting that no further reasons for refusal would be considered. If appellant still refused the offered position, she would face termination of her wage-loss compensation benefits.

By letters dated October 9, 2003, appellant's attorney requested confirmation with regard to whether the position was still available and raised the issue that appellant had been separated from the establishment. He noted that the Office advised him that the position was still available.

In a memorandum of telephone call dated October 16, 2003, the Office noted that appellant's attorney was advised that the 15 days ran from the October 3, 2003 letter and that appellant needed to decide if she was going to return to work or not.

By letters dated October 16, 2003, appellant's attorney advised the Office that appellant was available to return to work. He specifically advised that they were attempting to comply with the Office's instructions, but they were unsure how to comply with the Office's instructions, as appellant was unsure of whom she should report to, when and how and he requested additional information.[3] Appellant's counsel also indicated that, if a job was available, they needed the necessary information to confirm that the previously offered position was available.

On October 17, 2003 appellant's attorney advised the Office that appellant had secured employment in the private sector and at a higher salary and that she no longer had any wage loss.

In a letter dated October 17, 2003, the Office advised appellant and her attorney that it had received the notice that appellant had accepted a position in the private sector effective October 17, 2003 and no longer had any wage loss. The Office advised her and her attorney that the position remained available and that the final decision would be postponed an additional 15

[3] The record also contains a memorandum of telephone call from the attorney regarding the Office contacting appellant and the attorney again requested confirmation that the job was still available.

days to allow appellant the opportunity to provide documentation including a position description and salary information.

On October 31, 2003 the Office received an October 15, 2003 letter from Steven Roberts, the Director and Chief Operating Office of LS3, Inc., a trust and management consulting company. He advised that appellant was offered the position of corporate strategist at an annual salary of $90,000.00 per year.[4] The position description indicated that appellant would be working out of her home and that there was no upper extremity physical activity or lifting required in the position. It was noted that no computing or writing would be required and that the position allowed her to make her own hours.

On October 21, 2003 the Office received handwritten confirmation from the employing establishment that the offered position was still available and that appellant was expected to return to work on October 20, 2003 at 8:00 a.m., at building EL570.

In a decision dated November 21, 2003, the Office terminated appellant's compensation benefits, finding that she had failed to accept suitable work after work was offered to her, noting that the file remained open for medical care. The Office determined that appellant was not employed at the time the job offer was made or at the time she was given 15 days to report to the employing establishment. The Office determined that the position in the private sector, created by her husband and which became available after the Office found that appellant's reasons for refusing the job offer were not valid, did not fairly and reasonably represent her wage-earning capacity. The Office further determined that acceptance of this position was not a valid reason for refusing the secretarial position at the employing establishment.

By letter dated 30, 2003, appellant, through her attorney, requested a review of the written record.

On May 14, 2004 the employing establishment provided a statement advising the Office that every effort was made to comply with appellant's medical restrictions. Additionally, the Office advised that, although the employing establishment took steps to remove appellant, the job offer was still available.

By decision dated August 2, 2004, the Office hearing representative affirmed the November 21, 2003 decision.

LEGAL PRECEDENT

Section 8106(c)(2)[5] 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 the employee is not entitled to compensation. Section 10.517(a)[6] of

[4] The record reflects that Mr. Roberts was also appellant's husband.

[5] 5 U.S.C. § 8106(c).

[6] 20 C.F.R. § 10.517(a).

the Office's regulation provides that an employee who refuses or neglects to work after suitable work has been offered to or secured for him or her has the burden to show that this refusal or failure to work was reasonable. After providing the two notices described in section 10.516,[7] the Office will terminate the employee's entitlement to further compensation under 5 U.S.C. §§ 8105, 8106 and 8107, as provided by 5 U.S.C. § 8106(c)(2). However, the employee remains entitled to medical benefits as provided by 5 U.S.C. § 8103. To justify termination, the Office must show that the work offered was suitable[8] and must inform appellant of the consequences of refusal to accept such employment.[9] According to Office procedures, certain explanations for refusing an offer of suitable work are considered acceptable.[10]

ANALYSIS

The record reflects that the physical restrictions of the modified position offered to appellant on May 7, June 9, July 2 and 15, 2003 were in agreement with those provided by Dr. Dorin, a Board-certified orthopedic surgeon and appellant's treating physician. The position offered to her which was referred to as a "restructured position" included working for six hours a day with half hour breaks to equate to no more than four hours of working and no lifting, and included using voice activated software to eliminate the repetitive motion requirement. The medical evidence of record, thus, establishes that, at the time the job offer was made, appellant was capable of performing the modified position.

In order to properly terminate appellant's compensation under section 8106, the Office must provide her notice of its finding that an offered position is suitable and give her an opportunity to accept or provide reasons for declining the position.[11] The record indicates that the Office, by letter dated July 15, 2003, advised appellant that a partially disabled employee who refused suitable work was not entitled to compensation and that the offered position had been found suitable. She was notified that, if she failed to report to the offered position and failed to demonstrate that her failure was justified, her right to compensation would be terminated. Appellant was allotted 30 days to either accept or provide reasons for refusing the position. She subsequently responded by letter dated July 28, 2003 and explained that she was unable to travel to work and that commuting by public transportation was not an option due to safety and health concerns and the increased costs of commuting. In a letter dated October 3, 2003, the Office advised appellant that the reasons given for not accepting the job offer were unacceptable. Appellant was given an additional 15 days in which to respond. Appellant's attorney, in an October 9, 2003 letter, subsequently questioned the validity of the offer and

[7] 20 C.F.R. § 10.517(a).

[8] *See Carl W. Putzier*, 37 ECAB 691 (1986); *Herbert R. Oldham*, 35 ECAB 339 (1983).

[9] *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon*., 43 ECAB 818 (1992). See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5d.(1) (July 1977).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment*: *Determining Wage-Earning Capacity*, Chapter 2.814.5a.(1)-(5) (July 1977).

[11] *Maggie L. Moore*, *supra* note 9.

referred to a prior separation, in which the employing establishment informed appellant that she was terminated. In an October 16, 2003 letter, counsel indicated that appellant was available to return to work and that the letter should be construed as an acceptance, but she was unsure of the reporting specifics and he requested additional information, including instructions as to where appellant was to report. The Board finds that the letter from counsel, dated October 16, 2003 constitutes an acceptance, which was timely. While counsel requested specific information about where appellant should report for work and when, but he did not make the acceptance contingent on any event.

Furthermore, in a separate letter dated October 17, 2003, appellant, through counsel, advised the Office that she had accepted a position of corporate strategist in the private sector. The Office subsequently received a position description, from appellant's husband, the chief operating officer, indicating that appellant had been offered a position as a corporate strategist with his company at the rate of $90,000.00 per year. He advised that she would be working out of her home within her medical restrictions. The Office reviewed the private sector job description and determined that the job created by appellant's husband, which became available after the Office found that her reasons for refusing the job offer were not valid and did not fairly and reasonably represent her wage-earning capacity. However, other than noting that the job was created by appellant's husband and that the physical requirements were "vague," the Office gave little reasoning for its finding that the job did not fairly and reasonably represent her wage-earning capacity.[12] The Office's procedure manual[13] provides that an acceptable reason for refusing an offered position includes: "[Appellant] found other work which fairly and reasonably represents his or her earning capacity (in which case compensation would be adjusted or terminated based on actual earnings)." Therefore, the summary dismissal of the offer without further findings regarding why it did not fairly and reasonably represent her wage-earning capacity reasons, was insufficient to disqualify the job offer presented by appellant.

In the instant case, the Office did not meet its burden to terminate appellant's compensation effective November 21, 2003 on the grounds that she refused an offer of suitable work. As noted above, the Office did not comply with its own regulations and procedural requirements by its failure to acknowledge the timely acceptance by appellant through her attorney on October 16, 2003 and also by making insufficient findings to support its determination that a private sector job accepted by appellant did not fairly and reasonably represent her wage-earning capacity. Thus, under section 8106 of the Act,[14] her compensation was improperly terminated effective November 21, 2003.

[12] *See Michael I. Schaffer*, 46 ECAB 845, 855 (1995).

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

[14] 5 U.S.C. § 8106(c).

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's wage-loss compensation effective November 21, 2003 on the grounds that she refused an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the August 2, 2004 decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 1, 2005
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member