United States Department of Labor
Employees' Compensation Appeals Board

R.R., Appellant	)	
and	)	**Docket No. 08-2046**
	)	**Issued: August 10, 2009**
DEPARTMENT OF THE AIR FORCE, HEADQUARTERS, VANDENBERG AIR FORCE BASE, CA, Employer	)	

Appearances:
Capp P. Taylor, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 21, 2008 appellant, through his representative, filed a timely appeal from the June 23, 2008 merit decision of the Office of Workers' Compensation Programs, which denied modification of the termination of his compensation for refusing suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation for refusing an offer of suitable work.

FACTUAL HISTORY

On November 15, 1964 appellant, then a 35-year-old firefighter, sustained an injury in the performance of duty while raising a 35-foot ladder and placing it on a building during a drill. The Office accepted his claim for lumbar strain and displacement of lumbar intervertebral disc.

Appellant had surgery on October 24, 1968 for excision of the L4-5 disc and spinal fusion at L5-S1.

On September 6, 2006 the employer offered appellant, who was living in Homosassa, Florida, the position of supply technician at his former duty station in California. The Chief of Workforce Effectiveness wrote: "Although you currently live in Homosassa, Florida, there are no suitable positions available for which I have the knowledge of or authority to place you." On September 15, 2006 appellant stated that he was very pleased to be considered for employment at his age (77), but for various reasons, including his desire to stay in that part of Florida, he was not able to accept the offer.

In a decision dated March 28, 2007, the Office terminated appellant's compensation under 5 U.S.C. § 8106(c)(2) for refusing an offer of suitable work. It noted that the employer "advised that they had no available positions in your commuting area" and would pay for relocation expenses. The Office further noted that it had given appellant 30 days, and then another 15 days, to accept the position or have his compensation terminated.

On June 23, 2008 the Office reviewed the merits of appellant's case and denied modification of its prior decision.

LEGAL PRECEDENT

Section 8106(c)(2) of the Federal Employees' Compensation Act states that a partially disabled employee who refuses to seek suitable work, or refuses or neglects to work after suitable work is offered to, procured by, or secured for him is not entitled to compensation.[1] The Office has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects suitable work when it is offered. Before compensation can be terminated, however, the Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work, and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.[2] In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused or neglected by appellant was suitable.[3]

Regulations implementing the Act provide that, if possible, the employer should offer suitable reemployment in the location where the employee currently resides. If this is not practical, the employer may offer suitable reemployment at the employee's former duty station or other location.[4]

[1] 5 U.S.C. § 8106(c)(2).

[2] *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

[3] *Glen L. Sinclair*, 36 ECAB 664 (1985).

[4] 20 C.F.R. § 10.508 (1999).

In the case of *Sharon L. Dean*,[5] the record contained no evidence that the U.S. Postal Service in New York had made any effort to determine whether it was possible to offer the claimant reemployment in Florida, where she currently resided. The Board held that it was reversible error for the Office to terminate the claimant's compensation without positive evidence showing that reemployment in the claimant's current location was not possible or practical.

ANALYSIS

Appellant's representative advances a number of arguments. As relevant to the disposition of this appeal counsel contended that under *Sharon L. Dean*, it was reversible error for the Office not to develop the issue of whether work was available to appellant in Florida. Appellant raised the issue on September 15, 2006, when he advised the Office that he did not want to leave that part of Florida for reemployment.

On the possibility of suitable reemployment in Florida, the only evidence is the following sentence from the employer's September 6, 2006 offer: "Although you currently live in Homosassa, Florida, there are no suitable positions available for which I have the knowledge of or authority to place you." The employer did not state, as the Office asserted in its March 28, 2007 decision, that there were no suitable positions available. The sentence reads as though the Chief of Workforce Effectiveness simply had no first-hand knowledge of available positions in Florida or did not hold the authority to place appellant in any such position if they existed. This is hardly the "positive evidence" the Board referred to in *Sharon L. Dean*; positive evidence showing that suitable reemployment in Florida was not possible or practical.

It remains unclear from the record whether the employer ever looked into the availability of suitable reemployment in Florida. The Board does not know what locations the employer might have searched, who the employer might have contacted, what response the employer might have received. In *Sharon L. Dean*, there was no evidence that the employer made any effort to determine whether suitable reemployment was possible in Florida.

The Board finds that, under the circumstances, where appellant would have to move across the country to accept the offer, the Office should have further developed the evidence on whether suitable reemployment in Florida was possible. Section 8106(c)(2) is a penalty provision, one that places a heavy burden on the Office. The penalty is more than a suspension of benefits. It is a denial of any further compensation for wage loss and any compensation for permanent physical impairment caused by the accepted employment injury. Prior to making any finding that an offer of work at the claimant's former duty station or other location is suitable, the Office must ensure that the record contains convincing documentation that suitable reemployment where the claimant currently resides is not possible or practical.

Because the record does not establish that suitable reemployment in Florida was not possible or practical, the Board finds that the Office did not meet its burden to show that the work offered to and refused by appellant was suitable. The Board will therefore reverse the Office's June 23, 2008 decision terminating appellant's compensation.

[5] 56 ECAB 175 (2004).

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation under 5 U.S.C. § 8106(c) and the implementing regulations.

ORDER

IT IS HEREBY ORDERED THAT the June 23, 2008 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 10, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board