U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LIZZIE M. GREER and DEPARTMENT OF DEFENSE, DEFENSE LOGISTICS AGENCY, Stockton, Calif.

Docket No. 96-2682; Submitted on the Record;
Issued September 21, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation under 5 U.S.C. § 8106(c) based on her refusal to accept suitable employment as offered by the employing establishment; and (2) whether the termination of appellant's compensation under 5 U.S.C. § 8106(c) serves as a bar to further compensation under section 8107 arising from the accepted employment injury.

On December 7, 1994 appellant, then a 61-year-old preservation servicer, filed a Form CA-2, notice of occupational disease, claiming a wrist condition causally related to factors of her federal employment. The Office accepted the claim for bilateral wrist osteoarthritis and authorized appropriate benefits.

On June 12, 1995 Dr. Jeffrey DeHaan, a Board-certified orthopedic surgeon and appellant's attending physician, released appellant to limited-duty work for 4 hours a day, with restrictions of no repetitive use of the wrists or hands, and no lifting over 10 pounds.

On July 26, 1995 the employing establishment offered appellant a light-duty position, within the restrictions recommended by her physician, for four hours a day.

In an July 28, 1995 letter, the Office advised appellant that the job offer was considered valid. Appellant was advised that the job remained open for her to accept and that she had 30 days in which to accept the job offer or provide an explanation for her refusal. Appellant was notified that if she rejected the job offer, she would not be entitled to further compensation benefits for wage loss or schedule award.

On August 18, 1995 appellant declined the job offer for the reason that she was physically incapacitated due to joint pain and swelling in the wrist.

In an August 31, 1995 letter, the Office advised appellant that her reason for refusing the job offer was not acceptable and provided appellant an additional 15 days to respond. No further response was received.

By decision dated September 19, 1995, the Office terminated appellant's compensation benefits under 5 U.S.C. § 8106(c) effective September 16, 1995 finding that she refused to accept a suitable job offer. The Office noted that appellant was not entitled to further compensation benefits with the exception of medical benefits for treatment of her accepted condition.

On November 20, 1995 appellant requested reconsideration. Appellant submitted a May 22, 1995 CA-20a form from Dr. DeHaan, which indicated appellant was totally disabled for usual work for an unknown period and recommended no work until further notice, and appellant's statement providing her reasons why she should still be entitled to compensation.

By decision dated December 7, 1995, the Office denied modification of the September 19, 1995 decision.

By letter of December 19, 1995, appellant requested reconsideration and submitted a December 7, 1995 report from Dr. DeHaan. In his report, Dr. DeHaan stated that on May 10, 1995 he had written that appellant reached maximum medical improvement, but "I did not return her to work and did not give her a return to work slip as far as I can recall."

By decision dated January 2, 1996, the Office denied modification of the December 7, 1995 decision.

Appellant requested reconsideration and submitted a January 9, 1996 medical report from Dr. DeHaan who indicated that appellant had reached maximum medical improvement and that if her job required any lifting greater than 15 pounds or repetitive hand activities, she could not return to the job held at the time of injury.

In a February 8, 1996 medical report, Dr. DeHaan indicated that appellant could not do her job because it requires a lot of bending.

In a February 12, 1996 medical report, Dr. DeHaan indicated that a functional capacity evaluation had been performed which showed appellant was in a sedentary to light-work capacity level, and she should not do repetitive grasping, pinching, wrist motions, and no lifting greater than 20 pounds. Appellant was restricted from crawling or climbing. He also indicated that appellant returned to a work trial; however, could not do the job because it required repetitive bending and using her hands in a repetitive fashion. He additionally indicated that appellant "would have roughly 20 percent impairment to both upper extremities."

In a February 29, 1996 medical report, Dr. DeHaan reiterated that appellant could not do repetitive and long-term writing, nor any secretarial work.

By decision dated April 5, 1996, the Office denied modification of its prior decisions finding that the evidence submitted was insufficient to establish that appellant was not capable of performing the job offer for four hours per day.

Appellant then claimed compensation for a schedule award. In a June 6, 1996 letter, the Office requested the necessary medical evidence from Dr. DeHaan.

By decision dated August 7, 1996, the Office denied appellant's claim for a schedule award finding that the evidence of record demonstrated that appellant was excluded from further monetary benefits.[1]

The Board finds that the Office properly terminated appellant's compensation effective September 16, 1995 based on her refusal of suitable work. The Board also finds that, based on her refusal of suitable employment, the Federal Employees' Compensation Act and implementing federal regulations serve as a bar to the receipt of further compensation under section 8107 by appellant arising from the accepted employment injury.

Section 8106(c) of the 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.[2] 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 agency *(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." [3]

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

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[1] After the issuance of their decision, the Office received an August 12, 1996 medical report from Dr. DeHaan. In the report, Dr. DeHaan reiterated that appellant reached maximum medical improvement on February 8, 1996 and calculated a total of 23 percent impairment for each upper extremity based on figure 29, figure 26 and figure 32 of the most recent edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

[2] 5 U.S.C. § 8106(c)(2).

[3] 20 C.F.R. § 10.124(c).

> "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).''[4]

In the present case, the Office properly exercised its authority as granted under the Act and implementing federal regulations.[5] The record on appeal demonstrates that following the acceptance of appellant's claim for bilateral wrist osteoarthritis causally related to her federal employment, the Office paid appropriate benefits and medical expenses. The employing establishment, in cooperation with the June 12, 1995 restrictions set forth by appellant's treating physician, identified a 4-hour light-duty position as within appellant's physical limitations. Appellant was properly notified by the Office that the selected position was found suitable and was advised that if she refused to accept the position her compensation benefits could be terminated. Appellant was provided with the opportunity to accept the position, but she declined the position stating that she had joint pain and swelling in her wrist and was physically incapacitated. However, the medical evidence from her treating physician did not support continuing total disability after June 12, 1995.

The Board finds that the Office properly determined that appellant rejected an offer of suitable employment and met its burden of proof in terminating appellant's compensation benefits effective September 16, 1995. The evidence of record establishes that appellant was provided with the opportunity to accept or reject the position, following notification of the Office's determination of suitability of the offered position and advising appellant of the penalty for refusing to accept such employment.

Following the termination of her benefits, appellant has not demonstrated, nor has she submitted any evidence, that the position was outside her physical limitations as recommended by her attending physician, Dr. DeHaan. Although Dr. DeHaan indicated in his report of February 12, 1996 that appellant recently returned to a work trial but could not do the job because it required repetitive bending and using her hands in a repetitive fashion, the evidence of record is devoid of the nature of the work appellant attempted to perform. The record reflects that appellant worked with limited-duty restrictions of no repetitive activities involving both hands from October 4, 1994 through February 22, 1995. Appellant stopped working on February 23, 1995 and has not returned. Appellant did not submit evidence to show she was not capable of performing the light-duty job offer for four hours per day.

[4] 20 C.F.R. § 10.124(e).

[5] 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).

On June 12, 1995 Dr. DeHaan released appellant to limited-duty work for four hours a day, with restrictions of no repetitive use of the wrists or hands and no lifting over 10 pounds. In medical reports of January 9 and February 8, 1996, Dr. DeHaan stated that appellant could not do any lifting greater than 15 pounds nor do a lot of bending. In his report of February 12, 1996, Dr. DeHaan indicated that a functional capacity evaluation showed appellant is in a sedentary to light-work capacity level, and could not do repetitive grasping, pinching, wrist motions, and no lifting greater than 20 pounds. The offered position fits into the sedentary to light capacity category as it only has lifting of three pounds. The job does not require repetitive wrist motions nor bending. The work is performed at a desk with flexibility to rest between the processing of papers. The job offer does not require extensive writing or forceful stamping. Appellant would be required to review documents for correctness, stamp and hand carry documents to the other end of the building. There is no mention of the requirement to staple documents with an industrial stapler. In his February 29, 1996 report, Dr. DeHaan stated that appellant could not do repetitive and long-term writing, nor any secretarial work. Dr. DeHaan noted that appellant was not able to return to her regular job duties. However, he never addressed appellant's inability to perform the light-duty job offered. Moreover, the functional capacity evaluation, an objective study, substantiate the fact that appellant is capable of performing the sedentary duties and lifting requirements of the job offered. Appellant has not submitted any medical evidence establishing that she was not physically capable of performing the duties of the light-duty position offered in this case. The Office, therefore, met its burden of proof to terminate appellant's monetary benefits effective September 16, 1995.

With regard to the second issue, the Office properly found that section 8106(c) of the Act served as a bar to further compensation for disability arising from the accepted employment injury. In the September 19, 1995 decision, the Office cited 5 U.S.C. § 8106(c), which excludes appellant from further entitlement of monetary benefits including a schedule award. The Office noted that, as the medical evidence of record established that maximum medical improvement was not reached until after the termination of appellant's compensation, she was not be entitled to a schedule award.[6] Thus, based on her refusal of suitable work, the Act and its implementing regulations, bar appellant from receiving further monetary benefits, including compensation granted under 5 U.S.C. § 8107 for a schedule award.[7]

[6] The Board notes that Dr. DeHaan indicated that appellant reached maximum medical improvement on May 10, 1995 and on February 8, 1996. In response to the Office's inquiries pertaining to entitlement to a schedule award, Dr. DeHaan stated that "I do believe MMI (maximum medical improvement) has occurred, as is mentioned in my notes previously dated February 8, 1996. I (believe) that would be an adequate date for her MMI date). The Board, therefore, finds that appellant reached maximum medical improvement for her bilateral wrist osteoarthritis on February 8, 1996. Inasmuch as the date of maximum medical improvement, February 8, 1996, was reached after the September 16, 1995 termination of compensation based on her refusal to accept a suitable offer of employment, section 8106(c) bars appellant's claim for a schedule award. *Stephen R. Lubin*, 43 ECAB 564, 573 (1992).

[7] 5 U.S.C. § 8106(c)(2). *See Stephen R. Lubin*, 43 ECAB 564 (1992) (finding that, based on claimant's refusal of suitable work, the Act and implementing regulations serve as a bar to the receipt of further monetary compensation, including compensation granted under 5 U.S.C. § 8107 for a schedule award); *see also* 20 C.F.R. § 10.124(e) (stating that an employee who refuses an offer of suitable work is not entitled to further compensation for total disability, partial disability, or permanent impairment but remains entitled to medical benefits).

The August 7, April 5, and January 2, 1996 and the December 7 and September 19, 1995 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
September 21, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member