U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SILAS M. LAWRENCE and DEPARTMENT OF AGRICULTURE, BITTERROOT NATIONAL FOREST, Hamilton, MT

Docket No. 97-2890; Submitted on the Record;
Issued August 20, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation because he refused an offer of suitable work.

The Board has carefully reviewed the record and finds that the Office met its burden of proof in terminating appellant's compensation.

Once the Office accepts a claim it has the burden of proving that the employee's disability has ceased or lessened before it may terminate or modify compensation benefits.[1] Section 8106(c)(2) of the Federal Employees' Compensation Act[2] provides that the Office may terminate the compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[3] The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.[4]

The implementing regulation[5] provides that 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 a showing before entitlement to compensation is terminated.[6] To

---

[1] *Karen L. Mayewski*, 45 ECAB 219, 221 (1993); *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

[2] 5 U.S.C. §§ 8101-8193; 5 U.S.C. § 8106(c)(2).

[3] *Camillo R. DeArcangelis*, 42 ECAB 941, 943 (1991).

[4] *Robert Dickerson*, 46 ECAB 1002, 1008 (1995).

[5] 20 C.F.R. § 10.124(c).

[6] *John E. Lemker*, 45 ECAB 258, 263 (1993).

justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.[7]

Office procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.[8] Unacceptable reasons include relocation for personal desire or financial gain, lack of promotion potential, or job security.[9] Further, if a claimant does not respond within 30 days to a notice of proposed termination, the Office will then proceed to terminate compensation.[10]

In this case, appellant's notice of traumatic injury, filed on September 10, 1986 was accepted for a contusion and torn medial meniscus after he fell and struck his left knee on a log while working as a surveying technician on August 20, 1986. Appellant underwent surgery on November 21, 1986 and worked intermittently at light duty until he was placed on the periodic compensation rolls on April 12, 1987.[11]

On May 22, 1997 the employing establishment offered appellant a full-time position as an engineering technician, reemployed annuitant, at an annual salary of $23,870.00.[12] Appellant refused the offer on May 30, 1997 stating that he did not think he could tolerate the job because of "almost constant pain" in his left knee and that he should "probably" take retirement.

On July 10, 1997 the Office informed appellant that the offered position had been found to be suitable to his work capabilities, as outlined by the second opinion examiner, Dr. Catherine C. Capps, a Board-certified orthopedic surgeon. The Office stated that appellant had 30 days to accept the position or provide medical evidence establishing that he could not do the job. The Office noted that electing retirement benefits was not a valid reason for refusing the job and warned appellant of the consequences of refusing suitable work without justification.

On August 19, 1997 the Office terminated appellant's disability compensation on the grounds that he had not responded to the 30-day notice and had thus refused an offer of suitable work.

The Board finds that Dr. Capps' opinion is sufficient to establish that appellant was capable of performing the duties of the offered position. Following her examination of appellant on March 5, 1997 Dr. Capps found appellant to be capable of full-time sedentary and semi-

[7] *Maggie L. Moore*, 42 ECAB 484, 487 (1991), *aff'd on recon.*, 43 ECAB 818 (1992).

[8] *C.W. Hopkins*, 47 ECAB 725-26 (1996); *see Patsy R. Tatum*, 44 ECAB 490, 495 (1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5 (May 1996).

[9] *Arthur C. Reck*. 47 ECAB 339, 343 (1996).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.8(a) (March 1997).

[11] On January 10, 1991 appellant received a schedule award for a 13 percent permanent impairment of his left leg.

[12] At the time of his injury, appellant was earning $16,790.00 a year, but was guaranteed only 13 pay periods annually.

sedentary jobs that did not require weight-bearing activities such as walking, climbing or standing for more than one hour at a time.

Appellant was restricted to lifting no more than 10 pounds and advised to avoid repetitive squatting and kneeling. The physical requirements of the engineering technician position included up to 8 hours of sitting a day, with lifting under 10 pounds. Appellant would work in an office setting and his work was described as sedentary. Therefore, the Board finds that the position offered to appellant was properly found to be suitable.

The Board also finds that the Office properly followed its procedures in terminating appellant's compensation. The employing establishment offered appellant the position after his disability retirement application had been approved. Appellant refused the position on May 30, 1997. The Office then reviewed the physical requirements of the engineering technician job and informed appellant on July 10, 1997 that the job duties had been found to be suitable.

The Office warned appellant that he had only 30 days to respond to its July 10, 1997 letter, that his compensation would be terminated if he did not respond and that his personal desire to retire was not a valid reason for refusing the position. Appellant did not respond to this letter and the Office ensured that the position was still available before terminating compensation on August 19, 1997. Thus, appellant had ample notice that his compensation would be terminated if he refused suitable employment.[13]

Appellant argued that his knee injury was so severe that he could not exercise and thus had become too disabled to go to work. The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by medical evidence.[14] Here, the medical evidence clearly indicated that appellant was capable of doing the job. Further, the employing establishment met with appellant prior to developing the job offer and stated that it would accommodate all of appellant's physical limitations and would not require him to drive a vehicle. Therefore, the Board finds that appellant had no medical reason for refusing to accept the offer.[15]

Appellant also argued that because of his lack of education and experience with office procedures, he was not qualified to provide technical support for engineering projects. However, the employing establishment was "well aware" of appellant's educational level when he was initially hired 20 years ago and his lack of education was not a concern in fulfilling the requirements of the offered position. Finally, the Board has long held that the personal decision to retire from all employment is not a valid reason for refusing an offer of a position found to be

[13] *See Cheryl D. Hedblum*, 47 ECAB 215, 219 (1995) (finding that because appellant neither responded to the Office's notice of termination of compensation nor accepted the offered position within the 30-day deadline, the Office properly terminated her compensation).

[14] *Marilyn D. Polk*, 44 ECAB 673, 680 (1993).

[15] *See Edward P. Carroll*, 44 ECAB 331, 341 (1992) (finding that appellant's assertion of inability to work is not reasonable grounds for refusing suitable work absent supporting medical evidence).

suitable.[16] Therefore, the Board finds that appellant's reasons for refusing the offered position are not justified.[17]

The August 19, 1997 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
August 20, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member

[16] *See Stephen R. Lubin*, 43 ECAB 564, 568 (1992) (finding that appellant's decision to accept retirement benefits did not justify his refusal of a position found to be suitable work).

[17] *See Henry W. Shepherd, III*, 48 ECAB ___ (finding that appellant's compensation was properly terminated after the Office found his reasons for refusing suitable work unacceptable).