U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ORLANDO R. MARTIN and DEPARTMENT OF DEFENSE, DEFENSE LOGISTICS AGENCY, Columbus, Ohio

Docket No. 97-1718; Submitted on the Record;
Issued June 28, 1999

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's monetary compensation for failing to accept an offer of suitable work.

In a decision dated May 13, 1994, the Office terminated appellant's monetary compensation effective May 1, 1994 on the grounds that he failed to accept suitable employment. In a decision dated February 17, 1997, the Office affirmed the termination of appellant's monetary compensation.

The Board finds that the Office properly terminated appellant's monetary compensation.

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]

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[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).

On July 14, 1992 the employing establishment offered appellant the position of contract specialist. The physical demands of the position are described as follows: "Work is mostly sedentary, but requires some regular and recurring walking, bending, and carrying of items such as files. No special physical demands are required to perform the work." The employing establishment submitted the position description and duties, including physical demands, to appellant's attending physician, Dr. Richard L. Rauck, for an opinion on whether the position was suitable. Dr. Rauck reported that he had reviewed the position of contract specialist, including the duties and physical demands, and that appellant was released to return to work as a contract specialist effective August 1, 1992 on the following schedule: four hours per day for four weeks, increasing to six hours per day for four weeks and then increasing to eight hours per day. In a report dated August 7, 1992, Dr. Rauck indicated that appellant could return to work based on his complaint of pain and that appellant could have physical therapy while working four hours per day. On November 5, 1992 Dr. Rauck reported that he instructed appellant to negotiate a return to work as previously specified.

On April 7, 1994 the Office notified appellant that it found the position to be suitable to his work capabilities and that the position was currently available. The Office advised appellant that he had 30 days to either accept the position or to provide an explanation of the reasons for refusing it.[4] When the Office received no response from appellant, it issued its May 13, 1994 decision terminating his monetary compensation. The February 17, 1997 decision affirming the termination followed.

As appellant's attending physician reviewed the position of contract specialist, including the duties and physical demands, and as he released appellant to return to work as a contract specialist, the Board finds that the evidence of record supports the Office's determination of suitability. The Office has met its burden of demonstrating that appellant can work, setting forth the specific restrictions, if any, on his ability to work, and has met its burden of establishing that a position has been offered within appellant's work restrictions, setting forth the specific job requirements of the position. Further, the Office properly advised appellant of its determination of suitability and of the position's current availability and allowed him 30 days to either accept the offer or to provide an explanation of the reasons for refusing it. By not responding, appellant effectively refused to work after suitable work was offered to him. Accordingly, pursuant to section 8106(c)(2) of the Act, he is not entitled to compensation.

[4] The Office had earlier notified appellant of the position's suitability, and on July 27, 1992 appellant declined the position because he was back on total disability because of hepatitis from a reaction to medication and because of a car accident. On August 11, 1992 appellant explained that he was now ready to return to the work force four hours a day but for a variety of reasons found it impractical and almost impossible to return to work for the employing establishment. In a decision dated March 14, 1994, the Office found a procedural flaw in its November 20, 1992 termination of monetary compensation but addressed the reasons given by appellant for declining the offer and found them to be unacceptable. To correct the procedural flaw, the Office gave appellant another opportunity to accept or to refuse with reasons.

The February 17, 1997 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
June 28, 1999

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member