U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GWENDOLYN A. GAMBLIN and U.S. POSTAL SERVICE, POST OFFICE, Akron, OH

Docket No. 99-2353; Submitted on the Record;
Issued October 19, 2000

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation entitlement under 5 U.S.C. § 8106(c)(2) on the grounds that she refused suitable work.

Appellant, then a 49-year-old mail handler, filed an occupational disease claim on June 15, 1996 alleging that she developed a constant pain in her right shoulder while federally employed. Appellant alleged that she first became aware of her condition and realized that the condition was caused or aggravated by her employment on June 7, 1996. The Office accepted appellant's claim for a right rotator cuff tear and authorized an anthrogram. Appellant did not miss work due to her condition; however, she was restricted to light duty.

Dr. Peter Ricci, a Board-certified orthopedist and appellant's treating physician, restricted appellant to light duty until she elected to have the anthrogram surgery to repair the right rotator cuff tear. In a work restriction evaluation dated January 17, 1997, Dr. Ricci indicated that appellant was permanently restricted from lifting no more than 25 pounds and reaching above eye level unless surgery was performed.[1] The Office then requested that appellant's employing establishment format a rehabilitation position for appellant since her work restrictions had been determined permanent.

On April 9, 1997 the employing establishment offered appellant a limited-duty position as a modified mail handler, based upon medical restrictions outlined by Dr. Ricci in the January 17, 1997 work restriction evaluation. The duties of the modified mail handler position were listed as: culling letters en route to canceling machines; separating thin letters from thick letters; facing and separating unfaced reject letters and repairing and dispatching damaged letters and other mail. The hours required for the position were listed from 1430 to 2300 hours each day, with nonscheduled days of Saturday and Sunday. Appellant subsequently notified a

[1] Appellant declined to have the anthrogram procedure and instead elected conservative treatment of the injury.

representative of the employing establishment that she rejected the April 9, 1997 job offer and asserted that the position would cause a hardship on her family, as she has custody of her grandchild and the hours would be difficult for her. Appellant indicated that her regular position required her to work from approximately 11:30 p.m. to 7:00 a.m. and the hours of the job offer were listed from 2:30 p.m. to 11:00 p.m. In response, the employing establishment modified the hours of the rehabilitation position to 2300 to 0730 hours each day, with nonscheduled days of Sunday and Wednesday to accommodate appellant. It drafted for appellant's signature a new rehabilitation offer dated August 8, 1997 with the same duties and modified hours.

By letter dated August 14, 1997, the Office notified appellant that a rehabilitation position was available, suitable to her work capabilities and that she had 30 days to either accept the position or provide justifiable explanation of the reasons for refusing it, or her compensation entitlement would be terminated. Appellant did not respond to the Office within the allotted timeframe.[2]

By decision dated September 23, 1997, the Office terminated appellant's entitlement to compensation based upon her refusal to accept a suitable offer of employment.

In a letter postmarked October 16, 1997, appellant requested an oral hearing.

The hearing was held on February 24, 1999. Appellant testified that she did not sign the August 8, 1997 job offer because the position of modified mail handler did not actually exist on the tour that it was offered. She testified that a position was offered in section 010, which she explained was an opening unit and actually a tour three section instead of a tour one section, which she stated required hours from 1:30 in the afternoon until 11:00 o'clock at night. Appellant further testified that she notified the distribution manager and union representative of the discrepancy regarding the position and she was told that they would seek clarification. Appellant testified that she waited and heard nothing further until she was notified that her benefits were terminated.

By decision dated May 3, 1999, the hearing representative affirmed the September 23, 1997 decision on the grounds that the Office properly terminated appellant's entitlement to compensation pursuant to section 8106(c)(2) of the Federal Employees' Compensation Act, based upon her refusal to accept a suitable offer of employment. He found that appellant refused the offer of employment, although the modified mail handler position was medically suitable for her. The hearing representative considered appellant's reasons for refusing the position and found no evidence supporting her claim that the position offered was nonexistent. The hearing representative found that the position conformed to the physical restrictions imposed by appellant's physician of lifting no more than 25 pounds and no reaching above eye level. He further found that the Office adhered to all procedural requirements in offering the position to appellant, by providing her with a copy of the job description and 30 days to respond to the offer.

[2] The record reflects that appellant did respond to the employing establishment and refused to sign the August 8, 1997 rehabilitation job offer because she wanted the same days off of work in the rehabilitation position that she had prior to the accepted work injury.

The hearing representative, therefore, found that the Office properly terminated appellant's entitlement to compensation under the requirements of the Act for refusal of suitable work.

The Board finds that the Office properly terminated appellant's compensation entitlement under 5 U.S.C. § 8106(c)(2) on the grounds that she refused suitable work.

Section 8106(c)(2) of the 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.[3] The Office has authority under this section to terminate compensation for any partially disabled employee who refuses 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.[4] 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 by appellant was suitable.[5]

The Office met its burden of proof in this case. Dr. Ricci, appellant's treating physician, determined on January 17, 1997 that appellant could work eight hours per day with specified work restrictions of lifting no more than 25 pounds and no reaching above eye level. In compliance with appellant's medical restrictions, her employing establishment outlined duties in an April 9, 1997 offer letter that appellant was able to perform as a modified mail handler. The job offer listed work duties, which included: culling letters en route to canceling machines, separating thin letters from thick letters, facing and separating unfaced reject letters and repairing and dispatching damaged letters and other mail. Appellant initially refused to sign the April 9, 1997 letter as she asserted that the hours would be difficult for her because of child-care responsibilities.

In a job offer dated August 8, 1997, the employing establishment advised appellant that the hours were modified from 1430 to 2300 hours each day, with nonscheduled days of Saturday and Sunday to 2300 to 0730 each day, with nonscheduled days of Sunday and Wednesday to accommodate her schedule. On August 14, 1997 the Office advised appellant that a rehabilitation position was available, suitable to her work capabilities and that she had 30 days to accept the position or provide an explanation for refusing it. Appellant did not respond to the Office's August 14, 1997 letter. An employee who refuses or neglects to work after suitable work has been offered to her must show that such refusal to work was justified.[6] Appellant argued at the hearing before the Office hearing representative that she declined the job offer because the position of modified mail handler did not actually exist on the tour that it was

[3] 5 U.S.C. § 8106(c)(2).

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

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

[6] 20 C.F.R. § 10.517.

offered in the August 8, 1997 letter. She testified that the position offered in section 010 was an opening unit and in a tour three section, which required hours from 1:30 in the afternoon until 11:00 o'clock at night. The evidence of record indicates that appellant notified the employing establishment that she refused to sign the August 8, 1997 rehabilitation job offer because she wanted the same days off of work in the rehabilitation position that she had prior to the accepted work injury. Appellant, however, did not provide this explanation as a reason for refusal at the oral hearing. The hearing representative reviewed appellant's reasons offered in her testimony for declining the job offer and determined that they were not justified, as there was no supportive evidence, which indicated that the offered position did not exist. The Office hearing representative found that the proposed duties outlined in the job offer complied with each of appellant's medical restrictions and that the Office provided appellant with a copy of the job description and 30 days to respond to the offer; however, appellant failed to respond to the offer within 30 days. The Board concurs with the hearing representative's finding that appellant was required to respond to the Office's August 14, 1997 letter, but did not do so. Furthermore, appellant never submitted any evidence in support of her allegations raised at the hearing that the modified work duties did not exist on the shift offered to her, at her request.

As the Office obtained medical evidence that appellant could perform modified mail handler duties eight hours per day and structured the suitable work position within the physical restrictions provided by appellant's physician and as the Office met the procedural requirements of a suitable work termination, the Office met its burden of proof in this case.

The decision of the Office of Workers' Compensation Programs dated May 3, 1999 is hereby affirmed.

Dated, Washington, DC
October 19, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member