U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA HILTON and U.S. POSTAL SERVICE,
GABRIEL STATION, Fort Wayne, IN

Docket No. 00-2711; Submitted on the Record;
Issued August 20, 2001

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs acted within its discretion in denying waiver of a $4,034.38 overpayment of compensation; and (2) whether the Office properly terminated appellant's compensation under 5 U.S.C. § 8106(c)(2) for refusing an offer of suitable work.

On July 27, 1998 appellant, then a 39-year-old auxiliary rural route carrier, injured her left shoulder while delivering mail. The Office accepted her claim for left shoulder strain. Appellant subsequently developed bilateral shoulder tendinitis while in the performance of her duties. She did not stop work.

On February 26, 1999 appellant received a schedule award for a 10 percent permanent impairment of her left upper extremity. The Office based the award on a current pay rate of $15.05 an hour and a regular schedule of 37.5 hours a week, or a weekly pay rate of $564.38.

The Office subsequently learned that appellant was an hourly employee without a set schedule at the time she was injured. The employing establishment advised that she averaged 18.85 hours a week for the year prior to the injury and had total earnings during that period of $14,673.15. The Office computed appellant's pay rate using both the regular average earnings formula and the "proviso" or "150" formula set forth in 5 U.S.C. § 8114(d)(3). The regular average formula resulted in a weekly pay rate of $293.46[1] while the 150 formula resulted in a weekly pay rate of $345.46.[2] Using the greater of these figures, the Office determined that the amount of appellant's schedule award should have been based on a weekly pay rate of $345.46 instead of the $564.38 figure actually used.

[1] Because appellant received no pay in pay period 12, 1997, the Office divided her total earnings for the year prior to injury by 50 weeks rather than by 52.

[2] The Office divided total earnings for the year prior to injury ($14,673.15) by total hours worked for the year (980.2) to arrive at an average hourly wage of $14.97. The Office multiplied this by 8 to obtain an average daily wage of $119.76. Multiplying by 150, pursuant to section 8114(d)(3), and dividing by 52, the Office calculated a weekly pay rate of $345.46.

On August 2, 1999 the Office made a preliminary determination that an overpayment of $4,034.38 occurred because appellant's schedule award should have been based on a lower pay rate. The Office found that appellant was without fault in the creation of the overpayment. The Office advised appellant to complete the enclosed overpayment recovery questionnaire and submit documents, such as income tax returns, bank account statements, bills, cancelled checks, pay checks and other records to support the income and expenses listed on the questionnaire. The Office explained that this information would be used to decide whether to waive the overpayment and that waiver would be denied if appellant failed to furnish the information requested within 30 days.

On September 1, 1999 appellant requested waiver and a prerecoupment hearing, the latter of which was held on March 1, 2000. She indicated that she almost had completed an updated questionnaire and would be sending it shortly. Appellant testified that she was a scheduled employee at the time of injury, working six days or 34 hours a week. The hearing representative requested that appellant submit her W2 for 1998 to show her total earnings for that year. Appellant testified that she could not repay the overpayment because she was forced to quit her job at her doctor's suggestion. She stated that she opened a business because she knew she was getting a schedule award. The business was losing money and creditors were threatening to sue her.

In a decision dated May 24, 2000, the hearing representative found that an overpayment of $4,034.38 existed and that appellant was not at fault in its creation. The hearing representative stated that the completion of a current overpayment recovery questionnaire, together with supporting financial documentation, was essential to the question of waiver. Because appellant failed to submit a completed questionnaire and because the limited financial information in the file was insufficient to allow a proper evaluation of appellant's financial condition, the hearing representative denied waiver.

The Board finds that the Office acted within its discretion in denying waiver of a $4,034.38 overpayment of compensation.

Appellant does not contest the fact of overpayment. After receiving information that appellant earned $15.05 per hour and worked a regular schedule of 37.5 hours per week, the Office issued a schedule award based on a weekly pay rate of $564.38. The employing establishment later informed the Office that appellant was in fact an hourly employee with no set schedule at the time she was injured.

For intermittent or irregular employees who are not a part of an agency's regular full-time or part-time workforce, the weekly pay rate is the average of the employee's earnings in federal employment during the year prior to the injury. However, the average annual earnings must not be less than 150 times the average daily wage earned within one year prior to the date of injury.[3] By simply dividing total pay earned during the year prior to injury by total number of weeks worked, the Office determined that appellant's average weekly earnings were $293.46.[4]

[3] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Continuation of Pay and Initial Payments*, Chapter 2.807.11(3) (July 1993).

[4] *See supra* note 1.

Appellant's earnings during the year prior to injury, however, were less than 150 times her average daily wage.[5] Multiplying her average daily wage by 150 and then divided by 52, the Office calculated a weekly pay rate of $345.46. This was the pay rate the Office should have used when issuing the schedule award. The Office's use of a higher pay rate created the overpayment.

To figure the amount of the overpayment, the Office subtracted the compensation appellant should have received using the proper pay rate from the compensation she did in fact receive under the inflated pay rate. The record supports that the overpayment was $4,034.38.

Section 8129 of the Federal Employees' Compensation Act provides that an overpayment of compensation must be recovered unless incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience. The fact that appellant was without fault in creating the overpayment in this case does not, under the Act, preclude the Office from recovering all or part of the overpayment. The Office must exercise its discretion to determine whether waiver is warranted under either the "defeat the purpose of the Act" or the "against equity and good conscience" standards pursuant to the guidelines set forth in sections 10.436 and 10.437 of the implementing regulations.[6]

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the Act or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary. Failure to submit the requested information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.[7]

When the Office made its preliminary determination on August 2, 1999, it advised appellant to submit the enclosed overpayment recovery questionnaire together with financial documents to support the income and expenses listed on the questionnaire. The Office explained that this information would be used to decide whether to waive the overpayment and further explained that waiver would be denied if appellant failed to furnish the information requested on the overpayment recovery questionnaire within 30 days. Seven months later, at the prerecoupment hearing held on March 1, 2000, the hearing representative presented appellant with another overpayment recovery questionnaire and again requested that she complete and return it with supporting documents within 30 days. Although appellant indicated that she would be sending an updated questionnaire shortly, the record does not show that she submitted an overpayment recovery questionnaire.

Whether to waive an overpayment of compensation is a matter that rests within the Office's discretion pursuant to statutory guidelines.[8] Because federal regulations provide that

[5] *See supra* note 2.

[6] *Leticia C. Taylor*, 47 ECAB 198 (1995); 20 C.F.R. §§ 10.436, 10.437 (1999).

[7] 20 C.F.R. § 10.438 (1999).

[8] *Carroll R. Davis*, 46 ECAB 361 (1994).

failure to submit the requested information within 30 days of the request shall result in denial of waiver,[9] the Board finds that the hearing representative did not abuse his discretion in denying waiver.[10]

On January 15, 1999 appellant underwent a functional capacity evaluation to determine what physical activities she was capable of performing. The validity profile showed that appellant's responses were 87 percent valid, indicating a maximal effort on her part. On January 27, 1999 Dr. Thomas L. Lazoff, a specialist in physical and rehabilitation medicine, reviewed the results of the physical capacity evaluation and specified appellant's permanent physical limitations.

Based on this evidence, the employing establishment developed the rehabilitation position of modified distribution clerk. On July 29, 1999 the employing establishment offered the position to appellant. Appellant responded that she could not accept the offer as it stood and gave her reasons.

On August 24, 1999 the Office submitted the job description, together with its physical requirements, to Dr. Mark A. King, appellant's attending osteopath who was treating her work-related bilateral tendinitis of the shoulders. The Office requested that Dr. King closely review the job duties and physical requirements of it and advise whether the position was medically suitable based on his current assessment of appellant. On August 26, 1999 Dr. King reported: "There should be no problems for [appellant] to perform the aforementioned job of modified distribution clerk."

On September 2, 1999 the Office notified appellant that the offered position was suitable to her work capabilities and that her doctor had reported that the position was consistent with her functional ability. The Office advised that the position was currently available and that she had 30 days either to accept the position or to provide an explanation for refusing it. The Office notified appellant of the penalty provision of 5 U.S.C. § 8106(c)(2), which provides: "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."

On September 29, 1999 appellant wrote to the Office to explain that the offered position was neither fair nor suitable. She argued that the offered position might be "physically correct" but that her physician was requesting that she not work at all because she was being treated for depression and extreme anxiety resulting from conditions of her employment. Appellant also argued that she felt the offered position was a punishment job designed to force her to quit. She stated that the job was demeaning, segregated and counterproductive.

On January 14, 2000 after confirming that the position was still available, the Office notified appellant that the job was found to be suitable to her work capabilities. The Office had reviewed appellant's reason for refusing the position and found them to be unjustified. The Office gave appellant 15 days to accept the offered position and advised that no further reasons

[9] *See supra* note 7.

[10] *See William D. Emory*, 47 ECAB 365 (1996) (the Office properly denied waiver of an overpayment where appellant submitted no financial evidence to establish that recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience).

for refusal would be considered. The Office again notified appellant of the penalty provision of 5 U.S.C. § 8106(c)(2).

On January 27, 2000 appellant informed the Office that she could accept no position with the employing establishment. She stated that she had resigned from the employing establishment on October 12, 1999 on her doctor's advice.

In a decision dated March 17, 2000, the Office terminated appellant's compensation benefits under 5 U.S.C. § 8106(c)(2). The Office noted that appellant provided no probative evidence to support her allegations that the position was a punishment job designed to force her to quit.

The Board finds that the Office properly terminated appellant's compensation benefits under 5 U.S.C. § 8106(c)(2) for refusing an offer of 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.[11] 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.[12] 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.[13]

A functional capacity evaluation on January 15, 1999 showed what physical activities appellant was capable of performing. A specialist in physical and rehabilitation medicine reviewed the results and specified appellant's permanent physical limitations. On this basis the employing establishment developed the rehabilitation position of modified distribution clerk. Dr. King, appellant's attending physician, reviewed the job duties and physical requirements of the position and advised that there should be no problem for appellant to perform the job duties. The record thus establishes that the position offered was within appellant's work restrictions. The Office has met its burden to establish that the position was suitable.

In the case of *Maggie L. Moore*, the Board held that when the Office makes a preliminary determination of suitability and extends the claimant a 30-day period either to accept or to give reasons for not accepting, the Office must consider any reasons given before it can make a final determination on the issue of suitability. Should the Office find the reasons unacceptable, it may finalize its preliminary determination of suitability, but it may not invoke the penalty provision

[11] 5 U.S.C. § 8106(c)(2).

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

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

of 5 U.S.C. § 8106(c) without first affording the claimant an opportunity to accept or refuse the offer of suitable work with notice of the penalty provision.[14]

FECA Bulletin No. 92-19, issued on July 31, 1992, adapted Office procedure to comply with the Board's ruling in *Moore*. The bulletin provides that, if the reasons given for refusal are considered unacceptable, the claimant will be informed of this by letter, given 15 days from the date of the letter to accept the job, and advised that the Office will not consider any further reasons for refusal. If the claimant does not accept the job within the 15-day period, compensation, including schedule award payments, will be terminated under 5 U.S.C. § 8106(c).[15]

The Office followed these procedures and afforded appellant the protections set forth in *Moore*. The Office gave appellant a reasonable opportunity to accept the offer of employment, notified her of the penalty provision of 5 U.S.C. § 8106(c) and properly considered her reasons for refusing. Although appellant made several arguments to justify her refusal, the Office correctly found that she had submitted no probative evidence to support her contentions that the job was a punishment job, that it was demeaning or that the job was unsuitable because she had depression and extreme anxiety. The Office extended appellant another 15 days to accept the offer. When she did not accept, the Office properly invoked the penalty provision of 5 U.S.C. § 8106(c).

The May 24 and March 17, 2000 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
August 20, 2001

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member

[14] 42 ECAB 484 (1991), *aff'd on recon.*, 43 ECAB 818 (1992).

[15] *See* 20 C.F.R. §§ 10.516-517; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(d), 2.814.5(d)(1) (July 1997).