U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA D. GUERRERO and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Cheyenne, WY

Docket No. 03-267; Submitted on the Record;
Issued April 28, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective July 30, 2002, on the grounds that she refused an offer of suitable work.

On May 16, 2001 appellant, then a 37-year-old certified nursing assistant, filed a traumatic injury claim (Form CA-1), alleging that she sustained a concussion on May 14, 2001 when she was struck by a television that fell from a wall.[1] The Office accepted the claim for concussion. By letter dated October 18, 2001, the Office placed her on the periodic rolls for temporary total disability.

In a December 3, 2001 work capacity evaluation form (OWCP-5c), Dr. David Ewing, an attending physician, released appellant to work four hours per day for three days per week with restrictions on reaching, pushing, pulling and lifting. Dr. Ewing indicated that appellant could not lift more than 10 pounds and should not lift over her shoulder.

In a February 4, 2002 work capacity evaluation form, Dr. Ewing opined that appellant was not capable of working and diagnosed depression and increased headaches and pain.

In a March 4, 2002 work capacity evaluation form, Dr. Ewing released appellant to work eight hours per day for three days per week with restrictions on reaching, pushing, pulling and lifting. He indicated that appellant was capable of pushing and pulling up to 30 pounds for 2 hours and lifting up to 25 pounds for 2 hours.

By letter dated March 5, 2002, the employing establishment offered appellant the position of fee basis health technician for four hours per day, three days a week. The position was for a

[1] Appellant was hired on a one-year contract on August 13, 2000. The contract period was to run for the period August 13, 2000 through August 12, 2001. Appellant submitted a resignation letter dated April 26, 2001 stating that her last day would be May 25, 2001.

period of one year and was sedentary in nature. In compliance with Dr. Ewing's restrictions, the physical demands of the position included standing, walking, sitting and reaching for less than one hour per day, no reaching above the shoulder, zero pounds of pulling or pushing and "approximately four hours of using a video display screen daily." The employing establishment also offered appellant relocation expenses.[2]

Appellant declined the position on March 18, 2002. In a letter dated March 18, 2002, appellant provided her reasons for declining the position which included the cost of affordable housing, that it was not in the best interest of her son to take him out of school and that she received physical therapy in Colorado two to three times a week.

By letter dated June 25, 2002, the Office informed appellant that it had reviewed the job offer and found it to be suitable to her work capabilities. The Office gave appellant 30 days to accept the offered position or provide sufficient reason for refusing, after which a final decision would be made. The Office noted that the position was currently available to appellant and indicated that, upon acceptance, appellant would be paid the difference between the pay of the offered position and the pay of her position on the date of injury. The Office advised appellant that, if she did not respond within 30 days in writing, it would assume that she had refused the job offer without reasonable cause and would commence termination of her compensation. The Office noted that Dr. Ewing had increased her work hours from four hours a day, three days a week to eight hours a day, three days a week. Appellant did not respond.

By decision dated July 30, 2002, the Office terminated appellant's compensation benefits on the grounds that she refused an offer of suitable work.

The Board finds that the Office properly terminated appellant's compensation effective July 30, 2002 for refusing an offer of suitable work.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[3] This burden of proof is on the Office when it terminates compensation, under 5 U.S.C. § 8106(c) for refusal to accept suitable work. The Office met its burden in the present case.

Section 8106(c)(2) of the Federal Employees' Compensation Act provides in pertinent part, "[a] partially disabled employee who ... refuses or neglects to work after suitable work is offered ... is not entitled to compensation."[4] To prevail under this provision, the Office must show that the work offered was suitable and must inform the employee of the consequences of refusal to accept such employment.[5] An employee who refuses or neglects to work after suitable

[2] The record reflects that at the time of injury appellant lived in Cheyenne, Wyoming. She subsequently moved to Evans, Colorado.

[3] *Fred Simpson*, 53 ECAB ___ (Docket No. 02-802, issued August 27, 2002).

[4] 5 U.S.C. § 8106(c)(2).

[5] *Dale K. Nunner*, 53 ECAB ___ (Docket No. 01-1374, issued February 14, 2002).

work has been offered has the burden of showing that such refusal to work was justified.[6] The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.[7]

The implementing regulation 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.[8] To 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.[9]

In initially assessing the suitability of the offered position, the Office utilizes the Office Procedure Manual[10] which provides that a temporary position will be considered unsuitable unless the claimant was a temporary employee when injured and the temporary position reasonably represents the claimant's wage-earning capacity.[11] The Office must consider whether the type of appointment is at least equivalent to the date-of-injury position. If the employee's date-of-injury position was permanent, the Office may not find a temporary job to be suitable.[12]

In the present case, appellant was a certified nursing assistant who was employed on a one-year contract commencing on August 13, 2000. The position description submitted by the employing establishment indicates that the part-time position of health technician was available for a period of one year, which reflected the status of appellant's employment on the date of injury. The temporary nature of the offered position, under the facts of this case, did not make it unsuitable.

In this case, appellant's treating physician, Dr. Ewing stated that she could work for four hours a day for three days a week with restrictions. He subsequently increased the number of hours she could work to eight hours a day for three days a week with restrictions. The employing establishment offered appellant a fee basis health technician position which conformed to her work restrictions and offered to pay her expenses to relocate back to Cheyenne, Wyoming. The Board finds that the fee basis health technician position conforms with appellant's work restrictions as outlined by Dr. Ewing and the Office correctly found that the job was suitable. By letter dated June 25, 2002, the Office advised appellant of the suitability determination and provided her 30 days to submit a response indicating her acceptance of the

[6] *Joyce M. Doll*, 53 ECAB ___ (Docket No. 02-311, issued September 25, 2002).

[7] *Anna M. Delaney*, 53 ECAB ___ (Docket No. 00-2090, issued February 22, 2002).

[8] 20 C.F.R. § 10.516 (1999).

[9] *Id.*

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(3) (December 1993).

[11] *Id.*

[12] FECA Bulletin No. 99-28 (issued August 30, 1999).

position or reasons for refusing the position. Appellant did not respond to the Office's 30-day notice letter. She did not demonstrate nor did she submit evidence to show that the position was outside her work limitations. The record contains no medical evidence that appellant could not perform the modified job offered. Thus, the Office properly terminated her compensation benefits effective July 30, 2002 based on her refusal to accept a suitable job offer.

The July 30, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.[13]

Dated, Washington, DC
April 28, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[13] The Board notes that appellant submitted additional evidence subsequent to the July 30, 2002 decision of the Office and with her appeal to the Board. The Board cannot consider this evidence as its review is limited to the evidence of record which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c). The Board also notes that the record contains a decision dated December 17, 2002 in which an Office hearing representative denied appellant's hearing request. The Office and the Board, however, may not have simultaneous jurisdiction over the same issue in the same case. Following the docketing of an appeal with the Board, which in the instant case was on November 4, 2002, the Office did not retain jurisdiction to render a further decision regarding a case on appeal until after the Board relinquishes its jurisdiction. Any decision rendered by the Office on the same issues for which an appeal is filed are null and void. Thus, the December 17, 2002 decision is null and void. *Noe L. Flores*, 49 ECAB 344, 346, n. 1 (1998); *Douglas E. Billings*, 41 ECAB 880, 895 (1990).