U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HARRY J. BILLOW and DEPARTMENT OF AGRICULTURE
FOREST SERVICE, KOOTENIA NATIONAL FOREST, Eureka, MT

Docket No. 03-1314; Submitted on the Record;
Issued December 1, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation under 5 U.S.C. § 8106(c) based on his refusal to accept suitable work.

On October 4, 1998 appellant, then a 46-year-old laborer (saw crew), filed a claim alleging injury due to his federal work duties on or about September 11, 1998 by spending long and arduous shifts on foot in the work environment of a sawyer working in fires and fuels. The Office accepted the condition of peroneal tendinitis in both legs on April 19, 1999. Appellant's supervisor approved limited duty beginning October 6, 1998. On May 6, 1999 appellant underwent reconstruction of the left peroneal tendon sheath with fibular osteotomy and received appropriate benefits for temporary total disability after the surgery. His laborer position with the employing establishment ended on May 29, 1999 unrelated to his employment injury.

Dr. David Sobba, a Board-certified orthopedic surgeon, treated appellant for his accepted condition. Dr. Sobba indicated in a CA-20 form dated June 2, 1999, that appellant was still disabled from work. In a report dated September 26, 2000, he stated that appellant had continual bilateral ankle pain and that "he can[no]t be up on them very much at all." Dr. Sobba opined that appellant would be permanently disabled because of his condition and that he would be unable to pursue jobs that required him to be on his feet for prolonged periods of time.[1]

On April 6, 2001 the Office referred appellant for vocational rehabilitation services. The initial interview was conducted with appellant and labor market research was completed. On April 26 and 27, 2001 appellant underwent a functional capacity evaluation, which noted that his ankle pain and lower extremity weakness limited weight bearing activities. In a vocational status report dated May 6, 2001, it was determined that appellant was capable of work in the medium-

[1] On October 3, 2000 the Office granted a schedule award for five percent permanent impairment of the right and left leg for the period March 6 to September 23, 2000. Based upon Dr. Sobba's September 26, 2000 report, appellant requested compensation for disability beginning on that date in a CA-7 form dated November 28, 2000. The Office awarded compensation for the period March 25 through April 21, 2001.

duty range with occasional standing. The employing establishment was contacted regarding employment opportunities for appellant within his specified physical restrictions.

In a work capacity evaluation report dated May 31, 2001, Dr. Sobba outlined that appellant could work with restrictions of walking no more than 3 hours per day, standing no more than 2 hours per day, limitations on twisting, squatting, kneeling and climbing and lifting no more than 10 pounds, between 3 to 6 hours per day.

On July 6, 2001 the employing establishment offered appellant a temporary full-time sedentary position as a forestry technician effective July 16, 2001. The employing establishment indicated that the position was expected to last for 90 days and that the duty station was located in Eureka, Montana where he was previously employed. The position required that a variety of administrative and technical resource information duties be performed associated with the compilation, summary and organization of resource information in fire management. Administrative duties also included assisting in program management, time keeping, seasonal hiring, purchasing, cache inventory and running computer modules. The written job offer noted that the sedentary position would be performed in an office setting that required light lifting no more than one hour per day and sitting, standing and moving about as necessary for comfort. The job description noted that the position would not require squatting, twisting, walking, kneeling or climbing.

In a letter dated July 20, 2001, appellant indicated that he had received the temporary full-time position offer; however, he felt that the position would create a hardship for himself and his family. Following this termination of his initial term position on May 28, 1999, appellant relocated to Columbia Falls, Montana and alleged that it would be a hardship on him and his family to return to Eureka for the offered position or to commute for 65 miles.[2]

On August 28, 2001 the Office notified appellant that the modified position as a forestry technician constituted suitable work. He was informed that he had 30 days to either accept the offered job or to provide reasons for his refusal of the offer of suitable work or else he risked termination of his compensation.

On September 20, 2001 appellant advised the Office that he would not accept the offer given by the employing establishment. He argued first that it was unclear to him why the position was being offered at that time since the employing establishment declined to offer a written limited-duty job offer while he was still employed in the original term position. Appellant further stated that Dr. Sobba had determined that his occupational disease would limit his ability to continue in his former work as documented in the medical record. He noted that when his position was terminated on May 28, 1999 he was still under treatment for his condition and would be for months and also that his left leg was still in a cast from surgery. Appellant stated again that he relocated to Columbia Falls, Montana in June 1999 and that it would be a hardship for his family to ask him to commute 65 miles or return to his former duty station.

[2] In a CA-1032 form dated April 2, 2001, appellant advised the Office that he was working part time in stocking and retail sales earning $6.00 per hour in Columbia Falls, Montana. In a subsequent letter dated June 8, 2001, appellant indicated that he was no longer working in the retail position because he required more sedentary-type work.

In a November 27, 2001 decision, the Office terminated appellant's compensation as well as compensation for permanent impairment to a scheduled member effective December 2, 2001 on the grounds that he failed to accept suitable employment as a forestry technician. The Office advised that appellant's medical benefits for the accepted condition continued.

In a letter dated December 5, 2001, appellant requested reconsideration. Appellant argued that he did not receive the August 28, 2001 letter from the Office providing him with 30 days to either accept the offered job or provide explanation for refusing it. The Office treated appellant's request as a request for a hearing and upon review of the record, on June 17, 2002 an Office hearing representative found that the case was not in posture for a hearing and remanded the case. In the June 17, 2002 decision, the Office hearing representative found that, although the job was medically and vocationally suitable for appellant, the Office did not follow appropriate procedure in terminating benefits. The Office hearing representative directed the Office to reinstate benefits retroactive to December 2, 2001 and on remand, provide appellant with another notification of the suitability of the position.

On remand the Office confirmed that the previously offered position was still available with the employing establishment. In a letter dated August 30, 2002, the Office furnished appellant with notification that the forestry technician position was consistent with his medical restrictions and vocationally suitable. The Office noted that appellant had previously refused the position citing his relocation to another city and the Office indicated that, as appellant voluntarily relocated to Columbia Falls, Montana and the move was not required by any medical condition, his reason for refusing the position was unacceptable. The Office provided appellant with 30 days to accept the position or to provide the Office with a justifiable explanation of the reasons for refusing it.

On September 17, 2002 appellant declined the position asserting that he currently held a valet parking position in Kalispell, Montana and that he would not entertain the offered forestry position in Eureka, Montana. Appellant reiterated that it would be a hardship to move back to Eureka for a period of three months after being established in Columbia Falls since 1999 and that it was infeasible to commute from his home to the offered position.

On October 3, 2002 the Office granted appellant an additional 15 days to accept the position without penalty and advised that the provisions of 5 U.S.C. § 8106(c) would be enforced if he still refused. Appellant did not respond to the October 3, 2002 letter, within the allotted time frame.

On October 23, 2002 the Office terminated monetary compensation under section 8106(c) on the grounds that appellant refused suitable work.[3]

In a letter dated November 9, 2002, appellant requested reconsideration. Additional evidence provided included references from appellant to a Montana State map and argument that Eureka was in the most economically depressed county per number of people in the state of Montana. Appellant also argued that the closest towns that might be considered with potential

[3] The Office paid appellant compensation from December 1, 2001 through October 23, 2002, as directed by the Branch of Hearings and Review for the period preceding the final termination decision.

for economic growth for relocation were both 70 miles from Eureka. Appellant then argued that he had employment potential with his current employer, Grizzly Securities in Columbia Falls, Montana, that it was the responsibility of the employing establishment to present him with a job offer before May 28, 1999, his date of termination and that, since he established himself in a new city, he would continue to find employment on his own.

He reiterated in a second November 9, 2002 letter, that it was unclear to him why the position was being offered at that time since the employing establishment declined to offer a written limited-duty job offer while he was still employed in the original term position. Appellant stated again that it would be a hardship for his family to ask him to commute 65 miles or return to his former duty station.

On November 26, 2002 the Office forwarded the additional evidence received by appellant to the employing establishment for comment. In a letter dated December 12, 2002, a representative from the employing establishment responded that appellant had applied for and was selected for several temporary and term positions with the employing establishment and was familiar with the guidelines for such appointments. The employing establishment representative further indicated that when appellant's temporary position ended in 1999 appellant was offered a verbal light-duty position but the agency did not follow-up with a written offer. The representative indicated that appellant chose not to reapply for similar positions as he had done in the past. The representative further noted that the temporary position recently offered to appellant was not an arduous position and that the employing establishment was capable and willing to accommodate appellant's limitations. The representative noted that Eureka was a very viable community and that many people regularly commuted between Eureka and Columbia Falls. The representative further indicated that the employing establishment would assist appellant with relocation expenses upon request.

In a decision dated January 2, 2003, the Office denied modification of the October 23, 2002 decision.

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits on the grounds that he refused an offer of suitable work.

Once the Office accepts a claim, it has the burden of proving that appellant's disability has ceased or lessened before it may terminate or modify compensation benefits.[4] Section 8106(c)(2) of the Federal Employees' Compensation Act[5] provides that the Office may terminate 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.[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

[4] *Karen L. Mayewski*, 45 ECAB 219 (1993); *Bettye F. Wade*, 37 ECAB 556 (1986).

[5] 5 U.S.C. § 8106(c)(2); *see also* 20 C.F.R. § 10.516 (1999).

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

[7] *Stephen R. Lubin*, 43 ECAB 564 (1992).

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] The Office met its burden in the present case.

The initial question in this case is whether the Office properly determined that the position was suitable. 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 the medical evidence.[10] A review of the medical evidence in the present case indicates that there is sufficient medical evidence to support a finding that the offered position was within appellant's physical limitations. In this regard, Dr. Sobba issued a work capacity evaluation report dated May 31, 2001, which outlined that appellant could work with restrictions of walking no more than 3 hours per day, standing no more than 2 hours per day and limitations on twisting, squatting, kneeling and climbing and lifting no more than 10 pounds, between 3 to 6 hours per day.

The offered position was a temporary full-time sedentary position, which primarily required administrative activities. The position was set in a comfortable office environment, which allowed for limited lifting within appellant's restrictions and sitting and standing as needed for comfort. The position required no squatting, kneeling, walking or climbing.

The Board notes that appellant had a term position at the time of his injury, which was set to expire on May 28, 1999. At that time, appellant was terminated because his position expired and not because of his employment injury. The employing establishment has agreed to accommodate appellant's current restrictions if appellant accepted the offered position. The record reflects that, although appellant noted that Dr. Sobba had determined that his occupational disease would limit his ability to continue in his former work, he has not established that he was incapable of performing the sedentary duties of the offered position. The Board also notes that and appellant has held a variety of active jobs since his federal employment.

In determining that appellant was physically capable of performing the forestry technician position, the Office properly relied upon the work restrictions outlined by Dr. Sobba, a Board-certified orthopedic surgeon. The Board finds that the forestry technician position offered by the employing establishment is medically suitable. As noted above, once the Office has established that a particular position is suitable, an employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified. Appellant submitted additional arguments in support of his refusal of the offered position. He asserted that, after his termination from the employing establishment in May 1999,

[8] 20 C.F.R. § 10.516 (1999).

[9] *See John E. Lemker*, 45 ECAB 258 (1993); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[10] *Robert Dickinson*, 46 ECAB 1002 (1995).

he relocated his family to a town 65 miles away and felt that moving back to Eureka, Montana an economically depressed area, for the offered position or commuting the distance every day would create a hardship on himself and his family. He further argued that the employing establishment was responsible for providing him with a written limited-duty job offer when his position expired in 1999 and because they did not, he had pursued employment in his more economically viable town of Columbia Falls, Montana on his own. The Office noted in its August 30, 2002 letter that, since appellant voluntarily relocated to Columbia Falls, Montana and the move was not required by any medical condition, his reason for refusing the position was unacceptable. The Office provided appellant with 30 days to accept the position or to provide the Office with a justifiable explanation of the reasons for refusing it. After appellant declined the position again on September 17, 2002 the Office granted appellant an additional 15 days to accept the position without penalty and advised that the provisions of 5 U.S.C. § 8106(c) would be enforced if he still refused. Appellant continually refused the offered position.

The Board finds that the Office followed the appropriate procedure in terminating appellant's benefits on the grounds that appellant unjustifiably refused an offer of suitable work.

The January 2, 2003 and October 23, 2002 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
December 1, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member