U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROL A. URBAN and DEPARTMENT OF VETERANS AFFAIRS, ZABLOCKI MEDICAL CENTER, Milwaukee, WI

Docket No. 03-1486; Submitted on the Record;
Issued September 16, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's disability compensation effective March 25, 2001.

On April 5, 2000 appellant, then a 56-year-old licensed vocational nurse, filed a claim alleging that she sustained a back and hip injury on that date while trying to prevent a combative patient from falling. The Office accepted that she sustained a low back strain and she began working in a modified-duty position as a unit secretary. Appellant received wage-loss compensation to cover the difference in pay between the salary of her date-of-injury job, licensed vocational nurse and the salary of her unit secretary job.[1] At the time of her injury, appellant was working for the employing establishment at the Martinez Medical Center in Martinez, CA. She moved to the Milwaukee, WI area and began working on March 25, 2001 for the employing establishment.[2] She continued to work in a modified-duty position as a unit secretary.

By letter dated September 17, 2001, appellant requested that the Office advise her regarding whether her relocation to the Milwaukee, WI area would affect her compensation benefits. She also completed a claim for compensation (Form CA-7) requesting compensation for the period March 25 through October 18, 2001.[3]

By decision dated November 14, 2001, the Office effectively terminated appellant's compensation as of March 25, 2001. In reaching its determination, the Office discussed case law concerning the termination of compensation due to the refusal of suitable work. The Office

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[1] It should be noted that the record does not contain any formal wage-earning capacity determination.

[2] Appellant indicated that she moved in order to help her mother who had a heart attack and underwent triple bypass surgery.

[3] Appellant requested compensation for the difference in wages between her former regular duty as a licensed vocational nurse and her modified duty as a unit secretary. She later submitted Forms CA-7 for periods continuing after October 18, 2001.

discussed appellant's relocation from the Martinez, CA area to the Milwaukee, WI area and indicated that she would not be "eligible for relocation or pay difference" because the reason for relocation was personal (*i.e.*, caring for her mother) rather than due to the employment injury or being terminated from the employing establishment's rolls. The Office quoted case law concerning acceptable reasons for refusing suitable work and indicated that appellant had not advanced such an acceptable reason.[4]

In December 2002, appellant requested a review of the written record by an Office hearing representative. By decision dated October 17, 2002, the Office hearing representative affirmed the Office's November 14, 2001 decision. The hearing represented stated that it was clear that appellant was not seeking relocation expenses, but rather wished to receive the difference in wages between her former regular duty as a licensed vocational nurse and her modified duty as a unit secretary. He indicated that appellant's relocation from the Martinez, CA area to the Milwaukee, WI area was not due to her work-related condition or termination from the employing establishment's rolls, but rather was due to her desire to be closer to her ailing mother. The hearing representative indicated that as appellant's relocation was voluntary there was no obligation on the part of the employing establishment to make up the difference in her lost wages. He stated, "Just as the employing establishment has no obligation to make up the pay difference to an injured federal employee who chooses to voluntarily reduce her work schedule to 20 hours per week, the employing establishment likewise has no obligation to make up the pay difference to an injured federal employee who chooses to voluntarily relocate and take a lesser paying position in another locale." The hearing representative stated that appellant's transfer was an interagency transfer and concluded, "As the evidence of record fails to support the claimant's claim to moving expenses and loss wages, the district Office decision of November 14, 2001 must be affirmed."

Appellant contacted her congressman concerning her claim and, by letter dated December 30, 2002, appellant's congressman requested that the Office investigate the claim. The Office treated this correspondence as a reconsideration request and, by decision dated January 27, 2003, it denied appellant's request for a review of the merits of her claim.

The Board finds that the Office improperly terminated appellant's disability compensation effective March 25, 2001.

In the present case, the Office accepted that appellant sustained an employment-related low back strain on April 5, 2000 and paid her wage-loss compensation to cover the difference in pay between the salary of her date-of-injury job, licensed vocational nurse, and the salary of her modified-duty position, unit secretary. Appellant later moved from the Martinez, CA area to the Milwaukee, WI area, where she continued to work for the employing establishment as a unit secretary, and requested that the Office continue to pay the difference in salary between the two positions. In decisions dated November 14, 2001 and October 17, 2002, the Office effectively terminated appellant's disability compensation as of March 25, 2001. Under the Federal

[4] It appears that appellant continued to receive medical benefits after March 25, 2001 due to her work-related condition.

Employees' Compensation Act,[5] once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits.[6]

The Board finds that the Office did not meet its burden of proof to terminate appellant's disability compensation effective March 25, 2001. Although the basis of the Office's termination of appellant's disability compensation remains unclear, it is clear that the Office has not advanced an adequate reason such that it met its burden of proof to terminate appellant's compensation.

In its November 14, 2001 decision, the Office suggested that it was terminating appellant's disability compensation effective March 25, 2001 because she rejected an offer of suitable work by the employing establishment. Section 8106(c)(2) of the Act provides in pertinent part, "A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation."[7] To justify such termination, the Office must show that the work offered was suitable.[8] An employee who refuses or neglects to work after suitable work has been offered to her has the burden of showing that such refusal to work was justified.[9] However, the circumstances of the present case do not bear any relation to those cases where compensation is terminated for refusal of suitable work. For example, appellant did not refuse any offer of employment by the employing establishment and the Office did not make any finding of suitability regarding a position offered by the employing establishment.[10]

In the October 17, 2002 decision, which affirmed the November 14, 2001 decision, the Office hearing representative suggested that the current case represented a situation in which an employee was claiming disability due to a work-related condition for a given period and therefore would have the burden of proof to establish such a claim.[11] However, prior to March 25, 2001, the Office paid appellant wage-loss compensation to cover the difference in pay between the salary of her date-of-injury job, licensed vocational nurse, and the salary of her modified-duty position, unit secretary. Therefore, as noted above, the Office would have the

[5] 5 U.S.C. §§ 8101-8193.

[6] *Charles E. Minniss,* 40 ECAB 708, 716 (1989); *Vivien L. Minor,* 37 ECAB 541, 546 (1986).

[7] 5 U.S.C. § 8106(c)(2).

[8] *David P. Camacho,* 40 ECAB 267, 275 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341, 345 (1981).

[9] 20 C.F.R. § 10.124; *see Catherine G. Hammond,* 41 ECAB 375, 385 (1990). The Office procedure manual contains guidelines relating to offers of work, determination of the suitability of offered positions and acceptable reasons for rejecting such offers. *See generally* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity,* Chapter 2.814.4, 5 (July 1997).

[10] Nor did the Office comply with various procedures contained in its procedural manual; *see supra* note 9.

[11] An employee seeking benefits under the Act has the burden of establishing the essential elements of her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury. *Elaine Pendleton,* 40 ECAB 1143, 1145 (1989).

burden of proof to provide justification for discontinuing payment of such compensation after March 25, 2001. The Office did not present medical evidence showing that appellant no longer had residuals of her April 5, 2000 employment injury after March 25, 2001 or advance any other valid reason for discontinuing appellant's disability compensation after that date.[12]

For these reasons, the Office improperly terminated appellant's disability compensation effective March 25, 2001.

The decision of the Office of Workers' Compensation Programs dated October 17, 2002 is reversed.[13]

Dated, Washington, DC
September 16, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[12] Moreover, the record does not appear to contain a formal wage-earning capacity determination and the present case does not otherwise reflect the circumstance where the Office meets its burden of proof to modify a wage-earning capacity determination. Once a loss of wage-earning capacity is determined, a modification of such a determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was in fact erroneous. *George W. Coleman*, 38 ECAB 782, 788 (1987); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984). The burden of proof is on the party attempting to show the award should be modified. *Jack E. Rohrabaugh*, 38 ECAB 186, 190 (1986).

[13] Given the Board's determination regarding the merit issue of the present case, it is not necessary to consider the January 27, 2003 nonmerit decision.