United States Department of Labor
Employees' Compensation Appeals Board

JESSIE L. TRUJILLO, Appellant	)	
	)	**Docket No. 04-1887**
and	)	**Issued: January 24, 2005**
U.S. POSTAL SERVICE, FIVE POINTS STATION, Albuquerque, NM, Employer	)	

Appearances:
Gordon Reiselt, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On July 21, 2004 appellant, through her attorney, filed a timely appeal from a June 18, 2004 merit decision of the Office of Workers' Compensation Programs in which a hearing representative affirmed the termination of her compensation on the grounds that she abandoned suitable work under 5 U.S.C. § 8106. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation under section 8106 on the grounds that she abandoned suitable work.

FACTUAL HISTORY

On January 2, 1996 appellant, then a 21-year-old rural carrier associate, filed a claim for injuries resulting from a motor vehicle accident on December 30, 1995. The Office accepted appellant's claim for cervical sprain, multiple contusions and abrasions, a fractured nasal bone requiring septorhinoplasty, aggravation of temporomandibular joint (TMJ) disorder and a herniated nucleus pulposus at L4-5. Appellant stopped work on January 20, 1996. The Office

paid compensation until October 12, 1996, when she returned to work for nine hours per week, the minimum scheduled hours for her hired position.

In a report dated January 17, 2002, Dr. Daniel E. Clifford, a dentist, diagnosed an aggravation of TMJ which he opined would not "prevent her working normal hours."

In a report dated February 6, 2002, Dr. George R. Swajian, an attending osteopath who specializes in orthopedic surgery, found that appellant had continued spine and shoulder problems due to her employment injury. Dr. Swajian determined that she should limit repetitive motion of the right shoulder, lifting, bending, pulling, and continuous standing or sitting. He found that she could lift 20 pounds occasionally and 10 pounds frequently.[1]

In a letter dated March 6, 2002, Dr. Swajian informed the Office that appellant wanted to increase her work hours. He stated, "I would like to return her back in a light capacity working three hours per day to start and increasing it by one hour every two weeks until we get to eight hours per day."

By letter dated September 9, 2002, the employing establishment requested that Dr. Swajian review an enclosed modified-duty assignment for the position of rural carrier associate. The position required keyboarding for six to eight hours per day. Dr. Swajian reviewed the modified-duty position on September 11, 2002 and, in a statement received by the Office on September 19, 2002, found that the position was not suitable. He opined that appellant could perform all the duties except computer data entry, which she could perform only on an occasional basis. Dr. Swajian stated that appellant should begin working four hours per day five days per week increasing the time by one hour every two to three weeks until she reached an eight-hour workday.

On September 19, 2002 the Office informed appellant that the offered position was suitable and allowed her 30 days to accept the position or offer her reasons for refusing. The Office explained the penalty for refusing a suitable work position without justification.

On September 26, 2002 the Office received a letter sent from appellant's attorney to the employing establishment protesting the position on the grounds that her physician had found the position unsuitable.

In a letter dated October 18, 2002, the Office informed appellant that her reasons for refusing the offered position were not acceptable and allowed her an additional 15 days to accept the position. The Office advised her that it would not consider any further reasons for refusal.

On October 30, 2002 the employing establishment offered appellant a revised modified position as a rural carrier associate in accordance with Dr. Swajian's September 11, 2001

[1] The results of a functional capacity evaluation, performed on February 19, 2002, indicated that appellant could work eight hours a day light duty. In a report dated February 26, 2002, Dr. Swajian reviewed the results of the functional capacity evaluation. He found that appellant might be able to increase her work hours but noted that her current work requirements exceeded her abilities.

recommendations. The position required occasional keyboarding and allowed her to begin working four hours per day five days per week, increasing one hour every three weeks.

In a letter dated October 30, 2002, the Office informed appellant that she had 15 days to accept the amended job offer. The Office noted that this letter superseded its October 18, 2002 letter and that it would not consider any further reasons for refusal.

In a letter dated November 13, 2002, counsel argued that the Office, in stating in its October 30, 2002 letter that it would not consider any further reasons for refusal, violated its procedural requirements. He asserted that appellant would "show up for work" on November 13, 2002 even though the position was not within her limitations.

In a decision dated November 25, 2002, the Office terminated appellant's compensation effective that date on the grounds that she refused suitable employment under section 8106. The Office noted that the employing establishment related that appellant had accepted the position on November 19, 2002 but refused to work on November 23, 2002 when she was unable to get nonconsecutive days off.

Joel G. Wadsworth, a manager at the employing establishment, described events on November 23, 2002 in a statement received by the Office on November 26, 2002. He related, "I asked [appellant] whether she could fulfill the job offer that she had signed and if she could not, I needed her to make a written statement. I told her the statement should say why she could not perform the duties stated in the job offer as required." After appellant noted that she had medical documentation he told her "to state, in her own words, why she could not fulfill the job offer. She sat for a minute and I asked her if she would make a statement or not. She said no. I asked her to leave [employing establishment] premises and not to report until she was contacted."

On December 11, 2002 appellant, through counsel, requested an oral hearing.

On January 27, 2003 the Office received reports from Dr. Swajian dated November 6 and 20, 2002. On November 6, 2002 Dr. Swajian noted that appellant related that the employing establishment was not abiding by her restrictions or work hours. He opined that she "probably" should not stand or sit for more than 30 to 35 minutes at a time. In a report dated November 20, 2002, Dr. Swajian indicated that appellant had returned to work for four hours per day five days per week. He listed unchanged findings on physical examination. Dr. Swajian suggested that she be allowed to work three days on, one day off, two days on and one day off to avoid an aggravation of her condition. In a certificate to return to work of the same date, Dr. Swajian requested adjustment of appellant's schedule to allow for nonconsecutive days off. The Office also received appellant's signed acceptance of the October 30, 2002 job offer dated November 19, 2002.

At the hearing, held on February 25, 2004, appellant's attorney contended that the Office had not followed its established procedures in failing to provide a 30-day letter following the second job offer from the employing establishment and in failing to fulfill its established procedures regarding abandonment of suitable work. Appellant, at the hearing, stated that she had accepted the job offer and returned to work on November 16, 2003. She saw her physician for a scheduled appointment on November 20, 2003 and that he recommended nonconsecutive

days off. Appellant related that she informed management of the changes on November 21, 2003 and was told to work the assigned job. She stated that on November 23, 2002 her supervisor told her to provide a statement or go home. Appellant maintained that she was not asked whether she was accepting or rejecting the job offer.

In a decision dated June 18, 2004, the hearing representative affirmed the Office's November 25, 2002 termination of appellant's compensation. The hearing representative determined that she had abandoned suitable work under section 8106.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation, including cases in which the Office terminates compensation under section 8106(c) for refusal of suitable work.[2]

Under section 8106(c)(2) of the Federal Employees' Compensation Act,[3] the Office may terminate compensation of an employee who refuses or neglects to work after suitable work is offered to, or procured by, or secured for the employee.[4] However, to justify such termination, the Office must show that the work offered was suitable,[5] and must inform the employee of the consequences of a refusal to accept employment deemed suitable.[6]

Section 10.516 of the Code of Federal Regulations states that the Office will advise the employee that the work offered is suitable and provide 30 days for the employee to accept the job or present any reasons to counter the Office's finding of suitability.[7] Thus, before terminating compensation, the Office must review the employee's proffered reasons for refusing or neglecting to work.[8] If the employee presents such reasons and the Office finds them unreasonable, the Office will offer the employee an additional 15 days to accept the job without penalty. The Board has clarified that in cases where compensation is terminated pursuant to section 8106(c), the essential requirements of due process, "notice and an opportunity to respond," apply not only where an employee refuses suitable work, but also apply in the same force to cases where an employee abandons suitable work.[9]

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[2] 5 U.S.C. § 8106(c); *Henry W. Sheperd, III*, 48 ECAB 382, 385 (1997); *Shirley B. Livingston*, 42 ECAB 855, 861 (1991).

[3] 5 U.S.C. § 8106(c)(2).

[4] *Martha A. McConnell*, 50 ECAB 190, 191 (1998).

[5] *Marie Fryer*, 50 ECAB 190, 191 (1998).

[6] *Ronald M. Jones*, 48 ECAB 600, 602 (1997).

[7] 20 C.F.R. § 10.516.

[8] *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[9] *Mary A. Howard*, 45 ECAB 646 (1994).

To determine whether a claimant has abandoned suitable work, the Office's procedure manual provides that the Office must advise appellant that the job is suitable and that refusal of it may result in application of the penalty provision of section 8106(c)(2) and allow the claimant 30 days to submit his or her reasons for abandoning the job.[10] In addition, if appellant submits evidence or reasons for abandonment, the Office must determine whether the reasons for abandoning the job are valid. If the reasons for abandoning the job are not deemed justified, the claimant must be so advised and allowed 15 additional days to return to work.[11] The imposition of section 8106(c), a penalty provision, is premised on the fact that suitable work remains available and the job held open during the required notice period.

ANALYSIS

In this case, appellant accepted the offered position on November 18, 2002 and worked in the position until November 23, 2002. As appellant accepted the position and returned to work, the issue is whether she abandoned suitable employment under section 8106.[12] The Board finds that the Office did not follow the procedures necessary to establish that she abandoned suitable work. The Office did not advise appellant, as required by its procedure manual, that the abandoned position was suitable, allow her 30 days to submit evidence or rationale for abandoning the job, or evaluate her reasons and provide her a final opportunity to accept or refuse the position without penalty prior to terminating her benefits.[13] In addition, upon notification that appellant stopped work, the Office, under its procedures, was required to consider whether the work stoppage constituted a recurrence of disability.[14] The Board has clarified that in cases where compensation is terminated pursuant to section 8106(c), the essential requirements of due process, "notice and an opportunity to respond," apply not only where an employee refuses suitable work, but also apply in the same force to cases where an employee abandons suitable work.[15] As appellant was not provided with notice and an opportunity to respond prior to a determination that she abandoned suitable work, the Office erred in terminating her compensation under section 8106.

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.10 (December 1995).

[11] *Id*. at Chapter 2.814.10(e)(1) (July 1996).

[12] The Board notes that the Office did not follow proper procedures in offering the suitable work position to appellant. The Office erred in determining that the September 9, 2002 job offer from the employing establishment was suitable in view of the finding by appellant's attending physician that it was not within her physical limitations. The Office further erred in issuing its October 30, 2002 15-day letter without reaching a suitability determination on the October 30, 2002 job offer from the employing establishment.

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.10 (December 1995).

[14] *Id*. at Chapter 2.814.9(1).

[15] *Mary A. Howard*, *supra* note 9.

CONCLUSION

The Board finds that the Office improperly terminated appellant's compensation under section 8106 on the grounds that she abandoned suitable work.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 18, 2004 is reversed.

Issued: January 24, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member