United States Department of Labor
Employees' Compensation Appeals Board

TERESA L. STEINKE, Appellant	)	
and	)	**Docket No. 04-1351**
	)	**Issued: March 25, 2005**
DEPARTMENT OF AGRICULTURE, McCLOUD RANGER STATION, McCloud, CA, Employer	)	

Appearances:
Teresa L. Steinke, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On April 27, 2004 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated March 2, 2004. 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 met its burden of proof to terminate appellant's compensation benefits effective March 21, 2004 on the grounds that she neglected to work after suitable work was procured for her.

FACTUAL HISTORY

On September 22, 1988 appellant, then a 26-year-old temporary[1] engineering aide, filed a traumatic injury claim alleging that on September 21, 1988 she injured her right knee and elbow

[1] The Office referred to appellant's position as temporary.

when she fell on stairs while carrying a door. The Office accepted appellant's claim for right knee strain and right elbow contusion on January 26, 1989. The Office approved the additional conditions of subluxation of L-5, bulging disc at L4-5 and sprain of the right knee on July 26, 1991. The Office entered appellant on the periodic rolls on February 28, 1989.

By decision dated May 18, 1992, the Office reduced appellant's compensation benefits based on her capacity to earn wages as a general clerk. Following appellant's request for a review of the written record, the hearing representative affirmed the Office's May 18, 1992 decision on November 13, 1992.

Appellant filed a notice of recurrence of disability on September 13, 1996 alleging that she sustained a recurrence of disability on November 13, 1995 causally related to her September 21, 1988 employment injury. On July 18, 2001 the Office modified the May 18, 1992 wage-earning capacity determination noting that appellant was totally disabled effective November 25, 2000. The Office also accepted the additional condition of herniated disc at L4-5. The Office entered appellant on the periodic rolls on July 26, 2001.

Dr. John P. Olson, a Board-certified neurosurgeon, completed a form report on December 17, 2001 and found that appellant could work eight hours a day with restrictions. He stated that appellant could walk only 1 to 2 hours a day; could not pull or lift over 10 pounds; and that she could not squat, kneel or climb. Dr. Olson stated that appellant should be allowed breaks as needed. On March 13, 2002 Dr. Olson released appellant to return to work eight hours a day with restrictions of no bending, lifting or twisting, no prolonged sitting and the ability to change positions as needed. In a note dated August 5, 2002, Dr. Olson stated that appellant could return to work in accordance with his prior restrictions.

The employing establishment offered appellant a full-time seasonal position of mail and file clerk on August 13, 2002. The work requirements included no prolonged sitting, with position changes as need, walking up to 2 hours a day, no limitation on standing, reaching up to 8 hours a day, no twisting, pulling and lifting up to 10 pounds, no squatting, bending, kneeling or climbing. The position was located in McCloud, California. Appellant resided in Conception Junction, Missouri.

In a letter dated October 7, 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 also explained the penalty for refusing a suitable work position. Appellant responded on October 24, 2002 and stated that she could not accept the position without further information regarding relocation expenses.

In a letter dated November 5, 2002, Dr. Patrick B. Harr, a Board-certified family practitioner, stated, "I think [appellant] should turn it [the offered position] down because of the fact that the job is in California and she now resides in Missouri. Her entire support system for her chronic back pain and diabetes is here in the Midwest." Dr. Harr noted that appellant was fully capable of performing a similar position located in Missouri.

In a letter dated December 3, 2002, the Office informed appellant that relocation expenses would be paid in accordance with federal travel regulations and that after receiving

such relocation expenses appellant would be required to work in her new position for at least one year.

By letter dated December 3, 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.

Appellant responded on December 10, 2002 and stated that she had not refused the position. She stated that she needed a job in Missouri in compliance with Dr. Harr's report, that she required additional information regarding relocation expenses and also noted that it was unclear whether she could receive the relocation expenses as the offered position was seasonal.

Dr. Harr submitted a note dated January 23, 2003 explaining that appellant had experienced a "flare up" of back pain and required physical therapy. On March 20, 2003 he diagnosed chronic back pain.

On June 9, 2003 the employing establishment again offered appellant the position of mail and file clerk, a full-time seasonal appointment.

In a letter dated June 30, 2003, the Office informed appellant that the clerk position was still available and allowed her 30 days to accept the position or offer her reasons for refusal.

On July 1, 2003 Dr. Harr diagnosed chronic low back pain with spasm.

The Office informed appellant that her reasons for refusing the position were unacceptable on August 5, 2003 and provided appellant with 15 days to accept the position. Appellant responded and alleged that her condition had worsened, that she needed additional employment to support herself as the offered position was seasonal and that she required relocation expenses as she could not afford to move to California. On August 19, 2003 appellant stated that she accepted the position based on the promise that she would receive compensation for her relocation expenses.

In several notes and form reports dated August 21, 2003, Dr. Harr stated that appellant was unable to work due to chronic low back pain and referred her to a spine specialist. He stated that appellant had experienced an exacerbation of her back pain due to chronic disc disease. Dr. Harr found that she was totally disabled due to back pain.

The employing establishment notified appellant on August 21, 2003 that she should report to work on September 8, 2003. Appellant did not report to work on the scheduled date.

In a report dated September 17, 2003, Dr. Alexander S. Bailey, a Board-certified orthopedic surgeon, examined appellant and diagnosed low back pain with radiculopathy, lumbar spinal stenosis L4-5 and degenerative disc disease of the lumbar spine most prominent at L4-5 and L5-S1. He recommended that she undergo a functional capacity evaluation to determine her work capacity.

The Office issued a letter on October 2, 2003 informing appellant that the clerk position was suitable and allowing her 30 days to accept the position or offer her reasons for refusing. On

October 14, 2003 the Office stated that the October 2, 2003 letter was issued in error and that a final decision would follow. On November 25, 2003 the Office authorized additional tests including a lumbar computerized tomography (CT) scan and a functional capacity evaluation.

The Office proposed to suspend appellant's compensation benefits for failure to cooperate with the medical examination on January 16, 2004 noting that she had not appeared for her scheduled CT scan. The Office allowed appellant 14 days to provide written reasons for failing to appear.

On January 16, 2004 the Office authorized a myelogram and CT scan from November 12, 2003 to February 29, 2004.

Appellant stated on January 26, 2004 that she was unable to attend the scheduled tests due to illness. She stated that she did not refuse to cooperate and that Dr. Bailey was awaiting authorization for the tests.

By decision dated March 2, 2004, the Office terminated appellant's compensation benefits effective March 21, 2004 on the grounds that she refused an offer of suitable work, the mail and file clerk position. The Office noted that appellant's attending physician, Dr. Olson, had found that appellant could work on August 5, 2002. The Office concluded that the additional medical evidence from Drs. Harr and Bailey was not sufficient to establish that appellant could not perform the duties of the suitable work position.[2]

LEGAL PRECEDENT

It is well settled that, once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[3] As the Office in this case terminated appellant's compensation under 5 U.S.C. § 8106(c), the Office must establish that appellant refused to work after suitable work was found for her. Section 8106(c) of the Federal Employees' Compensation Act[4] provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee is not entitled to compensation. Section 10.517 of the applicable regulations[5] 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 showing before a determination is made with respect to termination of entitlement to compensation. To justify

[2] Following the Office's March 2, 2004 decision, appellant submitted additional new evidence. As the Office did not consider this evidence in reaching a final decision, the Board may not review it for the first time on appeal. 20 C.F.R. § 501.2(c).

[3] *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[4] 5 U.S.C. § 8106(c)(2).

[5] 20 C.F.R. § 10.517(a).

termination of compensation, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[6]

The Office's regulations also state:

> "[The Office] shall advise the employee that it has found the offered work to be suitable and afford the employee 30 days to accept the job or present any reasons to counter [the Office's] finding of suitability. If the employee presents such reasons, and [the Office] determines that the reasons are unacceptable, it will notify the employee of that determination and that he or she has 15 days in which to accept the offered work without penalty. At that point in time, [the Office's] notification need not state the reasons for finding that the employee's reasons are not acceptable."[7]

The Board has held that, once a suitable work position has been accepted by the claimant, the claimant must report to work or submit medical evidence substantiating that she was unable to work on the start day or another acceptable reason for failure to report to work. If no such reason is offered, the claimant has neglected to work after suitable work has been procured for her.[8]

If possible, the employer should offer suitable reemployment in the location where the employee currently resides. If this is not practical, the employer may offer suitable reemployment at the employee's former duty station or other location.[9]

ANALYSIS

The employing establishment initially offered appellant, who was residing in Missouri, a limited-duty seasonal position of mail and file clerk located in California on August 13, 2002. On June 30, 2003 the Office determined that this position was still available and that it was suitable work. The Office allowed appellant 30 days to accept the position or offer her reasons for refusal. By regulation, when an employee would need to move to accept an offer of reemployment, the employing establishment should, if possible, offer suitable reemployment in the location where the employee currently resides. The Board finds that the record contains no evidence that the employing establishment made any effort to determine whether such reemployment was possible in Missouri. The Office, knowing that appellant would have to move back to California to accept the McCloud Ranger Station position, should have developed this aspect of the case before finding the offer suitable.

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[6] *Arthur C. Reck*, 47 ECAB 339, 341-42 (1995).

[7] 20 C.F.R. § 10.516.

[8] *Shirley B. Livingston*, 42 ECAB 855, 861 (1991).

[9] 20 C.F.R. § 10.508 (1999). This regulation applies to both those employees who are no longer on agency rolls and those employees who continue on the agency rolls.

In 1987 the pertinent regulation applied only to former employees, employees who were terminated from the agency's employment rolls:

> "Where an injured employee relocates after having been terminated from the agency's employment rolls, the Office encourages employing agencies to offer suitable reemployment in the location where the former employee currently resides. If this is not practical, the agency may offer suitable employment at the employee's former duty station or other alternate location."[10]

The regulation in effect since 1999 contains no such restrictive language. The regulation now states that the employing establishment "should" offer suitable reemployment where the employee currently resides, if possible. Under the circumstances of this case, where appellant would need to move to accept a position in McCloud, California, the Board finds that the Office should have developed the issue of whether suitable reemployment in or around Conception Junction, Missouri, was possible. It was reversible error for the Office to terminate appellant's compensation benefits without positive evidence showing that such an offer was not possible or practical.[11]

CONCLUSION

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

[10] 20 C.F.R. § 10.123(f) (1987).

[11] *Sharon L. Dean*, 56 ECAB ___ (Docket No. 04-1707, issued December 9, 2004).

ORDER

IT IS HEREBY ORDERED THAT the March 2, 2004 decision of the Office of Workers' Compensation Programs is reversed.

Issued: March 25, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member