United States Department of Labor
Employees' Compensation Appeals Board

M.L., Appellant	)	
and	)	**Docket No. 06-136**
	)	**Issued: September 25, 2006**
DEPARTMENT OF VETERANS AFFAIRS, SOUTHERN ARIZONA VETERANS ADMINISTRATION HEALTH CARE SYSTEM, Tucson, AZ, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 24, 2005 appellant filed a timely appeal from the August 1, 2005 merit decision of the Office of Workers' Compensation Programs, which terminated her compensation for refusing suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this termination.

ISSUE

The issue is whether the Office has met its burden of proof to justify terminating appellant's compensation under 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

The facts of this case are set forth in prior Board decisions and orders[1] and are hereby incorporated by reference. Briefly, the employing establishment offered appellant a position as a Health Aid/Sitter, with retained pay, in Tucson, Arizona. Appellant, who was living in Montana at the time, accepted based on what she stated was the employing establishment's representation that she was eligible for the complete Permanent Change of Station (PCS) Travel Package, including the Home Sale Program. She facsimiled her acceptance on November 27, 2002. On December 3, 2002 the employing establishment wrote to appellant to acknowledge receipt and to advise:

> "As per our conversation, for detailed information regarding your eligibility for special programs and allowable travel/transportation as a new appointee please call the Travel Authority Help Desk directly at 512-460-5125. A travel specialist will be able to answer all of your questions regarding the move.
>
> "Your moving expenses will be authorized according to the GSA [General Services Administration] travel regulations and according to what the agency would authorize for any other newly appointed federal civilian employee.
>
> "The position offered remains available to you until final determination by the U.S. Department of Labor.
>
> "You are hereby notified that your report to duty date is December 16, 2002."[2] (Emphasis deleted.)

In a decision dated December 10, 2002, the Office terminated appellant's compensation effective December 2, 2002 for refusing suitable work. The Board set aside this termination and remanded the case for proper consideration of all the evidence, including appellant's acceptance of the offered position.

In a decision dated June 15, 2004, the Office terminated appellant's compensation retroactive to December 10, 2002 for refusing suitable work. The Office found that she did not report for work as her November 27, 2002 letter stated she would: "The employing [establishment] expected your arrival at work on December 15, 2002. You did not show for work, thus you refused suitable employment." The Board reversed this termination of appellant's compensation because the Office's own regulations, in effect since 1999, provided as follows: "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."[3] The record showed no

[1] Docket No. 93-712 (issued July 1, 1993), *petition for recon. denied* (issued October 20, 1993); Docket No. 95-1406 (issued October 2, 1997); Docket No. 04-395 (issued April 30, 2004); Docket No. 04-2226 (issued April 19, 2005).

[2] On December 2, 2002 Danna Corbell notified appellant that her report-to-duty date was December 15, 2002. December 15, 2002 was a Sunday, a scheduled day off under the offer.

[3] 20 C.F.R. § 10.508 (1999).

evidence that the employing establishment had made any effort to determine whether reemployment was possible in or around the location where appellant resided in Montana. The Board found that the Office should have developed this aspect of the case before making a finding on the suitability of the position in Tucson.

On return of the case record, the Office asked the employing establishment whether suitable employment was available in or near appellant's new residence at the time of the offered employment, and also whether the suitable employment previously offered was still available.

On July 18, 2005 Ms. Corbell, the employing establishment's workers' compensation program manager, responded:

> "I discussed the possibility of reemployment near her [Frenchtown, Montana] residence with her Rehabilitation Counselor, Travis Stortz, of Vocational Mgt Services, when he contacted me regarding possible reemployment with the agency. Mr. Stortz, who was very familiar with the area, informed me that the claimant lived in a rural area with limited opportunities.
>
> "Mr. Stortz and I discussed the VA Medical Center, located in Fort Harrison, Montana, approximately, 128.6 miles from Frenchtown. I am unclear to what extent the agency must go to determine whether or not employment opportunities exist in the location where the claimant resides. I did a query of the OPM website for vacancies in Montana and there were none listed appropriate to her educational background and work experience. Pragmatically, we determined that a job at a facility in Montana was not possible, nor practical.
>
> "I contacted the VA Montana Health Care System on July 15, 2005, and posed the question, 'would work have been available to her at the time of the job offer in Tucson?'
>
> "Please see the attached response from Carline Lundstrom, Human Resources Specialist. Ms. Lundstrom researched my request for information regarding possible employment with the VA in Montana and confirmed that there were no vacancies in the agency that would have been available to the claimant, nor is there a current vacancy available.
>
> "The suitable employment previously offered to the claimant in Tucson is currently available."

On July 20, 2005 Ms. Lundstrom wrote that "there were no vacancies that our agency would have offered to the claimant" at any of the VA Montana Health Care System facilities within commuting distance of Frenchtown on or about July to September 2002.

In a decision dated August 1, 2005, the Office terminated appellant's compensation retroactive to December 10, 2002 for failure to accept suitable employment: "You rejected a suitable position as a Health Aid/Sitter with the Tucson Veterans Medical Center, which was available and offered to you on October 1, 2002, by the Office of Personnel Management [OPM]. This position was determined to be within your medical and vocational capabilities."

The Office explained that suitable reemployment in the location where appellant currently resided was taken into consideration by the employing establishment prior to the offer of the position in Tucson. Noting that positions located near appellant's home in both the public and private sector were not available at the time the Tucson job was offered, the Office stated: "Although not discussed at the time, this was clearly known by the employing [establishment] representative from the date of injury employment location as limited-duty jobs in remote locations accommodating employees with limited work capacities from other areas is virtually nonexistent." The Office stated that the employing establishment expected appellant's arrival at work on December 15, 2002, and as she did not show for work, she refused suitable employment in violation of 5 U.S.C. § 8106(c)(2).

LEGAL PRECEDENT

Section 8106(c)(2) of the Federal Employees' Compensation Act states that a partially disabled employee who refuses to seek suitable work, or refuses or neglects to work after suitable work is offered to, procured by, or secured for him is not entitled to compensation.[4] The Office has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects suitable work when it is offered. Before compensation can be terminated, however, the Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work, and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.[5] In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused or neglected by appellant was suitable.[6]

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. Where the distance between the location of the offered job and the location where the employee currently resides is at least 50 miles, the Office may pay such relocation expenses as are considered reasonable and necessary if the employee has been terminated from the agency's employment rolls and would incur relocation expenses by accepting the offered reemployment. The Office may also pay such relocation expenses when the new employer is other than a federal employer. The Office will notify the employee that relocation expenses are payable if it makes a finding that the job is suitable. To determine whether a relocation expense is reasonable and necessary, the Office shall use as a guide the federal travel regulations for permanent changes of duty station.[7]

[4] 5 U.S.C. § 8106(c)(2).

[5] *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

[6] *Glen L. Sinclair*, 36 ECAB 664 (1985).

[7] 20 C.F.R. § 10.508 (1999) (may relocation expenses be paid for an employee who would need to move to accept an offer of reemployment?).

ANALYSIS

The Office's August 1, 2005 decision terminates appellant's compensation retroactive to December 10, 2002. "You did not show for work," the Office explained, "thus you refused suitable employment." But appellant's report-to-duty date was December 16, 2002. So on its face, the Office's decision terminates compensation prematurely, before appellant was expected to show for work.

Moreover, with the receipt of Ms. Corbell's July 18, 2005 letter, the Office believes it has cured the deficiency, noted on the last appeal, regarding the possibility of suitable reemployment in the location where appellant currently resided. Ms. Corbell now alleges that, when appellant's rehabilitation counselor, Mr. Stortz, contacted her regarding possible reemployment with the agency, she discussed the possibility of reemployment near appellant's residence in Frenchtown, Montana. She alleges that Mr. Stortz informed her that appellant lived in a rural area with limited opportunities. Ms. Corbell also alleges that she and Mr. Stortz discussed the VA Medical Center, located in Fort Harrison, Montana. She states that she did a query on the OPM website and found no vacancies in Montana appropriate to appellant's educational background and work experience. Pragmatically, she stated, "we determined that a job at a facility in Montana was not possible, nor practical."

Nothing in this account of events is corroborated by the contemporaneous evidence. Ms. Corbell wrote to the Office on May 31, 2002 to ask for a file review and to express a willingness to accommodate appellant with a modified assignment. On July 11, 2002 appellant's case was referred for "placement, previous employer with other services." The rehabilitation specialist, Bill Simmons, called Ms. Corbell on July 12, 2002 and discussed the option of either using "the VA's target job" as the work condition site in a graduated part-time to full-time schedule or having appellant undergo work conditioning in Montana with the expectation of a full-time release post treatment and subsequent job offer. So from the very beginning it appears that the employing establishment's target job was in Tucson.

Mr. Stortz, the rehabilitation counselor, made his initial report on August 11, 2002. Like all vocational rehabilitation counselors, he kept a detailed record of his actions and communications. On July 22, 2002 he attempted to contact Ms. Corbell to discuss return to work options and the likely need for a functional capacity evaluation (FCE). He left a message. His call was returned the same day:

> "Staffed file with TOI [time of injury] employer. Advised that they would be willing to offer TOI [w]age position to employee no matter the restriction. Want FCE done so that we have clear and present restrictions. If gradual [return to work], need to have graduated schedule in writing from the physician. Cannot do based on 'tolerance.' Positions may include Rating Specialist, Quality Case Management, or something similar. (Need to discuss potential FCE with Bill Simmons.)"

Two days later, on July 24, 2002, Mr. Stortz noted the following:

> "Staffed file with RS. Need to contact client and her physician to discuss FCE scheduling. Will try to meet with client and her physician to discuss work hardening, etc. Can also discuss early retirement whereby client could earn 40 percent of the TOI wage and can earn 80 percent in the private sector. If not client will be offered position in Tucson where she was injured and she will have the opportunity to accept or reject the position."

The employing establishment sought to offer alternative permanent work in Tucson as soon as current restrictions were outlined. There is no indication in this report, or in any of Mr. Stortz's reports, that he and Ms. Corbell discussed the possibility of reemployment near appellant's residence in Frenchtown, Montana, or that Mr. Stortz informed Ms. Corbell that appellant lived in a rural area with limited opportunities, or that they discussed the VA Medical Center in Fort Harrison, Montana, or that they determined that a job at a facility in Montana was not possible or practical. None of this is reflected in the evidence from the rehabilitation specialist, from the Office or even from Ms. Corbell herself. Because Ms. Corbell's July 18, 2005 letter appears inconsistent with the contemporaneous evidence from 2002, the record in this case does not support the Office's August 1, 2005 finding that suitable reemployment in the location where appellant currently resided was taken into consideration by the employing establishment prior to the offer of the position in Tucson.

But more to the point, it is the Office that bears the burden of proof to establish the suitability of this position. Because the Office made a finding in October 2002 that the sitter position in Tucson was suitable without first developing whether suitable reemployment was possible in the location where appellant currently resided, the Board finds that the suitability of the offered position was not established in 2002.

The Office has since obtained evidence addressing the possibility of suitable reemployment in Montana. The Board has already discussed Ms. Corbell's July 18, 2005 letter. The Office also received a July 20, 2005 communication from Ms. Lundstrom, a human resources specialist in Montana, who reported that "there were no vacancies that our agency would have offered to the claimant" at any of the VA Montana Health Care System facilities within commuting distance of Frenchtown on or about July to September 2002. Assuming, merely for the sake of argument, that this evidence is sufficient to establish that suitable reemployment with the employing establishment was not possible or practical in the location where appellant currently resided,[8] the Office cannot use later evidence to resuscitate its October 2002 finding of suitability. The Board has long recognized that the evidence necessary to sustain the Office's burden in termination cases must be in the record prior to the action effecting termination.[9] As the Board explained in the case of *Wilbur W. McInerney*: "It is obviously unfair to permit the Bureau [now the Office] to guess that the compensation is no

[8] The new evidence addresses vacancies for regular, established positions. It does not explain why a facility in Montana would be unable to provide appellant with a "sitter" or similar kind of modified or makeshift rehabilitation assignment.

[9] *Michael C. Kolosey*, 8 ECAB 549 (1956).

longer payable, to cut off compensation, and then to go out to collect evidence to substantiate its case."[10] The claimant must have notice and an opportunity to be heard. It is a denial of due process for the Office to terminate compensation effective December 10, 2002 on the grounds that appellant refused an offer of suitable work when the record in 2002 contained no evidence -- necessary for a finding of suitability -- that suitable reemployment was not possible or practical where appellant currently resided. And with its August 1, 2005 decision, the Office continues to deny appellant an opportunity to be heard on the matter. Although it received evidence in July 2005 that the position in Tucson remained available to appellant, the Office did not allow her 30 days to accept the position or an opportunity to challenge any newly supported finding of suitability. Instead, the Office effectively reissued its December 10, 2002 decision based on evidence obtained two to three years after the fact. The Board finds this to be reversible error.

The Board will reverse the Office's August 1, 2005 decision terminating appellant's compensation under 5 U.S.C. § 8106(c)(2). To be clear, Office procedures provide as follows:

> "If the Board has held that the Office did not meet is burden of proof before reducing or terminating benefits, the following actions will be taken:
>
> > (1) National Office staff will release a letter to the claimant or representative enclosing a Form CA-8 (or Form CA-12 in the case of death benefits) with instructions to complete the form and submit it to the district office.
> >
> > (2) On receipt of the completed form, the district office should promptly reinstate benefits to the claimant at the previous level, including retroactive payment to the date of reduction or termination."[11]

CONCLUSION

The Board finds that the Office did not meet its burden of proof to justify terminating appellant's compensation under 5 U.S.C. § 8106(c)(2). The new evidence received in July 2005 does not establish that suitable reemployment in the location where appellant currently resided was taken into consideration by the Office prior to its October 2002 finding of suitability. The Office may not use this evidence to rehabilitate its October 2002 finding and may not terminate compensation for refusing suitable work without providing appellant, in the usual manner, proper notice and an opportunity to be heard.[12]

[10] 8 ECAB 615, 618 (1956).

[11] Federal (FECA) Procedural Manual, Part 2 -- Claims, *Appeals*, Chapter 2.1603 (September 1993).

[12] The disposition of this appeal makes it unnecessary for the Board to decide whether suitable reemployment in Tucson was logistically impractical, as appellant argues, given the estimate of expenses associated with the relocation, the alleged lack of action on the part of the employing establishment and the time allowed for appellant to report to duty.

ORDER

IT IS HEREBY ORDERED THAT the August 1, 2005 decision of the Office of Workers' Compensation Programs is reversed. The case is remanded for reinstatement of benefits consistent with Office procedures.

Issued: September 25, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board