United States Department of Labor
Employees' Compensation Appeals Board

A.W., Appellant	)	
and	)	**Docket No. 06-1296**
	)	**Issued: March 7, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Fairfield, CT, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 22, 2006 appellant, through counsel, filed a timely appeal of a May 1, 2006 merit decision of an Office of Workers' Compensation Programs' hearing representative, affirming the termination of her compensation benefits because she refused an offer of suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this termination case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation benefits effective December 26, 2004 on the grounds that she refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

This case has twice been on appeal before the Board. In a May 4, 1995 decision, the Board found that appellant had not shown a change in the nature of her light-duty job and that the medical evidence was insufficient to establish that she sustained a recurrence of total

disability on or after September 20, 1991, causally related to her November 30, 1977 employment injuries.[1] In a decision dated February 8, 2000, the Board found that appellant failed to establish that she sustained a recurrence of disability on or after September 20, 1991 causally related to her November 30, 1977 accepted employment injuries. The Board further found that the Office properly denied appellant's January 22 and May 19, 1997 requests for reconsideration under 5 U.S.C. § 8128(a).[2] The facts and the circumstances of the case as set forth in the Board's prior decisions are incorporated herein by reference. The facts and the history relevant to the present issue are set forth.

On November 30, 1977 appellant, then a 28-year-old clerk, sustained injury to her back, neck and head as a result of being rear-ended while driving an employing establishment vehicle. She stopped work on December 1, 1977. The Office accepted appellant's claim for lumbar and cervical strains, right central herniated nucleus pulposus at L4-5 and temporary post-traumatic depression. On August 3, 1991 appellant returned to part-time limited-duty work. She stopped work again on October 21, 1991 alleging that she sustained a recurrence of disability on September 20, 1991 causally related to her November 30, 1977 employment-related injuries. Appellant has not returned to work.

By letter dated July 13, 2004, the Office referred appellant, together with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. C. David Bomar, a Board-certified surgeon, for a second opinion medical examination to determine her ability to perform limited-duty work. In a July 30, 2004 medical report, Dr. Bomar reviewed a history of appellant's November 30, 1977 employment injuries and medical treatment. He noted her complaint of neck and back pain. Dr. Bomar reported essentially normal findings on physical examination with the exception of pain in the cervical and lumbar spines. He opined that there were no objective findings to support appellant's subjective complaints and that any cervical and lumbar strain had long since resolved. Dr. Bomar stated that no further medical treatment was necessary and that appellant could perform full-time work with a lifting restriction of no more than 30 pounds. He concluded that she had reached maximum medical improvement.

On August 10, 2004 the employing establishment offered appellant a mail processing clerk position based on the restrictions set forth in Dr. Bomar's July 30, 2004 report. The position involved sorting and distributing mail to post offices and to carrier routes in accordance with the appropriate sort program or distribution scheme. It also may require the performance of a variety of services at public windows or post offices and post office branches or stations. The position also required the performance of related duties as assigned. The physical requirements included no lifting or carrying more than 30 pounds, sitting, standing, walking and simple grasping eight hours per day, bending/stooping and twisting five hours per day, pulling/pushing two hours per day and reaching above the shoulder six hours per day.

In an August 20, 2004 letter, the Office advised appellant that a suitable position based on Dr. Bomar's July 30, 2004 opinion was available and that she had 30 days to either accept the position or arrange for the submission of a medical report. It further advised that her

[1] Docket No. 93-2366 (issued May 4, 1995).

[2] Docket No. 98-543 (issued February 8, 2000).

compensation would be terminated based on her refusal to accept a suitable position or to demonstrate that her refusal was justified.

On August 20, 2004 the Office received appellant's August 17, 2004 rejection of the job offer. She contended that she was still disabled and unable to perform the duties of the offered position due to her November 30, 1977 employment-related injuries. Appellant further stated that she would submit medical evidence in the near future. None was forthcoming.

By decision dated December 10, 2004, the Office terminated appellant's compensation benefits effective December 26, 2004 on the grounds that she refused an offer of suitable work. The Office found that Dr. Bomar's July 30, 2004 report constituted the weight of the medical opinion evidence as it was comprehensive and well rationalized. In a January 4, 2005 letter, appellant requested an oral hearing before an Office hearing representative.

By letter dated February 5, 2006, appellant's counsel advised the Office that he would not be able to attend the hearing scheduled for February 14, 2006. He requested a hearing by telephone conference. In a letter dated February 28, 2006, the Office advised appellant that her request for postponement of the hearing was denied. It further advised that the hearing could not be rescheduled and, thus a review of the written record would be conducted.

The Office received a February 14, 2006 medical report of Dr. Albert F. Walters, a Board-certified internist, who provided a history that in 1977 appellant sustained disabling work-related injuries. Dr. Walters noted that she attempted to work from August to October 1991 but was unable to continue due to her original symptoms. He stated that, over this period, appellant saw multiple specialists and a February 1996 magnetic resonance imaging (MRI) scan demonstrated evidence of reversal of the normal curvature of the cervical spine and an anterior and posterior herniated disc at C5-6. Dr. Walters further stated that, when he last examined appellant in January 2005, she was still symptomatic. He opined that she would most likely remain symptomatic indefinitely.

By decision dated May 1, 2006, an Office hearing representative affirmed the December 10, 2004 termination decision. She found that Dr. Bomar's July 30, 2004 report constituted the weight of the medical opinion evidence.

LEGAL PRECEDENT

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits. Under section 8106(c)(2) of the Federal Employees' Compensation Act,[3] the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[4]

[3] U.S.C. §§ 8101-8193.

[4] *Patrick A. Santucci*, 40 ECAB 151 (1988); *Donald M. Parker*, 39 ECAB 289 (1987).

Section 10.516 of the implementing regulation[5] provides in pertinent part:

"[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."

Section 10.517 of the implementing regulation[6] further provides:

"(a) 5 U.S.C. § 8106(c) provides that a partially disabled employee who refuses to seek suitable work or refuses to or neglects to work after suitable work is offered to or arranged for him or her, is not entitled to compensation. An employee who refuses or neglects to work after suitable work has been offered or secured for him or her has the burden to show that this refusal or failure to work was reasonable or justified.

"(b) After providing the two notices described in sec[tion] 10.516, [the Office] will terminate the employee's entitlement to further compensation under 5 U.S.C. §§ 8105, 8106 and 8107, as provided by 5 U.S.C. § 8106(c)(2). However, the employee remains entitled to medical benefits as provided by 5 U.S.C. § 8103."

ANALYSIS

In this case, the Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits on the grounds that she refused an offer of suitable work. On August 20, 2004 the employing establishment offered appellant a modified mail processing clerk position based on the July 30, 2004 medical opinion of Dr. Bomar, an Office referral physician. Dr. Bomar opined that there were no objective findings to substantiate appellant's subjective complaints and that her cervical and lumbar strains had long since resolved. He further opined that she was capable of working full time with the restriction of lifting no more than 30 pounds. The Office, by letter dated August 20, 2004, found that the position was suitable and allowed appellant 30 days to accept the position or offer reasons for her refusal. On August 17, 2004 appellant rejected the job offer, stating that she was still disabled and that she would submit medical evidence supportive of her continuing disability. On September 14, 2004 she requested additional time to submit medical evidence supportive of her continuing disability because she was grieving the death of her father-in-law. The Board notes that appellant did not submit any additional medical evidence.

[5] 20 C.F.R. § 10.516.

[6] *Id.* at § 10.517(a), (b).

In the case of *Maggie L. Moore*,[7] the Board held that, when the Office makes a preliminary determination of suitability and extends the claimant a 30-day period either to accept or to give reasons for not accepting, the Office must consider any reasons given before it can make a final determination on the issue of suitability. Should the Office find the reasons unacceptable, it may finalize its preliminary determination of suitability, but it may not invoke the penalty provision of 5 U.S.C. § 8106(c) without first affording the claimant an opportunity to accept or refuse the offer of suitable work with notice of the penalty provision. In the instant case, the Office did not follow these procedures and; therefore, did not afford appellant the protections set forth in *Moore*.[8] The Office gave appellant a reasonable opportunity to accept the offer of employment and notified her of the penalty provision of 5 U.S.C. § 8106(c). However, it failed to properly consider her stated reason for refusing the job offer in determining the suitability of the offered position. It did not provide appellant with 15 days to accept the offered position with no penalty before issuing the December 10, 2004 termination decision. The Board finds that the Office improperly terminated appellant's compensation benefits on the grounds that she refused an offer of suitable work.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation effective December 26, 2004 on the grounds that she refused an offer of suitable work because it improperly invoked the penalty provision of 5 U.S.C. § 8106(c).

[7] 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992); *see also Linda Hilton*, 52 ECAB 476 (2001).

[8] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the May 1, 2006 decision of the Office of Workers' Compensation Programs is reversed.

Issued: March 7, 2007
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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