United States Department of Labor
Employees' Compensation Appeals Board

M.C., Appellant	)	
and	)	**Docket No. 08-1631**
	)	**Issued: May 1, 2009**
DEPARTMENT OF THE AIR FORCE, ROBINS AIR FORCE BASE, GA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 20, 2008 appellant filed a timely appeal from an April 11, 2008 decision of the Office of Workers' Compensation Programs terminating her compensation benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.d(3), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether the Office properly terminated appellant's compensation under 5 U.S.C. § 8106(c)(2) on the grounds she refused an offer of suitable work.

FACTUAL HISTORY

The Office accepted that on October 31, 1990 appellant, then a 51-year-old sheet metal mechanic, sustained a fractured left patella and abrasions of the forehead and right knee when she tripped and fell on a sidewalk. Dr. Frank B. Kelly, an attending Board-certified orthopedic surgeon, performed open reduction and internal fixation of the left patella on November 1, 1990, with removal of hardware on July 23, 1991. Appellant returned to light-duty work for four hours

a day on February 21, 1991. She returned to full-time light duty on January 15, 1992.[1] Dr. Kelly submitted periodic progress notes and work restrictions through March 1995, diagnosing post-traumatic arthritis of the left knee.

Appellant stopped work on December 4, 1995 and was separated from the employing establishment due to disability effective January 25, 1996. She received benefits on the daily rolls.[2] Appellant's case was placed on the periodic rolls effective February 1, 1998.

Dr. Joseph E. Slappey, Jr., an attending Board-certified orthopedic surgeon, submitted February 18 and April 1, 1998 reports diagnosing right plantar fascial pain.

On March 2, 2006 the Office obtained a second opinion from Dr. Jeffrey A. Field, a Board-certified orthopedic surgeon, who found appellant able to perform limited-duty work with restrictions. On February 13, 2006 the employing establishment offered appellant a job as a modified clerk, but did not provide a position description.

Following additional development, the Office authorized a second-opinion examination by Dr. Alexander M. Doman, a Board-certified orthopedic surgeon, who submitted a July 17, 2007 report based on a statement of accepted facts and the medical record. Dr. Doman diagnosed mild left patellofemoral pain. He opined that appellant could perform full-time light-duty work, with sitting and standing limited to four hours a day, climbing limited to two hours a day and no squatting.

In November 2007, the Office referred appellant to a vocational rehabilitation counselor to initiate a reemployment plan. In a November 7, 2007 report, the counselor reviewed appellant's vocational and medical history. The counselor noted that appellant did not wish to return to work due to her age.

On January 8, 2008 the employing establishment offered appellant a full-time position as a modified clerk. The required duties included answering the telephone, photocopying and filing. Lifting, pulling and pushing were limited to 10 pounds. Appellant could sit or stand as needed and was not required to climb or squat. The employing establishment instructed appellant regarding the deadline for accepting or refusing the position, and when and where to report for duty. Appellant did not respond to the job offer.

In a January 9, 2008 report, the vocational counselor noted that appellant would refuse the offered modified clerk position as she did not wish to return to work.

By letter dated February 1, 2008, the Office advised appellant that the offered modified clerk position was suitable work within the restrictions set forth by Dr. Doman. It afforded her 30 days to accept the position or provide a written explanation for her refusal. The Office noted

[1] The Office issued wage-earning capacity determinations on April 23, 1991 and March 4, 1992, based on appellant's actual earnings. By decision dated May 7, 1992, it granted appellant a schedule award for a 12 percent permanent impairment of the left lower extremity.

[2] By decision dated October 25, 1995, the Office initially denied compensation for the period August 15, 1995 onward. It vacated this decision on October 23, 1996.

that, if appellant failed to report for work or present adequate justification for her refusal, her compensation would be terminated.

In a February 11 and March 28, 2008 reports, the vocational rehabilitation counselor stated that appellant continued to refuse the offered position and would elect retirement benefits. The counselor encouraged her to contact the Office directly to explain her reasons for refusing the job offer. Appellant did not do so.

In an April 11, 2008 telephone memorandum, the employing establishment advised the Office that the offered modified clerk position remained open and available. Appellant did not report for work.

By decision dated April 11, 2008, the Office terminated appellant's monetary compensation under section 8106(c)(2) of the Act on the grounds that she refused an offer of suitable work. It found that the offered modified clerk position was suitable work within the restrictions set forth by Dr. Doman, the second opinion examiner. Appellant did not respond to the offer, provide reasons for her refusal or submit any medical evidence indicating that the offered position was not suitable work. The Office noted that she remained entitled to medical benefits.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[3] The Office may terminate compensation under section 8106(c)(2) of the Act, which 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."[4] To justify termination of compensation, the Office must show that the work offered was suitable and must inform the claimant of the consequences of refusal to accept such employment.[5] For conditions not accepted by the Office as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation.[6] Once the Office establishes that the work offered was suitable, the burden of proof shifts to the employee who refuses to work to show that such refusal was reasonable or justified.[7] Section 8106(c) will be narrowly construed as it serves as a penalty provision, which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.[8]

[3] *Linda D. Guerrero*, 54 ECAB 556 (2003); *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[4] 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

[5] *Ronald M. Jones*, 52 ECAB 190 (2000).

[6] *Alice J. Tysinger*, 51 ECAB 638 (2000).

[7] *Bryant F. Blackmon*, 56 ECAB 752 (2005).

[8] *Joan F. Burke*, 54 ECAB 406 (2003); *see Robert Dickerson*, 46 ECAB 1002 (1995).

Section 10.517(a) of the Act's implementing regulations provide that an employee who refuses or neglects to work after suitable work has been offered or secured by the employee, has the burden of showing that such refusal or failure to work was reasonable or justified.[9] Pursuant to section 10.516, the employee shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.[10] The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by medical evidence.[11]

ANALYSIS

The Office accepted that, on October 31, 1990, appellant sustained a fractured left patella and abrasions of the right knee and forehead. She received total disability compensation beginning in February 1996.

The Office obtained a second opinion report on July 17, 2007 from Dr. Doman, a Board-certified orthopedic surgeon, who found appellant able to perform full-time light-duty work with sitting and standing limited to four hours a day, climbing limited to two hours a day and no squatting. On January 8, 2008 the employing establishment offered appellant a modified clerk position within the restrictions set forth by Dr. Doman. The Board finds that Dr. Doman's report established that the offered position was within appellant's physical limitations.[12] Also, the offer was in writing, described the assigned duties and their physical requirements and instructed appellant when to report for work.[13] The Board finds that the Office met its burden to establish that the position was suitable work.[14]

As appellant did not respond to the offer, the Office advised her in a February 1, 2008 letter of the Act's penalty provisions for refusing suitable work. The Board finds that the Office complied with its procedural requirements in advising her that the position was suitable work and allowing her to accept the job or justify her refusal. Appellant did not report for duty or respond with reasons for refusing the offered position.[15] Therefore, the Office terminated her

[9] 20 C.F.R. § 10.517(a); *see Ronald M. Jones*, *supra* note 5.

[10] 20 C.F.R. § 10.516.

[11] *Kathy E. Murray*, 55 ECAB 288 (2004).

[12] *Richard P. Cortes*, 56 ECAB 2000 (2004).

[13] *See* 20 C.F.R. § 10.507.

[14] *Marilou Carmichael*, 56 ECAB 451 (2005).

[15] The Office complied with its regulation at 20 C.F.R. § 10.516 by sending the February 1, 2008 letter affording her 30 days to accept the position, soliciting her reasons for refusal and advising her of the Act's penalty provision at 5 U.S.C. § 8106(c)(2). As appellant did not provide the Office with her reasons for refusing the job offer, the Office was not obligated to send appellant a second letter affording her an additional 15 days to accept the job without penalty. 20 C.F.R. § 10.516, codifying the notification procedure set forth in *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

compensation benefits by decision dated April 11, 2008. Accordingly, it met its burden of proof to terminate appellant's compensation based on her refusal of suitable work.

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation under section 8106(c)(2) of the Act as she refused an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 11, 2008 is affirmed.

Issued: May 1, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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