U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANN LOUISE GREGORY and DEPARTMENT OF THE NAVY, Bremerton, Wa.

Docket No. 96-1411; Submitted on the Record;
Issued December 9, 1998

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's entitlement to monetary compensation benefits on the grounds that she abandoned suitable work.

The Board has duly reviewed the case record and finds that the Office did not meet its burden of proof in this case.

In the present case, the Office has accepted that appellant, a supply clerk, sustained a herniated disc at L4-5 on March 19, 1984, which required lumbar laminectomy; and that appellant fell again at work on January 28, 1987 reinjuring her back and requiring decompression of the L4-5 disc and fusion of L4-S1. The Office additionally accepted that appellant sustained an acceleration of personality disorder and somatoform disorder as a result of her employment injury. Appellant worked intermittently thereafter. The Office placed appellant in a rehabilitation program in 1992. On April 11, 1994 the employing establishment offered appellant the position of administrative supply clerk for five hours a day, five days a week. On April 20, 1994 the Office informed appellant that it had determined that the administrative support clerk position was suitable to her work limitations. The Office advised appellant that the position was currently available and that she would have 30 days to accept or refuse the position. Appellant was advised that pursuant to 5 U.S.C. § 8106(c)(2) if she did not accept the position and did not substantiate that the failure to work was justified, her compensation would be terminated. Appellant accepted the position and began work on May 16, 1994 for three hours a day, with "job coach" assistance for two weeks. Appellant worked in this position until June 24, 1994. Appellant stated that she stopped work on June 24, 1994 due to back pain and migraine headaches.

By decision dated November 28, 1994, the Office found that appellant was not entitled to monetary compensation benefits because she refused to work after suitable work was offered to her and because her migraine headaches were not causally related to her employment. By decision dated February 7, 1996, an Office hearing representative affirmed the Office's November 28, 1994 decision. The hearing representative found that appellant had failed to

establish that she was unable to perform the light-duty position to which she returned in May 1994 and neglected suitable work after June 24, 1994.

The Board finds that the Office did not properly find that appellant was not entitled to compensation after June 24, 1994 because she neglected suitable work under 5 U.S.C. § 8106(c)(2).

Section 8106(c) of the Federal Employees' Compensation Act provides:

"A partially disabled employee who --

(1) refuses to seek suitable work; or

(2) refuses or neglects to work after suitable work is offered to, procured by, or secured for him; is not entitled to compensation."[1]

The Board finds that the application of section 8106(c) was improper in the instant case. This section of the Act is further defined by regulation. 20 C.F.R. § 10.124(c) provides in relevant part:

> "Where an employee has been offered suitable employment (or reemployment) by the employing [establishment] (*i.e.,* employment or reemployment which the Office has found to be within the employee's educational and vocational capabilities, within any limitations and restrictions which preexisted the injury and within the limitations and restrictions which resulted from the injury), or where an employee has been offered suitable employment as a result of job placement efforts made by or on behalf of the Office, the employee is obligated to return to such employment. 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 as provide by 5 U.S.C. § 8106(c)(2)."

The Office's procedure manual states the Office's policy regarding suitable work emphasizes returning partially disabled workers to suitable employment. The manual states that the Office will therefore make every reasonable effort to arrange for employment of a partially disabled claimant, first with the employing establishment and then with a new employer. Accordingly, the Office's procedure manual states that the effort to provide suitable employment will take into account both medical conditions which preexisted the injury, and those which arose afterwards.[2] The procedure manual further provides that if medical reports in the file document a condition which has arisen since the compensable injury, which disables the

[1] 5 U.S.C. § 8106(c).

[2] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining wage-earning capacity* Chapter 2.814.3 (June 1996).

claimant from the offered job, the job will be considered unsuitable even if the subsequently acquired condition is not employment related.[3]

In the present case, the Office found that appellant had neglected suitable work because her injury-related condition did not preclude her from performing the position of administrative support clerk, to which she returned in May 1994. The Office also found that appellant's migraine headaches were not employment related. The Office did not evaluate whether appellant's migraine headaches, a preexisting condition, precluded her from performing the duties of the administrative support clerk position.

The medical evidence of record substantiates that appellant had a history of migraine headaches preexisting the employment injury. A May 30, 1984 hospital record prepared by Dr. Gordon Cromwell Jr., a Board-certified orthopedic surgeon, noted current headache, as well as a history of migraine headaches. Dr. Cromwell further noted appellant's comment that she had a history of headaches, but that her current headache was different in nature. After appellant's return to work in May 1994, in a report dated July 21, 1994, Dr. Paul Lewis appellant's treating physician, stated that he believed it was in appellant's best interests to stop work as even working four hours per day subjected her to severe back pain and migraine headaches. Dr. C. Richard Johnson, a Board-certified psychiatrist and the Office's second opinion physician, noted in his report dated August 22, 1994 that appellant had experienced migraine headaches two to three times a week after she returned to work, and that the migraines decreased to a frequency of once every three weeks after she stopped work. Dr. Johnson stated that appellant's migraine headaches were caused by "the tension induced from trying her very best to do her job in the presence of chronic severe pain," and he indicated that he did not find significant evidence of a personality disorder or somatoform pain disorder, rather appellant's depression and migraine headaches were secondary to chronic pain exacerbated in the workplace. Dr. Johnson concluded that appellant's physical symptoms rather than her depression would preclude her return to the position of administrative support clerk, which she performed in May and June 1994.

In the present case, the Office found that appellant had neglected suitable work. The Office was required to, but did not, evaluate whether appellant's preexisting migraine condition disabled appellant from performance of the administrative support clerk position, such that the position did not constitute suitable work. Furthermore, the Board finds that the Office did not comply with due process procedural requirements before terminating appellant's monetary compensation benefits.

It is well established that the termination of benefits under section 8106(c) raises due process and fairness considerations.[4] The Board has explained that these considerations arise because compensation benefits constitute a property interest that is protected by the due process clause. As the Supreme Court has held that the essential requirements of due process are "notice and an opportunity to respond," these essential due process principles require that an employee have "at least notice and an opportunity to respond in some manner" prior to the termination of

[3] *Id* at Chapter 2.814.4.

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

compensation benefits.[5] Accordingly, the Board finds that appellant's monetary compensation may not be terminated under section 8106(c)(2) for neglecting suitable work without prior notification and an opportunity to respond.

In the present case, the Office failed to notify appellant of the provisions of section 8106(c); and failed to provide appellant opportunity to respond before terminating her compensation benefits. Appellant was preliminarily advised by the Office on April 20, 1994, prior to her return to the administrative support clerk position, that her light-duty job was considered "suitable" under section 8106(c) of the Act. After appellant stopped work in June 1994, however, she was not advised by the Office of the consequences of neglecting suitable work; she was not allowed an opportunity to respond to the Office with reasons why she stopped work prior to the finalization of the Office's suitable work determination; nor was she notified after the finalization of the suitable work determination, that the position remained available, and that refusal to accept the position would result in the termination of her monetary compensation.[6]

The Board therefore finds that the Office improperly terminated appellant's compensation under 5 U.S.C. § 8106(c)(2) for abandoning suitable work. It is well settled that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[7] For the reasons noted above, the Board finds that the Office has failed to meet its burden of proof in terminating appellant's compensation effective June 24, 1994.

The decision of the Office of Workers' Compensation Programs dated February 7, 1996 is hereby reversed.

Dated, Washington, D.C.
December 9, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

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

[6] *Id.*

[7] *Frank J. Mela, Jr.*, 41 ECAB 115 (1989).