U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARIE FRYER and DEPARTMENT OF THE AIR FORCE, KELLY AIR FORCE BASE, San Antonio, Tex.

Docket No. 97-502; Submitted on the Record;
Issued December 11, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation on the grounds that she refused an offer of suitable work.

In the present case, the Office accepted that appellant sustained a left knee contusion and permanent aggravation of left knee degenerative arthritis in the performance of duty. By letter dated August 7, 1995, the Office determined that appellant had been offered the position of supply technician and advised appellant that the position was considered suitable. The Office stated that appellant had 30 days to accept the position or provide reasons for refusing the position, noting that an employee who refuses an offer of suitable work without justification is not entitled to compensation for wage loss. By decision dated September 14, 1995, the Office terminated appellant's compensation on the grounds that she refused an offer of suitable work. By decisions dated November 29, 1995 and January 11 and September 18, 1996, the Office reviewed the case on its merits and denied modification.

The Board has reviewed the record and finds that the Office failed to meet its burden of proof in terminating appellant's compensation.

The Federal Employees' Compensation Act, 5 U.S.C. § 8106(c), provides in pertinent part, "A partially disabled employee who … (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation." It is the Office's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.[1] To justify such a termination, the Office must show that the work offered was suitable.[2]

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[1] *Henry P. Gilmore*, 46 ECAB 709 (1995).

[2] *John E. Lemker*, 45 ECAB 258 (1993).

An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.[3]

With respect to an offer of a light-duty job by the employing establishment, the Office's procedure manual states in pertinent part:

> "*Any such offer must be in writing* and must include the following information:
>
> (a) A description of the duties to be performed.
>
> (b) The specific physical requirements of the position and any special demands of the workload or unusual working conditions.
>
> (c) The organizational and geographical location of the job.
>
> (d) The date on which the job will first be available.
>
> (e) The date by which a response to the job offer is required."[4] (Emphasis in the original.)

The applicable implementing federal regulation, 20 C.F.R. § 10.124(b), also require that the employing establishment make a written offer of employment. In this case, the Office apparently based its suitability determination on a memorandum of conference dated August 2, 1995, which reported that the employing establishment had made a job offer, with appellant's supervisor stating that it would be in accordance with appellant's physical restrictions as described by Dr. Joe W. Tippett, in a June 2, 1995 form report. The memorandum stated that "some" of the duties included answering phones, filing and counting nuts and bolts.

There is no indication, however, that a written job offer was made in this case in accordance with Office procedures. The record includes a job description for a Supply Technician position, but this includes moderate lifting of up to 45 pounds and describes many duties, which are not included in the memorandum of conference. It is evident from the memorandum that the position discussed was a modified position, without a clear description of the actual job duties. The Board has held that the Office must follow its procedures and secure a written job offer containing a description of the light-duty job.[5] As the Board explained in *Charlene R. Herrera*,[6] due process and elementary fairness require that the Office observe certain procedures before terminating a claimant's monetary benefits under 5 U.S.C. § 8106(c) and these procedures include a written offer of employment. There must be a specific written offer with a description of the job duties so that the claimant may be able to adequately respond,

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[3] *Catherine G. Hammond*, 41 ECAB 375, 385 (1990); 20 C.F.R. § 10.124(c).

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.4(a) (June 1996).

[5] *Richard F. Burger*, Docket No. 96-408 (issued January 7, 1998).

[6] 44 ECAB 361, 372-73 (1993).

and a physician may be able to properly review the position and provide an opinion as to whether the claimant can perform the position.

The Board accordingly finds that the Office failed to follow its established procedures and failed to meet its burden of proof in terminating compensation under 5 U.S.C. § 8106(c).

The decisions of the Office of Workers' Compensation Programs dated September 18 and January 11, 1996 and November 29, 1995 are reversed.

Dated, Washington, D.C.
December 11, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member