U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GLEN E. ARVEY and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER,
Durham, N.C.

Docket No. 97-2610; Submitted on the Record;
Issued June 23, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective April 20, 1996 on the grounds that he refused an offer of suitable work.

On June 22, 1994 appellant, then a 43-year-old registered nurse sustained a contusion of the right arm in the performance of duty.

In a report dated October 26, 1995, Dr. L. Andrew Koman, a Board-certified orthopedic surgeon of professorial rank, provided findings on examination and diagnosed a contusion of the right upper extremity with persistent pain and swelling. He stated that appellant's objective disability was minimal and he was capable of performing his nursing duties.

In a letter dated November 28, 1995, Dr. David G. Dye, appellant's attending Board-certified orthopedic surgeon, stated that appellant's involuntary spasms posed a potential liability to appellant and the patients he served. He stated, "I feel that he needs to be in another work environment altogether."

By letter dated January 18, 1996, the employing establishment offered appellant a modified-duty position as a staff nurse with certain restrictions as set forth in a March 18, 1995 functional capacity evaluation performed at the rehabilitation center. The employing establishment noted that Dr. Koman had opined that appellant could perform the duties of a staff nurse.

By letter dated January 19, 1996, the Office advised appellant that it had found the modified staff nurse position to be suitable to appellant's work capabilities and noted that the position was currently available. The Office advised appellant that he had 30 days within which to either accept the position or provide an explanation of his reasons for refusing it. The Office

advised appellant that, if he failed to accept the offered position and failed to demonstrate that the failure was justified, his compensation benefits would be terminated, including any entitlement to a schedule award.

In a letter dated February 6, 1996, the Office asked Dr. Dye to review a copy of the modified nursing position offered to appellant. The Office noted that appellant was able to request assistance in any situation which he felt he could not handle or which posed the chance of injury to himself or to a patient. The Office asked Dr. Dye to review the documentation and to provide a well-reasoned report as to whether appellant could perform the duties of the modified position.

In a letter dated February 15, 1996, Dr. Dye stated that he had reviewed the modified nursing position offered to appellant and stated his opinion that the job description failed to comment on the most significant deficit that appellant had with his right hand, endurance. He stated that appellant could not perform any type of repetitive motion with his right hand and forearm such as the repetitive signing of charts and repetitive opening of medication packages.

By letter dated February 16, 1996, appellant rejected the modified nursing position.

By letter dated March 6, 1996, the employing establishment advised Dr. Dye that it had further modified the position offered to appellant and that appellant would not be required to: lift and carry greater than 30 pounds with the right hand alone and 45 pounds with the left hand alone; lift and carry with both hands over 50 pounds; carry more than 50 pounds a distance greater than 100 feet; participate in the care of combative patients; or utilize the ambu bags with ventilator-dependent patients because of the repetitive motions required. The employing establishment advised that appellant would perform charge nurse and team leader responsibilities to include medication administration (scissors would be provided for opening packages) and tube feedings). He was expected to utilize the pull tabs on feeding cans and hang the tube feeding from the suspension pole for infusion. The employing establishment noted that a medication team normally had a maximum of five patients with tube feedings and that all feedings were not administered at the same time. The employing establishment stated that appellant was expected to provide care and assist with patient care to all categories of patients to include giving baths and noted that appellant could determine the timing of the baths. Appellant was expected to refrain from lifting beyond the weight limits identified on the modified-duty offer and utilize good judgment and safe practice should a patient become unexpectedly agitated. The employing establishment noted that appellant was not required to sign all the charts at one time and was expected to use good judgment and organized his work load to prevent repetitive signing of charts and also noted that the usual chart assignment was 20 or less. The employing establishment asked Dr. Dye if appellant could perform the modified nursing position with the additional modifications.

In a physician's consent form dated March 14, 1996, Dr. Dye indicated that appellant could return to duty on March 18, 1996 within the limitations set forth in the employing establishment's March 6, 1996 letter.

By letter dated March 18, 1996, appellant stated that the signing of charts and opening of medication packages would constitute repetitive motion tasks. He stated that using scissors to

open medication packages would simply be another form of repetitive motion. Appellant noted that the employing establishment stated that he was not required to sign all charts at one time but that he was not permitted to sign charts until after 2:30 p.m. and his shift ended at 4:00 p.m. He noted that he had to sign all charts and administer medication within that one and one-half hour period of time which would result in constant repetitive motion within a concentrated period of time.

By letter dated March 25, 1996, the employing establishment advised appellant that it had received from Dr. Dye a March 14, 1996 physician's consent form releasing appellant to return to duty on March 18, 1996 with restrictions. The employing establishment advised appellant that he could return to the offered position no later than April 8, 1996.

By letter dated March 29, 1996, the Office advised appellant that it had reviewed his letter dated March 18, 1996 providing his reasons for his refusal of the modified nursing position and that his reasons for refusal had been found unacceptable. The Office noted that appellant's attending physician, Dr. Dye, had approved the job description as presented and that no further reason for refusal would be considered. Appellant was advised that he had 15 days from the date of the letter to accept the offered job of modified staff nurse and that if he did not accept the position within the 15-day period his compensation benefits would be terminated under 5 U.S.C. § 8106(c).

By decision dated April 18, 1996, the Office terminated appellant's compensation benefits effective April 20, 1996 on the grounds that the evidence of record established that he had refused an offer of suitable work.

By letter dated May 17, 1996, appellant requested an oral hearing before an Office hearing representative and submitted additional evidence.

In a report dated March 27, 1996, Dr. Rupinder Kaur, a psychiatrist, related that appellant had injured his right arm at work and that he had been doing well but was hospitalized on March 22, 1996 when he found out that he was being asked to go back to work. He related that appellant could not cope with the request to return to work because he felt that he could not function due to constant pain in his right arm. Dr. Kaur provided the results of a mental status examination and diagnosed adjustment disorder with depressed mood.

In a report dated April 11, 1996, Dr. Masoud S. Hejazi, a Board-certified psychiatrist and neurologist, related that appellant was upset because he was asked to return to work and felt that he could not function due to constant pain in his right arm. He diagnosed adjustment disorder with depressed mood. He noted that throughout his hospitalization appellant was clearly requesting assistance in avoiding a return to work. Dr. Hejazi related appellant's statement that he planned to be active if he did not return to work at the employing establishment, that he "had plans for other businesses." He stated that he advised appellant to return to work and work within the system to acquire a job that he could perform.

In a report dated May 6, 1996, Dr. Charles Guyer, II, a clinical psychologist, stated that appellant was under his care for the treatment of depression and pain management. He stated that appellant became more depressed and agitated when confronted with the possibility of

returning to work as a floor nurse and felt he was not physically capable of performing this job. Dr. Guyer stated: "due to [appellant's] heightened anxiety and depression when confronting with the possibility of returning to work, it is felt that [appellant] may not be able to return to work as floor nurse."

On March 12, 1997 a hearing was held before a hearing representative at which time appellant testified.

By decision dated May 9, 1997, the Office hearing representative affirmed the Office's April 18, 1996 decision.

The Board finds that the Office properly terminated appellant's monetary compensation benefits on the grounds that he refused an offer of suitable work.

Once the Office accepts a claim it has the burden of proving that the disability has ceased or lessened before it may terminate or modify compensation benefits.[1]

Under section 8106(c)(2) of the Federal Employees' Compensation Act[2] the Office may terminate the compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.[3] Section 10.124(c), Part 20 of the Code of Federal Regulations[4] provides that 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.[5] To justify termination, the Office must show that the work offered was suitable[6] and must inform appellant of the consequences of refusal to accept such employment.[7]

In the present case, the Office has properly exercised its authority granted under the Act and the implementing federal regulations. The record demonstrates that following the Office's acceptance of appellant's claim the Office paid appropriate benefits and medical expenses. On January 18, 1996 the employing establishment offered appellant a modified position as a staff nurse. On March 14, 1996 Dr. Dye, appellant's attending physician, reviewed the modified staff

[1] *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 239, 241 (1984).

[2] 5 U.S.C. § 8106(c)(2).

[3] *Camillo R. DeArcangelis*, 42 ECAB 941, 943 (1991).

[4] 20 C.F.R. § 10.124(c).

[5] *Camillo R. DeArcangelis*, *supra* note 3; *see* 20 C.F.R. § 10.124(e).

[6] *Carl W. Putzier*, 37 ECAB 691, 700 (1986); *Herbert R. Oldham*, 35 ECAB 339, 346 (1983).

[7] *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.4(c) (December 1993).

nurse position description and reported that appellant was approved for the position. The Board notes that, therefore, the Office has established that the modified nurse position offered by the employing establishment is suitable.

The Office complied with the procedural requirements by advising appellant of the suitability of the position offered, that the job remained open and that his failure to accept the offer, without justification, would result in the termination of his compensation. The Office provided appellant 30 days within which to either accept the position offered or submit his reasons for refusal. By letter dated March 18, 1996, appellant refused the job offer and submitted his reasons in justification of his rejection of the job offer. On March 29, 1996 the Office informed appellant that his reasons for rejecting the job offer were not justified and offered him an additional 15 days in which to accept the job offer. Appellant did not accept the job offer. Thereafter, on April 18, 1996 the Office terminated appellant's compensation benefits effective April 20, 1996.

As noted above, once the Office has established that a particular position is suitable, 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. The Board has carefully reviewed the evidence and argument submitted by appellant in support of his refusal of the modified staff nurse position and notes that it is not sufficient to justify his refusal of the position.

Appellant alleged that the position was outside his physical limitations as recommended by his attending physician. However, the record shows that in a physician's consent form dated March 14, 1996, appellant's attending physician, Dr. Dye approved the modified staff nurse position. The record shows that in preparing the position approved by Dr. Dye on March 14, 1996 the employing establishment had made additional modifications to the original modified position in order to comply with the concerns which had been expressed by Dr. Dye in his letter dated February 15, 1996.

Appellant provided reports from a psychologist stating that he was unable to perform the staff nurse position due to depression. However, this condition is not an accepted employment injury in this case.[8] Furthermore, there is no indication that the psychologist had reviewed a description of the modified job offered to appellant. In any event, appellant's attending physician, who had treated his accepted employment injury, is more qualified to determine whether appellant was capable of performing the modified position.

For these reasons, the Office properly terminated appellant compensation effective September 20, 1992 on the grounds that he refused an offer of suitable work.[9]

[8] The Board notes that a Board-certified psychiatrist who examined appellant, Dr. Hejazi, had related that appellant had sought assistance in avoiding a return to work and complained of pain in his arm but Dr. Hejazi had advised appellant to return to work and work within the system to obtain a job that he could perform.

[9] The Board notes that the Office complied with its procedural requirements prior to terminating appellant's compensation, including providing appellant with an opportunity to accept the modified nurse position after informing him that his reasons for initially refusing the position were not valid; *see generally Maggie L. Moore*, *supra* note 7.

The May 9, 1997 decision of the Office of Workers' Compensation Programs is affirmed.[10]

Dated, Washington, D.C.
June 23, 1999

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom

[10] The Board notes that, on appeal, appellant requested review of his claim for a schedule award. However, there is no final Office decision of record regarding a schedule award claim. The Board has jurisdiction to consider and decide appeals from final Office decisions only. 20 C.F.R. § 501.2(c). Therefore, the Board has no jurisdiction to review appellant's claim for a schedule award as it appears that no final decision has been issued.