U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of REGINA F. HOLT-ANDERSON and U.S. POSTAL SERVICE, POST OFFICE, Houston, Tex.

Docket No. 97-2084; Submitted on the Record;
Issued May 25, 1999

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 monetary compensation effective January 16, 1997 based on her refusal to accept suitable employment in accordance with 5 U.S.C. § 8106(c).

On May 17, 1995 appellant, then a 31-year-old letter carrier, filed a claim alleging that on May 11, 1995, she sustained a left shoulder injury in the performance of duty. The Office accepted appellant's claim for left shoulder sprain and authorized a September 22, 1995 arthroscopy of the left shoulder.

On July 29, 1996 the employing establishment offered appellant a full-time limited-duty clerical/administrative position. Appellant accepted the position but returned to work for only six hours per day.

By letter dated November 20, 1996, the Office advised appellant that it had determined that the clerical/administrative position offered by the employing establishment was suitable. The Office informed appellant that she had 30 days from the date of the letter to accept the position or provide an explanation for refusing the position. The Office indicated that any evidence or argument provided by appellant for refusing the position would be considered prior to termination of her compensation for refusing an offer or suitable work.

Appellant submitted medical reports from Dr. Rawle Andrews, who specializes in general practice and occupational medicine, and Dr. Arnold Ravdell, an attending orthopedic surgeon.

By decision dated January 16, 1997, the Office terminated appellant's disability compensation on the grounds that she refused an offer of suitable work[1] and, by decision dated February 11, 1997, the Office denied modification of its prior decision.

The Board finds that the Office improperly terminated appellant's compensation under 5 U.S.C. § 8106(c) based on her refusal to accept suitable employment.

Section 8106(c)(2) of the Federal Employees' Compensation Act states that a partially disabled employee who refuses to seek suitable work, or refuses or neglects to work after suitable work is offered to, procured by, or secured for him or her is not entitled to compensation.[2] The Office has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects suitable work when it is offered. Before compensation can be terminated, however, the Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work, and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific requirements of the position.[3] To justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty position, the Office has the burden of showing that the work offered to and refused or neglected by appellant was suitable.[4]

The Board finds that the Office denied appellant a reasonable opportunity to comply with 5 U.S.C. § 8106(c). When the Office sent appellant its November 20, 1996 notification that it had determined that the position offered by the employing establishment was suitable, it informed her of a preliminary determination. By inviting her to write and give reasons for not accepting, the Office acknowledged that its determination was not yet final, and that a reasonable explanation would justify her refusal and result in the continuation of her compensation for disability. Certain explanations will, of course, justify a claimant's refusal to accept an offer of employment. The Office's procedure manual lists a number of reasons that are considered acceptable.[5] If a claimant refuses the employment offered and provides such a reason, the Office will consider her refusal justified and will continue her compensation for disability.[6]

If a claimant chooses to respond within 30 days and gives reasons for not accepting the offered position, the Office must consider these reasons before it can make a final determination on the issue of suitability. Only after it has made a final determination on the issue of suitability can the Office afford the claimant an opportunity to accept or refuse an offer of suitable work. And only after it has finalized its decision on suitability can the Office notify the claimant that

[1] The Office indicated that appellant was still entitled to compensation for medical treatment.

[2] 5 U.S.C. § 8106(c)(2).

[3] *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

[4] *Glen L. Sinclair*, 36 ECAB 664 (1985).

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5 (July 1997).

[6] *Id.*

refusal to accept shall result in the termination of compensation, as the language of 5 U.S.C. § 8106(c) clearly mandates.[7]

In the instant case, the Office did not afford appellant an opportunity to accept the position offered after making a final determination that the position was suitable. The Office, therefore, denied appellant a reasonable opportunity to accept an offer of "suitable" work. Without such an opportunity, appellant cannot be held to have refused an offer of suitable work within the meaning of the statute. Appellant submitted medical evidence from her physicians in response to the Office's preliminary notification that the position offered by the employing establishment constituted suitable employment. The Office reviewed only one of the medical reports submitted and found that the report was unacceptable.[8] At the same instant, the Office terminated appellant's compensation for disability, thereby denying her an opportunity to accept the position after determining it to be a suitable one.

Additionally, the medical evidence of record did not show that appellant was capable of performing the clerk/administrative job at the time that her compensation was terminated. The Office based its determination that appellant was physically capable of performing the light-duty position offered by the employing establishment on the opinions of Dr. C. Craig Crouch, a Board-certified orthopedic surgeon and Office referral physician, and Dr. Ravdell. However, the reports of Drs. Crouch and Ravdell are insufficient to meet the Office's burden of proof in showing that the position offered was suitable.

In a report dated February 12, 1996, Dr. Crouch reviewed the history of injury and medical treatment received, and diagnosed status post arthroscopy of the left shoulder, a possible partial rotator cuff tear and probable adhesive capsulitis. He found that appellant had "ongoing disability as a result of the May 11, 1995 work injury and subsequent surgery. This does prevent her from returning from her regular position as described in the statement of accepted facts." He recommended aggressive physical therapy and also noted that appellant might need another magnetic resonance imaging (MRI) study and further surgery.

In a consultation with a rehabilitation nurse assigned by the Office to appellant, Dr. Crouch indicated that appellant probably could do light duties with no lifting above the shoulder level. He further stated that appellant should undergo a work capacity evaluation to confirm his impression of her ability to work. Dr. Crouch's finding that appellant could return to work and perform limited duty is couched in speculative terms and does not contain a sufficiently detailed description of appellant's ability to perform work to justify a finding that appellant could perform the full-time limited-duty position in January 1997.

In a work restriction evaluation dated October 15, 1996, Dr. Ravdel found that appellant could work for eight hours per day with restrictions on lifting above her shoulders. However, in

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

[8] The Office reviewed additional medical evidence, including that before the Office prior to its termination of compensation, in its February 11, 1997 denial of modification. At this point, however, the Office had already terminated appellant's compensation benefits, depriving her of her right to accept the position after it was found to be suitable.

a report dated October 25, 1996, Dr. Ravdel diagnosed "possible impingement syndrome of the left shoulder with scarring" and noted that he must rule out a torn rotator cuff. He recommended surgery on the shoulder to evaluate the rotator cuff and that "[p]ending the above, [appellant] would be able to work 8 hours with the restrictions specified." In his October 25, 1996 report, Dr. Ravdel appeared to qualify his opinion regarding appellant's ability to work by recommending surgery to rule out a rotator cuff tear and thus his opinion is insufficient to support the Office's finding that appellant could perform the proffered position.

For the foregoing reasons, the Office failed to meet its burden of proof to terminate appellant's compensation benefits on the grounds that she refused an offer of suitable work.

The decisions of the Office of Workers' Compensation Programs dated February 11 and January 16, 1997 are hereby reversed.

Dated, Washington, D.C.
May 25, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member