U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MANOLO U. MEJIA and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Long Beach, CA

Docket No. 00-759; Submitted on the Record;
Issued September 19, 2001

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 compensation benefits pursuant to 5 U.S.C. § 8106(c)(2).

On December 8, 1989 appellant, then a 50-year-old cook, sustained an injury while in the performance of his duties. The Office accepted his claim for lumbosacral strain and paid benefits. On December 16, 1990 appellant sustained another injury, which the Office accepted for left shoulder strain. Appellant received compensation for temporary total disability.

On March 7, 1995 the Office informed appellant that the position of cook, offered by the employing establishment, was suitable and currently available. The Office advised:

> "You have 30 days from the date of this letter to accept the position or provide a written explanation of your reasons for refusing it.[1] Without further notice, at the expiration of 30 days, a final decision on this issue will be made. If you fail to accept the position, any explanation or evidence which you provide will be considered prior to determining whether or not your reasons for refusing the job are justified.
>
> "5 U.S.C. § 8106(c)(2) states: 'A partially disabled employee who … refuses or neglects to work after suitable work is offered to, procured by, or secured for him is not entitled to compensation.' If you without reasonable cause refuse this employment, fail to report for work when scheduled, or stop working in the new position, your compensation benefits for wage loss or schedule award will be terminated. You will retain your entitlement to medical care for your work-related condition."

[1] The Office extended this period because appellant had moved.

On May 1, 1995 the Office informed appellant that he still had an opportunity to accept the position with no penalty. The Office gave him 15 days from the date of that letter to accept the position. If he failed to do so, his compensation benefits would be terminated under 5 U.S.C. § 8106(c)(2) without further notice.

On May 1, 1995 appellant accepted the offer of employment. He began work in the new position on May 8, 1995 but stopped after two or three days. He filed a Form CA-8, claim for continuing compensation on account of disability, for the period beginning May 11, 1995.

In a decision dated July 18, 1995, the Office denied compensation for wage loss on the grounds that the medical evidence of record established that appellant was physically capable of performing the duties of the position of cook.

In a September 24, 1997 letter to appellant's congressman, the Office advised that, if appellant suffered a recurrence of his work-related shoulder or back condition, he should file a claim for recurrence.

On December 18, 1997 appellant filed a Form CA-2a, notice of recurrence of disability and claim for continuation pay/compensation. Appellant claimed that he suffered a recurrence of disability on May 10, 1995 and stopped work on May 11, 1995 as a result of his accepted employment injury.

On January 9, 1998 the Office requested that appellant submit additional evidence within 30 days to support his claim of recurrence. The Office further notified appellant of the following:

> "You should also be aware that 5 U.S.C. § 8106(c)(2) states that 'A partially disabled employee who … refuses or neglects to work after suitable work is offered to, procured by, or secured for him is not entitled to compensation.' Therefore, anyone who stops working a suitable job without good cause is not entitled to further compensation for wage loss or schedule award."

In a decision dated April 3, 1998, the Office denied appellant's claim of recurrence of disability.

On February 12, 1998 appellant requested reconsideration of the Office's July 18, 1995 decision.

In a decision dated April 15, 1998, the Office reviewed the merits of appellant's claim. The Office noted that it had advised appellant, by letters dated March 7 and May 1, 1995, of the penalties that would be imposed under 5 U.S.C. § 8106(c)(2) if he did not accept the job. "Although he did return to work," the Office stated, "he abandoned the job and refused to return after being released to do so by the physician whose report represents the weight of medical evidence. Therefore, in reference to monetary compensation, the claimant is not entitled to any payments because under that provision of the Act [sic]." The Office modified the July 18, 1995

decision to find that appellant's entitlement to compensation was denied under 5 U.S.C. § 8106(c)(2) because he abandoned the job.[2]

In a decision dated September 10, 1999, the Office reviewed the merits of appellant's claim and denied modification of the April 15, 1998 decision.

The Board finds that the Office improperly terminated appellant's compensation benefits.

Once the Office accepts a claim it has the burden of proof to justify termination or modification of compensation benefits.[3] Because it terminated appellant's compensation benefits for abandoning or neglecting suitable work, the Office has the burden to establish that it properly invoked the penalty provision of 5 U.S.C. § 8106(c)(2).

In the case of *Maggie L. Moore*, the Board held that, when the Office makes a preliminary determination of suitability and extends the claimant a 30-day period either to accept or to give reasons for not accepting, the Office must consider any reasons given before it can make a final determination on the issue of suitability. Should the Office find the reasons unacceptable, it may finalize its preliminary determination of suitability, but it may not invoke the penalty provision of 5 U.S.C. § 8106(c) without first affording the claimant an opportunity to accept or refuse the offer of suitable work with notice of the penalty provision.[4] FECA Bulletin No. 92-19, issued July 31, 1992, adapted Office procedure to comply with the Board's ruling in *Moore*. The Bulletin provides that, if the reasons given for refusal are considered unacceptable, the claimant will be informed of this by letter, given 15 days from the date of the letter to accept the job, and be advised that the Office will not consider any further reasons for refusal. If the claimant does not accept the job within the 15-day period, compensation payments, including schedule award payments, will be terminated under 5 U.S.C. § 8106(c).

In the case of *Tobey Rael*,[5] the Board held that the principles of due process applicable to a termination of compensation based on a claimant's refusal of suitable work, as in *Moore*, also applied to terminations of compensation based on a claimant's neglecting to work after suitable work was procured by or secured for him.

In this case, the Office failed to provide appellant with the due process protections set forth in *Moore* and *Rael*. Although the Office provided due process protections prior to appellant's acceptance of the offered employment on May 1, 1995, those protections did not justify the Office's decision on April 15, 1998 to terminate compensation benefits for subsequent neglect of suitable work. When it invoked 5 U.S.C. § 8106(c)(2), the Office reminded appellant of the penalty provision on January 9, 1998 but failed to notify him that the position in question remained available and that he could still return to the position without penalty. Further, the

[2] This decision effectively superceded the earlier denials of appellant's claim for continuing compensation and claim of recurrence by changing the basis for denial to neglect of suitable work.

[3] *Harold S. McGough*, 36 ECAB 332 (1984).

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

[5] 46 ECAB 231 (1994).

Office extended no period of time for appellant either to return to the position or to provide reasons for not returning. The Office's March 7, 1995 notice and opportunity to respond related to the initial acceptance or refusal of the offered employment and afforded no due process protection against the April 15, 1998 termination for neglect.

The Board finds that the Office prematurely invoked the penalty provision of 5 U.S.C. § 8106(c)(2) and thereby failed to discharge its burden of proof to justify the termination of appellant's compensation benefits.

The September 10, 1999 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, DC
September 19, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member