U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DALE K. NUNNER and DEPARTMENT OF THE NAVY, NAVAL UNDERSEA WARFARE CENTER, Keyport, WA

Docket No. 01-1374; Submitted on the Record;
Issued February 14, 2002

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 effective August 22, 2000 on the grounds that he refused an offer of suitable work.

On December 8, 1999 appellant, then a 46-year-old boatbuilder, filed an occupational disease claim alleging that he sustained injuries to his right knee in the course of his federal employment duties.[1] The Office accepted the claim for right medial meniscus tear, arthroscopic debridement and repair and temporary aggravation of traumatic arthritis of the right knee. The Office placed appellant on the periodic rolls and paid appropriate compensation benefits.

On May 20, 2000 appellant's treating physician, Dr. Larry D. Iversen, a Board-certified orthopedic surgeon, released appellant to light-duty work, effective May 30, 2000. The physician's restrictions included: no prolonged standing and walking; no squatting or kneeling, and no use of scaffolds for two to three months.

In a May 30, 2000 disability certificate, Dr. Iversen, stated that appellant could return to full-time status with restrictions of no prolonged walking or standing until his next appointment.

In a June 7, 2000 duty status report, Dr. Iversen related that appellant was to continue his restrictions including: standing and walking, for no more than two hours per day; climbing, for no more than one-half hour per day; and no kneeling.

[1] Appellant originally filed a traumatic injury claim. By letter dated October 14, 1999, the Office advised appellant that his claim appeared to be an occupational disease claim and advised that he should file a notice of occupational disease and claim for compensation.

On June 22, 2000 the employing establishment offered appellant a light-duty position in accommodation of his regular permanent position of a boatbuilder. The position corresponded to the physical restrictions delineated by Dr. Iversen.

On July 14, 2000 Dr. Iversen responded to a request from the Office regarding appellant's status. He stated that a right knee arthroscopic partial medial menisectomy was performed on May 16, 2000 and he planned to keep appellant off work until at least June 5, 2000. Dr. Iversen believed that appellant could return to work in a limited-duty capacity with no prolonged walking or standing, with these restrictions lasting until approximately July 12, 2000, which was about two months, post surgery. It was his plan, however, for appellant to return to his office for reassessment to see if the initial recommendations were realistic. Dr. Iversen stated that appellant was last seen in his office on July 11, 2000 and appellant still had the ongoing limitations. Dr. Iversen stated that he was going to see appellant in another month, for his last appointment, three months post surgery, and he would assess his limitations.

On June 28, 2000 the Office advised appellant that the light-duty accommodation within his permanent position had been found to be suitable to his capabilities and was currently available. Appellant was advised that he should accept the position or provide an explanation for refusing the position within 30 days. The Office informed appellant that if he failed to accept the offered position and failed to demonstrate that the failure was justified, his compensation would be terminated.

By letter dated July 11, 2000, appellant refused the offer of employment stating that his attorney did not receive a copy of the suitability letter.

By letter dated August 2, 2000, the Office informed appellant that his reasons for refusing the position were not acceptable and allowed an additional 15 days for appellant to accept the position or face termination of his compensation.

By certified mail dated August 17, 2000,[2] appellant accepted the position and his acceptance was received by the Office on August 22, 2000.

After determining that the offered job remained available, by decision dated August 22, 2000, the Office terminated appellant's compensation benefits finding that he had refused an offer of suitable employment.

By letter dated August 25, 2000, appellant, through his representative requested an oral hearing. Appellant contended that the decision was in error as he had agreed to accept the offered position and sent his acceptance via certified mail.

The hearing was held on January 18, 2001. During the hearing, the hearing representative determined that appellant's acceptance letter was indeed mailed on August 17, 2000 as evidenced by the return receipts. Appellant also confirmed that he was prepared to return to work, under protest, but he was willing to return.

[2] The record reflects that appellant presented a certified receipt during the hearing confirming that the acceptance was mailed on August 17, 2000.

In a letter dated February 8, 2001, the employing establishment submitted comments concerning the hearing and requested that the Office's August 22, 2000 decision be affirmed.

In a decision dated March 21, 2001 and finalized on March 22, 2001, an Office hearing representative affirmed the Office's August 22, 2000 termination of benefits. In his decision, the hearing representative found that, although appellant had timely accepted the offer, his acceptance was in bad faith as he waited until the last possible moment to accept the offer and did not report to the agency for a few days afterwards.

The Board finds that the Office improperly terminated appellant's compensation 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 employee's disability has ceased or lessened before it may terminate or modify compensation benefits. Section 8106(c)(2) of the Federal Employees' Compensation Act[3] provides that the Office may terminate compensation of a partially disabled employee who refuses or neglects to work after suitable work is offer to, procured by or secured for the employee.[4] The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.[5]

The implementing regulation 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 a showing before entitlement to compensation is terminated.[6] To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.[7]

In the instant case, the Office improperly terminated appellant's compensation benefits for neglecting to work after suitable work was procured for him on the basis that he mailed his acceptance letter at the last possible moment. Additionally, the Office stated that appellant did not appear to be making a good faith effort to return to his employment, as he accepted under protest and did not appear to want to return to work. However, the record reflects that appellant was allotted 15 days to accept the position, and he did so, via certified mail. There is no provision in the regulations indicating that appellant will be penalized if he accepts the offer on the eve of the 15th day. Additionally, the regulations do not provide for termination of benefits where the job offer is accepted, even if accepted under protest. As appellant accepted the position within the allotted time period, the Office improperly terminated appellant's compensation benefits effective August 22, 2000.

[3] 5 U.S.C. § 8106(c)(2); *see also* 20 C.F.R. §§ 10.516, 10.517 (1999).

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

[5] *Stephen R. Lubin*, 43 ECAB 564 (1992).

[6] 20 C.F.R. §§ 10.516, 10.517 (1999).

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

The decision dated March 21, 2001 and finalized March 22, 2001 of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC
February 12, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member