United States Department of Labor
Employees' Compensation Appeals Board

SANDRA L. DeFRATE, Appellant	)	
and	)	**Docket No. 05-3**
	)	**Issued: April 7, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Spokane, WA, Employer	)	

Appearances:
Sandra L. DeFrate, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On September 24, 2004 appellant filed a timely appeal from the August 5, 2004 merit decision of the Office of Workers' Compensation Programs, which terminated her compensation benefits for refusing an offer of suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this termination.

ISSUE

The issue is whether the Office properly terminated appellant's compensation under 5 U.S.C. § 8106(c)(2) for refusing an offer of suitable work.

FACTUAL HISTORY

On June 23, 1998 appellant, then a 43-year-old mail handler working limited duty,[1] filed a claim alleging that she injured her neck, right shoulder and right shoulder blade while in the performance of her duties. The Office accepted her claim for cervical degenerative disc disease

[1] The Office File No. 14-316795 (accepted for left cubital tunnel syndrome).

and arthritis of the right acromioclavicular joint. The Office authorized surgery and paid compensation for temporary total disability on the periodic rolls.

The attending neurosurgeon reported that appellant's total disability ended on August 30, 2001. He released her to return to work with permanent restrictions. On January 17, 2002 appellant underwent a physical capacity evaluation, which Dr. Judith A. Heusner, an attending specialist in occupational medicine, endorsed.

Based on this evaluation, the employing establishment offered appellant a job as a general clerk verifying identities at a security gate. On May 5, 2002 Dr. Heusner conditionally approved the position:

> "I attended a site ergonomic assessment at the postal facility that has offered [appellant] restricted duty. This would be a permanent placement. The job entails monitoring four video screens, communicating *via* intercom to visitors to the facility and to walk over to a monitor that has a zoom-in/zoom-out capability to check identification. [Appellant], her union representative, her nurse case manager, the placement specialist for the [employing establishment] and her supervisor were all in attendance, as well as myself. Several ergonomic modifications were identified, but once these have been implemented, I feel I would be able to return [appellant] to work on a reasonably continuous basis."

On August 28, 2002 the Office of Personnel Management (OPM) notified appellant that her application for disability retirement was approved. OPM informed her that it was notifying the employing establishment of the approval and asking them to separate her. Appellant elected OPM benefits in lieu of compensation effective August 28, 2002. The employing establishment separated appellant from employment effective September 6, 2002.

Also on August 28, 2002 the employing establishment reissued its offer to appellant for a job as a general clerk verifying identities at a security gate. The offer stated that she would report for work on September 19, 2002 and that the modifications recommended by Dr. Heusner would be made by then.

On September 19, 2002 the employing establishment reissued the offer, which expressly annulled all previous offers.[2] It stated that the position would be available and that appellant would report for work on October 4, 2002. The offer indicated that modifications would be made prior to her return to work:

> "I am including the following ergonomic issues that were expressed by Dr. Heusner in our meeting of May 2, 2002 and on the job offer signed May 7, 2002. These modifications will be made prior to your return to work.
>
> (1) Provide push button to chord with close reach.
>
> (2) Cut desk out in order to access the window.

[2] The Office received this offer on September 19, 2002 the day it was issued.

(3) Provide a 20” step to reach zoom equipment.

(4) Typing duties to tolerance (not to exceed 20 minutes in a three hour timeframe).

(5) Lower surveillance screen.

(6) Provide telephone headset.”

The offer stated that this was a permanent position that may be abolished or changed based on appellant’s physical restrictions or organizational needs. The offer further stated: “Upon successful return to full duty, bidding out of position, retirement, etc., this position will be reverted.”

On September 19, 2002 the Office notified appellant that the position offered was suitable and currently available to her. The Office advised that she had 30 days to accept or provide an explanation for refusing the position. The Office also informed her of the penalty provision of 5 U.S.C. § 8106(c)(2).

Appellant’s representative responded that the offer was invalid because appellant was no longer an employee. The Office replied that retiring under OPM did not stop the process and that appellant still had until October 19, 2002 to accept or provide reasons for refusing.

On October 11, 2002 appellant argued that the offer impermissibly crossed craft divisions. She argued that she was not subject to 5 U.S.C. § 8106 because OPM found her to be totally disabled. She argued that the employing establishment had an obligation to return her to her former job or equivalent position. She contended that the offered position was formulated to be the worst shift possible, in a different craft and with horrible days off: “It is nonproductive especially formulated for my punishment and to be an example to other employees who might be considering reporting a work-related injury.” Appellant noted that she would lose her seniority if she accepted the offer. She also noted that the employing establishment had not yet made the necessary modifications and without them, the position was outside her physical capabilities. Appellant doubted the employing establishment’s intention to make such modifications and she indicated that all parties were in agreement that the position was unsuitable as it currently existed. Appellant stated that the offer was in violation of the collective bargaining agreement because it made her responsible for working safely within her known medical restrictions. She argued that “administrative duties” were not defined and she observed that the job would be reverted upon retirement.

On October 28, 2002 the Office notified appellant that the issues she raised were labor management issues or issues she may need to address with OPM, but had no bearing on its suitability determination. The Office added:

> “Regarding the ergonomic modification issue, the [employing establishment] has assured me that these modifications will be made by November 4, 2002.

Therefore, this letter serves to amend the availability of the job offer to November 4, 2002.

"You are being granted an additional 15 days from the date of this letter to accept this position without penalty. No further reason for refusal will be considered. If at the end of this 15 days you still refuse the position, the provisions of 5 U.S.C. 8106(c) will be enforced."

On November 13, 2002 the Office contacted the employing establishment, which advised that appellant had made no contact concerning the job offer. In a decision dated November 13, 2002, the Office terminated her compensation under 5 U.S.C. § 8016(c).

Appellant requested an oral hearing before an Office hearing representative, which was held on May 12, 2003. Following the hearing, she submitted documents relating to her application for disability retirement. Her supervisor indicated that in these documents efforts were made to accommodate her with numerous job offers of the past several years, but they were rejected or refused: "We tried to match her restrictions, but with no success." The acting manager of personnel services indicated that a reasonable effort to accommodate was not made because "the medical evidence presented to the agency shows that accommodation is not possible due to severity of medical condition and the physical requirements of the position." He indicated that reassignment was not possible: "There are no vacant positions at this agency, at the same grade or pay level and tenure within the same commuting area, for which the employee meets minimum qualifications standards."

On June 3, 2003 the employing establishment explained that there was no contradiction in accommodating appellant with her disability retirement while at the same time continuing to offer her employment. The modifications were not completed because they were to be accomplished upon her return to work.

In a decision dated July 29, 2003, the Office hearing representative affirmed the termination of appellant's compensation, finding that she refused or neglected to work without sufficient cause or reason after suitable work was offered to her. Noting appellant's mistrust of the employing establishment, the hearing representative found that the evidence submitted by her "does not prove that the [employing establishment] was so untrustworthy that the claimant was justified in not accepting the job offer.… I simply have no good reason not to believe that the [employing establishment] would have done the modifications."

In a decision dated August 5, 2004, the Office reviewed the merits of appellant's claim and denied modification of the July 29, 2003 decision.

LEGAL PRECEDENT

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 her is not entitled to compensation.[3] The Office

[3] 5 U.S.C. § 8106(c)(2).

has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects suitable work when it is offered. Before the Office can terminate compensation, 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 job requirements of the position.[4] In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused or neglected by appellant was suitable.[5]

ANALYSIS

The determination of whether an employee is physically capable of performing a modified position is a medical question that must be resolved by medical evidence.[6] The medical evidence in this case establishes that appellant's total disability for work ceased on or around August 30, 2001, the date her neurosurgeon released her to work with restrictions. She underwent a physical capacity evaluation on January 17, 2002 and her attending physician, Dr. Heusner, endorsed the results. This evidence establishes that appellant was partially disabled and capable of working.

Her restrictions established that the employing establishment extended an offer for the position of general clerk. The employing establishment revised this offer several times, either to fill in necessary details or to make clear that the position remained available beyond a previously identified starting date. Dr. Heusner obtained a firsthand look at the proposed work environment when she, together with appellant, a union representative, the nurse case manager, her supervisor and the employing establishment's placement specialist, attended a site ergonomic assessment at the employing establishment. Dr. Heusner identified several ergonomic modifications and reported that, once these were implemented, "I feel I would be able to return [appellant] to work on a reasonably continuous basis." In response, the employing establishment reissued the offer to identify each of the ergonomic concerns expressed by Dr. Heusner and to represent that the modifications would be made before appellant reported to work. The offer issued on September 19, 2002 reasonably addressed Dr. Heusner's conditions for returning appellant to work. The Board finds, therefore, that the offered position was medically suitable. The question that remains is whether appellant was justified in not accepting the offer.[7]

Appellant argued that 5 U.S.C. § 8106(c) did not apply to her because OPM found her to be totally disabled and she was no longer an employee. The Board has held, however, that determinations of other administrative agencies with respect to whether or not an employee is disabled are not binding on the Office or the Board with respect to whether the individual is

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

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

[6] *Robert Dickerson*, 46 ECAB 1002 (1995).

[7] *Ronald M. Jones*, 52 ECAB 190 (2000) (holding that where the Office properly demonstrated that the offered position was suitable work based on the claimant's restrictions at that time, the burden then shifted to the claimant to show that his refusal to work in that position was justified).

disabled under the Act.[8] A determination of disability for retirement purposes is not determinative of the extent of physical impairment or loss of wage-earning capacity for compensation purposes.[9] Indeed, the Board has consistently held that electing to receive retirement benefits is not an acceptable reason for refusing suitable work.[10] The employing establishment's inability to return appellant to her original, unmodified position or to accommodate her with an existing funded position does not prevent it from offering a nonfunded position tailored to her particular needs.

Appellant also argued that the Office's finding of suitability and the resulting November 13, 2002 decision terminating her compensation related to an offer on August 28, 2002, which was rendered null and void by the offer on September 19, 2002. In fact, the Office made its finding of suitability on the same day that it received the September 19, 2002 offer. As the Office gave no indication that it was referring to the earlier offer and as the November 13, 2002 decision is at least ambiguous about the matter, appellant's argument is not well founded.

As for appellant's argument that accepting the offer would result in a loss of seniority, the Board has held that such an argument is irrelevant to the issue of suitability and not an acceptable reason for refusing offer of suitable work.[11]

Appellant raised issues dealing with the legality of the position, such as whether it impermissibly crossed craft divisions and whether it violated the collective bargaining agreement. The Board has no jurisdiction to rule on such matters.

Appellant correctly argues that the offer did not define "administrative duties," but the Board finds that this is not fatal to a finding of suitability. For the record, the offer indicated that she would "assist the Tour Office Clerk with administrative duties within her medical restrictions." This language appeared in the offer when Dr. Heusner gave her conditional approval; she expressed no reservations. Appellant's belief that the employing establishment would leverage this phrase to render the job untenable is speculation and not an acceptable reason for refusing the offer of employment.

The evidence in this case establishes the medical suitability of the offered position. The record shows that the Office afforded appellant administrative due process by providing her with proper notice and an opportunity to be heard. As her refusal of the offer was not justified, the Board finds that she is not entitled to compensation under 5 U.S.C. § 8106(c)(2).

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[8] *Constance G. Mills*, 41 ECAB 317 (1988).

[9] *Hazelee K. Anderson*, 37 ECAB 277, 283 (1986); *Fabian W. Fraser*, 9 ECAB 367 (1957).

[10] *Robert P. Mitchell*, 52 ECAB 116, 119 (2000) (claimant chose to receive disability retirement benefits from OPM rather than accept a position offered by the employing establishment).

[11] *Stephen R. Lubin*, 43 ECAB 564, 568-69 (1992).

CONCLUSION

The Office properly terminated appellant's compensation under 5 U.S.C. § 8106(c)(2) for refusing an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the August 5, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 7, 2005
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member