United States Department of Labor
Employees' Compensation Appeals Board

DOROTHY C. PLUMMER, Appellant	)	
and	)	**Docket No. 05-567**
	)	**Issued: August 22, 2005**
DEPARTMENT OF THE ARMY, HEALTH SERVICES COMMAND, Fort Carson, CO, Employer	)	

Appearances:
Timothy Quinn, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 7, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions dated January 29 and June 22, 2004, terminating her compensation for refusal of suitable work and a December 16, 2004 decision denying her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the January 29, June 22 and December 16, 2004 decisions.

ISSUE

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation on the grounds that she refused an offer of suitable work; and (2) whether the Office properly denied her request for further merit review of her claim under 5 U.S.C. § 8128.

FACTUAL HISTORY

On September 28, 1989 appellant, then a 52-year-old registered nurse, sustained a right wrist sprain, right ankle sprain, bilateral carpal tunnel syndrome and bilateral reflex sympathetic dystrophy when she stumbled on a sidewalk.

Effective April 18, 1993, appellant was placed on the periodic rolls to receive compensation for temporary total disability.

Dr. Timothy V. Sandell, an attending Board-certified physiatrist, released her to return to work for eight hours a day with restrictions based on a functional capacity evaluation performed on January 31, 2002. The March 26, 2002 restrictions included sedentary work with no lifting greater than five pounds, avoid squatting or kneeling, self-paced work with resting when needed and a ten-minute break every two hours. There were no restrictions regarding sitting, standing, walking, bending or climbing. Dr. Sandell signed a copy of the job description for the position of secretary, office automation, and wrote, "OK as long as within restrictions given on March 26, 2002." Appellant began performing the position of secretary in April 2002.

On August 27, 2002 Dr. Sandell indicated that appellant could continue working with the same physical restrictions as provided. In reports dated October 1 and 23, 2002, Dr. Sandell indicated that appellant had been offered a secretarial position. He stated that her work restrictions should be permanent.

On September 30, 2002 the employing establishment offered appellant a permanent position as a secretary, office automation, the same position she had been performing since April 2002. Appellant declined the job offer on October 25, 2002 and submitted an October 28, 2002 letter stating that she elected to retire effective October 31, 2002 "based on my health [and] inability to perform my duties as a [r]egistered [n]urse or any other duties that have tendered to me."

In a December 18, 2002 report, Dr. Sandell stated that appellant had retired from her job because she felt she could not continue to work. He stated that she would likely do better with some reduction in her work activity.

By letter dated December 31, 2002, the Office advised appellant that the modified secretary position was found suitable and gave her 30 days in which to accept the position or provide her reasons for refusal. The Office also advised her that an employee who refuses an offer of suitable work without reasonable cause is not entitled to compensation.

On January 20, 2003 appellant responded that her stress, extreme pain "and limited amount of time given to make a decision to [accept] the position which I was not qualified for, gave me the opportunity to announce my retirement effective [October 31, 2002]." She also stated "I was no longer able to conten[d] with the actions of management in regards to my condition."

By letter dated March 5, 2003, the Office advised appellant that her reasons for refusing the position were not acceptable and she had 15 days to accept. On March 10, 2003 appellant responded that she had retired October 31, 2002 and did not plan to return to work.

By decision dated May 1, 2003, the Office terminated appellant's compensation on the grounds that she refused an offer of suitable work.

Appellant requested an oral hearing that was held on November 19, 2003.

In reports dated July 18 and November 18, 2003, Dr. Sandell indicated that there had been no change in appellant's work restrictions.

In a report dated November 6, 2003, Dr. Glenn M. Kaplan, Ph.D., a licensed clinical psychologist, indicated that appellant felt the secretarial job she had been offered was "demeaning" for a trained nurse and exceeded her physical restrictions. He opined that the position was unsuitable for appellant.[1]

By decision dated January 29, 2004, the Office hearing representative affirmed the May 1, 2003 termination decision.

Appellant requested reconsideration and submitted additional evidence.

In an April 8, 2004 report, Dr. Sandell stated that he had reviewed a position for secretary, office automation, which involved some repetitive activity that was in excess of her work restrictions and caused increased pain, lack of dexterity and a need for medication "[p]er her report." He stated that some of the repetitive activities were outside her work restrictions and caused pain. Dr. Sandell stated, "It appears the job is not within the restrictions and there are also difficulties regarding the effect of her pain and medication."

In a May 27, 2004 report, Dr. Kaplan stated that appellant was depressed and in a "rut," thinking about her employment injury.

By decision dated June 22, 2004, the Office denied modification of its January 29, 2004 decision.

Appellant requested reconsideration and submitted additional evidence. A December 4, 2001 operative report indicated that she underwent a ganglion block on her left arm. In an April 12, 2004 report, Dr. Kaplan stated that appellant felt depressed and angry due to her pain and "the way she was treated at [the employing establishment]." In an October 7, 2004 report, Dr. Sandell stated that appellant had upper extremity symptoms and radiating pain consistent with cervical radiculopathy.

By decision dated December 16, 2004, the Office denied appellant's request for reconsideration.

[1] Dr. Sandell referred appellant to Dr. Kaplan for help in dealing with chronic pain symptoms.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[2] The Office terminated appellant's compensation under section 8106(c)(2) of the Federal Employees' Compensation Act,[3] which provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee is not entitled to compensation."[4] To justify termination of compensation, the Office must show that the work offered was suitable and must inform the employee of the consequences of refusal to accept such employment.[5] Section 8106(c) will be narrowly construed as it serves as a penalty provision, which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.[6]

Section 10.517(a) of the Act's implementing regulations provides that an employee who refuses to work after suitable work has been offered to or secured for the employee, has the burden of showing that such refusal or failure to work was reasonable or justified.[7] Pursuant to section 10.516, the employee shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.[8]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a right wrist sprain, right ankle sprain, bilateral carpal tunnel syndrome and bilateral reflex sympathetic dystrophy as a result of the accident on September 28, 1989. On September 30, 2002 the employing establishment offered her a permanent position as a secretary, office automation, the same position she had been performing since April 2002. The Office terminated appellant's compensation by decision dated May 1, 2003 on the grounds that she refused an offer of suitable work. The initial question is whether the Office properly determined that the position was suitable.

The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by the medical evidence.[9] In this case, the Office relied on the opinion of Dr. Sandell in finding that

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[2] *Richard P. Cortes*, 56 ECAB ___ (Docket No. 04-1561, issued December 21, 2004); *Melvin James*, 55 ECAB ___ (Docket No. 03-2140, issued March 25, 2004).

[3] 5 U.S.C. §§ 8101-8193.

[4] 5 U.S.C. § 8106(c)(2); *see also Linda D. Guerrero*, 54 ECAB ___ (Docket No. 03-267, issued April 28, 2003).

[5] *Ronald M. Jones*, 52 ECAB 190 (2000); *Arthur C. Reck*, 47 ECAB 339 (1995).

[6] *Richard P. Cortes, supra* note 2.

[7] 20 C.F.R. § 10.517(a); *see Ronald M. Jones, supra* note 5.

[8] 20 C.F.R. § 10.516.

[9] *See Gayle Harris*, 52 ECAB 319 (2001).

the modified secretary position offered by the employing establishment was within appellant's work limitations. The record shows that the physical capacity required for the position was within appellant's work restrictions as listed by Dr. Sandell. The Office, therefore, properly found that the offered position was suitable.[10] Upon advising appellant that the offered position was suitable, the Office provided appellant 30 days to accept the position or provide reasons for refusal. Appellant responded that she would not accept the position due to stress, pain and her retirement. On March 5, 2003 the Office advised appellant that her reasons for refusing the position were not acceptable and she had 15 days to accept the position. On March 10, 2003 appellant responded that she had retired on October 31, 2002 and did not plan to return to work. However, she did not submit evidence to show that the position was outside her work limitations. The reports of Dr. Sandell established that appellant could perform the duties of the offered position as of the Office's May 1, 2003 decision and she has not offered an acceptable reason for refusing the offered position. Additionally, the record shows that she performed the position for several months beginning in April 2002. Therefore, the Board finds that the Office met its burden of proof to terminate appellant's compensation based on her refusal to accept an offer of suitable work.

Appellant asserted that a December 18, 2002 report from Dr. Sandell established that the offered position was unsuitable. In this report, Dr. Sandell stated that appellant had retired from her job because she felt she could not continue to work. He stated that she would likely do better with some reduction in her work activity. However, appellant was not working at the employing establishment at the time of Dr. Sandell's December 18, 2002 report. This report does not show that the position offered appellant in October 2002, the position she performed for several months prior to the permanent job offer, exceeded the restrictions set forth by Dr. Sandell and was therefore not suitable. Furthermore, this report is not consistent with his July 18 and November 18, 2003 reports in which he indicated that appellant's restrictions could remain the same.

Appellant listed her retirement as a reason for refusing the position.[11] The Board has held that electing to receive retirement is not a justifiable reason to refuse an offer of suitable work. In *Robert P. Mitchell*,[12] the Board noted that the employee's election to receive retirement benefits was not a valid reason for refusing an offer of suitable work.[13] A review of the relevant portion of the Office's procedure manual[14] does not establish that electing to receive retirements is an acceptable reason for refusing an offer of suitable work, except in those situations where a

[10] *See Marilyn D. Polk*, 44 ECAB 673 (1993).

[11] There is no medical evidence that appellant retired due to medical reasons.

[12] 52 ECAB 116 (2000).

[13] *See also Stephen R. Lubin*, 43 ECAB 564 (1992); *Roy E. Bankston* 38 ECAB 380 (1987).

[14] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.10d (July 1996). This provision does not include electing to receive retirement benefits as an acceptable reason for refusing suitable work.

formal loss of wage-earning capacity determination is in place prior to the employee's retirement.[15]

Upon consideration of all the evidence, the Board finds that the Office met its burden of proof to terminate appellant's compensation on the grounds that she refused an offer of suitable work.

Where the Office shows that an offered limited-duty position was suitable based on a claimant's work restrictions at that time, the burden shifts to the claimant to show that his or her refusal to work in that position was justified.[16] Subsequent to the Office's termination of compensation, appellant submitted medical evidence in support of her claim that she was unable to perform the offered position.

In a November 6, 2003 report, Dr. Kaplan indicated that appellant felt the secretarial job she had been offered was "demeaning" for a trained nurse and exceeded her work restrictions.[17] He opined that the position was unsuitable for appellant. However, Dr. Kaplan merely reported appellant's concerns about the job. He did not provide any rationalized medical opinion explaining how the position offered to appellant was medically unsuitable. Therefore, his report is not sufficient to justify appellant's refusal of an offer of suitable work in 2002.

In an April 8, 2004 report, Dr. Sandell stated that the secretarial position involved some repetitive activity that was in excess of appellant's work restrictions and caused increased pain, lack of dexterity and a need for medication "[p]er her report." Dr. Sandell stated, "It appears the job is not within the restrictions…." However, he did not explain the nature of the repetitive activities or how the job duties exceeded appellant's work restrictions. However, this report was written a year after the job offer. It does not establish that appellant's refusal of the position offered in 2002 was justified.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act provides that the Secretary of Labor may review an award for or against payment of compensation on her own motion or on application. The Secretary, in accordance with the facts found on review, may end, decrease or increase the compensation previously awarded; or award compensation previously refused or discontinued.[18]

The Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office;

[15] *Id.* at Chapter 2.814.9.

[16] *Deborah Hancock,* 49 ECAB 606 (1998).

[17] Appellant's contention that the job was demeaning or beneath her abilities is not an acceptable argument for rejecting a job offer. *See Linda Hilton*, 52 ECAB 476 (2001).

[18] 5 U.S.C. § 8128(a).

or (3) constituting relevant and pertinent evidence not previously considered by the Office.[19] When an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.[20]

ANALYSIS -- ISSUE 2

In support of her request for reconsideration, appellant submitted a December 4, 2001 operative report describing a surgical procedure. In an April 12, 2004 report, Dr. Kaplan stated that appellant felt depressed and angry due to her pain and "the way she was treated at [the employing establishment." In an October 7, 2004 report, Dr. Sandell stated that appellant had upper extremity symptoms and radiating pain consistent with cervical radiculopathy. However, these reports do not address the issue of appellant's refusal of an offer of suitable work in October 2002. Therefore, they do not constitute relevant and pertinent evidence not previously considered by the Office.

Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.[21] The medical evidence submitted with appellant's reconsideration request did not address the issue of whether she refused an offer of suitable work in October 2002. Therefore, the Office properly denied her request for reconsideration.

Appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or advance relevant and pertinent evidence not previously considered by the Office. Therefore, the Office properly denied her request for reconsideration.

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation for refusing an offer of suitable work. The Board finds that, following the Office's termination of her compensation for refusal to accept an offer of suitable work, she failed to meet her burden of proof to show that her refusal to work in that position was justified. The Board further finds that the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

[19] 20 C.F.R. § 10.606(b)(2).

[20] 20 C.F.R. § 10.608(b).

[21] *Ronald A. Eldridge*, 53 ECAB 218 (2001).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 16, June 22 and January 29, 2004 are affirmed.

Issued: August 22, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board