United States Department of Labor
Employees' Compensation Appeals Board

MELANIE A. SIMMS, Appellant	)	
and	)	**Docket No. 04-1174**
	)	**Issued: July 26, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Santa Clarita, CA, Employer	)	

Appearances:
Ron Watkins, for the appellant
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge

JURISDICTION

On March 30, 2004 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated January 2, 2004, affirming a November 18, 2002 Office decision terminating appellant's compensation on the grounds that she refused an offer of suitable work. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation benefits on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

Appellant, a 40-year-old letter carrier, filed a Form CA-7 claim for benefits on June 6, 2000, claiming compensation from December 30, 1999 through June 19, 2000 for a work-related postarthroscopic partial left medial meniscectomy and chondroplasty of the patella and work-related left knee injury. She sustained the following accepted, work-related conditions: left knee

sprain; left knee arthroscopy; and removal of retained hardware on July 24, 1998. Appellant stopped working for the employing establishment on December 30, 1999 due to a work-related left knee condition.[1]

In a report dated April 26, 2002, Dr. Ronald Kvitne, a Board-certified orthopedic surgeon and the attending physician, outlined work restrictions. He opined that appellant could work an 8-hour day with restrictions of no lifting over 10 pounds, no squatting, kneeling, standing or walking more than 15 minutes per hour.

By letter dated September 11, 2002, the Office advised appellant that the employing establishment had offered her a job as a video coding systems technician based on the restrictions outlined by Dr. Kvitne. The job description stated that none of the duties involved lifting over 10 pounds, squatting, kneeling, standing or walking more than 15 minutes per hour.[2] Appellant rejected the offer on September 20, 2002. She stated:

> "Due to my physical limitations and restrictions set by Dr. Kvitne, I am unable to sit for more than 15 minutes at a time. This offer requires that I commute 45 [to] 90 minutes to and from work and on a daily basis. Therefore, I regretfully decline at this time."

In a September 20, 2002 report and in a September 28, 2002 work capacity evaluation, Dr. Kvitne amended appellant's restrictions to include no sitting for more than 15 minutes without a break. In a report dated October 2, 2002, Dr. Kvitne rescinded his restriction on sitting for more than 15 minutes without a break and approved the job description of data conversion operator/video coding systems technician.[3] He reiterated this approval on October 18, 2002, when he checked a box on an employing establishment form which stated, "There are no medical conditions that restrict [appellant's] ability to perform the essential functions of this position."

By letter dated October 21, 2002, the Office advised appellant that a suitable position was available and that, pursuant to section 8106(c)(2), she had 30 days to either accept the job or provide a reasonable, acceptable explanation for refusing the offer. The Office advised appellant

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[1] The record does not contain a claim for compensation other than CA-7 forms dated June 6 and May 26, 2000.

[2] The job required appellant to put on a headset and sit or stand at her discretion at the workstation, where she would log onto the computer and view pieces of mail displayed on the video screen. The worker would then speak to tell the video machine how to manipulate the piece of mail so that it is in a position where it could be read. The worker would read information from the piece of mail, speaking the information into the headset microphone, so that the mail could be machine-sorted appropriately. Workers were given ergonomic training and were taught how to adjust their ergonomic chairs and the two portions of their workstations in order to attain maximum comfort.

[3] Dr. Kvitne stated:

> "[Appellant] stated that she was having difficulty riding in a car or driving from her home to her proposed work site which was over 30 minutes away. [Appellant] was quite tearful in her pleading with me that she was unable to make this drive on a daily basis at work. Therefore, I had erroneously given her permanent work restrictions precluding sitting for more than 15 minutes at a time without a 5- [to] 10-minute break in between to get up and move around. This is inappropriate given the nature of her left knee industrial injury, her subsequent surgeries, and her current complaints."

that it would be terminating her compensation based on her refusal to accept a suitable position which reflected her ability to work as a video coding systems technician for eight hours per day. The Office noted that, as of that date, appellant had not responded to the employing establishment's offer. The Office stated that, if appellant refused the job or failed to report to work within 30 days, without reasonable cause, it would terminate her compensation pursuant to 5 U.S.C. § 8106(c)(2).[4]

By letter dated October 21, 2002, the Office advised appellant that she had 15 days in which to accept the position, or it would terminate her compensation. Appellant did not respond within 15 days. The employing establishment received a facsimile acceptance from appellant which was dated November 4, 2002, but which was date stamped as received on November 7, 2002. In addition, an undated letter from Kaiser Permanente indicated that appellant had scheduled, in the beginning of October 2002, a nonwork-related surgical procedure, which she underwent on November 4, 2002.

By decision dated November 18, 2002, the Office terminated appellant's compensation benefits on the grounds that she refused an offer of suitable work.

By letter dated November 14, 2002, appellant received disability retirement from the employing establishment.

By letter dated November 22, 2002, appellant requested an oral hearing, which was held on September 17, 2003. At the hearing, appellant stated that she was in the process of scheduling her surgical procedure during the time that her job offer was being evaluated. She further argued that the employing establishment was aware of the procedure and that she did fax her acceptance of the job offer on November 4, 2002, which was within the required time frame. She stated that, although she was advised by the employing establishment to await reporting instructions, the employing establishment never sent these instructions to her.

By letter dated October 16, 2003, the employing establishment rebutted appellant's allegations. Elizabeth Carman, the employing establishment's human resource specialist, stated that, although appellant testified that she faxed her acceptance of her job offer on November 4, 2002, she did not actually send her acceptance until November 7, 2002; appellant only signed the acceptance on November 4, 2002. Ms. Carman rejected appellant's assertion that she fully intended to return to work and was merely awaiting further instructions from the employing establishment which she never received. According to Ms. Carman, appellant never contacted the employing establishment after it sent her a letter on September 16, 2002 requesting her to contact Mr. Inda for reporting instructions. She advised that the employing establishment also sent appellant a November 19, 2002 letter instructing her to return to duty but appellant opted for disability retirement instead. Ms. Carman further stated that appellant spoke to another human resources specialist and told her that she would not accept the job offer as it was not within her

[4] 5 U.S.C. § 8106(c)(2).

restrictions and that she planned to undergo nonwork-related surgery which would disable her for six to eight weeks.[5]

By decision dated January 2, 2004, an Office hearing representative affirmed the November 18, 2002 termination decision.

LEGAL PRECEDENT

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits. Under section 8106(c)(2) of the Federal Employees' Compensation Act[6] the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[7] Section 10.517 of the Office's regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured 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 a determination is made with respect to termination of entitlement to compensation.[8] To justify termination, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[9] This burden of proof is applicable if the Office terminates compensation under 5 U.S.C. § 8106(c) for refusal to accept suitable work.

ANALYSIS

The determination 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.[10] In the instant case, the employing establishment located a job as a video coding systems technician for eight hours per day, which Dr. Kvitne, the attending physician, approved as suitable for appellant and within her physical restrictions. The Office found that the weight of the medical evidence rested with Dr. Kvitne's opinion and indicated that appellant was capable of performing the modified job and returning to work within the indicated

[5] The human resources specialist, Michelle Kinchen, denied appellant's accusation that she had been rude to her and asserted that appellant had told her in a telephone conversation that she did not return to the employing establishment and preferred to continue with vocational rehabilitation training. She stated that, in a second telephone conversation, appellant told her that she was not accepting the job offer. Ms. Kinchen stated that appellant informed her that she would not be reporting to work because the job offer was not within her medical restrictions and because she was scheduled to have surgery, which would disable her for six to eight weeks.

[6] 5 U.S.C. §§ 8101-8193.

[7] *Patrick A. Santucci*, 40 ECAB 151 (1988); *Donald M. Parker*, 39 ECAB 289 (1987).

[8] 20 C.F.R. § 10.517; *see also Catherine G. Hammond*, 41 ECAB 375 (1990).

[9] *See John E. Lemker*, 45 ECAB 258 (1993).

[10] *Robert Dickinson*, 46 ECAB 1002 (1995).

restrictions. This decision was proper, as Dr. Kvitne's unrefuted opinion represented the weight of medical opinion at the time of the Office's termination decision.[11]

Further, although appellant argued that she did not refuse to work and timely accepted the job offer, the Act also provides that an employee who neglects to work is not entitled to compensation. The Board finds based on the totality of the circumstances in this case that appellant had sufficient notification and time to accept the offered position, but neglected to do so. The Office's letter providing her with 15 days to accept the position was dated October 15, 2002, appellant's faxed acceptance was not received by the employing establishment until November 7, 2002, notwithstanding her signature date of November 4, 2002. Appellant did not attempt to contact the employing establishment to finalize her reporting date and time, as she had been instructed to do on September 16, 2002, rather appellant's contacts with the employing establishment were to finalize her disability retirement. At the time of the suitable work determination, appellant had known of her upcoming surgery for approximately one month and the record contains no evidence that appellant attempted to contact Mr. Inda to advise him of her upcoming surgery until November 21, 2002, by which time her disability retirement had already been approved.

The record indicates that, although appellant was aware of her proposed surgery as early as October 2002, she made no effort to inform Mr. Inda until after she received the employing establishment's 15-day notice and approval of her disability retirement. Therefore, as the record indicates appellant made an insufficient effort to accept the job offer and return to work, the Office met its burden of proof to establish that appellant refused a suitable position. The Board therefore finds that the Office met its burden of proof in this case to terminate appellant's compensation benefits pursuant to 5 U.S.C. § 8106.

Following the Office's termination of compensation, the burden of proof in this case shifted to appellant.[12] Although appellant argued at the hearing that she made a good faith effort to accept the job offer, she did not submit any additional medical evidence. She stated that she was in the process of scheduling her surgical procedure during the time that her job offer was being evaluated, that the employing establishment was made aware of the procedure, and that she did accept the job offer within the required time frame. However, the employing establishment submitted rebuttal statements which refuted these allegations. Thus, appellant did not submit evidence sufficient to satisfy appellant's burden of proof to warrant modification of the Office's November 18, 2002 termination decision. Accordingly, the Board affirms the Office's January 2, 2004 decision, affirming the November 18, 2002 termination decision.

CONCLUSION

The Board finds that the Office met its burden to terminate appellant's compensation benefits pursuant to 5 U.S.C. § 8106.

[11] *Barbara R. Bryant*, 47 ECAB 715 (1996).

[12] *Talmadge Miller*, 47 ECAB 673, 679 (1996); *see also George Servetas*, 43 ECAB 424 (1992).

ORDER

IT IS HEREBY ORDERED THAT the January 2, 2004 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: July 26, 2005
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board