United States Department of Labor
Employees' Compensation Appeals Board

REGINALD FLOOD, Appellant	)	
and	)	**Docket No. 06-81**
	)	**Issued: May 2, 2006**
DEPARTMENT OF DEFENSE, GROTON COMMISSARY, Groton, CT, Employer	)	

Appearances:
Reginald Flood, pro se
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 October 12, 2005 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated September 29, 2005, which denied modification of a May 13, 2005 decision, which terminated benefits on the grounds that he abandoned suitable work. Pursuant to 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 on the grounds that he abandoned suitable work.

FACTUAL HISTORY

On November 10, 1998 appellant, a 33-year-old store worker, filed a traumatic injury claim alleging that he twisted his ankle and injured his left foot on that date when he slipped and fell. The Office accepted the claim for left ankle sprain and arthroscopic surgery on the left

ankle, which was performed on November 11, 1999. Appellant returned to a limited-duty job on February 6, 1999 working four hours per day five days a week.[1]

On October 11, 2000 the employing establishment offered appellant the part-time position of customer service clerk working 20 hours a week. Appellant accepted the offer by letter dated December 26, 2000 and returned to work on February 26, 2001. On March 1, 2001 he filed a claim for a recurrence of disability due to his November 10, 1998 employment injury.

In an April 3, 2001 report, Dr. Jeffrey A. Salkin, a treating Board-certified orthopedic surgeon, related that appellant continued to have left ankle problems. A physical examination revealed no gait disturbance on ambulation and "pain on subtalar eversion and inversion as well as pain over the anterior talofibular ligament."

Appellant resigned his position effective November 30, 2001. He noted the reason for his resignation was due to his relocating out of the state of Connecticut.

In a letter dated January 10, 2002, the Office accepted appellant's claim for a recurrence of disability beginning March 1, 2001.

By letter dated March 1, 2004, the Office informed appellant that he had 30 days to provide his reasons for abandoning the position of customer service clerk. He was apprised of the penalty provisions of the Federal Employees' Compensation Act of an employee who refuses an offer of suitable work.

On March 11, 2004 appellant informed the Office that he had resigned his position because he was relocating out of the state of Connecticut. In a March 18, 2004 letter, appellant stated that he had talked with his case worker prior to resigning and was informed that he "could resign under personal reasons" and once he found work in his home state, his case would be transferred to that state.

In a letter dated April 5, 2004, the Office informed appellant that it had reviewed the position description and found the job offer suitable with his physical limitations. Appellant was advised that his reasons for resigning were not suitable and that he had 30 days to provide his reasons for abandoning the position. He was apprised of the penalty provisions of section 8106 pertaining to an employee who refuses an offer of suitable work. The Office advised appellant that, if he failed "to demonstrate that your abandonment of the position was justified, your claim to compensation from the time you left work will be denied." He was then "again advised to provide an explanation within 30 days as to why you left the customer service clerk position."

On April 30, 2004 the Office received a letter from appellant detailing his reasons for resigning from the position. He contended that the job was not suitable as he was required to work outside his restrictions. Appellant stated that the employing establishment did not "have light-duty positions and due to the heavy flow of customers made it impossible to use my scooter."

[1] In a decision dated June 22, 2001, appellant was awarded a seven percent impairment for his left lower extremity.

By decision dated June 2, 2004, the Office terminated appellant's compensation effective November 30, 2001 pursuant to section 8106(c)(2). It found that he had abandoned suitable work.

On July 7, 2004 appellant requested an oral hearing before an Office hearing representative, which was held on February 24, 2005.

By decision dated May 13, 2005, the Office hearing representative affirmed the termination of appellant's compensation benefits pursuant to 5 U.S.C. § 8106(c) on the grounds that he had abandoned suitable work.

In a letter dated June 29, 2005, appellant requested reconsideration and reiterated his reasons for resigning concluding that the offered position was not suitable to his condition.

By merit decision dated September 29, 2005, the Office denied modification of the May 13, 2005 decision.

LEGAL PRECEDENT

The Act provides at section 8106(c)(2) that a partially disabled employee who refuses or neglects to work after suitable work is offered is not entitled to compensation.[2] Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits under section 8106 for refusing to accept or neglecting to perform suitable work.[3] The Board has recognized that section 8106(c) serves as a penalty provision as it may bar an employee's entitlement to future compensation and, for this reason, will be narrowly construed.[4] To establish that a claimant has abandoned suitable work, the Office must substantiate that the position offered was consistent with the employee's physical limitations and that the reasons offered for stopping work were unjustified.[5] 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 of record.[6]

Section 10.516 of the Code of Federal Regulations states that the Office will advise the employee that the work offered is suitable and provide 30 days for the employee to accept the job or present any reasons to counter the Office's finding of suitability.[7] Thus, before terminating compensation, the Office must review the employee's proffered reasons for refusing

[2] 5 U.S.C. § 8106(c)(2).

[3] *See Bryant F. Blackmon*, 56 ECAB ___ (Docket No. 04-564, issued September 23, 2005); *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

[4] *See Richard P. Cortes*, 56 ECAB ___ (Docket No. 04-1561, issued December 21, 2004); *H. Adrian Osborne*, 48 ECAB 556 (1997).

[5] *See Wayne E. Boyd*, 49 ECAB 202 (1997).

[6] *See John E. Lemker*, 45 ECAB 258 (1993); *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

[7] 20 C.F.R. § 10.516.

or neglecting to work.[8] If the employee presents such reasons and the Office finds them unreasonable, the Office will offer the employee an additional 15 days to accept the job without penalty. The Board has clarified that in cases where compensation is terminated pursuant to section 8106(c), the essential requirements of due process, "notice and an opportunity to respond," apply not only where an employee refuses suitable work, but also apply in the same force to cases where an employee abandons suitable work.[9]

To determine whether a claimant has abandoned suitable work, the Office's procedure manual provides that it must advise appellant that the job is suitable and that refusal of the position may result in application of the penalty provision of section 8106(c)(2) and allow the claimant 30 days to submit his reasons for abandoning the job.[10] If a claimant submits evidence or reasons for abandonment, the Office must determine whether the reasons for abandoning the job are valid. If the reasons for abandoning the job are not deemed justified, the claimant must be so advised and allowed 15 additional days to return to work.[11] The imposition of section 8106(c), a penalty provision, is premised on the fact that suitable work remains available and the job held open during the required notice period.

ANALYSIS

The Board finds that the Office did not meet its burden of proof in terminating appellant's compensation effective November 30, 2001, on the grounds that he abandoned suitable work. Appellant's claim was accepted for left ankle sprain and left ankle arthroscopic surgery was authorized.

On December 26, 2000 appellant accepted an employing establishment offer of a modified job assignment working 20 hours a week as a customer service clerk. He subsequently filed a recurrence of disability claim on March 1, 2001, which was accepted by the Office on January 10, 2002. On June 2, 2004 the Office terminated appellant's compensation, finding that appellant abandoned suitable work.

The Office procedure manual provides that in situations in which a claimant stops work after reemployment, further action is required depending on whether a wage-earning capacity determination has been made.[12] Where no wage-earning capacity decision has been issued, the claims examiner is to inquire as to the employee's reasons for stopping work and make a suitability determination.[13] If the reasons stated by the employee amount to an argument for a

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

[9] *Mary A. Howard*, 45 ECAB 646 (1994); *see also Jessie L. Trujillo*, Docket No. 04-1887 (issued January 24, 2005).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.10 (July 1997).

[11] *Id.* at Chapter 2.814.10(e)(1) (July 1996).

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9 (December 1995).

[13] *Id.* at subsection b.

recurrence of disability, the claims examiner is to develop and evaluate the evidence upon receipt of a Form CA-2a under the standards of *Terry R. Hedman*.[14] When no claim for a recurrence of disability is filed and a retroactive wage-earning capacity determination is not appropriate, the claims examiner should consider the application of the penalty provision of section 8106(c)(2).[15]

The Board finds that the Office erred in this case by proceeding with an adjudication of the suitable work issue. Appellant filed a Form CA-2a, for a recurrence of disability and alleged a change in the nature of his injury-related condition. On January 10, 2002 the Office accepted appellant's recurrence of disability claim. The record neither contains evidence that appellant could return to duty nor a referral to vocational rehabilitation. Consequently, the Office did not meet its burden of proof to terminate benefits as it improperly imposed the penalty provision for abandonment of suitable work in light of its acceptance of the recurrence of disability claim. The Board finds that the Office improperly terminated appellant's wage-loss compensation benefits under section 8106(c)(2).

CONCLUSION

The Board finds that the Office improperly terminated appellant's wage-loss compensation benefits effective November 30, 2001 pursuant to 5 U.S.C. § 8106(c)(2) on the grounds that he abandoned suitable work and will reverse the May 13 and September 29, 2005 decisions.

[14] 38 ECAB 222 (1986).

[15] Federal (FECA) Procedure Manual, *supra* note 10 at subsection b(2).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 29 and May 13, 2005 are reversed.

Issued: May 2, 2006
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