U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SUSAN L. DUNNIGAN and DEPARTMENT OF VETERANS AFFAIRS, MEDICAL CENTER, Dayton, Ohio

Docket No. 96-2673; Oral Argument Held November 13, 1997; Issued January 7, 1998

Appearances: *Jon E. Rosenstengel, Esq.*, for appellant; *Sheldon G. Turley, Jr., Esq.*, for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS, DAVID S. GERSON

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

On October 16, 1991 appellant, then a 30-year-old radiology technician, filed a notice of traumatic injury, claiming that she twisted her right knee when she "toppled backwards" off an x-ray work platform while trying to lift a patient. The Office accepted an acute right knee sprain and torn anterior cruciate ligament.

Following three surgeries and a work-hardening program, the Office referred appellant to vocational rehabilitation for retraining. On December 16, 1992 appellant informed the rehabilitation counselor that her husband would be transferred soon to another military base. Appellant moved to Edwards, California, in May 1993. After several attempts at vocational retraining, she was offered a light-duty position of medical clerk by the Dayton, Ohio, employing establishment on April 25, 1995. The Office asked Dr. Robert R. Lawrence, a Board-certified orthopedic surgeon and appellant's treating physician, to determine whether appellant was physically capable of doing the job.

In a May 30, 1995 report, Dr. Lawrence stated that the position's requirements were "within the limitations resulting from [appellant's] work injury." He added that appellant could do no work that required bending or twisting the right knee and restricted the duration of standing and sitting, as well as lifting no more than 25 pounds.

On June 15, 1995 the Office informed appellant that the medical clerk position was found to be suitable and was still available, that she had 30 days to accept the position or explain her

reasons for refusing the job, and that if she refused the offer or failed to report for work, her compensation benefits for wage loss or schedule award would be terminated.

On July 31, 1995 the Office terminated appellant's compensation on the grounds that she had not accepted the medical clerk position or provided any response to the June 15, 1995 notice of suitability. Subsequently, appellant's husband was transferred to Scott Air Force Base in Belleville, Illinois. In a September 6, 1995 response to appellant's inquiry regarding the move, the Office stated that the fact that she had since relocated to another geographic area was irrelevant to the determination of job suitability unless the move was strictly for medical purposes.

On October 30, 1995 appellant's attorney requested reconsideration on the grounds that it would have been "impossible" for appellant to have accepted the medical clerk position in Dayton, Ohio, since she was living in California, that the employing establishment should have been required to find a similar position in the area where appellant lived, and that the requirements of the position exceeded her physical limitations according to Dr. Lawrence's October 10, 1995 report.

On January 12, 1996 the Office denied appellant's request on the grounds that the evidence was insufficient to warrant modification of its prior decision. The Office stated that Dr. Lawrence's latest report failed to justify appellant's refusal of a position he found to be suitable in May 1995. The Office added that although appellant had moved to California, she was listed on the employing establishment's rolls when the medical clerk position was offered and was still on the rolls as of this decision.[1]

Appellant again requested reconsideration and submitted a copy of a letter dated May 12, 1995 and faxed to the employing establishment as well as military transfer orders. On August 2, 1996 the Office denied appellant's request on the grounds that the evidence submitted was repetitious and therefore insufficient to require reopening of her claim.

The Board finds that the Office properly terminated appellant's compensation because she 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.[2] Section 8106(c)(2) of the Federal Employees' Compensation Act[3] provides that the Office may terminate the compensation of a partially disabled employee who refuses or neglects to work

[1] The employing establishment informed appellant in a letter dated March 5, 1996 of her proposed removal from her radiology technician position in Dayton, Ohio. The letter noted that she had been carried on the employing establishment's rolls from December 23, 1991 through July 31, 1995 when her compensation was terminated and had been charged absent without leave (AWOL) since then.

[2] *Karen L. Mayewski*, 45 ECAB 219, 221 (1993); *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

[3] 5 U.S.C. §§ 8101-8193 (1974); 5 U.S.C. § 8106(c)(2).

after suitable work is offered 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]

To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of her refusal to accept such employment.[6] 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 medical evidence.[7]

Section 8106's implementing regulation[8] 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.[9]

Office procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.[10] Unacceptable reasons include relocation for personal desire or financial gain, lack of promotion potential, or job security.[11] Thus, the Board has held that if an employee on the employing establishment's rolls moves from the area in which the employing establishment is located, such a move is an unacceptable reason for refusing an offer of suitable work.[12]

In this case, the Office properly complied with the procedural requirements of advising appellant of the suitability of the job offered and the sanctions for refusing the job. The Office informed appellant that the job was available and provided her with the opportunity either to accept the position or explain her refusal. While appellant faxed a letter to the employing establishment on May 12, 1995 explaining that she had moved to California, she did not respond to the Office's June 15, 1995 letter. Therefore, the Office properly terminated her compensation.[13]

---

[4] *Camillo R. DeArcangelis*, 42 ECAB 941, 943 (1991).

[5] *Stephen R. Lubin*, 43 ECAB 564, 573 (1992).

[6] *Maggie L. Moore*, 42 ECAB 484, 487 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[7] *Marilyn D. Polk*, 44 ECAB 673, 680 (1993).

[8] 20 C.F.R. § 10.124(c).

[9] *John E. Lemker*, 45 ECAB 258, 263 (1993).

[10] *C.W. Hopkins*, 47 ECAB ___ (Docket No. 94-1025, issued August 23, 1996); *see Patsy R. Tatum*, 44 ECAB 490, 495 (1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5 (May 1996).

[11] *Arthur C. Reck* 47 ECAB ___ (Docket No. 94-1072, issued February 1, 1996).

[12] *Richard S. Gumper*, 43 ECAB 811 (1992); *Arquelio Pacheco*, 40 ECAB 277 (1988).

[13] *See Henry W. Shepherd, III*, 48 ECAB ___ (Docket No. 96-814, issued March 3, 1997) (finding that

The Board finds that the evidence of record establishes that appellant was capable of performing the duties of the medical clerk position offered by the employing establishment.[14] Dr. Lawrence completed a work restriction form on October 20, 1993, stating that appellant was permanently disabled for any type of work that required bending, lifting, kneeling, climbing, stooping, and squatting, and should be retrained for a sedentary position. On May 15, 1995 the Office sent Dr. Lawrence a copy of the medical clerk job description, inquiring whether appellant was physically capable of performing the outlined duties. By letter dated May 30, 1995, Dr. Lawrence stated that he had reviewed the physical requirements and concluded that appellant could perform them.

On reconsideration, appellant submitted an October 10, 1995 form completed by Dr. Lawrence. However, this report does not address the physical requirements of the medical clerk job and merely reiterates that appellant is limited to "semi-sedentary work" with no prolonged walking, standing or climbing stairs.

At oral argument, appellant's attorney contended that the job offer was not suitable because appellant was outside the commuting area when it was made. He also argued that because appellant's husband was in the U.S. Air Force, she had no choice but to accompany him when he was transferred in 1993 to California and again in 1995 to Illinois. The attorney explained that appellant's relocation was not voluntary on her part, as occurred in the case of *Edward P. Carroll*,[15] but was necessary to keep her family together and that to force her to remain in Dayton, Ohio, to accept an offer of suitable work would be against public policy.

While this case is distinguishable from the facts in *Pacheco*, *Gumper*, and *Carroll* in that appellant faced a Hobson's Choice situation, she was still carried on the rolls of the employing establishment in Dayton, Ohio at the time the job offer was made; thus, that agency was responsible for her compensation benefits, even though she had relocated to California in May 1993 as a result of her husband's transfer. As the employing establishment in Dayton, Ohio, was paying compensation and appellant had not resigned from that agency, it was required to find a

---

appellant's compensation was properly terminated after the Office found his reasons for refusing suitable work unacceptable).

[14] *See Michael I. Schaffer*, 46 ECAB ___ (Docket No. 93-1969, issued June 30, 1995) (finding the medical evidence sufficient to establish that appellant was physically capable of performing the duties of the offered modified position).

[15] 44 ECAB 331 (1992).

light-duty position for her, which it did in April 1995. The fact that appellant had left the area two years previously, whether voluntarily or not, is irrelevant.[16]

Appellant's explanation that she had to accompany her husband to keep her family together is exemplary, but also constitutes a personal reason for the relocation, and the Board has held that relocation for personal reasons is insufficient to constitute a reasonable basis for refusal of suitable work.[17] Further, appellant's status as the spouse of a career military person who is subject to frequent transfers of his duty station does not allow the Board to fashion an exception to the statutory obligation of an employee to accept an offer of suitable work.

While the statute's implementing regulation[18] permits exceptions for reasonable cause, the founding premise of the Act is that compensation will be paid for disability for work, as determined by medical evidence. Appellant was found to be fit for light-duty work, and a suitable position was available. Therefore, appellant was no longer disabled, and her refusal to accept and do the work for other than medical reasons under the circumstances of this case means that she is not entitled to compensation.

[16] *See Lawrence T. Pisapio*, 47 ECAB ___ (Docket No. 95-25, issued April 15, 1996) (finding that because appellant remained on the employing establishment's rolls in California, his refusal of suitable work because he lived in Massachusetts was unacceptable and therefore his compensation was properly terminated); *cf. Carl N. Curts*, 45 ECAB 374, 381 (1994) (noting that if an employee has left the employing establishment's rolls, a move or relocation from its area may give rise to an acceptable reason for refusing a position offered by the employing establishment under some circumstances).

[17] *See Fred L. Nelly*, 46 ECAB ___ (Docket No. 93-1681, issued October 19, 1994) (finding that appellant's reasons for refusing suitable work—that he now lives 1,200 miles from the employing establishment in Ohio, that he did not wish to return to a cold climate, that his daughter's physicians were located in his new home, that he was purchasing property there, and that it would be a hardship to return to Ohio—were found to be unacceptable; appellant had been on the employing establishment's rolls for about eight years before suitable work was offered).

[18] 20 C.F.R. § 10.124(c).

The August 2 and January 12, 1996 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
January 7, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member