U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WESLEY T. WILLIAMS and DEPARTMENT OF THE NAVY, NORFOLK NAVAL SHIPYARD, Portsmouth, Va.

Docket No. 97-718; Submitted on the Record;
Issued January 26, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective October 31, 1996 on the grounds that he neglected suitable employment.

The Office accepted that appellant, a pipefitter, sustained employment-related right carpal tunnel syndrome and authorized a right ulnar nerve decompression and recurrent carpal tunnel releases. Appellant stopped working on July 14, 1994 and did not return.[1]

In a report dated October 14, 1993, Dr. Pat L. Aulicino, a Board-certified orthopedic surgeon and appellant's attending physician, related that appellant could return to work with restrictions on lifting over 25 pounds, working with vibratory tools, climbing ladders and "high speed repetitive jobs."

By letter dated July 28, 1995, the Office requested an updated medical report from Dr. Aulicino regarding appellant's current physical limitations; however, Dr. Aulicino informed the Office that he no longer wished to treat appellant. The Office therefore referred appellant, together with the case record and a statement of accepted facts, to Dr. John Williamson, a Board-certified orthopedic surgeon, for a second opinion examination.

[1] By decision dated May 12, 1993, the Office granted appellant a schedule award for a 28 percent permanent impairment of his right arm.

In a report dated November 22, 1995, Dr. Williamson discussed appellant's history of carpal tunnel syndrome with subsequent surgeries. He found that appellant had residuals of his right carpal tunnel syndrome which would prevent him from performing his regular employment. Dr. Williamson stated:

> "His restrictions would be no heavy lifting, no heavy pushing or pulling, avoiding strong grip with his right hand, no pneumatic or vibratory tools with that hand and no high speed repetitive jobs with his right hand. This is permanent. I agree with Dr. Aulicino's past permanent restrictions."

On February 2, 1996 the Office referred appellant to a rehabilitation counselor for vocational rehabilitation. After performing vocational testing on appellant, the rehabilitation counselor, in a report dated May 17, 1996, recommended placement with a new employer. The rehabilitation counselor found that appellant's return to work was questionable considering his willingness, his history of asbestosis and his prior back injuries.

In a report dated June 21, 1996, the rehabilitation counselor related that appellant had been offered light janitorial work and that the employer had agreed to provide appellant job assignments within his physical limitations. He stated that the prospective employer, Ms. Barbara W. Hooper, had interviewed appellant on June 21, 1996 and that appellant had agreed to begin work.

In a letter dated June 27, 1996, Ms. Hooper informed the Office that appellant reported to work as scheduled but refused to perform any of the assigned tasks.

By letter dated September 20, 1996, the Office informed appellant that the position of light janitorial work was suitable and provided him 30 days to submit evidence showing that he could not perform the duties of the position or his compensation benefits would be terminated.

Appellant submitted statements from Ms. Margaret Holmes and Ms. Crystal Ray dated June 25, 1996. Ms. Holmes related that appellant could not perform the work assigned on June 25, 1996 without severe pain. Ms. Ray stated that appellant had great difficulty cleaning restrooms. Appellant further submitted a Social Security Administration decision finding that he was medically disabled due to his asbestosis, carpal tunnel syndrome and low back problems. Appellant also submitted a report dated October 9, 1996 from Dr. Auliciano noting that he continued to have the same work restrictions.

By decision dated October 30, 1996, the Office terminated appellant's compensation benefits on the grounds that he neglected suitable work under 5 U.S.C. § 8106.

The Board finds that the Office improperly terminated appellant's compensation.

Section 8106(c)(2) of the Federal Employees' Compensation Act states that a 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 him or her is not entitled to compensation.[2] The Office

[2] 5 U.S.C. § 8106(c)(2).

has authority under this section to terminate compensation for any disabled employee who refuses or neglects suitable work when it is offered. Before compensation can be terminated, 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 requirements of the position.[3] To justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty position, the Office has the burden of showing that the work offered to and refused or neglected by appellant was suitable.[4]

In the instant case, appellant accepted a job offer to perform light janitorial work and reported to work as scheduled on June 25, 1996. Appellant, however, did not perform the assigned-job duties and left work on that date. The Office on September 20, 1996 advised appellant that the position offered in June 1996 was suitable and provided him 30 days to submit evidence supporting that he was unable to perform the duties of the position. The Office finalized its determination that appellant neglected suitable work on October 30, 1996.

The Office, however, failed to follow its procedures regarding suitable work determinations. According to the Office's own procedures, suitable work offers must be in writing and include, among other things, a description of the duties to be performed and the specific physical requirements of the position.[5] In this case, the record does not contain a position description for the janitorial position to which appellant returned on June 25, 1996. The Board is therefore unable to review the conclusions of the Office that the position was suitable for appellant, given appellant's work restrictions.

The Board further finds that the Office denied appellant a reasonable opportunity to comply with 5 U.S.C. § 8106(c). Appellant submitted evidence in response to the Office's preliminary determination of suitability within 30 days. If a claimant chooses to respond within 30 days and gives reasons for not accepting the offered position, the Office must consider these reasons before it can make a final determination on the issue of suitability. Only after it has made a final determination on the issue of suitability can the Office afford the claimant an opportunity to accept or refuse an offer of suitable work; and only after it has finalized its decision on suitability can the Office notify the claimant that refusal to accept shall result in the termination of compensation, as the language of 5 U.S.C. § 8106(c) clearly mandates.[6]

The Office informed appellant in September 1996 that the position offered had been found suitable. Appellant submitted evidence regarding his refusal of the position. The Office did not, thereafter, inform appellant that his reasons for refusing the position were not justified and allow appellant, once again, an opportunity to accept the position. Rather, on October 30,

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

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

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4 (June 1996). If the job offer is made by a nonfederal employer, it is the responsibility of the rehabilitation specialist or rehabilitation counselor to provide the above-listed information.

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

1996 the Office terminated his compensation benefits on the basis that he had refused an offer of suitable work without first advising appellant that his reasons for refusing the position were not justified and thus allowing him a final opportunity to accept the position.[7]

For these reasons, the Board finds that the Office improperly invoked the penalty provision of 5 U.S.C. § 8106(c).

The decision of the Office of Workers' Compensation Programs dated October 30, 1996 is reversed.

Dated, Washington, D.C.
January 26, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

[7] Additionally, in the instant case, the Office made a retroactive determination of suitability without regard to whether the position remained currently available. The Board has explained that a retroactive determination of suitability denies appellant the opportunity to respond or act upon this finding of suitability. If the Office had determined and advised appellant in June 1996 that the position was suitable, appellant could have chosen to return to the position. Instead, the Office waited until September 1996 to reach a suitability determination, thus prejudicing appellant's ability to return to the position.