U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DENNIS A. DANTZLER and DEPARTMENT OF VETERANS AFFAIRS, VETERANS HOSPITAL, Coatesville, PA

Docket No. 97-2670; Submitted on the Record;
Issued July 20, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits for refusal to accept suitable work.

Appellant injured his right arm when a ladder kicked out under him on July 2, 1992. The Office accepted the claim for strain right arm, right shoulder impingement syndrome. Appellant stopped work on July 2, 1992 and he received appropriate disability compensation through June 6, 1995.

In an attending physician's report dated May 31, 1995, Dr. Michael J. Maggitti, an attending Board-certified orthopedic surgeon and appellant's treating physician, checked that appellant was unable to return to his regular work and that his disability would continue for 90 days or more. He noted that appellant was partially disabled and that he should not perform any overhead use of his right upper extremity, avoid repetitive use of the right upper extremity and not carry or lift over five pounds.

In a letter dated July 5, 1995, the employing establishment advised appellant that Dr. Maggitti indicated that he was disabled from performing his usual employment, but was capable of light-duty work. The employing establishment requested appellant to report for light-duty work in engineering services on July 10, 1995 from 8:00 a.m. to 4:30 p.m. The employing establishing informed appellant that his refusal to perform the offered light-duty position would result in any leave taken being charged to his annual leave, sick leave, leave without pay or absence without leave.[1] The employing establishment did not provide a description of the position offered or the physical requirements of the position.

[1] By letter dated October 24, 1995, appellant's representative indicated that appellant had submitted CA-8's, but had not received compensation in the past three months.

In attending physician reports dated September 5, October 6, November 3, December 1 and December 29, 1995, Dr. Maggitti indicated that appellant was capable of performing light-duty work provided he avoid repetitive work involving his right upper extremity, restricted overhead use of his right upper extremity and he was not required to lift more than 10 pounds.

In a November 3, 1995 treatment note, Dr. Maggitti[2] noted that appellant had been involved in an automobile accident on October 16, 1995 and appellant denied any injury to his right shoulder.

By letter dated December 1, 1995, the Office advised appellant that payment could not be authorize for periods when appellant was not totally disabled and requested appellant to provide information on his October 16, 1995 automobile accident.

In a letter dated January 10, 1996, the employing establishment offered appellant a light-duty position which was not permanent and advised that appellant would be returned to his original position of industrial equipment mechanic when released for full duty. The position duties included generator testing, minor equipment repair and miscellaneous assignments such as performing inventory checks for chemicals and inventory parts, etc. The employing establishment noted that the work mentioned was within the restrictions noted by his physician. Under the position duties, the employing establishment noted that the work could be performed within the appellant's physical restrictions. The employing establishment requested appellant to report for the position on Monday, January 29, 1996. Dr. Maggitti indicated on February 2, 1996 that the position was appropriate for appellant as described.

In a letter dated February 14, 1996, the Office advised appellant that the position of light-duty worker, engineering services was currently available, that it would consider any reasons for refusal and that if he did not accept the offered position within the next 30 days, a decision would be issued terminating benefits under 5 U.S.C. § 8106(c) if he failed to adequately justify why he refused the job offer.

In a letter to the employing establishment dated February 14, 1996, the Office indicated that appellant had not been paid compensation since June 6, 1995. The Office noted that it had received the employing establishment's light-duty offer, but that the offer failed to address whether light duty was made available to appellant since June 7, 1995.

By letter dated February 22, 1996, the employing establishment stated that appellant had been on leave without pay since June 7, 1995 and that at no time did he advise the employing establishment that he was capable of returning to light duty nor did he seek a light-duty position. The employing establishment did not advise whether the 1995 light duty was made available to appellant after he was placed on leave without pay.

By letter dated March 12, 1996, appellant's representative enclosed appellant's responses indicating that he required "clarity on the duty of positions offered and a position description" before accepting or declining. Appellant's representative requested further details of the position

[2] The note was initialized "MJM" which are Dr. Maggitti's initials.

such as the number of hours he would be required to lift, stand, sit, walk and the weight he would be expected to lift and carry.

By letter dated March 28, 1996, the Office found the requests for clarification on the position description requested by appellant and his representative were insufficient to justify refusal of the offered position. The Office informed appellant that he had 15 days to accept the position and that no further reason for refusal of the offer would be considered.

By decision dated April 16, 1996, the Office terminated appellant's compensation benefits effective July 10, 1995 on the grounds that he refused an offer of suitable employment. The decision stated that he remained entitled to medical treatment for treatment of his employment-related conditions.

By letter dated April 18, 1996, appellant, through his representative, requested a hearing which was held on November 21, 1996.

In a report dated April 29, 1996, Dr. Maggitti noted appellant's work injury history and opined that appellant would not be able to return to his preinjury position. He indicated that the restrictions of limited overhead use of the right arm, avoiding repetitive use of the right upper extremity and no lifting more than 10 pounds were permanent.

Appellant submitted medical reports from Dr. Maggitti dated February 23, July 19, August 23 and September 20, 1996 which opined that appellant could not return to his preinjury job without restrictions.

In a report dated August 5, 1996, Dr. Maggitti opined that appellant had reached maximum medical improvement in his right shoulder and that the restrictions for activities involving his right upper extremity were permanent. He stated that appellant's back problems were related to his automobile accident and unrelated to his accepted employment injury.

By decision dated January 31, 1997, the hearing representative affirmed the Office's April 16, 1996 decision terminating appellant's compensation benefits effective July 10, 1995.

By letter dated February 21, 1997, appellant, through his representative, requested reconsideration of the January 31, 1997 decision and submitted a January 28, 1997 report by Dr. Maggitti in support of his request. In his January 28, 1997 report, Dr. Maggitti noted that appellant cannot lift or carry more than 10 pounds, cannot perform repetitive work using his right upper extremity and restricted use of his right arm.

In a merit reconsideration decision dated May 19, 1997, the Office denied appellant's request for modification of its prior decision.

The Board finds that the Office improperly terminated appellant's compensation benefits on the grounds that he refused suitable work.

Once the Office accepts a claim it has the burden of proving that the disability has ceased or lessened before it may terminate or modify compensation benefits.[3] This burden of proof is applicable if the Office terminates compensation, under 5 U.S.C. § 8106(c), for refusal to accept suitable work.[4] The Office has not met its burden in the present case.

Under section 8106(c)(2) of the Federal Employees' Compensation Act[5] the Office may terminate the compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.[6] Section 10.124(c) of Part 20 of the Code of Federal Regulations[7] 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 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[9] and must inform appellant of the consequences of refusal to accept such employment.[10]

The Board finds that the Office improperly terminated benefits on the basis that appellant refused suitable employment for several reasons.

First, in initially assessing the suitability of the offered position, the Office procedures[11] provide that a temporary job would be considered unsuitable unless the claimant was a temporary employee when injured and the temporary job reasonably represents the claimant's wage-earning capacity. The procedure manual also states that a temporary job would be unsuitable if it would terminate in less than 90 days.[12] In the instant case, appellant was a full-

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[3] *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

[4] *See Leonard W. Larson*, 48 ECAB ____ (Docket No. 95-1102, issued May 12, 1997).

[5] 5 U.S.C. § 8106(c)(2).

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

[7] 20 C.F.R. § 10.124(c).

[8] *Camillo R. DeArcangelis*, *supra* note 6; *see* 20 C.F.R. § 10.124(e).

[9] *See Carl W. Putzier*, 37 ECAB 691, 700 (1986); *Herbert R. Oldham*, 35 ECAB 339, 346 (1983).

[10] *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.11(c) (July 1997).

[11] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and* Determining *Wage-Earning Capacity*, Chapter 2.814.4(b) (July, 1997). *Gerald R. Wilman*, 49 ECAB ____ (Docket No. 97-317, issued January 30, 1998).

[12] *Id. Cf. Arthur C. Reck*, 47 ECAB 339 (1996). (The Office found that a temporary job would be unsuitable if it would terminate in less than 90 days. The Board found that if, on the date of injury, the employee was temporary and the position was modified to reflect that the temporary position would last at least three months, then the temporary nature of the position did not make it unsuitable).

time employee and the employing establishment offered him a modified position which was temporary. There is no indication that the employing establishment offered appellant a permanent position. The January 10, 1996 letter notes that the position was temporary in nature. The Office erred in terminating appellant's compensation benefits on the basis of his refusal of the temporary position as such an offer did not conform with the Office's procedural requirements. Consequently, appellant demonstrated a valid reason for rejecting the job offering as it was a temporary position.

The Office failed to follow the regulations governing the Act and the Office's procedure manual provide several steps which must be followed prior to a determination that the position offered was suitable and that, therefore, an employee refused or neglected to work after suitable work was secured for him.

The Office's procedure manual states that to be valid, an offer of light duty must be in writing and must include the following information: (1) a description of the duties to be performed; (2) the specific physical requirements of the position and any special demands of the workload or unusual working conditions; (3) the organizational and geographical location of the job; (4) the date on which the job will first be available; and (5) the date by which a response to the job offer is required.[13]

Section 10.124(b) of the Office's regulations reads:

> "Where an employee has been advised by the employing agency in writing of the existence of specific alternative positions within the agency, the employee shall furnish the description and physical requirements of such alternative positions to the attending physician and inquire whether and when the employee will be able to perform such duties."[14]

In this case, the Office found appellant was not entitled to wage-loss compensation for the period beginning on July 10, 1995 on the grounds that he refused to work after suitable work had been procured for him. There is no evidence that the Office followed its procedure manual or the regulations in reaching this conclusion.[15] The July 5, 1995 light-duty job offer contained no description of the limited-duty position as to the physical requirements or the duties or the pay rate. Instead, the Office determined that appellant had refused to work after suitable work had been procured for him, without following the established procedures to determine if indeed the position procured on July 5, 1995 for appellant was suitable.[16]

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[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, 2.814.4(a) (July 1997).

[14] 20 C.F.R. § 10.124(b).

[15] The Board notes that, at the time of its April 16, 1996 decision, the Office was required to show that the work offered appellant on July 5, 1995 was suitable, that it was available and provide appellant an opportunity to accept it; *see Oleita G. Spiers*, 32 ECAB 1297 (1981); *Lee B. Hawkins*, 30 ECAB 1305 (1979).

[16] *John R. Gerety*, Docket No. 86-2162 (issued July 29, 1987). The Board notes that the January 10, 1996 job offer by the employing establishment did comply with the Office regulations.

In determining that appellant was not entitled to compensation after July 10, 1995, there is no evidence that the Office secured confirmation from the employing establishment that the light-duty position in engineering services, first offered to appellant on July 5, 1995, remained open and available to appellant as of January 10, 1996, the date of the second light-duty offer by the employing establishment. In a February 14, 1996 letter, the Office asked the employing establishment whether the light-duty position was still available. In its response dated February 22, 1996, the employing establishment did not confirm that the position had been available from July 10, 1995 to January 10, 1996, only that appellant had been placed on leave without pay. Thus, the Office failed to obtain confirmation from the employing establishment that the light-duty position remained available.

Because the Office failed to make a valid offer of employment,[17] the Board finds that the penalty provision of section 8106(c)(2) was not properly invoked. The record, therefore, establishes that the Office did not meet its burden of proof in terminating wage-loss compensation under 5 U.S.C. § 8106(c). For these reasons, the Board finds that the Office improperly invoked the penalty provision of 5 U.S.C. § 8106(c).

The decisions of the Office of Workers' Compensation Programs dated May 19 and January 31, 1997 are hereby reversed.

Dated, Washington, D.C.
July 20, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[17] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, 2.814.4 (c) (July 1997) (advising appellant).