U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROLE A. KETTERER and DEPARTMENT OF THE ARMY, TOOELE ARMY DEPOT, Tooele, Utah

Docket No. 97-1694; Submitted on the Record;
Issued June 4, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS, BRADLEY T. KNOTT

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.

Appellant's notice of occupational disease, filed on June 3, 1990, was accepted by the Office for bilateral carpal tunnel syndrome and epicondylitis of the elbows. Appellant, then a 45-year-old forklift operator, underwent release surgery on June 21, 1991 and returned to light duty in August 1991.

Subsequently, appellant had further surgery for synovitis of her right hand and left thumb and removal of a cyst. On January 23, 1994 appellant was separated from the employing establishment because of physical disability.

On June 25, 1996 appellant was referred for vocational rehabilitation. On August 6, 1996 the employing establishment offered appellant a clerk's position, starting at four hours a day and working up to full time. Dr. Robert G. Hansen, Board-certified in physical medicine and rehabilitation, and appellant's treating physician, approved the offer as within appellant's physical restrictions.

Appellant declined the job offer on August 16, 1996, stating that she wished to take disability retirement. On August 19, 1996 the Office informed appellant that the job offer had been found to be suitable and that she had 30 days to accept the position or provide reasons for refusing it.

Appellant responded that she had "quite a lot of pain and weakness" in her hands and felt that disability retirement was in her "best interests." The Office rejected appellant's reasons on September 20, 1996 and provided her with 15 days to accept the offer without penalty. On

October 2, 1996 the Office terminated appellant's disability compensation on the grounds that she had refused an offer of suitable work.[1]

The Board finds that the Office properly terminated appellant's compensation on the grounds that she refused to accept 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 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]

The implementing regulation[6] 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.[7] 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.[8]

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.[9] The issue of whether an employee has the physical ability to perform a modified position offered by

[1] Appellant elected disability retirement on October 13, 1996. The Board notes that disability retirement is not generally a valid justification for refusing an offer of suitable work; *see Stephen R. Lubin*, 43 ECAB 564, 569 (1992) (finding that approval of appellant's application for disability retirement did not constitute medical evidence of appellant's inability to perform the duties of the offered position).

[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; 5 U.S.C. § 8106(c)(2).

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

[5] *Stephen R. Lubin*, *supra* note 1 at 573.

[6] 20 C.F.R. § 10.124(c).

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

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

[9] *C.W. Hopkins*, 47 ECAB 725, 727 (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) (unacceptable reasons for refusing employment found suitable include personal dislike of the position, potential for promotion and job security).

the employing establishment is primarily a medical question that must be resolved by medical evidence.[10]

The Board finds that the Office met its burden of proof in terminating appellant's compensation because the evidence of record establishes that the Office complied with the required procedures and that the offered position was medically suitable. The Office properly found that the physical requirements of the clerk's job fell within the restrictions listed by Dr. Hansen -- no lifting greater than 10 pounds and no repetitive use of the hands.

While Dr. Hansen ordered a nerve conduction study to reevaluate the condition of appellant's hand and arm nerves, and recommended that appellant do stretching exercises during the date, he approved the job offer on July 29, 1996.[11] His August 26, 1996 treatment note does not address the issue of whether appellant can perform the duties of the offered position. Neither does the August 22, 1996 report from Dr. J. Mark McGlothlin, Board-certified in physical medicine and rehabilitation, who administered electrodiagnostic studies and provided a rating for permanent partial impairment of appellant's hands.

Further, the Office complied with its procedures in terminating appellant's compensation by informing her that she had 30 days to justify her refusal to accept the job, by considering her reasons for refusal, and by providing an additional 15 days to accept the position without penalty.

Appellant argues on appeal that her rights to apply for a schedule award and to receive a formal decision were taken away because she was given no information on how or when to appeal. The record belies appellant's contention.

On July 31, 1996 the Office sent to appellant the form that Dr. McGlothlin needed to complete for appellant to apply for a schedule award. On August 22, 1996 the rehabilitation counselor discussed with appellant the fact that there could be no schedule award if a claimant refused a job that she had been medically released to do. On September 3, 1996 the rehabilitation counselor informed appellant that retirement was not a valid reason for refusal of suitable work and reported that appellant understood that if she wanted a schedule award settlement, she would have to return to work.

On October 1, 1996 the rehabilitation counselor reported that appellant had submitted a CA-7 form to try to obtain a schedule award before her disability compensation ended. The rehabilitation counselor confirmed this with appellant, who stated that she had until October 5, 1996 to respond to the Office's 15-day letter, but had no intention of returning to work because she wanted to move to Phoenix, Arizona, to be with her family. Thus, appellant was well aware that her entitlement to a schedule award depended on her return to work.

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

[11] *See Michael I. Schaffer*, 46 ECAB 845, 855 (1995) (finding the medical evidence sufficient to establish that appellant was physically capable of performing the duties of the offered modified position).

Appellant also had sufficient time to accept the job offer without penalty and thus ensure that her entitlement to a schedule award would not be jeopardized. Dr. McGlothlin rated her for a schedule award on August 29, 1996, the Office's initial termination letter provided until September 18, 1996 to accept the job offer, and the 15-day letter was dated September 20, 1996. The October 2, 1996 letter terminated compensation effective October 13, 1996, thus providing additional time for appellant to change her mind and accept the job offer. Therefore, the Board rejects appellant's argument.

The October 2, 1996 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
June 4, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member