U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RUGGEIRO A. PIGNOTTI and U.S. POSTAL SERVICE, POST OFFICE, Newark, NJ

Docket No. 99-190; Submitted on the Record;
Issued May 15, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation, effective June 25, 1998 on the grounds that he refused an offer of suitable work.

The Board has duly reviewed the case record in the present appeal and finds that the Office properly terminated appellant's compensation for refusing an offer of suitable work.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.[1] Under section 8106(c)(2) of the Federal Employees' Compensation Act,[2] the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.[3] To justify termination of compensation, the Office must show that the work offered was suitable,[4] and must inform appellant of the consequences of refusal to accept such employment.[5] An employee who refuses or neglects to work after suitable work has been offered or secured for him has the burden of showing that such refusal or failure to work was reasonable or justified.[6] Additionally, the employee shall be provided the opportunity to make such a showing before entitlement to compensation is terminated.[7] Office procedures state that acceptable reasons for

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[1] *Frank J. Mela, Jr.*, 41 ECAB 115 (1989); *Mary E. Jones*, 40 ECAB 1125 (1989).

[2] 5 U.S.C. §§ 8101-8193.

[3] *Patrick A. Santucci*, 40 ECAB 151 (1988); *Donald M. Parker*, 39 ECAB 289 (1987).

[4] *Arthur C. Reck*, 47 ECAB 339 (1996).

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

[6] 20 C.F.R. § 10.124(c).

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

refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.[8]

In the instant case, appellant, a 67-year-old retired motor vehicle operator, sustained an injury to his right shoulder while in the performance of duty on August 9, 1995 and he ceased working that same day. He later returned to work in a light-duty capacity on August 14, 1995 and continued to work until undergoing surgery on October 26, 1995. The Office accepted the claim for a torn right rotator cuff and authorized two surgical procedures, the most recent of which was performed on March 26, 1997. Additionally, appellant received appropriate wage-loss compensation for his injury. He retired from service with the employing establishment on December 3, 1997 and is currently receiving benefits from the Office of Personnel Management.

On January 21, 1998 the employing establishment offered appellant a limited-duty position as a modified motor vehicle operator, which was designed to accommodate the November 7, 1997 physical limitations imposed by appellant's treating physician, Dr. Martin L. Sorger, a Board-certified orthopedic surgeon. The position entailed light sweeping, dusting, cleaning of tabletops, emptying wastebaskets and answering telephones. The specific physical limitations noted included no lifting or overhead work with the right arm, no lifting over one pound and no repetitive motions of the wrist or elbow. Appellant, however, declined the position on January 26, 1998. His stated reason for refusing the offer was that he had elected to apply for retirement as of December 3, 1997 and that Dr. Sorger had found him to be permanently disabled on December 26, 1997. At the Office's request, Dr. Sorger subsequently reviewed the limited-duty position description on February 2, 1998 and expressed his approval. He specifically noted that appellant "May perform [the] job duties as written."

The Office informed appellant on February 5, 1998 that it found the modified motor vehicle operator position to be suitable for his work capabilities and that it was currently available. The Office also advised appellant that he had 30 days within which to either accept the position or provide an explanation for refusing the position. Appellant again declined the offer on February 18, 1998 for the same reasons he noted with respect to his earlier refusal.

On May 11, 1998 the Office advised appellant that the reasons he provided for declining the job offer were unacceptable and that he had an additional 15 days within which to accept the position. Appellant did not subsequently accept the offered position, and therefore, by decision dated June 24, 1998, the Office terminated appellant's compensation effective June 25, 1998

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5 (May 1996); *see C.W. Hopkins*, 47 ECAB 725, 727 (1996).

based upon his failure to accept suitable employment. Appellant subsequently filed an appeal with the Board on September 22, 1998.[9]

With respect to the procedural requirements for termination under section 8106(c) of the Act, the Office, by letters dated February 5 and May 11, 1998, properly advised appellant of the availability of suitable work and the consequences of his refusal to accept such work. Inasmuch as appellant did not accept the offered position subsequent to the Office's May 11, 1998 notification, the Office accordingly terminated benefits thereafter. The Board, therefore, finds that the Office properly followed the procedural requirements for termination under section 8106(c).

The determination of whether appellant is capable of performing the offered position is a medical question that must be resolved by medical evidence.[10] As previously noted, appellant's treating physician approved the January 21, 1998 limited-duty job offer. Appellant declined the position because he had applied for retirement and because Dr. Sorger had earlier indicated that appellant was totally disabled. While the record indicates that Dr. Sorger had previously stated that appellant was permanently disabled his more recent assessment clearly established that appellant was capable of performing the January 21, 1998 limited-duty position of modified motor vehicle operator. Thus, he has failed to present medical evidence to justify his February 18, 1998 refusal of the offered position. Moreover, appellant's desire to retire effective December 3, 1997 does not justify his refusal to accept the limited-duty job offer. In conclusion, 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. Accordingly, the Office properly terminated appellant's wage-loss compensation.[11]

[9] Appellant submitted evidence on appeal that was not submitted to the Office prior to the issuance of its June 24, 1998 decision. Inasmuch as the Board's review is limited to the evidence of record which was before the Office at the time of its final decision, the Board cannot consider appellant's newly submitted evidence. 20 C.F.R. § 501.2(c).

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

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

The decision of the Office of Workers' Compensation Programs dated June 24, 1998 is hereby affirmed.

Dated, Washington, D.C.
May 15, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member