U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LES RICH and DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, New York, NY

Docket No. 00-1139; Submitted on the Record;
Issued September 1, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation, effective July 29, 1999, on the grounds that he refused an offer of suitable work; and (2) whether the Office properly denied appellant's request for an oral hearing.

On July 2, 1984 appellant, then a 38-year-old special agent, sustained an injury to his back while in the performance of duty. The Office accepted his claim for a herniated disc at L4-5 and appellant was placed on the periodic compensation rolls. Appellant subsequently sustained a consequential injury to his right knee on October 6, 1985, which the Office accepted for patella tendon laxity. Additionally, the Office authorized three surgical procedures performed in October 1985, January 1987 and August 1992.

In May 1999, after several earlier unsuccessful attempts at vocational rehabilitation, the Office and the employing establishment were able to identify a position that was consistent with the physical restrictions imposed by appellant's treating physician, Dr. Cary Skolnick, a Board-certified orthopedic surgeon. On May 11, 1999 the employing establishment offered appellant a limited-duty position as a modified information research assistant available as of May 26, 1999. The Office informed him on May 14, 1999 that it found the offered position to be suitable for his work capabilities and that it was currently available. The letter further explained that upon acceptance of the position, appellant would be paid compensation based on the difference, if any, between the pay of the offered position and the pay of his position on the date of injury. The Office also advised him that he had 30 days within which to either accept the position or provide an explanation for refusing the position.

In a letter dated May 24, 1999, appellant requested that the employing establishment provide him with a written explanation concerning how the job offer would affect his benefits and status with respect to retirement, pension, promotion, disability, leave and reassignment. While the employing establishment indicated a willingness to accommodate appellant's request

for a more specific statement regarding his status, appellant effectively declined the offered position on June 14, 1999. He returned the job offer to the employing establishment with the following notation: "Please send me a calculation. I will sign under acceptance or declination after I get the calculation."

On June 17, 1999 the Office advised appellant that the reason he provided for declining the job offer was unacceptable and that he had an additional 15 days within which to accept the position. In a letter dated June 28, 1999, appellant advised that he was still awaiting a response from the employing establishment regarding his requested calculations as to the amount of salary and benefits he would receive upon acceptance of the offered position. He further requested that the position start date be postponed until September 20, 1999.

Appellant did not subsequently accept the offered position. By decision dated July 28, 1999, the Office terminated his compensation effective July 29, 1999 based upon his failure to accept suitable employment. Appellant subsequently requested an oral hearing, which was postmarked October 1, 1999.

By decision dated November 8, 1999, the Office found that appellant did not submit his request for an oral hearing within 30 days of the Office's July 28, 1999 decision and therefore, he was not entitled to a review as a matter of right. Additionally, the Office considered the matter in relation to the issue involved and denied appellant's request on the basis that the issue of whether he refused an offer of suitable employment could equally well be addressed through the reconsideration process. Appellant subsequently filed an appeal with the Board on January 19, 2000.

In a decision dated February 18, 2000, the Office denied modification of its prior decision dated July 28, 1999. The Office specifically addressed the substance of appellant's June 28, 1999 letter requesting a postponement of the position start date to September 20, 1999.

Initially, the Board finds that the Office did not have the authority to issue its February 18, 2000 decision denying modification. The Board and the Office may not simultaneously exercise jurisdiction over the same issue in a case.[1] At the time the Office issued its February 18, 2000 decision, appellant had already filed an appeal with the Board regarding the Office's July 28, 1999 decision terminating benefits. Inasmuch as the Board had obtained jurisdiction over the case on January 19, 2000, the Office lacked jurisdiction to issue the February 18, 2000 decision. Accordingly, the Office's February 18, 2000 decision is set aside as null and void.[2]

The Board finds that the Office properly terminated appellant's compensation for refusing an offer of suitable work.

[1] *Arlonia B. Taylor*, 44 ECAB 591 (1993).

[2] *Terry L. Smith*, 51 ECAB ___ (Docket No. 97-808, issued November 29, 1999).

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.[3] Under Section 8106(c)(2) of the Federal Employees' Compensation Act,[4] 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.[5] To justify termination of compensation, the Office must show that the work offered was suitable[6] and must inform appellant of the consequences of refusal to accept such employment.[7] 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.[8] Additionally, the employee shall be provided 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]

The determination of whether appellant is capable of performing the offered position is a medical question that must be resolved by medical evidence.[11] In the instant case, appellant has not alleged, nor does the record demonstrate, that the offered position of modified information research assistant is inconsistent with the physical limitations imposed by appellant's treating physician, Dr. Skolnick. The offered position, which is sedentary in nature, clearly conform with Dr. Skolnick's recommendation that appellant perform only sedentary work and that he be permitted to change positions at will. Furthermore, whereas Dr. Skolnick had previously imposed a commuting limitation of 10 miles, he reported on April 26, 1999 that appellant could drive more than 10 miles to get to work. Consequently, there is no medical justification for appellant's failure to accept the offered position. The Board finds that the offered position is medically suitable.[12]

With respect to the procedural requirements for termination under section 8106(c) of the Act, the Office, by letters dated May 14 and June 17, 1999, properly advised appellant of the availability of suitable work and the consequences of his refusal to accept such work.

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

[4] 5 U.S.C. §§ 8101-8193.

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

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

[7] *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1972).

[8] 20 C.F.R. § 10.124(c).

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

[10] 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 n. 5 (1996).

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

[12] *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).

Appellant's failure to accept the offered position within the allotted time frame appears to have been motivated by his desire to secure a more convenient start date. In his June 28, 1999 letter to the Office, appellant explained that before accepting the job offer, he was awaiting a response from the employing establishment which would "outline all pertinent salary calculations, benefits and information relevant to [his] acceptance." The Office previously advised appellant that his request for a "calculation" was not an acceptable reason to decline the offered position. Despite the Office's June 17, 1999 notification that it would not consider any further reasons appellant might wish to submit in justification of his refusal of the offered position, appellant nonetheless requested that the position start date be postponed until September 20, 1999. The reason offered for the requested delay was that appellant had several doctors' appointments scheduled for July and August, as well as continued physical therapy three times per week. Appellant, however, offered no evidence to suggest that the medical treatment he planned to receive would render him physically incapable of performing the offered position.

In his June 28, 1999 letter, appellant also explained that he planned to observe the Jewish holidays in September and "since [he had] no leave available … at this time, [he did] not wish to be on leave without pay." While resuming work prior to September 20, 1999 may have posed some inconvenience for appellant, he did not provide an acceptable reason for his failure to accept the offered position within the allotted time frame. Furthermore, having previously afforded appellant the opportunity to voice his concerns regarding the suitability of the offered position, the Office was under no further obligation to entertain appellant's June 28, 1999 request to postpone the start date of the offered position.[13] Inasmuch as appellant did not accept the offered position subsequent to the Office's June 17, 1999 notification, the Office properly terminated benefits. The Board finds that the Office properly followed the procedural requirements for termination under section 8106(c). 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.

The Board also finds that the Office properly denied appellant's request for an oral hearing.

Any claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of issuance of the decision. A claimant is not entitled to a hearing or a review of the written record if the request is not made within 30 days of the date of issuance of the decision.[14] The Office has discretion, however, to grant or deny a request that is made after this 30-day period.[15]

[13] Once the Office advises a claimant that his reasons for refusing an offered position are unacceptable and he is given an opportunity to accept the position or have compensation terminated, the claimant submits further reasons and supporting evidence at his own risk. *Rosie E. Garner*, 48 ECAB 220, 225 (1996).

[14] 20 C.F.R. § 10.616(a).

[15] *Herbert C. Holley*, 33 ECAB 140 (1981).

In such a case, the Office will determine whether a discretionary hearing should be granted and, if not, will so advise the claimant with reasons.[16]

As previously noted, the Office terminated appellant's wage-loss compensation in a decision dated July 28, 1999. Appellant's request for an oral hearing was postmarked October 1, 1999, which is more than 30 days after the Office's July 28, 1999 decision. As such, appellant is not entitled to an oral hearing as a matter of right. Moreover, the Office considered whether to grant a discretionary review and correctly advised appellant that the issue of whether he refused an offer of suitable employment could equally well be addressed by requesting reconsideration.[17] Accordingly, the Board finds that the Office properly exercised its discretion in denying appellant's untimely request for a hearing.

The decisions of the Office of Workers' Compensation Programs dated November 8 and July 28, 1999 are hereby affirmed.

Dated, Washington, D.C.
September 1, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member

[16] *Rudolph Bermann*, 26 ECAB 354 (1975).

[17] The Board has held that a denial of review on this basis is a proper exercise of the Office's discretion. *E.g., Jeff Micono*, 39 ECAB 617 (1988).