U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CLAUDETTE J. BOWMAN and DEPARTMENT OF THE NAVY, NORFOLK NAVAL SHIPYARD, Norfolk, VA

Docket No. 00-650; Submitted on the Record;
Issued August 6, 2001

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

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.

On June 9, 1980 appellant, then a 38-year-old laborer, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that on that date, she sustained right shoulder and neck injuries while cleaning a pump well at dry dock in the course of her federal employment. Following medical and factual development, the Office accepted appellant's claim for herniated nucleus pulposus at C6-7, right, with surgical discectomy and fusion, and consequential right carpal tunnel syndrome with subsequent surgery. Appellant stopped work on the date of the injury and began receiving appropriate compensation benefits for temporary total disability.

Appellant's treating physician, Dr. Wallace K. Garner, a Board-certified neurological surgeon, submitted periodic reports documenting appellant's progress and on June 9, 1986 released appellant to work 8 hours a day with permanent restrictions of lifting no more than 25 pounds, no overhead work, no more than 6 hours of walking, lifting, bending, twisting and standing in an 8-hour period and no more than 2 hours of climbing and kneeling in an 8-hour period. Dr. Garner reiterated these restrictions in 1989, 1992 and 1993, but on March 27, 1995, he additionally restricted appellant from performing strong gripping with her right hand, due to her carpal tunnel syndrome.

On February 23, 1996 the Office referred appellant to Dr. David E. Lannik, a Board-certified orthopedic surgeon, for a second opinion evaluation. The Office provided Dr. Lannik with a statement of accepted facts, copies of the medical record and a list of questions to be answered.

In a report dated June 5, 1996, Dr. Lannik reviewed the evidence of record and listed his findings on examination. Dr. Lannik diagnosed cervical spine sprain, status post arthrodesis with right-sided cervical radiculopathy, and stated that a functional capacity assessment performed on

May 21, 1996 revealed that appellant was fit for work at a sedentary physical capacity level regarding her upper extremities. In a Form OWCP-5 dated October 30, 1997, submitted in response to a request by the Office for further information, Dr. Lannik indicated that appellant had already reached maximum medical improvement, and that she could work eight hours a day provided she limited overhead work and reaching with the right arm at shoulder level or above. Dr. Lannik added that these restrictions were both permanent and employment related. While Dr. Lannik further indicated that appellant had an antalgic gait secondary to right hip pain, he specifically noted that this was a nonwork-related condition and did not indicate whether any specific physical restrictions were associated with this condition.

On May 1, 1998 the Office began vocational rehabilitation efforts, using Dr. Lannik's October 30, 1997 restrictions as a guide.

By letter dated June 25, 1998, Diversified Industrial Concepts, Inc., a private employer with whom appellant had interviewed the previous day, offered appellant the position of janitor, modified duty. The letter included the start date, hours and location of the job, but other than indicating that the position was "modified to accommodate the physical restrictions described by Dr. Lannik dated October 30, 1997," did not describe the job duties.

By letter dated June 25, 1998, the Office advised appellant that the offered position had been reviewed and was deemed suitable to her work capabilities. The Office further stated that the duties and physical limitations of the offered position were described in an attached letter; however, no such attachment exists in the record. The Office explained that, upon acceptance of the position, she would be paid compensation based on the difference, if any, between the pay of the offered position and the pay of her date-of-injury position. Appellant was further advised of the provision of 5 U.S.C. § 8106(c) and given 30 days from the date of the Office's letter to either accept the position or provide a written explanation of her reasons for refusing the offer.

Appellant did not respond to the Office's June 25, 1998 letter, although a June 25, 1998 entry by the vocational rehabilitation counselor indicates that appellant telephoned and stated that she could not take the position as to do so would cost her about $400.00 a month in benefits when her compensation was compared with the offered salary.

By decision dated November 23, 1998, after confirming that the position remained available to appellant, the Office terminated appellant's monetary compensation on the grounds that appellant refused an offer of suitable employment.[1]

The Board finds that the Office improperly terminated appellant's wage-loss compensation on the grounds that she refused an offer of suitable work.

[1] As appellant did not respond to the Office's June 25, 1998 letter requesting that she either accept the position or provide her reasons for refusing, the Office properly finalized its preliminary determination without further notice; *see* FECA Bulletin No. 92-19, issued July 31, 1992, adapting Office procedure to comply with the Board's ruling in *Maggie L. Moore*, 43 ECAB 818 (1992). The Bulletin provides that if an appellant provides reasons for refusing a position, and the reasons given for refusal are considered unacceptable, the claimant will be informed of this by letter, given 15 days from the date of the letter to accept the job, and advised that the Office will not consider any further reasons for refusal. If the claimant does not accept the job within the 15-day period, compensation payments, including schedule award payments, will be terminated under 5 U.S.C. § 8106(c).

It is well settled that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[2] As the Office, in this case, terminated appellant's compensation under 5 U.S.C. § 8106(c), the Office must establish that appellant refused an offer of suitable work.

Section 8106(c)(2) of the Federal Employees' Compensation Act,[3] provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee is not entitled to compensation.[4] However, 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 is suitable. In the present case, the Office has failed to make that showing.

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.[5]

The private employer did not describe the duties of the job it offered appellant.[6] It indicated that it was offering her the position of modified janitor and that such position would accommodate the physical restrictions set forth by Dr. Lannik in his October 30, 1997 report. This general offer of a light-duty position specially fitted to appellant's physical limitations did not provide the objective criteria necessary for either appellant or the Office to make a reasoned determination as to whether it constituted suitable work.

[2] *Mohammed Yunis*, 42 ECAB 325, 334 (1991).

[3] 5 U.S.C. §§ 8101-8193.

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

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4 (December 1993).

[6] *Thomas P. Michell,* 34 ECAB 1538 (1983).

The November 23, 1998 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, DC
August 6, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member