U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THOMAS R. MULVIHILL and U.S. POSTAL SERVICE,
POST OFFICE, Philadelphia, PA

Docket No. 99-2588; Submitted on the Record;
Issued August 1, 2001

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits under 5 U.S.C. § 8106(c) on the grounds that he refused an offer of suitable work.

This is appellant's second appeal before the Board on this issue. In the prior appeal, by decision dated December 18, 1997 the Board found that the Office's termination of appellant's compensation under 5 U.S.C. § 8106(c) on the grounds that he refused an offer of suitable work was proper.[1] The facts and circumstances of the case are set out in the prior decision and are hereby incorporated by reference.

Following the Board's 1997 decision, appellant requested reconsideration of his claim. Appellant, through his representative, contended that he was not given a reasonable time within which to accept the offered position. Appellant argued that Dr. Philip J. Marone, his attending Board-certified orthopedic surgeon, had provided a September 7, 1994 report explaining why he was unable to perform the position, and that, although the record did not reflect receipt of this report, the "mailbox rule" was applicable as it was mailed in the regular course of business such that receipt by the Office should be presumed. Appellant contended that the Office was required to examine the report, advise appellant if it was an unacceptable explanation or justification for his refusal, and provide appellant another 15 days within which to accept the offered position.

Attached was a copy of the September 7, 1994 report, which was initially received by the Office date stamped December 23, 1994. This report is set forth in the Board's prior decision and was found to be unrationalized, as it did not address appellant's use of taxicabs or handicapped transportation to commute to the offered sedentary position. The Board noted that Dr. Marone did not explain why Motrin, a mild nonsteroidal anti-inflammatory analgesic, would cause appellant to feel sleepy and hence leery of driving. The Board also noted that this report

[1] Docket No. 96-2215 (issued December 18, 1997).

did not state that the previously approved duties of the offered position were not appropriate to appellant's partially disabled state.

By decision dated May 6, 1999, the Office denied modification of the prior September 6, 1995 Office decision.[2] The Office found that the "mailbox rule" presumption did not apply as no evidence of proper mailing was included in the record, and that, even if the "mailbox rule" did apply, the September 7, 1994 letter could not be considered to be a response from appellant to the Office's October 20, 1994 suitability determination.

By letter dated May 19, 1999, appellant, through his representative, requested reconsideration, contending that, following the holding in *Bonnye Matthews*,[3] the "mailbox rule" was applicable to claimants as well as to the Office, with evidence from the originator of proper addressing and mailing in the normal course of business. Attached was a May 18, 1999 signed statement from Dr. Marone indicating that his September 7, 1994 report "was mailed from my office on September 15, 1994, the date of transcription, to the U.S. Department of Labor in the ordinary course of business."

By decision dated August 4, 1999, the Office denied modification of the May 6, 1999 decision finding that the evidence submitted in support was insufficient to warrant modification. The Office found that, even accepting that the September 7, 1994 letter was received by the Office in the ordinary course of business, appellant never responded to the subsequent October 20, 1994 suitability determination letter requesting that he submit evidence supporting his refusal of the offered employment, during the 30-day period specified by the letter, or during the 48-day period preceding the Office 's December 6, 1994 decision.

The Board finds that the Office properly terminated appellant's compensation benefits under 5 U.S.C. § 8106(c) due to his refusal to accept suitable work.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[4] This includes cases in which the Office terminates compensation under 5 U.S.C. § 8106(c) for refusal to accept suitable work.[5]

Section 8106(c)(2) of the Federal Employees' Compensation Act states that a partially disabled employee who refuses to seek suitable work, or refuses or neglects to work after suitable work is offered to, procured by, or secured for him is not entitled to compensation.[6] To

[2] The Office incorrectly indicated that it was reconsidering the Board's December 18, 1997 decision; however, the Office cannot reconsider a Board decision, and accordingly must reconsider its own most recent decision dated September 6, 1995. *See* 20 C.F.R. § 501.6(c).

[3] 45 ECAB 657 (1994). In *Matthews* the Board found that although the original of a letter was not contained in the case record, the "mailbox rule" raised a presumption that the Office received the letter, as the copy showed a proper address and the attorney indicated that it was mailed in the ordinary course of business. *Id.* at 667; *see also Larry L. Hill*, 42 ECAB 596 at 600-01 (1991).

[4] *Harold S. McGough*, 36 ECAB 332 (1984).

[5] *Shirley B. Livingston*, 42 ECAB 855 (1991).

[6] 5 U.S.C. § 8106(c)(2); *see also Patrick A. Santucci*, 40 ECAB 151 (1988).

justify termination, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[7]

Title 20 of the Code of Federal Regulations, section 10.516 states that an employee will know if the Office considers a job to be suitable as follows:

> "[The Office] shall advise the employee that it has found the offered work to be suitable and afford the employee 30 days to accept the job or present any reasons to counter [the Office's] finding of suitability. If the employee presents such reasons, and [the Office] determines that the reasons are unacceptable, it will notify the employee of that determination and that he or she has 15 days in which to accept the offered work without penalty. At that point in time, [the Office's] notification need not state the reasons for finding that the employee's reasons are not acceptable."

Section 10.517 of 20 C.F.R. discusses the penalties for refusing to accept a suitable job offer as follows:

> "5 U.S.C. § 8106(c) provides that a partially disabled employee who refuses to seek suitable work, or refuses to or neglects to work after suitable work is offered to or arranged for him or her, is not entitled to compensation. An employee who refuses or neglects to work after suitable work has been offered or secured for him or her has the burden to show that this refusal or failure to work was reasonable or justified."[8]

As detailed in the December 18, 1997 decision, the Board found that the Office met its burden of proving that the offered position was suitable. The Board also determined that appellant was properly notified by the Office's October 20, 1994 letter of this suitability determination. The Board noted that appellant did not respond to the October 20, 1994 letter within the 30-day period or provide an explanation as to why he was not accepting the offered position.

In the August 23, 1998 reconsideration request appellant contended that, under the "mailbox rule," the Office is presumed to have received Dr. Marone's September 7, 1994 report, was required to review the report, to advise appellant whether his reasons for refusal were unacceptable and provide him with an additional 15 days within which to accepted the offered position. Appellant contends that the Office's failure to provide him an additional 15 days within which to accept the offered position constituted a violation of the Office's procedures which require reinstatement of appellant's compensation benefits.

After initially rejecting appellant's argument regarding the applicability of the "mailbox rule" based on the lack of evidence of mailing, the Office accepted that the September 7, 1994

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

[8] 20 C.F.R. § 10.517(a); *see also Catherine G. Hammond*, 41 ECAB 375 (1990). 20 C.F.R. § 10.517(b) provides, however, that "the employee remains entitled to medical benefits as provided by 5 U.S.C. § 8103."

report was presumed received by the Office after appellant submitted a signed statement from Dr. Marone advising that the report was mailed in the ordinary course of business on September 15, 1994. Under the "mailbox rule" it is presumed that the September 7, 1994 report was received by the Office following its September 15, 1994 mailing. The fact of mailing, however, does not establish that the September 7, 1994 report of Dr. Marone constituted a response to the Office's October 20, 1994 suitability determination.

The September 7, 1994 report predated the Office's October 20, 1994 suitability determination in this case and failed to address the relevant issue. Since the September 7, 1994 report does not address or provide any explanation for appellant's refusal of the offered position, it does not constitute an acceptable reason for refusing suitable employment. The Office was not required to afford appellant an additional 15 days within which to accept the offered position.

Following the Office's issuance of the October 20, 1994 suitability determination and its notification for appellant to submit reasons or justification for his refusal, appellant failed to respond within the 30-day period. As no response was received from appellant during the time period designated, the Office properly finalized its termination of compensation under 5 U.S.C. § 8106(c).

On appeal appellant argues that the Board's decision in *Migdalia Tirado*, Docket No. 96-2303, issued March 25, 1999,[9] is applicable to the fact of this case and supports that the 5 U.S.C. § 8106(c) termination be set aside. On January 24, 2001 the Director of the Office responded, arguing threefold: first, to the extent that *Tirado* requires reversal, there are important factual differences between *Tirado* and appellant's case that make *Tirado* inapplicable; second, the facts upon which appellant bases his argument were available to the Board at the time of its December 18, 1997 decision in the prior appeal and the Board did not find that appellant was not provided an opportunity to accept the offered position; and third, in the alternative, that *Tirado* was wrongly decided and should be limited to its precise facts.

In *Maggie Moore*,[10] the Board found that the Office denied appellant a reasonable opportunity to comply with 5 U.S.C. § 8106(c) when it terminated her compensation for refusal of suitable work without first advising her that her reasons for refusal were insufficient to justify such refusal. The Office advised appellant on July 15, 1986 that the position was found to be suitable and invited her to reply within 30 days with any reasons or justification for her refusal. Appellant replied, offering reasons for refusal on July 31, 1986, but the Office failed to address to her reply or advise appellant that it found her reasons were insufficient to justify refusal of the position. On August 15, 1986 the Office terminated appellant's compensation entitlement under 5 U.S.C. § 8106(c), finding that she had refused an offer of suitable work. In that decision, the Office, for the first time, addressed the sufficiency of appellant's proffered reasons for refusal. The Board found the Office did not provide appellant a reasonable opportunity to accept the position after being advised that her reasons for refusal were unjustified.

[9] This was a nonprint case.

[10] *Supra* note 7.

In *Moore*, the Board held that due process and elementary fairness require that the Office must not only inform each claimant of the provisions of the above statute, but also inform him or her that a specific position offered is suitable; the consequences of refusal of the position; and allow the claimant a reasonable period to accept or reject the position or submit evidence or reasons why the position is not suitable and cannot be accepted. If the claimant submits evidence or reasons or both, the Board noted that the Office must evaluate the evidence or reasons submitted and inform the claimant of its decision as to whether the evidence or reasons submitted are accepted or rejected, before it can terminated compensation under the 5 U.S.C. § 8106(c)(2) penalty provision.[11]

The Board finds that the facts in this case are inapplicable to the facts in *Maggie Moore*, as appellant, submitted no reasons or justification for his refusal of the offered position in response to the Office's October 20, 1994 suitability determination. The September 7, 1994 medical report from Dr. Marone was dated substantially before the Office's suitability determination, and does not constitute a response from appellant to the Office's October 20, 1994 job suitability determination. Moreover, the report of Dr. Marone did not address how job duties previously approved were not suitable to appellant's partially disabled condition, and hence was not relevant to that issue. Therefore, this report does not support appellant's subsequent refusal of the job.

The Board further finds that, to the extent that its holding in *Migdalia Tirado* departs from the principles and procedures articulated in *Maggie Moore*, it is overruled.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated August 4 and May 6, 1999 are hereby affirmed.

Dated, Washington, DC
August 1, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

[11] *Id.* at 824.