U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RONALD D. BLACKBURN and DEPARTMENT OF VETERANS AFFAIRS, PALO ALTO VETERANS' HOSPITAL, MENLO PARK DIVISION, Menlo Park, CA

Docket No. 00-540; Submitted on the Record;
Issued March 9, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for vocational rehabilitation services.

The Office accepted that on March 24, 1994 appellant, then a 25-year-old medical clerk, sustained a right wrist carpal scaphoid fracture with delayed union, requiring a November 8, 1996 surgical closure with bone graft. Appellant received compensation on the daily and periodic rolls from November 8, 1996 through February 12, 1999.

On January 8, 1997 Dr. Earl F. Evans an attending Board-certified orthopedic surgeon, was provided with a light-duty job description for appellant. In a January 27, 1997 reply, Dr. Evans stated that appellant could photocopy, fax, take short messages, handle items up to five pounds, answer a telephone with his left hand, perform "light computer entries' with his left hand and with "right fingers," but could not file documents.[1] He limited appellant to light-duty work through March 16, 1997 and released him to full duty as of May 5, 1997. The record indicates that appellant was assigned the light-duty office position within the restrictions set by Dr. Evans beginning in January 1997 and that the assignment was open and available from that time forward.

In a June 23, 1997 notice, finalized July 24, 1997, appellant was removed from the employing establishment effective August 1, 1997, due to a series of unauthorized absences, attempts to falsify time and attendance records and failing to follow procedures for requesting leave. Appellant was informed in periodic meetings from May 24, 1996 to February 26, 1997 that full-time light-duty work had been assigned to him within his prescribed restrictions. However, appellant was charged as absent without leave (AWOL) for failing to report for duty or request leave from June 18 to August 16, 20 and 21, 1996, December 9, 1996 to February 21, 1997, February 24, March 3 to 7 and March 10, 1997 and continuing. The employing

[1] In a February 4, 1997 follow-up report, Dr. Evans noted that one pin had eroded through appellant's skin, removed the pin and applied a new short-arm cast.

establishment specified that from January 29, 1997 onward, appellant was "consistently late arriving to work and left work at approximately 11:30 every day," alleging that there was no work for him at his afternoon duty station in the health unit, whereas the unit's nurse supervisor stated that appellant had not been told there was no work and that he had not reported for work. The employing establishment concluded that appellant falsified his attendance records to obtain salary and benefits as he falsely asserted that he had been assisting two employees in the Brief Partial Hospitalization Program (BPHP) unit and approached Ms. Kristine Martin and asked her to lie to his supervisor that he "had been helping her on the … BPHP every day." The employing establishment also charged that appellant submitted medical slips indicating disability for work only from December 19, 1996 through February 1, 1997 but claimed disability compensation for the period November 8, 1996 through February 7, 1997.

In an August 1, 1997 letter, the employing establishment noted that appellant had been separated for misconduct and was not entitled to further compensation benefits.

By decision dated July 14, 1998, the Office awarded appellant a schedule award for 18 percent permanent loss of use of the right upper extremity. The period of the award ran from January 15, 1998 to February 12, 1999.

In a January 8, 1999 report, Dr. Evans noted that appellant had "returned to body building and weightlifting with both upper extremities," which was detrimental to the health of his right wrist due to the degree of degenerative arthritis present.

In a May 27, 1999 report, Dr. Paul Roache, an attending orthopedist, diagnosed right wrist stiffness, status postsurgery and indicated that appellant could work without restrictions. Dr. Roache prescribed physical therapy to improve appellant's range of motion.

Following the end of the schedule award period, the Office undertook development to determine appellant's eligibility for vocational rehabilitation services.[2] In a June 28, 1999 letter, the Office advised appellant that he was not entitled to vocational rehabilitation services as he constructively refused suitable work and was terminated "for cause."

In a July 1, 1999 letter received by the Office on July 13, 1999, appellant requested that the Office provide vocational rehabilitation services. He alleged that he was not provided job accommodations, was forced to work outside his medical restrictions and was wrongfully terminated by the employing establishment. He submitted medical visit verification slips for various dates from October 1996 through May 1997, which he contended demonstrated the employing establishment erred in finding him absent without leave for those dates. Appellant also submitted a September 26, 1996 letter of removal, which was later rescinded, a July 15, 1996 letter from the nursing staff apologizing to appellant for "any remarks made … in frustration which could be perceived as … derogatory … a July 14, 1996 Equal Employment

[2] The Office requested that appellant submit an affidavit of earnings and employment (Form CA-1032), which appellant returned on June 3, 1999. Appellant stated that he worked part time from December 1998 to April 1999 delivering medical supplies at $12.00 an hour or $300.00 per week from September 1996 onward , operated "Loc-N-Load Records," "a small independent record label," promoting and marketing talent and coordinating projects for $208.00 per week and volunteered for 20 hours per week from June to December 1998 as an intern for Universal Music and Video in exchange for college credits.

Opportunity settlement agreement which did not "constitute an admission of guilt, fault or wrongdoing by either party" and documents relating to appellant's participation in a voluntary leave transfer program.

By decision dated July 12, 1999, the Office denied appellant's request for vocational rehabilitation[3] on the grounds that he had "forfeited all future entitlement to compensation … due to [his] constructive abandonment of suitable employment and subsequent removal 'for cause.'" The Office concluded that under section 8106(c)(2), he had refused or neglected to work after suitable work had been secured for him and that he was, therefore, not entitled to further compensation. Although appellant returned to modified employment on or about January 27, 1997, his misconduct constituted a constructive abandonment of suitable employment, "forcing his agency to initiate removal proceedings," finalized August 1, 1997.[4] The Office noted that appellant remained entitled to "ongoing medical treatment for the accepted" right wrist condition.

Appellant disagreed with this decision and in an August 29, 1999 letter requested reconsideration, newly alleging that he was discriminated against due to race. He submitted copies of job descriptions and performance appraisals.

By decision dated October 5, 1999, the Office denied modification of the prior decision on the grounds that the evidence submitted was insufficient. The Office found that there was no evidence of record indicating that the employing establishment acted unreasonably in "the administration of personnel matters" including appellant's removal, noting that appellant had failed to submit any decision "by an appropriate appellate body" finding that the employing establishment had erred in removing appellant. The Office, therefore, found that it had no jurisdiction over the removal matter. The Office noted its continuing jurisdiction "over compensation payments for medically certified time lost from work due to [his] accepted work injury and for related medical expenses. However, since entitlement to monetary compensation has ceased, there is no entitlement to vocational rehabilitation services."[5]

[3] The Office also denied a "schedule award" and "wage-replacement" compensation. However, it is not clear from the record if appellant was claiming an additional schedule award or wage-loss compensation.

[4] The employing establishment proposed to remove appellant in August 1996 for misconduct related to unauthorized absences, misuse of leave, false claims regarding periods of disability. The action was later rescinded.

[5] The Office noted that appellant's allegations of harassment and discrimination were not relevant to his right wrist claim.

Initially, the Board finds that the Office did not properly invoke the penalty provisions of section 8106(c) to the circumstances of this case.[6]

Section 8106(c) of the Federal Employees' Compensation Act provides, in pertinent part, that a partially disabled employee who "refuses to seek suitable work; or (2) refuses or neglects to work after suitable work is offered to, procured by, or secured for him; is not entitled to compensation."[7] As applied to this case, the Office denied appellant vocational rehabilitation services on the grounds that he refused or "constructively abandoned" suitable work under section 8106(c) of the Act, as he was dismissed due to absences and misconduct from June 1996 through March 1997. The question arises as to whether it was proper for the Office to apply section 8106(c) standards to the issue of whether appellant was entitled to vocational rehabilitation services.

The threshold issue is whether appellant did in fact abandon suitable work. It is a well-settled principle that once the Office accepts a claim, it has the burden of justifying termination of compensation benefits under 5 U.S.C. § 8106(c)(2) for a claimant's refusal to accept suitable work.[8] To establish that appellant has refused or abandoned suitable work, the Office must first substantiate that the position offered was consistent with appellant's physical limitations, provide notice to the claimant of the penalty provision under section 8106(c)(2) and give the claimant a reasonable period to accept or reject the position or submit evidence or reasons why the position is not suitable and determine whether the reasons for declining or refusing the position were justified.[9] However, in this case the Office did not provide appellant with any notice that the light-duty position approved by Dr. Evans on January 27, 1997 was suitable work, or of the penalties under section 8106(c) for abandoning or refusing suitable work. As appellant did not receive notice from the Office that the position he began performing in January 1997 was considered suitable work, or of the penalties for refusing or abandoning such employment, appellant cannot be found to have "constructively" abandoned suitable work.

The Board finds that as appellant did not abandon suitable work it must now be determined if the Office had other grounds on which to deny appellant's request for vocational rehabilitation services.

It is clear from the Act and its implementing regulations that vocational rehabilitation is provided and administered as a discretionary component of the federal compensation program and is not an entitlement. Section 8104(a) of the Act, provides, in pertinent part, that the "Secretary of Labor may direct a permanently disabled individual whose disability is compensable under this subchapter to undergo vocational rehabilitation. The Secretary shall

[6] The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. As appellant filed his appeal with the Board on November 5, 1999, the only decision properly before the Board are the July 13 and October 5, 1999 decisions denying appellant's request for vocational rehabilitation services. 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[7] 5 U.S.C. § 8106(c).

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

[9] *John E. Lemker*, 45 ECAB 258 (1993); *Mary A. Howard*, 45 ECAB 646 (1994); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon*., 43 ECAB 818 (1992).

provide for furnishing the vocational rehabilitation services."[10] Section 10.518(a) of the Office's implementing regulations provides, in pertinent part, that the Office "*may, in its discretion*, provide vocational rehabilitation services as authorized by 5 U.S.C. § 8104."[11] (Emphasis added.)

In its July 12 and October 5, 1999 decisions, the Office found that although appellant returned to modified employment on or about January 27, 1997 his misconduct through March 1997, including prolonged periods of unauthorized absence, falsifying time and attendance records and asking another employee to falsify attendance records, resulted in his removal as of August 1, 1997.[12] The Office noted that appellant did not provide evidence that the employing establishment erred in terminating his employment. The Office exercised its discretion and denied appellant's request for vocational rehabilitation services based upon an accurate reading of the facts of the case. The Board finds that this exercise of discretion stands independently of the Office's erroneous invocation of section 8106(c) standards, which thus constitutes harmless error on the issue of denial of vocational rehabilitation services.

The Office was within its discretion to deny appellant's request for vocational rehabilitation services. However, the Office erred in its July 12, 1999 decision, as affirmed by its October 5, 1999 decision, that appellant was no longer entitled to "wage replacement" or additional schedule award benefits on the grounds that he had refused suitable work. As set forth above, appellant cannot be found to have abandoned suitable work in this case as the Office did not fulfill its notice requirements. Thus, the July 12 and October 5, 1999 decisions are modified to reflect appellant's continuing entitlement to such benefits should he properly claim them in the future and after appropriate development by the Office.

[10] 5 U.S.C. § 8104(a).

[11] 20 C.F.R. § 10.518(a) (1999).

[12] Prior to the July 12, 1999 decision, the Office also undertook development to determine the nature and extent of any permanent work-related disability by referring appellant for a second opinion examination and requested that appellant submit information about his employment subsequent to August 1, 1997. *See supra* notes 5 and 9.

The decisions of the Office of Workers' Compensation Programs dated October 5 and July 12, 1999 are hereby affirmed as modified.

Dated, Washington, DC
March 9, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member