U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALFRED GOMEZ and DEPARTMENT OF AGRICULTURE, GILA NATIONAL FOREST, Silver City, NM

Docket No. 00-1817; Submitted on the Record;
Issued October 9, 2001

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective April 27, 1999 on the grounds that he refused an offer of suitable work.

On September 21, 1996 appellant, then a 65-year-old maintenance worker, filed a claim alleging that he sustained injuries when he slipped on loosely piled timbers and fell to the ground. The Office accepted the claim for lumbar sprain and right shoulder impingement syndrome. In a letter dated June 9, 1998, the Office advised appellant that it found a light-duty job offered by the employing establishment to be suitable. By letter dated July 6, 1998, the Office advised appellant that he had not provided acceptable reasons for refusing the position, and he was given another 15 days to accept the position. By decision dated April 27, 1999, the Office terminated appellant's compensation on the grounds that he had refused suitable work. In a decision dated February 14, 2000, the Office denied modification.

The Board finds that the Office properly terminated compensation on the grounds that appellant refused an offer of suitable work.

The Federal Employees' Compensation Act, at 5 U.S.C. § 8106(c), provides in pertinent part, "A partially disabled employee who … (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation." It is the Office's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.[1] To justify such a termination, the Office must show that the work offered was suitable.[2]

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[1] *Henry P. Gilmore*, 46 ECAB 709 (1995).

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

An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.[3]

With respect to the procedural requirements of termination under section 8106(c), the Board has held that the Office must inform the employee of the consequences of refusal to accept suitable work, and allow him an opportunity to provide reasons for refusing the offered position.[4] If the employee presents reasons for refusing the offered position, the Office must inform him if it finds the reasons inadequate to justify the refusal of the offered position and afford him a final opportunity to accept the position.[5]

In May 1998 the employing establishment offered appellant a light duty, sedentary position as a clerk. The position was reviewed by appellant's attending physician, Dr. Thomas G. Cohn, a specialist in physical medicine and rehabilitation, and in a report dated May 20, 1998, Dr. Cohn opined that appellant could perform the duties of the position.

After being advised that the Office found the job to be suitable, appellant asserted that he had found other private employment that represented his wage-earning capacity. The Board notes that the Office's procedures indicate that finding other work that fairly and reasonably represents wage-earning capacity can be an acceptable reason for refusing a suitable offer, since the Office can issue a wage-earning capacity decision based on actual earnings.[6] Appellant had not, however, actually begun work in private employment. The Office advised appellant that it found his reason unacceptable in the July 6, 1998 letter. By electronic mail transmission dated July 14, 1998, the Office advised appellant's representative that it would wait 60 days to determine if the private employment fairly and reasonably represented his wage-earning capacity. In a letter dated April 15, 1999, appellant indicated that the private employment never "materialized" and in fact he had not worked in private employment. Although appellant asserted that he had found other work in the private sector, the record reveals that he never returned to work. Accordingly, the Board finds that appellant did not offer an acceptable reason for refusing an offer of suitable work in this case.

The Office contacted the employing establishment in April 1999 and confirmed that the offered job remained available. Appellant argues that the offered position could not be available because the employing establishment had, by letter dated February 1, 1999, removed appellant from employment as a maintenance worker. The removal from appellant's date-of-injury position does not preclude the employing establishment from continuing to offer appellant a suitable light-duty position. The employing establishment indicated that on April 27, 1999 the job remained available and there is no probative evidence refuting this conclusion.

[3] *Catherine G. Hammond*, 41 ECAB 375, 385 (1990); 20 C.F.R. § 10.517(a).

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

[5] *Id.*

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.5 (July 1997).

Based on the evidence of record the Board finds that the offered position was suitable, and appellant failed to offer an acceptable reason for refusing. The Office properly terminated appellant's compensation pursuant to 5 U.S.C. § 8106(c).

The decisions of the Office of Workers' Compensation Programs dated February 14, 2000 and April 27, 1999 are affirmed.

Dated, Washington, DC
October 9, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member