U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DARA D. TAUSCH and DEPARTMENT OF THE ARMY, DIRECTORATE OF CIVILIAN PERSONNEL, San Antonio, TX

Docket No. 01-1092; Submitted on the Record;
Issued July 15, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated her compensation for refusing an offer of suitable work; and (2) whether the termination of appellant's wage-loss compensation under 5 U.S.C. § 8106(c) serves as a bar to further compensation under section 8107 arising from the accepted employment injury.

On July 20, 1992 appellant, then a 27-year-old clerk typist, filed a traumatic injury claim (Form CA-1) alleging that she sustained injuries to her left foot and back on July 16, 1992 after moving and lifting various items after her office had been reconfigured. The Office accepted the claim for left foot sprain, left reflex sympathetic dystrophy, L5 nerve root irritation, nondiscogenic and authorized decompression with left lumbar fusion. On December 21, 1999 the Office issued appellant a schedule award for a 20 percent permanent impairment of the left lower extremity with the period of entitlement being November 8, 1998 to December 16, 1999.[1] The Office accepted appellant sustained a recurrence of disability beginning June 18, 1999 and placed her on automatic rolls for temporary total disability.

In progress notes dated March 24 and 28, 2000, Dr. Gilbert R. Meadows, an attending Board-certified orthopedic surgeon, released appellant to four hours of work per day. In the March 28, 2000 report, Dr. Meadows related going over with appellant her restrictions and ability to work four hours per day. He related to her that she was capable of performing a sedentary position for a maximum of four hours. Appellant's restrictions included 30 minutes of sitting, walking or standing, the ability to change positions as needed, no exposure to extreme hot or cold environments, scaffolding and heights, no lifting more than 10 to 15 pounds occasionally, no frequent lifting of more than 5 to 10 pounds, occasional climbing of stairs and limited overhead reaching. In concluding, Dr. Meadows stated that he had "no problem with her performing that level of activity" if a job could be found with the restrictions he noted. He also recommended that appellant continue with her disability retirement application. Regarding the

[1] Payment of appellant's schedule award was interrupted due to her being placed on the disability rolls.

proposed job description, Dr. Meadows concluded that she was capable of performing some of the duties, "but she needs to have the leniency described in the above restrictions."

In treatment notes dated March 30 and April 6, 2000, Dr. Salvador P. Baylan, a treating physiatrist, concluded that appellant was totally disabled.

In a work restriction form dated March 24 and April 11, 2000, Dr. Meadows indicated that appellant was capable of working four hours per day with restrictions on sitting, walking, standing, pushing, pulling, lifting, climbing and twisting.

In a memorandum of conference dated April 6, 2000, the Office detailed discussions with appellant, Dr. Meadows, the employing establishment and the Office regarding whether a suitable modified job could be offered to appellant. The employing establishment verified that it could offer appellant a job complying with her restrictions and noted that her job duties would be the same duties she had previously performed.

In an April 11, 2000 treatment note, Dr. Meadows clarified appellant's restrictions to include that she be given 10- to 15-minute breaks every hour and that she could only work 4 hours per day.

In an undated letter, the employing establishment offered appellant the position of secretary working four hours per day with a start date of May 15, 2000. The employing establishment noted the physical restrictions of the position included 30 minutes of sitting, walking or standing, the ability to change positions as needed, no exposure to extreme hot or cold environments, scaffolding and heights, no lifting more than 10 to 15 pounds occasionally, no frequent lifting of more than 5 to 10 pounds, occasional climbing of stairs and limited overhead reaching. Appellant's job duties were to be duties determined by her supervisor.

By letter dated May 16, 2000, the Office advised appellant that a suitable position was available and that, pursuant to section 8106(c)(2), she had 30 days to either accept the job or provide a reasonable, acceptable explanation for refusing the position. The Office stated that, if appellant refused the job or failed to report within 30 days without reasonable cause, it would terminate her compensation pursuant to 5 U.S.C. § 8106(c)(2).

By letter dated June 15, 2000, the Office again advised appellant that it had found that her reasons for refusing the position to be unacceptable and gave her an additional 15 days within which to respond. The Office noted no further reasons for refusing the position would be accepted and that, if she did not accept the position within 15 days, a final decision would be issued. Appellant accepted the position.

Dr. Meadows indicated that, in a July 25, 2000 treatment note, he did not believe appellant "should return to her job or the stressful environment that she was in with that job" and noted that she was capable of performing light to medium work at a point of time which would "be of her choosing."

On September 26, 2000 the Office referred appellant for vocational rehabilitation assistance.

In an undated letter, the employing establishment offered appellant the position of secretary working four hours per day with a start date of October 23, 2000.[2] The employing establishment noted the physical restrictions of the position included 30 minutes of sitting, walking, or standing, the ability to change positions as needed, no exposure to extreme hot or cold environments, scaffolding and heights, no lifting more than 10 to 15 pounds occasionally, no frequent lifting of more than 5 to 10 pounds, occasional climbing of stairs and limited overhead reaching. Appellant accepted the offer on October 25, 2000.

Dr. Meadows prescribed a comfort chair with no change in her restrictions on October 30, 2000.

By letter dated November 9, 2000, the employing establishment changed her start date to November 20, 2000 to ensure that all accommodations were in place.

On November 14, 2000 appellant declined the offered position.

By letter dated November 17, 2000, the Office advised appellant that a suitable position was available and that, pursuant to section 8106(c)(2), she had 30 days to either accept the job or provide a reasonable, acceptable explanation for refusing the position. The Office stated that, if appellant refused the job or failed to report within 30 days without reasonable cause, it would terminate her compensation pursuant to 5 U.S.C. § 8106(c)(2).

In a letter dated December 15, 2000, appellant indicated that she declined the position after talking with the employing establishment about the position.

By letter dated December 19, 2000, the Office again advised appellant that it had found that her reasons for refusing the position to be unacceptable and gave her an additional 15 days within which to respond. The Office noted no further reasons for refusing the position would be accepted and that, if she did not accept the position within 15 days, a final decision would be issued.

In a January 3, 2001 letter, appellant stated that she was "medically unfit to work" and she was going to "be taken off of any type of duty until I am physically able to work again."

By decision dated January 18, 2001, the Office terminated appellant's compensation effective January 28, 2001, finding that she refused an offer of suitable work. However, further medical treatment was authorized.

Appellant requested immediate payment of the remainder of her schedule award since her benefits had been terminated in a January 22, 2001 letter.

In a decision dated February 14, 2001, the Office informed appellant that she was not entitled to the remaining 68 days of her schedule award as the penalty provisions of section 8106(c) had been invoked which precluded payment.

[2] In a subsequent undated job offer, the employing establishment reissued the job offer noting a start date of November 13, 2000. The start date was later pushed back to November 20, 2000.

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

It is well settled that, once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[3] 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.

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.[4] To justify such a termination, the Office must show that the work offered was suitable.[5] An employee who refuses or neglects to work after suitable work has been offered to her has the burden of showing that such refusal to work was justified.[6]

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.[7]

The record demonstrates that the position of secretary offered appellant in an undated letter with a start date of May 15, 2000 was within the restrictions set forth by Dr. Meadows, appellant's attending Board-certified orthopedic surgeon. He restricted her to working 4 hours per day, with no lifting more than 10 to 15 pounds, occasional climbing of stairs, limited overhead reaching and no more than 30 minutes of sitting, walking or standing and the ability to change positions as needed. In subsequent undated letters, the employing establishment changed appellant's start date to October 23, 2000 and then later changed it to November 20, 2000. These job offers repeated the restrictions from the first offer and enumerated her duties.

In declining the position, appellant stated that she declined it after talking with the employing establishment and stating she was "medically unfit to work." The record is devoid of

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

[4] *Alfred Gomez*, 53 ECAB ___ (Docket No. 00-1817, issued October 9, 2001); *Henry P. Gilmore*, 46 ECAB 709 (1995).

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

[6] *Linda Hilton*, 52 ECAB ___ (Docket No. 00-2711, issued August 20, 2001); *Henry C. Garza*, 52 ECAB ___ (Docket No. 99-1074, issued January 10, 2001); *Catherine G. Hammond*, 41 ECAB 375, 385 (1990); 20 C.F.R. § 10.517(a).

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

any medical evidence supporting appellant's contention that she was unable to perform the offered position from a medical standpoint.

Consequently, the Office properly invoked the penalty provision of section 8106(c) of the Act in terminating appellant's wage-loss compensation benefits, effective January 21, 2001, on the grounds that the limited-duty job offer made to her was within her medical restrictions and was, therefore, properly determined to be suitable work.

The Board finds that the Office properly denied payment of the remaining 68 days of appellant's schedule award on the grounds that appellant forfeited her right to compensation under 5 U.S.C. § 8106(c).

In view of the Board's disposition on the issue whether the Office properly invoked the penalty provision of section 8106(c), the Board notes that section 8106(c) serves as a bar to receipt of further compensation under section 8107 of the Act for a period of disability arising from the accepted employment injury.[8] Thus, appellant was not entitled to wage-loss compensation for the claimed period remaining on her schedule award and the Office's denial of payment for the remaining 68 days on appellant's claim was justified.

The decisions of the Office of Workers' Compensation Programs dated February 14 and January 18, 2001 are hereby affirmed.

Dated, Washington, DC
July 15, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[8] 5 U.S.C. §§ 8106-8107; *see Armando D. Rodriguez*, 46 ECAB 721 (1995); *see also Merlind K. Cannon*, 46 ECAB 581 (1995).