U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DOUGLAS W. DUCKETT and U.S. POSTAL SERVICE,
POST OFFICE, Asheville, NC

Docket No. 02-776; Submitted on the Record;
Issued May 24, 2002

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective April 12, 2000 under section 8106(c) of the Federal Employees' Compensation Act, on the grounds that he refused an offer or suitable work.

The Office accepted that on December 28, 1999 appellant, then a 41-year-old manager of distribution operations at "Level 18," sustained an adult situational adjustment disorder with anxiety and depression causally related to a death threat against him by subordinate Michael Wayne Logan.[1] Appellant stopped work on December 29, 1999 and did not return.

Appellant submitted chart notes dated January 2000 to June 2001 from Dr. Frances Stroud, an attending clinical psychologist and Dr. Alan Krueger, an attending Board-certified psychiatrist, recommending that appellant be assigned to a different post office, away from the employee who threatened him.

[1] The Office initially denied appellant's emotional condition claim in a June 15, 2000 decision. By decision dated and finalized September 19, 2000, the Office hearing representative set aside the June 15, 2000 decision and accepted that appellant sustained an adjustment reaction with anxiety and depression causally related to the December 28, 1999 threat. In a March 2, 2001 investigative memorandum, the employing establishment asserted that appellant's character and veracity were questionable as he had omitted from his employment application that he had been arrested on two felonies in 1987 and had prior law enforcement experience. Appellant also failed to report on his claim form that he had been hospitalized for psychiatric illness in 1981 and received outpatient treatment for one year. In an April 6, 2001 memorandum, an Office hearing representative found that none of the investigative "information or evidence warrante[d] changing [his] decision of September 19, 2000. The hearing representative instead found that Mr. Logan's statement that he did not threaten appellant lacked credibility, as he was arrested on January 31, 1999 for DWI [driving while intoxicated], and on March 13, 1999 for assaulting a government official and convicted on both charges. Mr. Logan was also asked to leave the employing establishment on January 29, 2000 as he "smelled of alcohol and his words were slurred and he was too impaired to work."

In an April 25, 2000 letter, appellant accused the employing establishment of fraudulently digitizing his signature and appending it to documents relating to his claim.[2]

On November 22, 2000 the employing establishment offered appellant the position of supervisor of distribution operations, at Level 16 with "Saved Grade," at the Charlotte Processing and Distribution Center. The job was to begin on December 2, 2000. The offer noted that appellant "must be moved out of the Asheville area. No medical restrictions regarding days off or hours of duty." In an attached November 22, 2000 letter, the employing establishment offered "to relocate [appellant] to Charlotte, North Carolina."

In a November 25, 2000 letter, appellant alleged that effective October 21, 2000, his date-of-injury position was upgraded from "EAS Level 18 to a Level 20," and asserted his entitlement to this upgrade. In a November 29, 2000 letter, Brenda Hall, plant manager at the Asheville station, stated that appellant's date-of-injury position remained at EAS Level 18.

Appellant rejected this offer in a December 4, 2000 letter, as the offered position was at "SDO Level 16," whereas his date-of-injury position was at Level 18. Appellant also noted that there were "unofficial upgrades of the" managers of distribution operations at Asheville "from Level 18 to Level 20."

On December 4, 2000 the employing establishment offered appellant the position of manager of distribution operations, Level 18, at the employing establishment's Charlotte Processing and Distribution Center. The position was to begin on December 26, 2000. The offer complied with the restriction that appellant "must be moved out of the Asheville area. No medical restrictions requiring days off or hours of duty."

In letters dated December 8 and 14, 2000, appellant stated that he would not accept the Level 18 position as he felt he was entitled to a Level 20 position due to an October 7, 2000 upgrade. Appellant asserted that the Charlotte district managers were also responsible for his illness and that he would prefer to return to the Asheville facility.

In a January 8, 2001 letter, Dr. Krueger reviewed the December 4, 2000 job offer. He noted that appellant continued to manifest "an acute situational adjustment reaction with depressed mood, triggered by alleged threats … at his previous job location. Once removed from this perceived threat, his current situational adjustment reaction should resolve and, therefore, the new offering has the potential for providing this relief." Dr. Krueger noted, however, that appellant felt that "there may be unfair bias by persons in the Charlotte office, which if he were assigned there, it would exacerbate his symptoms." He concluded that as appellant's perceptions of possible bias were as yet unproven, he could "make no clinical objection to this reassignment at this time," noting that it would be optimal if appellant were

[2] In a September 5, 2000 letter, appellant requested that Ardine Harley, Jr., senior plant manager at the Charlotte processing and distribution center, offer him a manager of distribution operations position comparable to his date-of-injury job, preferably outside the Charlotte district.

assigned to a "location where no one directly supervising [him] would have had any involvement in actions pertaining to his previous employment situation."[3]

In a January 19, 2001 supplemental report, Dr. Krueger stated that appellant could not accept the offered position as it was in the Charlotte management district. He explained that "to the degree that [appellant] receives prejudice from the Charlotte division, he would be entering a 'hostile work environment' prolonging his situational adjustment reaction."

In a February 12, 2001 letter, the Office advised appellant that the December 4, 2000 offer was suitable work and that, if he refused it, his compensation benefits could be terminated. The Office noted that there was "no evidence to support [appellant's] contention of unfair bias at the Charlotte station." Appellant was afforded 30 days, in which to submit additional evidence or argument as to why the offered position was not suitable work.

Appellant responded by February 17, 2001 letter, rejecting the position as he felt he would be treated unfairly by the Charlotte district managers.

By letter dated March 19, 2001, the Office advised appellant that his reasons for refusing the offered position were insufficient. The Office afforded appellant 15 days, in which to accept the offered position, noting that no further reasons for refusing the offered position would be considered.

In a March 21, 2001 letter, appellant asserted that the Charlotte managers were "as responsible for [his] present condition as the threat maker," were "trying to get [him] in that position to hurt [him]," and forged documents related to his claim. Appellant alleged that Charlotte plant manager Mr. Harley did not respond to a letter, indicating hostility toward appellant. Appellant also alleged a conspiracy against him by the Office as his case was assigned to a different claims examiner on reconsideration and that claims examiners "over-rul[ed]" Dr. Krueger's opinion. Appellant also alleged that, on April 24, 2000, supervisor Ms. Hall falsely accused him of being absent without leave (AWOL).

By decision dated April 12, 2001, the Office denied appellant's claim for continuing compensation on the grounds that he had refused an offer of suitable work under section 8106(c) of the Act. The Office found that appellant had submitted no evidence substantiating any hostility, prejudice or discrimination by the Charlotte office. The Office characterized appellant's reasons for refusal as fear of future injury and a desire to work in a particular job or location, both noncompensable, self-generated reactions.

Appellant disagreed with this decision and in a May 3, 2001 letter, requested a review of the written record by a representative of the Office's Branch of Hearings and Review.[4]

[3] The record contains a January 10, 2001 Equal Employment Opportunity Commission (EEOC) acknowledgement and order regarding appellant's request for a hearing regarding the denial of his claims for discrimination. There is no final EEOC determination of record.

[4] In an April 18, 2001 letter to the Office, appellant stated that he accepted the offered position in Charlotte and requested relocation expenses.

Appellant asserted that he could not drive two-and-a-half hours from Asheville to Charlotte due to side effects from prescription Paxil and Diazepam. Alternatively, he asserted that the December 4, 2000 job offer was "fraudulent" as it was no longer available to him after the Office's April 12, 2000 decision and that he would not accept the position in Charlotte due to a managerial conspiracy against him.[5]

In a May 11, 2001 letter, Dan Pierce, a human resources manager at the Asheville office, noted that appellant remained in a leave without pay status. Mr. Pierce stated that appellant was eligible "to request noncompetitive reassignment to any position at the same or lower level that [he was] qualified for" and complied with the restriction against working in Asheville.[6] Mr. Pierce added in a May 18, 2001 letter, that appellant could also obtain a medical clearance to return to his former position, apply for disability retirement or resign.

In a May 28, 2001 letter, appellant stated that he would seek disability retirement. Mr. Pierce submitted June 29, 2001 documents supporting appellant's application. Appellant then accused the employing establishment, in a July 23, 2001 letter, of trying to force him into "medical retirement" through an "unreasonable job offer," asserted that he was never informed that he had to accept the job offer and requested $218,000.00 in relocation expenses. Appellant's application for Office of Personnel Management disability retirement was approved on August 28, 2001.

In an August 31, 2001 letter, the employing establishment explained that appellant was offered a position in Charlotte as it was the processing and distribution center closest to Asheville and "offered to relocate [appellant] to Charlotte, NC," but that "relocation was not the reason stated for [appellant]s refusal to accept the job offer." The employing establishment noted that appellant refused to accept the offer or inquire about relocation until after the Office's April 12, 2001 decision.

In a September 14, 2001 letter, appellant contended that the Hickory, North Carolina processing and distribution center was located only one hour east of Asheville, but was "totally overlooked, because it [fell] outside the immediate rule of those individuals seeking to further [his] afflictions." He alleged that Mr. Harley's lack of response to his April 17, 2001 letter constituted hostility against him.

By decision dated and finalized November 16, 2001, the Office hearing representative affirmed the April 12, 2001 decision, finding that appellant had refused an offer of suitable work. The hearing representative found that appellant remained entitled to continuing medical benefits for the accepted adjustment disorder. The hearing representative also found that appellant was not entitled to a Level 20 position as the upgrade occurred after he stopped work on December 29, 1999. The hearing representative further found that appellant had not established

[5] In a May 11, 2001 letter, the Office advised appellant that as the employing establishment had not terminated him, "it would be at their discretion" as to whether to pay his relocation expenses. The Office reiterated that as appellant refused the offer of suitable work, he was "no longer eligible for wage-loss compensation (even if the position is later accepted)…."

[6] Appellant responded by May 16, 2001 letter, characterizing Mr. Pierce as untruthful and a "stressor."

his allegations of hostility or prejudice by the Charlotte managers, or that he would be supervised by persons having knowledge of Mr. Logan's threat against him. The hearing representative noted that fear of future injury was not compensable. The hearing representative found that as appellant was not terminated from the employing establishment as of the April 12, 2000 decision, there was no provision for payment for relocation expenses under the Act. The hearing representative also found no administrative error regarding the Office's handling of appellant's case.

The Board finds that the Office properly terminated appellant's compensation benefits effective April 12, 2000 on the grounds that he refused an offer of suitable work under section 8106(c) of the Act.

Section 8106(c)(2) of the Act[7] provides in pertinent part, "A partially disabled employee who ... refuses or neglects to work after suitable work is offered ... is not entitled to compensation."[8] To prevail under this provision, the Office must show that the work offered was suitable and must inform the employee of the consequences of refusal to accept such employment. An employee who refuses or neglects to work after suitable work has been offered has the burden of showing that such refusal to work was justified.[9]

In this case, the record reflects that on December 4, 2000 the employing establishment offered appellant reemployment in a permanent, full-time position. There is nothing in the medical restrictions provided by Dr. Krueger in his January 8, 2001 report, or any other medical opinion at that time that would preclude appellant from performing the offered position. Accordingly, the Board finds that the medical evidence of record establishes that, at the time the job offer was made, appellant was capable of performing the position.[10]

The Board notes that in his January 19, 2001 supplemental report, Dr. Krueger stated that appellant could not accept the offered position as it was in Charlotte and appellant feared hostility or retaliation by the managers there. However, fear of future injury is not compensable.[11] Additionally, appellant did not submit any factual information to substantiate hostility, bias or a conspiracy against him by Charlotte personnel. Therefore, Dr. Krueger's January 19, 2001 opinion is not dispositive regarding the suitability of the offered position.

In order to effect proper termination of appellant's compensation under 5 U.S.C. § 8106, the Office must first provide appellant notice of its finding that an offered position is suitable. The Office must then give appellant an opportunity to accept or provide reasons for declining the position.[12] The record in this case indicates that the Office properly followed the procedural

[7] 5 U.S.C. §§ 8101-8193.

[8] 5 U.S.C. § 8106(c)(2).

[9] *See Michael I. Schaffer*, 46 ECAB 845 (1995).

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

[11] *Bonnie Goodman*, 50 ECAB 139 (1998).

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

requirements. The employing establishment offered appellant the Level 18 manager of distribution operations position on December 4, 2000. Appellant rejected the job offer by letters dated December 8 and 14, 2000, on the grounds that he wanted a Level 20 position and that the Charlotte managers were conspiring against him. Following appellant's rejection, by letter dated February 12, 2001, the Office advised appellant that a partially disabled employee who refused suitable work was not entitled to compensation, that the offered position had been found suitable and allotted him 30 days to either accept or provide reasons for refusing the position. By letter dated February 17, 2000, appellant stated that he rejected the December 4, 2000 offer as there was a conspiracy against him by various managers at the Charlotte office. By letter dated March 19, 2001, the Office advised appellant that the reasons given for not accepting the job offer were unacceptable. He was given an additional 15 days in which to respond. In a March 21, 2001 letter, appellant again rejected the December 4, 2000 offer of suitable work, alleging a conspiracy against him.

The Board finds that there is no evidence of a procedural defect in this case as the Office provided appellant with proper notice. The record, therefore, establishes that appellant was offered a suitable position by the employing establishment and such offer was refused. Therefore, under 5 U.S.C. § 8106(c), appellant's compensation was properly terminated effective April 12, 2001.

Given that the Office has shown that the position offered to appellant was suitable based on his medical situation at that time, the burden then shifted to appellant to show that his refusal to work in that position was justified.[13]

Appellant alleged that his refusal of the December 4, 2000 job offer was based partly on the Office's refusal to pay relocation expenses from Asheville to Charlotte. However, the record does not support this. Appellant did not raise the relocation issue until his April 18, 2001 letter, requesting relocation expenses, six days after the April 12, 2001 decision terminating his compensation benefits. Arguendo, in a November 22, 2000 letter accompanying the job offer, the employing establishment stated that it would relocate appellant from Asheville to Charlotte. Therefore, appellant's contention that he was unable to accept the offer of suitable work due to the cost of relocation is without merit.

Appellant also alleged that he refused the offered position due to a pattern of hostility, prejudice, bias or a conspiracy against him by managers at the Charlotte office. However, appellant has submitted no evidence indicating bias, hostility or prejudice toward him. In a September 14, 2001 letter, appellant contended that Mr. Harley, the Charlotte plant manager, demonstrated hostility toward him by failing to reply to his April 17, 2001 letter accepting the offered Level 18 position, written after the April 12, 2001 termination decision. However, the Board finds that Mr. Harley's lack of response is moot, as it occurred after the April 12, 2001 decision. Similarly, appellant alleged discrimination by Charlotte managers and submitted a January 10, 2001 acknowledgement regarding an EEOC hearing. However, there is no final determination of record finding any discrimination or wrongdoing toward appellant by any element of the employing establishment. Appellant also alleged, but did not provide factual

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

evidence to substantiate, that supervisor Ms. Hall falsely accused him of being AWOL. Therefore, appellant's assertion that he could not accept the offered position in Charlotte due to management hostility or conspiracy is without merit. Perceptions and feelings are not compensable without corroborating factual evidence substantiating those impressions.[14]

Alternatively, appellant alleged that he did not accept the offered position as he was unaware that he was obligated to accept it, provide sufficient reasons for refusal or face the termination of his compensation benefits. However, the Board finds that appellant received clear, explicit notice that the offer was suitable work and of the penalties for refusing the position in the Office's February 12 and March 19, 2001 letters. Appellant received those letters and responded to each of them with a detail rejection of the offered position. Appellant, therefore, seemed well aware of his obligation to respond to the Office's correspondence. Therefore, his assertion that he was unaware of his obligation to either accept the offered position or provide sufficient justification for refusal is utterly without merit.

As appellant failed to submit rationalized evidence supporting his refusal of the offered position, he failed to demonstrate that the termination of compensation on April 12, 2001 for refusal of suitable work was not justified.

The decisions of the Office of Workers' Compensation Programs dated November 16 and April 12, 2001 are hereby affirmed.

Dated, Washington, DC
May 24, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[14] *Bonnie Goodman*, *supra* note 11.