U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROL VAUGHN and U.S. POSTAL SERVICE,
POST OFFICE, Rancho Cucamonga, CA

Docket No. 03-232; Submitted on the Record;
Issued June 25, 2003

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation.

On December 1, 2000 appellant, then a 48-year-old modified mail carrier, filed a notice of occupational disease and claim for compensation (Form CA-1) alleging that, after returning to work in February 1999 after 14 years, her chronic low back pain became acute after repeatedly sitting, standing, reaching and bending for short periods of time. She further noted that she also developed pain in the cervical, thoracic and upper lumbar regions of her back. On March 21, 2001 the Office accepted appellant's claim for aggravation of lumbar herniated disc.

By letter dated August 1, 2001, the Office granted appellant's request for change of treating physician to Dr. Don R. DeFeo, a Board-certified neurosurgeon. In a medical report dated September 12, 2001, Dr. DeFeo noted that, in view of appellant's pain which was aggravated by significant activity, he would recommend a light-duty job or job retraining. He did not recommend that she return to heavy work. In a medical report dated September 26, 2001, Dr. DeFeo again noted that appellant should not return to her original position with the employing establishment. Dr. DeFeo indicated that appellant could return to light duty if it was available. He completed a work capacity evaluation indicating that appellant had a 15-pound lifting restriction and that she would "need to alternate her standing, walking and sitting as tolerated." He further noted that appellant's orthopedic physician would need to address her work status regarding her carpal tunnel condition. Finally, he stated that no further surgical efforts were needed at this time.

In an October 1, 2001 work capacity evaluation, Dr. DeFeo indicated that appellant could push, pull and lift 25 pounds. Dr. DeFeo reviewed a proposed job description from the employing establishment for a position as a video coding system technician. The job description indicated that the worker would read addresses into a headset microphone as individual pieces of mail were displayed on the screen. It indicated that appellant could sit or stand as needed for comfort. The description indicated that the work duties did not require use of the hands.

Dr. DeFeo marked the box indicating that appellant had no medical condition which would restrict her ability to perform the essential functions of this position.

On November 19, 2001 the employing establishment offered appellant a position as a modified position. The offer stated: "The duties of the proposed position are outlined on the attached job description and are in strict compliance with your medically defined work limitations. Your treating physician has found this job to be suitable." The job description associated with the offer is the video coding systems technician position reviewed by Dr. DeFeo. Appellant rejected this position, indicating that she did not feel that she was able to work eight hours a day with her back pain plus an additional two to three hours a day driving to the job.

By letter to appellant dated February 14, 2002, the Office noted that appellant had been offered a position as a video coding technician with the employing establishment and that the Office found that this position was suitable to her work capabilities. The Office gave appellant 30 days from the date of the letter to accept the position or provide an explanation for refusing it. The Office further noted that at the expiration of 30 days, a final decision on the issue would be made. Appellant did not respond to this letter.

By decision dated October 15, 2002, the Office terminated appellant's wage-loss compensation effective November 3, 2002. The Office noted that appellant had not returned to work as a video coding systems technician and had not responded to the Office's February 14, 2002 letter. The Office verified that the video coding systems technician position remained available as of October 9, 2002.

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

Once the Office accepts a claim it has the burden of proving that the employee's disability has ceased or lessened before it may terminate or modify compensation benefits. Section 8106(c)(2) of the Federal Employees' Compensation Act[1] provides that the Office may terminate compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.[2] The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.[3]

The implementing regulation provides that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of showing that such refusal or failure to work was reasonable or justified and shall be provided with the opportunity to make such a showing before entitlement to compensation is terminated.[4] To

[1] 5 U.S.C. § 8106(c)(2); *see also* 20 C.F.R. §§ 10.516, 10.517 (1999).

[2] *Dale K. Nunne*, 53 ECAB ___ (Docket No. 01-1374, issued February 14, 2002).

[3] *Stephen R. Lubin*, 43 ECAB 564 (1992).

[4] 20 C.F.R. §§ 10.516, 10.517 (1999).

justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of her refusal to accept such employment.[5]

In the instant case, the employing establishment offered appellant a position as a video coding technician, a position where appellant would read addresses into a microphone as individual pieces of mail were displayed on the computer screen.[6] The position description was reviewed by appellant's own physician, Dr. DeFeo, who indicated that there were no medical conditions which restricted appellant's ability to perform the essential functions of the position. By letter dated February 14, 2002, the Office indicated that the position of video coding systems technician was suitable to appellant's work capabilities; that the employing establishment confirmed that this position remains open, and that appellant had 30 days to either accept this position or provide an explanation for refusing it. The letter clearly stated that appellant's compensation benefits would be terminated if appellant's reasons for refusing the position were found to be unjustified.

Despite being informed of the consequences of her failure to respond to the Office's letter or accept the position, appellant failed to do either. As the position of video coding systems technician was determined to be within her restrictions by Dr. DeFeo and as appellant has failed to provide an explanation for refusing the offer of employment, the Office properly terminated benefits.[7]

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

[6] Although the offer listed the offered position as modified city carrier, the job description associated with this offer was that of video coding systems technician.

[7] *Id.*

The decision of the Office of Workers' Compensation Programs, dated October 15, 2002, is hereby affirmed.[8]

Dated, Washington, DC
June 25, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[8] The record also contains a January 15, 2003 decision, which the Office issued after appellant filed her appeal with the Board. It is well established that the Board and the Office may not have concurrent jurisdiction over the same case and those decisions that change the status of the decision on appeal are null and void. *Douglas E. Billings*, 41 ECAB 880, 895 (1990). The January 15, 2003 decision refusing to modify the prior decision is therefore null and void. The Board notes that in the January 15, 2003 decision the Office addressed additional evidence that was submitted after the October 15, 2002 decision. The Board has no jurisdiction to review this evidence; *see* 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 135 (1952).