U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SANDRA K. CUMMINGS and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, North Chicago, IL

Docket No. 03-101; Submitted on the Record;
Issued March 13, 2003

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 terminated appellant's compensation effective September 4, 2002 because she abandoned suitable work.

Appellant filed a traumatic injury claim on March 5, 2001 after she hurt her back lifting a patient. The Office accepted appellant's claim for a lumbar strain, herniated disc at L5-S1 and lumbosacral radiculopathy. Appellant, a nursing assistant, accepted a light-duty job and returned to work on April 13, 2001 for four days per week. She underwent physical therapy and continued on light duty. Appellant started working for five days per week on May 25, 2001. She continued to work until November 2, 2001 when the employing establishment fired her for cause.

On July 26, 2002 the Office issued a notice of proposed termination of compensation on the grounds that appellant had abandoned suitable work by being fired for cause.[1] On September 4, 2002 the Office terminated appellant's compensation, effective that day, on the grounds that she had forfeited her right to continuing wage-loss or schedule award benefits.[2]

The Board finds that the Office failed to meet its burden of proof in terminating appellant's compensation on the grounds that she abandoned suitable work.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation, including cases in which the Office terminates compensation under section 8106(c) for refusal to accept suitable work.[3]

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[1] Appellant was fired for falsifying documents regarding employment experience that would have allowed her to take the examination for certification as a vocational nurse.

[2] Appellant obtained employment in the private sector on January 6, 2002.

[3] 5 U.S.C. § 8106(c); *Henry W. Sheperd, III*, 48 ECAB 382, 385 (1997); *Shirley B. Livingston*, 42 ECAB 855,

Under section 8106(c)(2) of the Federal Employees' Compensation Act,[4] the Office may terminate compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[5] However, to justify such termination, the Office must show that the work offered was suitable,[6] and must inform the employee of the consequences of a refusal to accept employment deemed suitable.[7]

Section 10.516 of the Code of Federal Regulations states that the Office will advise the employee that the work offered is suitable and provide 30 days for the employee to accept the job or present any reasons to counter the Office's finding of suitability.[8] Thus, before terminating compensation, the Office must review the employee's proffered reasons for refusing or neglecting to work.[9] If the employee presents such reasons and the Office finds them unreasonable, the Office will offer the employee an additional 15 days to accept the job without penalty.

Once the Office establishes that the work offered was suitable, the burden of proof shifts to the employee who refuses to work to show that such refusal or failure to work was reasonable or justified.[10] The issue of whether an employee has the physical ability to perform the duties of the position offered is a medical question that must be resolved by medical evidence.[11]

In this case, appellant accepted a light-duty job on April 17, 2001. She started working four days per week but increased to five days per week as of May 25, 2001 and used leave without pay for her prescribed therapy. Appellant completed a functional capacity evaluation on July 9, 2001, which found her capable of light physical work. Her treating physician, Dr. Shakuntala Chhabria, Board-certified in neurology, released her to work with permanent work restrictions on July 26, 2001. Appellant claimed wage-loss compensation for several days of work missed due to back pain and the Office paid benefits as appropriate.

The employing establishment advised the Office on October 30, 2001 that appellant would be fired because she had falsified employment documents. The employing establishment added that the firing had nothing to do with her work-related injuries and appellant would have

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861 (1991).

[4] 5 U.S.C. § 8106(c)(2).

[5] *Martha A. McConnell*, 50 ECAB 129, 131 (1998).

[6] *Marie Fryer*, 50 ECAB 190, 191 (1998).

[7] *Ronald M. Jones*, 48 ECAB 600, 602 (1997).

[8] 20 C.F.R. § 10.516.

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

[10] 20 C.F.R. § 10.517(a); *Deborah Hancock*, 49 ECAB 606, 608 (1998).

[11] *Marilyn D. Polk*, 44 ECAB 673, 680 (1993).

continued on light duty until a permanent position that met her restrictions became available. The employing establishment asked the Office to deny any further compensation. The nurse practitioner assigned to appellant closed her file on November 9, 2001 due to appellant's termination by the employing establishment.

In issuing its proposed notice of termination, the Office stated that the employing establishment had accommodated appellant's restrictions and would have offered a permanent job if she had not removed herself from the realm of permanent employment. The Office stated that appellant had offered no explanation justifying her abandonment of the limited duties she had been performing and stated that she had unreasonably abandoned suitable work.

In its September 4, 2002 termination, the Office stated that appellant had the burden to show that suitable limited duties were not available and reiterated its conclusion that she had abandoned suitable work pursuant to section 8106(c)(2).

The Board finds that the Office has not established that appellant abandoned suitable work and was thus not entitled to compensation.

The Office's procedure manual provides guidelines pertaining to the development of claims where a claimant stops work after reemployment. If no formal wage-earning capacity determination is issued following reemployment, the Office is to consider whether the reasons for stopping work amount to a recurrence of disability.[12] Where a claimant returns to a light-duty job, the employee must thereafter show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements to support continuing disability.[13]

To determine whether a claimant has abandoned suitable work, the procedure manual notes that the claims examiner is to make a finding of suitability, advise the claimant that the job is suitable and allow 30 days for submission of evidence or reasons for abandoning the job.[14] Following the submission of a claimant's response, the procedure manual directs that the claims examiner is to determine whether the reasons for stopping work are valid. If the reasons for abandoning the job are not deemed justified, the claimant must be so advised and allowed 15 additional days to return to work.[15] The imposition of section 8106(c), a penalty provision, is premised on the fact that suitable work remains available and the job held open during the required notice period.

In instances where a reemployed claimant is removed from work, the procedure manual notes that such occurrences are not considered recurrences of disability.[16] Rather, the claims

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9 (December 1995).

[13] *See Terry R. Hedman*, 38 ECAB 222 (1986).

[14] Federal (FECA) Procedure Manual, *supra* note 12 at Chapter 2.814.10.

[15] *Id*. at Chapter 2.814.10(e)(1).

[16] *Id.* at Chapter 2.814.12.

examiner is directed to take action as to whether a retroactive wage-earning capacity determination is appropriate.[17]

The July 26, 2002 notice of proposed termination and the September 4, 2002 termination decision of the Office do not comport with the above procedural requirements nor properly invoke the penalty provision of section 8106(c). Termination of an employee for cause is not an appropriate ground on which to invoke the penalty provision. Appellant returned to light-duty work on April 17, 2001 and was working five days with restrictions as of May 25, 2001. At no time did the Office determine that the position held by appellant constituted suitable work under section 8106(c). Following her termination from the employing establishment on November 2, 2001, the Office noted that appellant secured work at a private hospital on January 6, 2002 with annual wages of approximately $28,093.26 per year. While there is ample evidence to support adjudication of a wage-earning capacity, the invocation of section 8106(c) under the facts of this case constituted error. There remained no position at the employing establishment to which appellant could return or which could be found suitable.

The September 4, 2002 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, DC
March 13, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[17] *Id*. at Chapter 2.814.12(b).