

**United States Department of Labor
Employees' Compensation Appeals Board**

_____)
CHARLOTTE J. CLOVER, Appellant)
)
and) **Docket No. 04-767**
) **Issued: December 16, 2004**
)
DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS ADMINISTRATION MEDICAL)
CENTER, Tucson, AZ, Employer)
_____)

Appearances:
Daniel M. Goodkin, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On February 6, 2004 appellant filed a timely appeal from a September 18, 2003 decision of the Office of Workers' Compensation Programs which denied modification of a July 18, 2002 decision terminating her compensation benefits on the basis that she abandoned suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation on the grounds that she abandoned suitable work.

FACTUAL HISTORY

On July 2, 1986 appellant, then a 43-year-old nurse, filed a traumatic injury claim alleging that on June 4, 1986 she slipped on a floor and injured her left knee and hip. The Office accepted the claim for a left knee contusion, bursitis of the left knee and hip and expanded this to

include reflex sympathetic dystrophy of the left knee. The Office authorized removal of the bursa and lipoma of the left knee, which occurred on August 11, 1988. Appellant stopped work on June 5, 1986 and received compensation on the periodic rolls.

Appellant came under the care of Dr. Randall S. Prust, a Board-certified orthopedic surgeon, for treatment of her work injury. In reports dated June 1 and July 24, 2000, he opined that she could return to work eight hours per day subject to permanent restrictions of no kneeling, crawling or squatting, standing limited to 1 hour at a time up to 3 hours per day, lifting up to 10 pounds frequently and 20 pounds occasionally, walking up to ¼ mile at a time with a 1½ mile per day maximum. Dr. Prust noted that appellant was opposed to returning to work and requested a change in physicians. He referred her to Dr. Jeannette Wendt, a Board-certified neurologist, for treatment.

Appellant was referred for vocational rehabilitation on July 13, 2000.

On December 6, 2000 the employing establishment offered appellant a full-time position as a medical clerk. The position entailed administrative duties including receiving patients either in person or on the telephone, scheduling appointments, providing instructions and maintaining administrative files. The physical requirements of the sedentary position included intermittent sitting, standing for short periods of time not to exceed one hour at a time, walking for short distances not to exceed a total of one quarter mile distance, no kneeling, squatting, climbing of stairs or crawling. The tour of duty was from 3:30 p.m. to 12:00 a.m. On December 19, 2000 appellant accepted the position, however, she noted that she would prefer a day shift because her medication caused drowsiness in the evenings. She also indicated that she feared the possibility of physical abuse by mentally ill patients working the psychiatric unit. Appellant requested that she delay her start time for one week.

In a January 11, 2001 letter, the Office advised appellant that the job offer constituted suitable work. She was informed that she had 30 days to either accept the position or provide an explanation of the reasons for refusing it; otherwise, she risked the termination of her compensation benefits. The employing establishment noted that appellant's concerns regarding her medication causing drowsiness in the evenings was irrelevant as the medication was prescribed for a nonwork-related injury. The employing establishment also noted that her fear of potential physical abuse while working in a psychiatric unit was prophylactic in nature. The employing establishment agreed to delay appellant's return to work until January 16, 2001.

Appellant returned to work on January 16, 2001 and stopped work on January 17, 2001 due to a swollen left leg.

On January 31, 2001 appellant submitted a report from Dr. Wendt dated January 11, 2000. She noted a history of appellant's work-related injury on June 4, 1986 and diagnosed reflex sympathetic dystrophy. She advised that appellant attempted to return to work on several occasions without success due to an increase in pain with activity. On February 15, 2001 appellant submitted a second report from Dr. Wendt dated January 18, 2001. She noted that appellant returned to work on January 16, 2001 and was unable to continue because of a marked increase in pain and swelling of the left leg when she was walking, climbing stairs and

sitting for prolonged periods of time at the computer. Dr. Wendt diagnosed marked exacerbation of her left leg pain related to reflex sympathetic dystrophy after an attempt to return to work.

In reports dated February 2 to April 18, 2001, the vocational rehabilitation counselor noted that appellant returned to work on January 16, 2001 and stopped work on January 17, 2001 due to a swollen left leg. The counselor noted that appellant sought treatment from Dr. Wendt on January 18, 2001.

In a letter dated February 20, 2001, the Office advised appellant that she discontinued a good faith participation in an Office approved job placement program. The Office indicated that the medical and factual evidence demonstrated that she was able to perform the duties of a medical clerk and that, while she accepted the position, she subsequently abandoned the position after working only one day. The Office further noted that the evidence indicated a possibility of a recurrence of injury in her case and if this was the case she should file a notice of recurrence of disability with supporting medical evidence. The Office allowed appellant 30 days to either return to work or provide an explanation for abandoning the position. Additionally, the Office advised appellant of the consequences under 5 U.S.C. § 8106(c)(2) of refusing an offer of suitable work.

On February 26, 2001 appellant, through her attorney submitted a letter to the Office indicating that she returned to work and lasted one and a half days before experiencing an exacerbation of reflex sympathetic dystrophy. She requested that the condition of reflex sympathetic dystrophy be accepted by the Office as causally related to her work-related injury in 1986.

In a decision dated May 16, 2001, the Office terminated appellant's compensation under section 8106(c) on the grounds that she abandoned suitable work. The Office noted that the medical evidence was insufficient to support that her condition of reflex sympathetic dystrophy was causally related to her work-related injury and was insufficient to support her return to total or partial temporary disability following her return to work on January 16, 2001.

In a letter dated June 1, 2001, appellant requested a hearing before an Office hearing representative, which was held on December 4, 2001. Her attorney submitted a post-hearing brief and argued that the Office improperly terminated appellant's compensation for abandonment of suitable work.

In a decision dated July 18, 2002, the hearing representative affirmed the May 16, 2001 decision, noting that appellant abandoned suitable work and did not properly justify her work stoppage on January 17, 2001. The hearing representative found that the report submitted by Dr. Wendt on January 18, 2001 was insufficient to support a diagnoses of reflex sympathetic dystrophy and that Dr. Wendt was not recognized as appellant's treating physician. However, the hearing representative remanded the matter to the Office for further development of the issue of whether appellant had reflex sympathetic dystrophy and whether such condition was causally related to her work-related injury of June 4, 1986.

The Office subsequently referred appellant to Dr. Boris Stojic, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated September 13, 2002,

Dr. Stojic discussed appellant's history of work injury and the medical record. Upon physical examination, he noted marked tenderness on palpation in the medial compartment and the area of the pes anserine bursa and noted that appellant was hyperesthetic to very light touch on the entire left leg. Dr. Stojic diagnosed reflex sympathetic dystrophy of the left knee and opined that this condition was medically connected to the accepted work-related injury. He noted that appellant's subjective complaints correlated with the physical findings on examination and were conclusive of the diagnosis of reflex sympathetic dystrophy, which was a complication causally related to the accident of June 4, 1986.

Appellant submitted reports from Dr. Wendt dated September 24, 2001 to May 10, 2002, who noted continued treatment for reflex sympathetic dystrophy.

In a decision dated October 8, 2002, the Office accepted that appellant developed reflex sympathetic dystrophy of the left knee as work related.

In a letter dated January 30, 2003, appellant, through her attorney, requested reconsideration of the Office decision dated July 18, 2002, contending that the Office improperly terminated her compensation for abandonment of suitable work.

In a decision dated April 29, 2003, the Office denied modification of the July 18, 2002 decision.

By letters dated August 18 and September 2, 2003, appellant requested reconsideration and argued that the Office did not properly terminate her benefits. She noted that, after she stopped work on January 17, 2001, the Office did not provide her with the mandatory notice advising her that she could return to her position without penalty within 15 days. Appellant also submitted a report from Dr. Wendt dated May 29, 2003 which advised that she had been treating appellant since January 11, 2000 for reflex sympathetic dystrophy. She noted that she was not appellant's treating physician and, therefore, she did address appellant's ability to work in her previous reports. However, Dr. Wendt prepared a work capacity evaluation and noted that appellant was totally disabled from work in any capacity.

In a decision dated September 18, 2003, the Office denied modification of the April 29, 2003 decision.

LEGAL PRECEDENT

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.¹ Section 8106(c)(2) of the Federal Employees' Compensation Act² provides that the Office may terminate the compensation of a disabled employee who refuses or neglects to work after suitable

¹ *Karen L. Mayewski*, 45 ECAB 219, 221 (1993); *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

² 5 U.S.C. §§ 8101-8193 (1974); 5 U.S.C. § 8106(c)(2).

work is offered to, procured by or secured for the employee.³ The Board has recognized that section 8106(c) is a penalty provision which must be narrowly construed.⁴

The Board has held that due process and elementary fairness require that the Office observe certain procedures before terminating a claimant's monetary benefits under section 8106(c)(2) of the Act.⁵ Section 10.516 of the Office's 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.⁶ Thus, before terminating compensation, the Office must review the employee's proffered reasons for refusing or neglecting to work.⁷ 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.⁸

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.⁹ The determination of whether an employee is physically capable of performing a modified position is a medical question that must be resolved by medical evidence.¹⁰ Office procedures state that acceptable reasons for refusing an offered position include medical evidence of inability to do the work or travel to the job.¹¹ Furthermore, if medical reports document a condition which has arisen since the compensable injury and the condition disables the employee, the job will be considered unsuitable.¹²

ANALYSIS

The Office failed to provide appellant proper notice prior to terminating compensation pursuant to 5 U.S.C. § 8106(c)(2). In the instant case, the Office advised appellant on January 11, 2001 that the offered position of medical clerk was deemed suitable for her work capabilities. Additionally, the Office informed her of the consequences under 5 U.S.C. § 8106(c)(2) of refusing an offer of suitable work.

³ *Camillo R. DeArcangelis*, 42 ECAB 941, 943 (1991).

⁴ *Steven R. Lubin*, 43 ECAB 564, 573 (1992).

⁵ *Supra* note 2; *see also Maggie L. Moore*, 42 ECAB 484 (1991), *aff'd on recon.*, 43 ECAB 818 (1992); *see also Linda Hilton*, 52 ECAB 476 (2001).

⁶ 20 C.F.R. § 10.516.

⁷ *See Maggie L. Moore*, *supra* note 5.

⁸ 20 C.F.R. § 10.516. *See Sandra K. Cummings*, 54 ECAB ____ (Docket No. 03-101 issued March 13, 2003).

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

¹⁰ *See Robert Dickerson*, 46 ECAB 1002 (1995).

¹¹ *Id.*

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(5) (July 1996); *see Susan L. Dunnigan*, 49 ECAB 267 (1998).

Appellant returned to work on January 16, 2001 and stopped work January 17, 2001 after working approximately one day. She stopped work for medical treatment and submitted supporting medical reports indicating that she was physically unable to work due to her diagnosed condition of reflex sympathetic dystrophy. Appellant was treated by Dr. Wendt on January 18, 2001. The physician noted her return to work on January 16, 2001 and stated that appellant was unable to continue work because of a marked increase in pain and swelling of the left leg while walking, climbing stairs and sitting for prolonged periods of time at the computer. Dr. Wendt diagnosed marked a exacerbation of her left leg pain related to reflex sympathetic dystrophy after an attempt to return to work.

In a letter dated February 20, 2001, the Office allowed appellant 30 days to either return to work or provide an explanation for abandoning the position. She responded on February 26, 2001 indicating that she returned to work and only lasted one and a half days before experiencing and exacerbation of reflex sympathetic dystrophy. Appellant requested that her condition of reflex sympathetic dystrophy be accepted by the Office as causally related to her work-related injury in 1986. However, the Office did not make a determination that the reasons were unacceptable prior to terminating compensation, nor did it notify appellant that she had 15 days in which to accept the offered work without penalty.

Appellant's January 17, 2001 work stoppage does not constitute a refusal of suitable work. She accepted the position, returned to work and, thereafter, stopped work on January 17, 2001 based on an exacerbation of reflex sympathetic dystrophy. The Office failed to provide appropriate notice to appellant prior to terminating compensation.¹³ While the Office followed proper procedures in offering the suitable work position to appellant,¹⁴ it did not complete the procedures necessary to establish that she abandoned suitable work.¹⁵ After its February 20, 2001 letter advising appellant that she had 30 days to either return to work or provide an explanation for abandoning the position, the Office, after receiving appellant's reasons for stopping work, did not allow her 15 days in which to return to work before terminating her monetary benefits. The Office's procedure manual provides that, if the abandonment of the job is not deemed justified, the Office must so advise the claimant "and allow 15 additional days to return to work."¹⁶ After appellant submitted additional medical evidence in support of her work stoppage on February 26, 2001 the Office did not determine whether the reasons were unacceptable, nor did it notify appellant that she had 15 days in which to accept or refuse the position prior to terminating compensation.¹⁷ The Board finds that the Office improperly terminated appellant's compensation.

¹³ *William M. Bailey*, 51 ECAB 197, 200 (1999).

¹⁴ *See* 20 C.F.R. § 10.516 (1999).

¹⁵ *Mary G. Allen*, 50 ECAB 103, 106 (1998).

¹⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.10(e)(1) (July 1996). *See also Sandra K. Cummings*, *supra* note 8.

¹⁷ *Id.*

CONCLUSION

The Board finds that the Office improperly terminated appellant's compensation on the grounds that she abandoned suitable work.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 18, 2003 is reversed.

Issued: December 16, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member