

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

MICHAEL FAULHABER, Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Seminole, FL, Employer**

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**Docket No. 04-344
Issued: May 17, 2004**

Appearances:

*Dean Albrecht, for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On November 24, 2003 appellant filed a timely appeal from an October 30, 2003 decision of the Office of Workers' Compensation Programs terminating his compensation benefits on the grounds that he refused an offer of suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this case. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision; therefore, the Board is unable to review evidence submitted by appellant for the first time on appeal.¹

ISSUE

The issue is whether the Office properly terminated appellant's compensation on the grounds that he refused an offer of suitable work.

¹ 5 U.S.C. § 501.2(c).

FACTUAL HISTORY

On September 17, 2001 appellant, then a 45-year-old nurse, filed a traumatic injury claim alleging that on September 15, 2001 a patient punched him in the right shoulder and then threw him down on his right shoulder. The Office accepted the claim for contusions of the right shoulder, upper arm and a right rotator cuff sprain/strain. Appellant stopped work on September 15, 2001. He began receiving compensation for total disability on the periodic rolls effective November 1, 2001.

Appellant came under the care of Dr. Robert L. Swiggett, Jr., a Board-certified orthopedic surgeon, for treatment of the work injury. In reports dated November 1 and December 7, 2001, he opined that appellant was totally disabled for regular duty until such time that he was able to undergo arthroscopic surgery to repair a right rotator cuff tear. Although the Office authorized surgery, appellant did not undergo surgery due to complications from a respiratory infection, pulmonary edema and hypertension.

On April 16, 2002 the employing establishment offered appellant a full-time limited-duty position as a telephone nurse. The physical requirements of the position included intermittent sitting, standing, walking, simple grasping and fine manipulation. Dr. Swiggett signed a copy of the job description on April 8, 2002 finding that appellant was able to perform the physical requirements of a telephone nurse.

In a May 6, 2002 letter, the Office advised appellant that the job offer constituted suitable work. He was informed that he had 30 days to either accept the position or provide an explanation of his reasons for refusing it; otherwise, he risked termination of his compensation benefits.

On May 31, 2002 the Office received a facsimile transmission of a May 1, 2002 report from Dr. Walter E. Afield, a Board-certified psychiatrist, who diagnosed a depressive disorder, post-traumatic stress disorder, a right rotator cuff tear and chronic pain. He opined that appellant's depression was related to his work injury. Dr. Afield noted that appellant was unable to return to his prior job as a critical care nurse since his depression prevented him from making crucial decisions and his short attention span posed a danger to himself and others. He signed a copy of the job offer stating that appellant was not able to perform the physical requirements of a telephone nurse. Dr. Afield stated that appellant was not able to do anything.

On June 6, 2002 the Office advised appellant that it had received a billing from the Office of Dr. Afield and had not received a response to the job offer. It found the position of a telephone nurse was suitable work and he was given 15 additional days to accept the job offer.

In a June 14, 2002 letter, appellant, by counsel, informed the Office that he was unable to accept the job because of his emotional condition. He submitted a copy of an April 23, 2002 letter to verify that he had been referred by Dr. Gerald Ciemaga to Dr. Afield for a mental health assessment.

The Office subsequently referred appellant to Dr. Bala K. Rao, a Board-certified psychiatrist, for a second opinion evaluation. In a report dated August 7, 2002, he discussed appellant's history of work injury and the medical record. He noted that appellant described being depressed, experienced difficulty sleeping due to pain and had nightmares about his attack. The diagnosis was listed as adjustment disorder with depressive features and post-traumatic stress disorder. Dr. Rao opined that none of appellant's psychiatric symptoms disabled him from performing work as a primary triage nurse answering telephones.

In an office note dated July 1, 2002, Dr. Afield reported that appellant did not like his medication and that he had "taken care of his problems surgically." He expressed surprise that appellant wanted to go back to work, but stated that it was in his best interest.

In a decision dated August 28, 2002, the Office determined that the medical evidence of record failed to establish a causal relationship between appellant's emotional condition and his accepted work injury. The Office noted that Drs. Swiggett and Rao had approved him for the job of a telephone nurse. The Office terminated appellant's compensation on the grounds that he refused an offer of suitable work. The termination was to be effective September 8, 2002.

By letter dated August 1, 2003, appellant requested reconsideration alleging that he never received a copy of the Office's August 28, 2002 decision. He further stated that he reported to the employing establishment on September 6, 2002 to accept the job offer but was told that the position was no longer available. Appellant also submitted a request for an oral hearing, CA-7 claims for compensation, medical progress notes covering the period of August 14, 2002 to June 18, 2003, medical reports from Dr. Afield dated September 13, November 22 and December 31, 2002 and February 18, March 26 and June 26, 2003, a prescription slip dated January 27, 2003 on which Dr. Afield stated that he was disabled and unable to work at his employment, an investigative report dated August 5, 2003 pertaining to an Equal Employment Opportunity (EEO) complaint filed by appellant against the employing establishment and an October 24, 2003 letter from Connie Blackburn.

In a decision dated October 30, 2003, the Office denied modification of the August 28, 2002 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.² Section 8106(c)(2) of the Federal Employees' Compensation Act³ provides that the Office may terminate the compensation of a disabled employee who refuses or neglects to work after suitable

² *Karen L. Mayewski*, 45 ECAB 219, 221 (1993); *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

³ 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.⁴ The Board has recognized that section 8106(c) is a penalty provision which must be narrowly construed.⁵

Section 10.516 of the implementing regulation⁶ provides in pertinent part:

“[The Office] shall advise the employee that it has found the offered work to be suitable and afford the employee 30 days to accept the job or present any reasons to counter [the Office’s] finding of suitability. If the employee presents such reasons, and [the Office] determines that the reasons are unacceptable, it will notify the employee of that determination and that he or she has 15 days in which to accept the offered work without penalty. At that point in time, [the Office’s] notification need not state the reasons for finding that the employee’s reasons are not acceptable.”⁷

Section 10.517 of the regulation⁸ further provides:

“(a) 5 U.S.C. 8106(c) provides that a partially disabled employee who refuses to seek suitable work or refuses to or neglects to work after suitable work is offered to or arranged for him or her, is not entitled to compensation. An employee who refuses or neglects to work after suitable work has been offered or secured for him or her has the burden to show that this refusal or failure to work was reasonable or justified.”

(b) After providing the two notices described in [section] 10.516, [the Office] will terminate the employee’s entitlement to further compensation under 5 U.S.C. 8105, 8106 and 8107, as provided by 5 U.S.C. 8106(c)(2). However, the employee remains entitled to medical benefits as provided by 5 U.S.C. 8103.”⁹

ANALYSIS

In this case, appellant was offered a job as a telephone nurse on April 16, 2002. The record reflects that his treating physician, Dr. Swigget, approved the position as within appellant’s medical restrictions and the Office advised him on May 6, 2002 that the job was considered to be suitable work. The Board finds that the Office properly advised appellant that it had found the offered work to be suitable and afforded him 30 days to accept the job or present any reasons to counter the Office’s finding of suitability. The record indicates that appellant

⁴ *Camillo R. DeArcangelis*, 42 ECAB 941, 943 (1991).

⁵ *Steven R. Lubin*, 43 ECAB 564, 573 (1992).

⁶ 20 C.F.R. § 10.516(a).

⁷ *Id.*

⁸ 20 C.F.R. § 10.517(a)(b).

⁹ *Id.*

provided a letter to counter the Office's finding of suitability from his treating physician. On May 31, 2002 the Office received a facsimile transmission of a May 1, 2002 report from Dr. Afield, who diagnosed depressive disorder, post-traumatic stress disorder, a right rotator cuff tear and chronic pain. He opined that appellant's depression was related to his work injury. Dr. Afield described that appellant was unable to return to his prior job as a critical care nurse since his depression prevented him from making crucial decisions and his short attention span posed a danger to himself and others. He signed a copy of the job offer, stating that appellant was not able to perform the physical requirements of a telephone nurse. Dr. Afield stated that appellant was not able to do anything. The Federal (FECA) Procedure Manual provides:

“[I]f medical reports in the file document a condition which has arisen since the compensable injury and this condition disables the claimant from the offered job, the job will be considered unsuitable (even if the subsequently-acquired condition is not work related).”¹⁰

After further development of the case, which included referring appellant to an Office referral physician, Dr. Rao, the Office failed to extend appellant another 15 days to accept the offer prior to termination on August 28, 2002.

In the case of *Maggie L. Moore*,¹¹ the Board held that, when the Office makes a preliminary determination of suitability and extends the claimant a 30-day period either to accept or to give reasons for not accepting, the Office must consider any reasons given before it can make a final determination on the issue of suitability. Should the Office find the reasons unacceptable, it may finalize its preliminary determination of suitability, but it may not invoke the penalty provision of 5 U.S.C. § 8106(c) without first affording the claimant an opportunity to accept or refuse the offer of suitable work with notice of the penalty provision. FECA Bulletin No. 92-19, issued on July 31, 1992 adapted Office procedure to comply with the Board's ruling in *Moore*. The bulletin provides that, if the reasons given for refusal are considered unacceptable, the claimant will be informed of this by letter, given 15 days from the date of the letter to accept the job and advised that the Office will not consider any further reasons for refusal. If the claimant does not accept the job within the 15-day period, compensation, including schedule award payments, will be terminated under 5 U.S.C. § 8106(c).¹²

The Office did not follow these procedures and; therefore, did not afford appellant the protections set forth in *Moore*.¹³ The Office gave appellant a reasonable opportunity to accept the offer of employment and notified him of the penalty provision of 5 U.S.C. § 8106(c), however, it failed to properly consider his reasons for refusing and his nonemployment-related

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b) (December 1993).

¹¹ *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992); *see also Linda Hilton*, 52 ECAB 476 (2001).

¹² See 20 C.F.R. §§ 10.516-517; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(d), 2.814.5(d)(1) (July 1997).

¹³ *See Maggie L. Moore*, *supra* note 11.

emotional condition in determining suitability of employment before issuing the notice of termination of June 6, 2002. Additionally, after further development of the case which included sending appellant for a second opinion examination, the Office did not extend him another 15 days to accept the offer¹⁴ and terminated his compensation on August 28, 2002.

CONCLUSION

The Board finds that the Office did not meet the burden of proof in terminating appellant's disability compensation for refusal of suitable employment. Therefore, the Board finds that the Office improperly invoked the penalty provision of 5 U.S.C. § 8106(c).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Worker's Compensation Programs dated October 30, 2003 is reversed.

Issued: May 17, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

¹⁴ See *Linda Hilton*, *supra* note 10.