United States Department of Labor
Employees' Compensation Appeals Board

MARGO L. STOKES, Appellant	)	
and	)	**Docket No. 05-305**
	)	**Issued: July 14, 2005**
DEPARTMENT OF HOUSING & URBAN DEVELOPMENT, REGIONAL OFFICE, New York, NY, Employer	)	

Appearances:
Margo L. Stokes, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 15, 2004 appellant filed a timely appeal of an August 13, 2004 decision of the Office of Workers' Compensation Programs, denying modification of an April 21, 2004 decision terminating appellant's compensation on the grounds that she refused an offer of suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office met its burden of proof to terminate compensation pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On March 16, 1994 appellant, then a 41-year-old legal technician, filed a traumatic injury claim (Form CA-1) alleging that she sustained injuries when an elevator stopped between floors and then dropped to the next floor. The Office accepted lumbosacral sprain, lumbar sprain and

bilateral knee and thigh contusions. Appellant returned to light-duty work at three days per week on October 4, 1994. By decision dated March 13, 1995, the Office determined that actual earnings fairly and reasonably represented her wage-earning capacity, and reduced her compensation. Appellant continued to receive compensation based on loss of wage-earning capacity.

On July 11, 2003 the Office referred appellant, along with medical records and a statement of accepted facts, to Dr. Lester Lieberman, an orthopedic surgeon.[1] In a report dated August 8, 2003, Dr. Lieberman provided a history and results on examination. He diagnosed "lumbar sprain superimposed on lumbosacral degenerative condition, which is an acceleration of the degenerative condition," and bilateral knee sprain that also was an acceleration of a degenerative knee condition. He opined that appellant was able to work full time, and completed a work capacity evaluation (Form OWCP-5c) providing work restrictions. The restrictions included two hours per day of bending/stooping, and a five-pound lifting restriction.

On February 9, 2004 the employing establishment offered appellant a full-time position as a modified legal technician position with no lifting, pushing or pulling over 5 pounds, no squatting, kneeling, climbing or bending, and a 15-minute break every 2 hours. Appellant advised the employing establishment by letter dated February 23, 2004 that she was rejecting the offered position.

In a letter dated February 23, 2004, the Office advised the employing establishment that the job offer should be modified prior to a finding that it was suitable. The Office stated that the job offer did not require bending or stooping, but Dr. Lieberman indicated that appellant could bend and stoop for up to two hours, and therefore it was recommended the offer reflect the ability to bend and stoop for two hours per day. The Office also stated that the offer should provide the actual hours to be worked and the nonscheduled days should be noted.

By letter dated March 1, 2004, the Office stated that it found an offer dated February 26, 2004 to be suitable.[2] The Office indicated that appellant had 30 days to accept the job or provide reasons for refusing the position, and noted the provisions of 5 U.S.C. § 8106(c). In a letter dated April 5, 2004, the Office noted that it had "not received medical evidence in support of your claim" since March 2000, and requested that appellant submit medical evidence regarding her employment-related condition.

On April 16, 2004 the Office received a letter from appellant and an April 15, 2004 work capacity evaluation (Form OWCP-5c) from Dr. John Hughes, a neurologist, who indicated that appellant was limited to working three days per week; he diagnosed chronic migraines, severe degenerative changes L5-S1, loss of disc height L5-S1 and disc bulging. Dr. Hughes provided work restrictions that included five pounds lifting, two hours sitting, one hour walking and standing, with no stooping to pick up.

[1] The record submitted to the Board does not contain the statement of accepted facts.

[2] The record submitted to the Board does not contain a February 26, 2004 job offer.

By decision dated April 21, 2004, the Office terminated appellant's compensation on the grounds that she refused an offer of suitable work. The Office acknowledged that appellant had submitted a report from Dr. Hughes, but found "the restrictions on the form are noted to be due to conditions not accepted as work related" and therefore the evidence did not establish that appellant was unable to perform the offered full-time job duties.

Appellant requested reconsideration by letter dated May 28, 2004. She submitted additional medical evidence, including treatment reports from Dr. Hughes.

In a decision dated August 13, 2004, the Office denied modification of the prior decision.

LEGAL PRECEDENT

Section 8106(c) provides in pertinent part, "A partially disabled employee who … (2) refuses or neglects to work after suitable work is offered... is not entitled to compensation." It is the Office's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.[3] To justify such a termination, the Office must show that the work offered was suitable.[4] An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.[5]

ANALYSIS

In the present case, the record indicates that the employing establishment offered appellant a modified legal technician position on February 9, 2004, which was designed to meet the restrictions provided by the second opinion referral physician, Dr. Lieberman, on August 8, 2003. The offered position was a full-time position with no lifting, pushing or pulling over 5 pounds, no squatting, kneeling, climbing or bending, and a 15-minute break every 2 hours. The offer was apparently modified to allow up to two hours of bending and stooping; the Office referred to a February 26, 2004 job offer but the record transmitted to the Board did not include a February 26, 2004 offer.

The Office terminated appellant's compensation pursuant to section 8106(c) on the grounds that appellant had refused an offer of suitable work. The record indicates, however, that the Office had issued a March 13, 1995 decision finding that appellant's actual earnings in a part-time light-duty job fairly and reasonably represented appellant's wage-earning capacity. Appellant continued to work in the light-duty position. As the Board noted in *Michael E. Moravec*,[6] there is an affirmative requirement for the Office to determine whether the position in which an employee earns actual wages fairly and reasonably represents wage-earning capacity, prior to a determination regarding suitable work. The Board observed that a different reading of

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

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

[5] *Catherine G. Hammond*, 41 ECAB 375, 385 (1990); 20 C.F.R. § 10.517(a).

[6] 46 ECAB 492 (1995).

the Act could bring about an incongruous situation where a partially disabled but employed claimant is penalized for turning down an offered position deemed suitable by the Office when a suitable position is already held, *i.e.*, a position in which actual wages earned and such wages fairly and reasonably represent wage-earning capacity.

In this case, the Office has already found that actual earnings did fairly and reasonably represent wage-earning capacity. Therefore the underlying principle of *Moravec* is applicable here; a claimant should not be penalized for turning down an offered position when a suitable position is already held. The Office determined that actual earnings fairly and reasonably represented wage-earning capacity, and once a determination has been made that actual earnings do fairly and reasonably represent wage-earning capacity, the wage-earning capacity determination remains undisturbed until it is modified.[7] The Office in this case did not modify the wage-earning capacity determination. It is not appropriate for the Office to invoke section 8106(c) when appellant has actual earnings and the Office has found the actual earnings to be a fair and reasonable representation of his wage-earning capacity. The Office's procedure manual clearly states, for example, that an acceptable reason for refusing an offer of work is when appellant has actual earnings that fairly and reasonably represent her earning capacity.[8]

Accordingly, the Board finds that the Office cannot terminate employment pursuant to section 8106(c) under the circumstances of this case. It is the Office's burden of proof, and they have not met their burden in this case.

CONCLUSION

The Board finds that the Office did not properly terminate compensation pursuant to 5 U.S.C. § 8106(c) since appellant had actual earnings that fairly and reasonably represented appellant's wage-earning capacity.

[7] *See Sharon C. Clement*, 55 ECAB ___ (Docket No. 01-2135, issued May 18, 2004).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.5(b)(2) (July 1996).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 13 and April 21, 2004 are reversed.

Issued: July 14, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board