United States Department of Labor
Employees' Compensation Appeals Board

PAUL DEAN, Appellant **and** **U.S. POSTAL SERVICE, ROCHESTER PROCESSING & DISTRIBUTION CENTER, Rochester, NY, Employer**	)	**Docket No. 04-1716** **Issued: March 8, 2005**

Appearances:
Paul Dean, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On June 28, 2004 appellant timely filed an appeal from a May 6, 2004 decision of the Office of Workers' Compensation Programs, which denied his request for reconsideration of a March 16, 2004 decision, which terminated his compensation for refusal to accept suitable employment. The Board has jurisdiction over the merits of this case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation for refusal to accept suitable employment; and (2) whether the Office properly denied appellant's request for reconsideration.

FACTUAL HISTORY

On December 14, 2002 appellant, then a 40-year-old distribution supervisor, filed a claim for an emotional condition.

In a January 7, 2003 letter, the Office requested more details from appellant on the factors of his employment that he considered detrimental to his health. The Office requested a detailed description on what occurred at work on December 14, 2002. In a January 23, 2003 response, appellant indicated that on December 12, 2002 an employee, angry at him for an earlier incident, yelled at him on the work floor, stating that appellant's fiancée was at a friend's home performing oral sex on other men. On December 14, 2004 another employee made similar comments. Appellant stated that he was plagued with thoughts of retaliation. He felt that no one in the organization cared about the incident. Appellant noted that he had severe headaches, woke up in a cold sweat, nightmares and would shake involuntarily. He stated that his symptoms became worse and he became increasingly bitter toward the employing establishment for not providing a safe environment.

Appellant submitted an October 7, 2003 report from Dr. Melvin Zax, a psychologist, who indicated that appellant had adjustment disorder with acute depression. He indicated that in his session with appellant, it became clear that the comments made by his coworkers stripped appellant of his confidence, self-worth and sense of "manhood." Dr. Zax stated that his emotional condition was a result of these events. He indicated that appellant could regain confidence in his leadership abilities and resume his position as a supervisor at the employing establishment if he could work in an office away from "all the nonsense tolerated by managers and supervisors in the local area." Dr. Zax expressed doubt that the employing establishment would be likely to offer appellant an opportunity to return to work.

In a January 4, 2004 decision, the Office accepted appellant's claim for adjustment disorder with acute depression.

In a January 8, 2004 letter, appellant indicated that a vocational rehabilitation specialist, in December 2003, had approved his wife's request to relocate. The specialist stated that vocational rehabilitation would find her suitable employment in the Fort Myers, Florida area. Appellant indicated that he and his wife would be moving to the Fort Myers area by March 31, 2004. He requested that he be placed in a vocational rehabilitation program. Appellant stated that the Office had documentation that he could not work in the local area due to the concerns for the safety of others and himself.

In a February 3, 2004 letter, the employing establishment offered appellant a position as a supervisor of Distribution Operations at the Utica Processing and Distribution Center. The employing establishment stated that he would perform the full duties of the position. It commented that the physical requirements of the position were not applicable since he had no physical limitations other than not working in his current district.

In a separate February 3, 2004 letter, the Office indicated that it had been informed by the employing establishment that appellant had been offered work consistent with his physical limitations. The Office noted that, although the position was not within appellant's commuting area, the employing establishment would incur the expense of relocation. The Office indicated that the offered position and its physical requirements were in accordance with the restrictions identified by his doctor. The Office stated that it found the job to be suitable for appellant. It warned that, if he refused the job offer or failed to report to work, without reasonable cause, his

compensation would be terminated. In a February 18, 2004 response, appellant marked that he refused the job offer.

Appellant submitted a January 18, 2004 facsimile message from his vocational rehabilitation specialist to his superior. The specialist indicated that he still planned on moving to Florida and had been traveling back and forth to the Fort Myers area where he and his wife were planning on relocating.

In a February 17, 2004 letter, appellant indicated to the Office that his mail would be sent to his new address prior to March 1, 2004, but he was still in the process of moving from Rochester, New York and, therefore, there would be a delay in responding to correspondence from the Office. He informed the Office that he would be leaving Rochester on March 1, 2001.

In a February 20, 2004 letter, appellant indicated that he had informed his rehabilitation counselors in January 2004, that he and his wife were moving to Florida to seek employment. He noted that he had surrendered his New York driver's license for a Florida driver's license on January 21, 2004, establishing residency in Florida. Appellant stated that he had established a new bank account with direct deposit, signed a rental agreement and put a deposit on the purchase of a house. He commented that he had loaded a rental truck for a third trip to Florida when he received the job offer. Appellant noted that a contract physician for the employing establishment had found him unfit for the position of distribution supervisor. He claimed that the job offer was meant to harass him and his wife. Appellant refused the job offer on the advice of Dr. Zax.

In a February 21, 2004 report, Dr. Zax indicated that the Office had offered jobs to appellant and his wife in Utica, New York and informed them that their compensation would be terminated if they refused the offer. He noted that the Office cited his recommendations that appellant's wife be placed outside of the geographic and management area where she had been working. Dr. Zax stated that, after that recommendation, appellant and his wife had been informed by the employing establishment that it would not be offering work to them. He stated that appellant and his wife responded constructively by deciding to move to Florida and seek employment there. Dr. Zax noted that appellant and his wife had rented a place to live, made several trips to move their belongings to Florida and had applied for job in the area. He stated that the job offer was a "bolt out of the blue" and had provoked many of the symptoms they had when they encountered the original problem. Dr. Zax indicated that appellant was angry and vengeful. He stated that he could not see how moving to a post office job in Utica would be good for them or the employing establishment.

In a February 23, 2004 letter, the Office informed appellant that it had reviewed his reasons for refusing to accept the offered position and found them insufficient to change its determination previously made that the job was suitable for him. The Office gave him 15 days to accept the position or his compensation would be terminated.

In a March 16, 2004 decision, the Office terminated appellant's compensation for refusal to accept suitable work. The Office stated that it had reviewed his reasons for not accepting the position and found them to be unacceptable.

In an April 1, 2004 letter, appellant requested reconsideration. In a May 6, 2004 decision, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted in support of his request was repetitious and, therefore, insufficient to warrant review of the prior decision.

LEGAL PRECEDENT

Section 8106(c)(2) of the Federal Employees' Compensation Act states: "a partially disabled employee who: (1) refused to seek suitable work; or (2) refuses or neglects to work after suitable work is offered is not entitled to compensation."[1] The Office has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects suitable work when it is offered. Before compensation can be terminated, however, the Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.[2] In other words, to justify termination of compensation under 5 U.S.C. § 8105(c), which is a penalty provision, the Office has the burden of showing that the work offered and refused or neglected by appellant was suitable.

If possible, the employer should offer suitable reemployment in the location where the employee currently resides. If this is not practical, the employer may offer suitable reemployment at the employee's former duty station or other locations.[3]

ANALYSIS

The basic issue presented in this case is whether suitable employment was possible or practical in or around Fort Myers, Florida. In a January 8, 2004 letter, appellant indicated that his wife's vocational rehabilitation specialist had approved her move to Fort Myers, Florida. In subsequent letters, he indicated that he had obtained a Florida driver's license, had made several trips to move belongings from Rochester, New York to Fort Myers, Florida, and had informed the Office of his new address and the date mail should be sent to that address. Therefore, by the time appellant received the notice of the new job offer and the Office's letter finding the work to be suitable, his correspondence was clear that he and his wife had relocated to Florida. By regulation, when an employee would need to move to accept an offer of reemployment, the employing establishment should, if possible, offer suitable reemployment in the location where the employee currently resides. The record contains no evidence to determine whether the employing establishment made any effort to determine whether such reemployment was possible in Florida after it had been informed of appellant's decision to move to Florida. The Office, knowing that appellant would have to move back to New York to accept the Utica offer, should have developed this aspect of the case before finding the offer suitable.

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[1] 5 U.S.C. § 8106(c)(2).

[2] *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

[3] 20 C.F.R. § 10.508 (1999).

The previous pertinent regulation applied only to former employees, which were employees terminated from the agency's employment rolls.[4] The regulation in effect since 1999 contains no such restrictive language.[5] The regulation now states that the employer "should" offer suitable reemployment where the employee currently resides, if possible. In this case, appellant would have needed to move to Utica, New York to accept a position. The Office, therefore, should have developed the issue of whether suitable reemployment was possible in the Fort Myers, Florida area. The Office erred in terminating appellant's compensation benefits without positive evidence showing that such an offer was not possible or practical.[6]

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits under 5 U.S.C. § 8106(c) and the implementing regulation.[7]

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 6 and March 16, 2004 be reversed.

Issued: March 8, 2005
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

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[4] 20 C.F.R. § 10.123(f) (1987).

[5] *Sharon L. Dean*, 56 ECAB __ (Docket No. 04-1707, issued December 9, 2004). Appellant in the cited case is the wife of appellant in the present case.

[6] *Id.*

[7] Based on the disposition of the first issue, the second issue is rendered moot.