United States Department of Labor
Employees' Compensation Appeals Board

EMMA B. WALKER, Appellant	)	
and	)	**Docket No. 04-1862**
	)	**Issued: March 9, 2005**
U.S. POSTAL SERVICE, MILITARY POST OFFICE, Tallahassee, FL, Employer	)	

Appearances:
Emma B. Walker, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On July 20, 2004 appellant filed a timely appeal from the December 11, 2003 merit decision of the Office of Workers' Compensation Programs, terminating her compensation effective December 11, 2003 on the grounds that she failed to accept 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 termination case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation effective December 11, 2003 on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

On February 28, 2000 appellant, then a 56-year-old mail processor clerk, filed a traumatic injury claim alleging that on that date she experienced lower back pain while pushing and pulling letter tray racks. The Office accepted appellant's claim for a lumbar sprain and aggravation of

lumbar disc degeneration. The Office authorized back surgery which was performed on March 6, 2001 and appellant received appropriate compensation.

In an October 3, 2001 work capacity evaluation, Dr. Charles H. Wingo, appellant's treating Board-certified orthopedic surgeon, stated that appellant had reached maximum medical improvement as of September 17, 2001. He stated that she could work eight hours a day with certain restrictions. Appellant was limited to sitting, walking, standing, operating a motor vehicle, kneeling and climbing no more than 6 to 8 hours a day, twisting no more than 2 to 4 hours a day and pushing, pulling and lifting no more than 30 pounds, and squatting 4 to 6 hours a day.

By letter dated December 17, 2001, the employing establishment offered appellant the position of modified mail processor, which she accepted on December 18, 2001. By decision dated March 8, 2002, the Office found that appellant's actual earnings as a modified mail processor fairly and reasonably represented her wage-earning capacity.

On April 17, 2002 the Office authorized removal of hardware and an exploration fusion which was performed on appellant by Dr. Wingo on May 7, 2002. She received appropriate compensation. Appellant returned to work in her permanent modified position on July 1, 2002 for eight hours a day. In an August 20, 2002 letter requesting that the Office declare an overpayment because she had returned to work, the employing establishment advised the Office that appellant returned to work on July 1, 2002 for four hours a day and that she was off work from July 2 through 5, 2002. The employing establishment also noted that appellant returned to work on July 8 through 14, 2002 for four hours a day. On July 15, 2002 she worked eight hours a day. By letter dated June 5, 2003, the Office requested that the employing establishment clarify the number of hours appellant worked per hour during July 2002 as the record indicated that she returned to work eight hours a day on July 1, 2002 and that she worked four hours a day from July 6 through 26, 2002. The Office also requested that the employing establishment provide a daily leave analysis for January 2003.

In a June 13, 2003 letter, the Office requested that Dr. Wingo provide, among other things, whether appellant could increase her work hours from four to six hours a day. By letter of the same date, the Office requested that the employing establishment provide a copy of appellant's position description, the limited-duty job offer and notification when appellant increased her hours or returned to full-time employment.

On July 1, 2003 the employing establishment submitted the requested leave analysis. On July 22, 2003 Dr. Wingo submitted a May 12, 2003 report in which he provided his findings on physical examination. He opined that appellant had chronic lumbar syndrome post fusion hardware removal at L5-S1. Dr. Wingo noted that she would continue to work four hours a day and if she felt like she could work more than four hours a day during the interval before he saw her again in three months, then she would contact him.

Appellant retired from the employing establishment effective July 31, 2003. Dr. Wingo submitted a note dated August 11, 2003 finding that appellant had a 17 percent permanent impairment of her lower extremities due to sciatic nerve sensory which equated to a 7 percent impairment of the whole person based on the American Medical Association, *Guides to the*

Evaluation of Permanent Impairment (5th ed. 2001). In a work capacity evaluation of the same date, Dr. Wingo indicated that appellant could not perform her usual work duties but, she could work eight hours a day with certain restrictions. Appellant was limited to sitting, walking, standing and reaching for no more than 1 hour, twisting, bending and stooping occasionally and pushing and pulling up to 50 pounds, lifting 11 to 20 pounds, squatting occasionally with 21 to 50 pounds and kneeling and climbing occasionally.

On September 2, 2003 the employing establishment offered appellant the modified position of mail processing clerk. The position required appellant to case mail at a modified case. The physical requirements included picking up a letter which weighed less than 1 pound at a time to place in the appropriate holdout, sitting and standing alternately for personal comfort, intermittent sitting, standing and walking in 1 hour increments, intermittent lifting up to 10 pounds continuously, 11 to 20 pounds frequently and 21 to 50 pounds occasionally, reaching, twisting, bending and stooping occasionally, no pushing or pulling over 5 pounds and kneeling and climbing occasionally. Appellant rejected the job offer on September 8, 2003.

By letter dated September 17, 2003, the employing establishment requested that the Office determine whether the offered position was suitable. In a September 29, 2003 letter, the Office advised appellant that the offered position was suitable and provided her with her procedural rights pursuant to 5 U.S.C. § 8106(c). She did not respond.

In a November 3, 2003 letter, the Office advised appellant that she had not responded to its September 29, 2003 letter and afforded her 15 days to accept the offered position or be subjected to termination of compensation benefits. On November 7, 2003 appellant rejected the employing establishment's job offer because she had retired. In a letter dated November 1, 2003 and received by the Office on November 10, 2003, appellant reiterated that she rejected the offered position because she had retired. She explained that, since she was eligible to retire, she preferred this option rather than returning to work full time as a mail processing clerk. Appellant stated that she was under the impression that her personnel office would forward a copy of her rejection to the Office. She apologized for this error.

In a December 11, 2003 decision, the Office terminated appellant's compensation effective that date on the grounds that she refused an offer of suitable work. The Office noted her reason for refusing the offered position and that the employing establishment verified that the offered position was still available to appellant on December 11, 2003.[1]

LEGAL PRECEDENT

Once the wage-earning capacity of an injured employee is properly determined, it remains undisturbed regardless of actual earnings or lack of earnings.[2] A modification of such a determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated

[1] By letter dated January 20, 2004, appellant requested reconsideration of the Office's December 11, 2003 decision. Appellant, however, appealed the Office's decision to the Board.

[2] *Roy Mathew Lyon*, 27 ECAB 186, 188-90 (1975).

or the original determination was in fact erroneous.[3] Chapter 2.814.11 of the Office's procedure manual contains provisions regarding the modification of a formal loss of wage-earning capacity. The relevant part provides that a formal loss of wage-earning capacity will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has changed; or (3) the claimant has been vocationally rehabilitated. The party seeking modification of a formal loss of wage-earning capacity decision has the burden to prove that one of these criteria has been met. If the Office is seeking modification, it must establish that the original rating was in error, that the injury-related condition has improved or that the claimant has been vocationally rehabilitated.[4]

The Office's procedure manual also provides in relevant part:

> "9. *Claims Actions After Reemployment*. Cases where a claimant stops work after reemployment may require further action depending on whether the rating has been completed at the time the work stoppage occurs.
>
> > a. *Formal Loss Of Wage-Earning Capacity Decision Issued*. If a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In this instance the CE [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity decision. If the claimant retires, the CE should offer an election between [Federal Employees' Compensation Act] and OPM [Office of Personnel Management] benefits if appropriate. A penalty decision under 5 U.S.C. § 8106(c) should not be issued."[5]

ANALYSIS

In the December 11, 2003 decision, the Office terminated appellant's compensation benefits effective that date on the grounds that she refused an offer of suitable work. Section 8106(c) of the Federal Employees' Compensation Act 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."[6] Prior to terminating appellant's compensation on December 11, 2003, however, the Office had issued a March 8, 2002 loss of wage-earning capacity decision which determined that her actual earnings as a modified mail processor fairly and reasonably

[3] *Elmer Strong*, 17 ECAB 226, 228 (1965).

[4] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11 (July 1997).

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

[6] 5 U.S.C. § 8106(c).

represented her wage-earning capacity.[7] The Board finds that the Office did not follow the applicable case law and procedures in terminating her compensation under section 8106(c). The Office did not address the March 8, 2002 loss of wage-earning capacity decision or otherwise modify this decision prior to making its suitable work determination on December 11, 2003.[8] The Office did not act in accordance with its procedures which specifically address cases where a claimant stops work after reemployment. Following the loss of wage-earning capacity decision of March 8, 2002, appellant retired effective July 31, 2003. Office procedures specifically provide that a decision effectuating a termination of compensation based on refusal of an offer of suitable work should not be issued in a case in which a claimant has retired following a formal loss of wage-earning capacity determination.[9] As the record before the Board establishes that appellant retired on July 31, 2003, the Office improperly proceeded to terminate her compensation under section 8106(c). The Office did not provide appellant an opportunity to elect between benefits under the Act and under OPM. For these reasons, the Board finds that the suitable work termination was not appropriate.[10]

CONCLUSION

The Board finds that the Office improperly terminated appellant's compensation benefits effective December 11, 2003 on the grounds that she refused an offer of suitable work as it failed to comply with the Act and its procedures which required modification of the March 8, 2002 loss of wage-earning capacity determination prior to any determination under 5 U.S.C. § 8106(c).

[7] Appellant retired from the employing establishment effective July 31, 2003. The Board notes that the above-described criteria for modifying formal loss of wage-earning capacity decisions remains the same regardless of whether a given claimant continues to work or stops work after the issuance of a formal loss of wage-earning capacity decision.

[8] The Board has previously addressed instances in which formal loss of wage-earning capacity decisions remain undisturbed unless modified in accordance with the above-described criteria. In *Wallace D. Ludwick*, 38 ECAB 176 (1986), the Office issued a formal loss of wage-earning capacity in which it determined that the employee's wage-earning capacity was represented by the position of deputy, a position which she had been performing. The Office then terminated the employee's compensation based on her refusal of a job which had been offered by the employing establishment and determined by the Office to be suitable. The Board reversed the Office's termination indicating that the loss of wage-earning capacity decision had not been modified and that the employee's refusal of the offered position was justified by the work which had been determined to represent her wage-earning capacity.

[9] *Sharon C. Clement*, 55 ECAB ___ (Docket No. 01-2135, issued May 18, 2004); *see also Robert L. Edwards*, Docket No. 01-1197 (issued May 19, 2003).

[10] *Sharon C. Clement, supra* note 9; *Wallace D. Ludwick*, 38 ECAB 176 (1986).

ORDER

IT IS HEREBY ORDERED THAT the December 11, 2003 decision of the Office of Workers' Compensation Programs is reversed.

Issued: March 9, 2005
Washington, DC

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member