United States Department of Labor
Employees' Compensation Appeals Board

KAREN M. NOLAN, Appellant	)	
and	)	**Docket No. 05-1710**
	)	**Issued: May 16, 2006**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, West Roxbury, MA, Employer	)	

Appearances:
Francis Hurley, Esq., for the appellant
Miriam Ozur, Esq., for the Director

Oral Argument April 4, 2006

DECISION AND ORDER

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

JURISDICTION

On August 15, 2005 appellant filed a timely appeal of a May 18, 2005 decision of the Office of Workers' Compensation Programs' hearing representative, affirming a July 8, 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 properly terminated appellant's compensation effective July 11, 2004 on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

On October 15, 1989 appellant, then a 32-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that she sustained a back injury in the performance of duty on that date from turning over a patient. She stopped working on October 15, 1989. The Office accepted the claim for a back strain and an L5-S1 herniated disc, and appellant began receiving compensation

for temporary total disability.[1] Appellant underwent back surgeries on November 29, 1989, October 17, 1990, October 25, 1991, July 9, 1996 and July 18, 2002.

On March 23, 1995 the employing establishment offered appellant a position as a modified registered nurse at 16 hours per week. The record contains a note from an Office claims examiner noting that the Office's procedures state that a job offer of less than four hours per day is unsuitable if the claimant is capable of working four or more hours per day. Appellant continued to receive compensation for temporary total disability.

The Office referred appellant, together with medical records and a statement of accepted facts, to Dr. Mordechai Kamel, a Board-certified orthopedic surgeon. In a report dated June 17, 2003, he provided a history and results on examination. Dr. Kamel diagnosed foot drop secondary to surgical complication and chronic degenerative disc disease secondary to herniated discs at L5-S1 and L4-5. He noted that appellant had not reached maximum medical improvement as the foot drop could recover over the next year. Dr. Kamel completed a work capacity evaluation (Form OWCP-5c) indicating that appellant could work eight hours per day with restrictions. The restriction included a 10-pound lifting restriction of 1 hour, 10 pounds pushing and pulling of 2 hours per day and 10-minute breaks every hour.

On May 3, 2004 the employing establishment offered appellant a position as a staff nurse acute care bed control. The offer stated that the position was for 16 hours per week, working on Tuesday and Wednesday. The physical requirements included 10 pounds pushing, pulling at 2 hours per day, "10 pounds squatting" (sic) at 1 hour per day, and the offer stated that the position would allow frequent changes in position if needed.

By letter dated May 10, 2004, the Office advised appellant that it found the offered position to be suitable. Appellant was advised of the provisions of 5 U.S.C. § 8106(c)(2) and if she failed to accept the position she must provide a written explanation within 30 days. In a letter dated June 1, 2004 and received by the Office June 14, 2004, appellant's representative indicated that he had tried to contact the Office and wished to discuss the May 10, 2004 letter. By letter dated June 16, 2004, the Office found that appellant had not offered valid reasons for refusing the position, and advised appellant that she had 15 days to accept the position or her compensation would be terminated.

On June 28, 2004 the Office received a June 24, 2004 report from the attending physician, Dr. Stephen Lipson, a Board certified orthopedic surgeon, who opined that he did not think appellant could tolerate a full eight-hour day. He stated that appellant required frequent change of position and had an intermittent need to recline, could not lift more than 10 pounds and he did not believe she could bend, lift or care for patients.

By decision dated July 8, 2004, the Office terminated appellant's compensation on the grounds that she refused an offer of suitable work. The Office did not refer to Dr. Lipson's report. Appellant requested a hearing before an Office hearing representative, which was held on March 15, 2005. On May 10, 2005 appellant submitted an unsigned treatment note from Dr. Lipson.

[1] Appellant received compensation based on a weekly pay rate of $721.20 (40 hours per week at $18.03 per hour).

In a decision dated May 18, 2005, the Office hearing representative affirmed the July 8, 2004 Office decision. The hearing representative found that the Office had properly terminated compensation pursuant to section 8106.

LEGAL PRECEDENT

Under 5 U.S.C. § 8106(c) "[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.[2] To justify such a termination, the Office must show that the work offered was suitable.[3] 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.[4]

In determining whether an offered position is suitable, the Office procedures state: "[a] job which involves less than four hours of work per day where the claimant is capable of working four or more hours per day will be considered unsuitable."[5]

ANALYSIS

In the present case, the position of staff nurse acute care bed control was offered to appellant at 16 hours per week. As noted above, and as noted by the Office in 1995 when the employing establishment offered appellant a 16-hour per week position, a position of less than 20 hours per week is not suitable when the claimant is capable of working more than 20 hours per week. In this case, the Office based its determination of medical suitability on the June 17, 2003 report of Dr. Kamel, the second opinion physician, who opined that appellant could work eight hours per day with restrictions.

The Board has held that 5 U.S.C. § 8106(c) is a penalty provision and is narrowly construed.[6] Based on the Office's procedures, a job which involves less than four hours of work per day is not considered a suitable position in this case. Since the job offer was limited to 16 hours per week, the Board finds that it does not represent a suitable job offer. Accordingly, the Board finds that the Office improperly terminated compensation pursuant to 5 U.S.C. § 8106(c)(2).

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

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

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

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

[6] *Stephen R. Lubin*, 43 ECAB 564 (1992).

CONCLUSION

The Office did not meet its burden of proof to terminate compensation under 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 18, 2005 is reversed.

Issued: May 16, 2006
Washington, DC

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

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