United States Department of Labor
Employees' Compensation Appeals Board

M.G., Appellant	)	
and	)	**Docket No. 07-1515**
	)	**Issued: January 18, 2008**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, San Francisco, CA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 14, 2007 appellant filed a timely appeal from a February 6, 2007 decision of a hearing representative of the Office of Workers' Compensation Programs affirming the termination of her compensation for refusing 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 under 5 U.S.C. § 8106 on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

The Office accepted that on June 1, 1994 appellant, then a 46-year-old clerk, sustained bilateral wrist and trapezius strain and left carpal tunnel syndrome in the performance of duty. The Office assigned the case file number 131064884. The Office additionally accepted that appellant sustained right shoulder tendinitis due to a February 18, 1999 employment injury,

assigned file number 131207196. Appellant stopped work on July 25, 2002 and filed a claim for an emotional condition alleging that on that date a coworker yelled at her and threatened her. On March 20 2003 the Office accepted that she sustained moderate to severe major depressive disorder, single episode, causally related to factors of her federal employment under file number 132059864.

In a disability certificate dated April 24, 2003, Dr. Robert A. Kaplan, a psychologist and appellant's attending physician, found that she was disabled from employment beginning July 25, 2002. Dr. Todd A. Cornett, a Board-certified psychiatrist, who provided a second opinion examination, found that she could work eight hours per day with restrictions. On August 19, 2003 the Office referred appellant to Dr. Robert A. Kimmich, a Board-certified psychiatrist, for an impartial medical examination. In a work restriction evaluation dated October 6, 2003, Dr. Kimmich determined that appellant could work four hours per day gradually increasing to eight hours per day by July 1, 2004. He opined that appellant required reassignment from her prior unit and "compatible coworkers." Dr. Kimmich noted that she also required hand and shoulder restrictions. In an accompanying narrative report, he indicated that appellant could not return to work in the same unit as the coworker who yelled at her.

On December 10, 2003 the employing establishment offered appellant a position as modified mail processing clerk effective that date working at night. Appellant refused the position because of the evening hours and her physical disability and submitted medical evidence from Dr. Kaplan in support of her refusal. On March 12, 2004 the Office requested that both Dr. Kaplan and Dr. Kimmich address whether appellant could perform the offered position. In a report dated March 16, 2004, Dr. Kaplan maintained that the job offer violated the work restrictions from Dr. Robert Harrison, a Board-certified internist, who treated appellant for her accepted shoulder and wrist conditions. In a report dated April 9, 2004, Dr. Kimmich found that the job offer was reasonable and that there was "no medical reason that she could not work those hours."

On September 10, 2004 the Office requested that Dr. Harrison clarify appellant's work restrictions. In a September 27, 2004 letter, he related that appellant could work without reaching over her shoulders or lifting, pushing or pulling over 10 pounds. In a report dated December 8, 2004, Dr. Harrison again listed work restrictions.[1]

On January 12, 2005 the employing establishment offered appellant a position as a modified mail processing clerk effective that date. On January 20, 2005 she refused the position, arguing that it violated the restrictions found by Dr. Harrison in his May 17 and December 8, 2004 reports.[2]

[1] The work restrictions in Dr. Harrison's December 8, 2004 report are not legible.

[2] On April 21, 2005 appellant questioned why she was receiving compensation under her shoulder claim instead of for disability from her accepted emotional condition. On April 27, 2005 the Office noted that she had received compensation under file number 132059864 for her psychiatric condition until it approved shoulder surgery in March 2004, at which time it began paying her compensation under file number 131207196. The Office indicated that she did not undergo the surgery because Dr. Harrison found that she was not a good candidate for surgery.

By letter dated April 28, 2005, the Office informed appellant that it had determined that the offered position was suitable and provided her 30 days to accept the position or provide reasons for her refusal.[3] The Office notified her that she would be compensated for any difference in pay between the offered position and her date-of-injury position, that she could accept the job without penalty and that an employee who refused or neglected suitable work was not entitled to further compensation.

In a report dated May 16, 2005, Dr. Lesley J. Anderson, a Board-certified orthopedic surgeon, diagnosed a rotator cuff repair and recommended surgery. She found that appellant was restricted from repetitive use at the shoulder level or above, working above the shoulder level and pushing or pulling over 10 pounds.

On June 22, 2005 the Office informed appellant that her reasons for refusing the position were not valid. The Office provided her 15 days to accept the position and make arrangements to return to work. The Office stated:

> "If you have not accepted the position and arranged for a report date within 15 days of the date of this letter, your entitlement to wage loss and schedule award benefits will be terminated. We will not consider any further reasons for refusal.
>
> "In the event that you now wish to accept the offer, you should advise the employer who offered the position and cooperate with any of their instructions about starting the position."

By letter dated June 22, 2005, received by the Office on June 24, 2005, appellant noted that Dr. Harrison told her that he could no longer assist her with her medical restrictions. She stated: "Please be advised that my shoulder surgery, which did not take place in 2003 or 2004, has been rescheduled for July of 2005. Thus, shortly after I return to work I will need to go back on disability just a few weeks later. Please let me know how I should proceed at this time." Appellant indicated that she would send the Office updated medical restrictions shortly.

In another letter dated June 22, 2005, received by the Office on July 1, 2005, appellant notified the Office and the employing establishment that she accepted the position "under protest." She stated: "Please let me know where I will be assigned, my duties, my part[-]time hours and my reporting date." Appellant informed the Office and the employing establishment that she was scheduled for authorized shoulder surgery under file number 131207196 for July 25, 2005.

An Office claims examiner telephoned the employing establishment on July 12, 2005 regarding appellant's acceptance of the job offer and her return to work date. An official with

[3] In an accompanying memorandum, the Office noted that an impartial medical examiner found that appellant could return to work for four hours per day gradually increasing to eight hours per day under file number 132059864, accepted for major depressive disorder. The employing establishment offered her a position on December 10, 2003; however, she was unable to work because she underwent right shoulder surgery in March 2004 under file number 131208196.

the employing establishment stated that she had "called the claimant's supervisor and she will provide the [return to work] date" as soon as she could. By letter dated July 12, 2005, appellant telephoned the employing establishment and informed them that she was unable to work due to a scheduled operation. She requested that the employing establishment contact her by telephone. In a report dated July 11, 2005, Dr. Thomas R. Hansen, a Board-certified psychiatrist, opined that appellant was unable to work from July 9 to 22, 2005.

In a telephone call dated July 14, 2005, the employing establishment informed the Office that "a 15-day warning letter was sent to her on June 22, 2005 and must report to work by July 9, 2005. [Appellant] pretty much knew about the reporting date of July 9, 2005 because she managed to convince her doctors again to write a statement excusing her from work for the period July 9, 2005 th[rough] the date of surgery on July 25, 2005."

By decision dated July 14, 2005, the Office terminated appellant's compensation effective that date on the grounds that she refused an offer of suitable work. The Office noted that the employing establishment related on July 12, 2005 that appellant had not returned to work.

On August 4, 2005 appellant requested an oral hearing. She also appealed to the Board. On March 17, 2006 the Board dismissed her appeal so that she could pursue her oral argument request before the Office.[4] By decision dated February 6, 2007, the Office hearing representative affirmed the July 14, 2005 decision.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[5] In this case, the Office terminated appellant's compensation under section 8106(c)(2) of the Federal Employees' Compensation Act,[6] which provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee is not entitled to compensation.[7] To justify termination of compensation, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[8] Section 8106(c) will be narrowly construed as it serves as a penalty provision, which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.[9]

Section 10.517(a) of the Act's implementing regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured by the employee, has

[4] Order Dismissing Appeal, Docket No. 06-192 (issued March 17, 2006).

[5] *Linda D. Guerrero*, 54 ECAB 556 (2003).

[6] 5 U.S.C. §§ 8101-8193.

[7] 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

[8] *Ronald M. Jones*, 52 ECAB 190 (2000).

[9] *Joan F. Burke*, 54 ECAB 406 (2003).

the burden of showing that such refusal or failure to work was reasonable or justified.[10] Pursuant to section 10.516, the employee shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.[11]

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, establishing that a position has been offered within the employee's work restrictions and setting for the specific job requirements of the position.[12] In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused by appellant was suitable.[13]

Once the Office establishes that the work offered is suitable, the burden shifts to the employee who refuses to work to show that the refusal or failure to work was reasonable or justified.[14] The determination of whether an employee is physically capable of performing a modified assignment is a medical question that must be resolved by medical evidence.[15] Office procedures state that acceptable reasons for refusing an offered position include medical evidence of inability to do the work.[16]

ANALYSIS

The Office based its termination of appellant's compensation on its finding that she refused suitable employment by failing to report for work. It does not appear from the record, however, that the employing establishment specifically advised her to report for duty on a particular date. In its June 22, 2005 letter to appellant, the Office told her that she must accept the position and arrange to start work within 15 days of the date of the letter or have her compensation terminated. Appellant notified both the Office and the employing establishment in letters dated June 22, 2005 that she accepted the position and requested information regarding her work location, duties and start date. The record, however, contains no evidence that the employing establishment responded to her request for information regarding her start date.[17] On July 12, 2005 the employing establishment informed the Office that appellant's supervisor would

[10] 20 C.F.R. § 10.517(a); *see Ronald M. Jones*, *supra* note 8.

[11] *Id*. at 10.516.

[12] *See Linda Hilton*, 52 ECAB 476 (2001).

[13] *Id*.

[14] 20 C.F.R. § 10.517(a).

[15] *Gayle Harris*, 52 ECAB 319 (2001).

[16] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(3) (July 1997).

[17] On July 12, 2005 appellant telephoned the employing establishment and indicated that she was unable to work due to a scheduled operation. She requested that the employing establishment telephone her. It does not appear from the record that the employing establishment responded to her request.

provide the return to work date shortly. It is unclear from this communication whether the employing establishment meant that a return to work date had yet to be determined or whether the date had been determined but not provided to the Office. On July 14, 2005 the date the Office terminated her compensation, the employing establishment advised the Office that appellant "pretty much knew about the reporting date of July 9, 2005." The indication by the employing establishment that she "pretty much knew" that she should begin work on July 9, 2005 is insufficiently definite to establish that she refused or neglected suitable work under section 8106, a penalty provision.[18] The Board finds that there is insufficient evidence to show that appellant was required to start work on July 9, 2005 or any other particular date. Consequently, the Office improperly terminated her compensation under section 8106 of the Act.

CONCLUSION

The Board finds that the Office improperly terminated appellant's compensation under 5 U.S.C. § 8106 on the grounds that she refused an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 6, 2007 is reversed.

Issued: January 18, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[18] The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed. *Joan F. Burke*, 54 ECAB 406 (2003).