United States Department of Labor
Employees' Compensation Appeals Board

Y.B., Appellant	)	
and	)	**Docket No. 07-1742**
	)	**Issued: June 2, 2008**
DEPARTMENT OF DEFENSE, DEFENSE COMMISSARY AGENCY, Virginia Beach, VA, Employer	)	

Appearances:
Appellant, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 20, 2007 appellant filed a timely appeal of the Office of Workers' Compensation Programs dated April 30, 2007, wherein an Office hearing representative affirmed a February 16, 2006 decision. In the February 16, 2006 decision, the Office terminated her compensation benefits for refusing an offer of suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly terminated appellant's wage-loss compensation effective February 16, 2006 under 5 U.S.C. § 8106(c) on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

This is the third appeal in this case. The Board issued its first decision on February 19, 2004 in which it reversed an August 22, 2003 decision of the Office on the grounds that the

Office improperly terminated appellant's compensation effective August 20, 2003 because she neglected to work after suitable work was offered to her.[1] The Board found that the Office failed to notify appellant that she had 15 days in which to accept the offered work without penalty. Furthermore, the Board found that the evidence of record was unclear as to whether the position was open and available to appellant.[2] In the second appeal, the Board reversed the April 5, 2005 decision of the Office on the grounds that the Office improperly terminated appellant's compensation effective April 5, 2005.[3] The Board found that the Office failed to develop the evidence regarding whether suitable employment was available in appellant's commuting area of Bowling Rock, NC. The facts and the circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

The relevant evidence includes an August 31, 2004 report by Dr. Maher Fahim Habashi, a second opinion Board-certified orthopedic surgeon. On August 31, 2004 he reported the history of appellant's May 20, 2001 employment injury and her medical treatment since that time. Dr. Habashi indicated that appellant did not have any range of motion deficits in her upper extremities, but had limited range of motion in her cervical spine. Range of motion in the cervical spine included 20 degrees extension, 20 degrees bending and 60 degrees rotation. He reported that appellant had "pain on stress of rotator cuff right shoulder." X-ray interpretations revealed "marked narrowing at C4-5 and C5-6," dorsal and lumbar spine degenerative changes, lumbar scoliosis and left shoulder acromioclavicular arthritis. Dr. Habashi concluded that appellant was capable of working with restrictions of no lifting more than 20 pounds and no "excessive repeated bending, excessive reaching above shoulder level and heavy pushing and pulling." In a June 1, 2005 corrected report, he reiterated the findings of his August 31, 2004 report.

On November 30, 2005 the employing establishment offered appellant a position as a modified sales store checker at Camp Lejeune Commissary.[4] The employing establishment noted that this position was consistent with previous job offers and with the restrictions noted by Dr. Habashi and prior physicians and that the position was immediately available. The restrictions included no lifting more than 20 pounds and no reaching above shoulder level, excessive repeated bending and heavy pulling or pushing. The employing establishment noted that there were "no Defense Commissary Agency commissaries in the commuting area of Bowling Rock NC" and thus the employing establishment was unable to offer her a position within her commuting area. Appellant was informed that relocation expenses would be provided.

[1] On May 23, 2001 appellant, then a 52-year-old cashier, sustained shoulder, arm, back and neck injuries on May 20, 2001 while participating in a team exercise. The Office accepted the claim for thoracic strain, scalp/head contusion and left shoulder/arm contusion. Subsequently, the Office authorized left shoulder arthroscopy with subacromial decompression and bursectomy on May 14, 2002 and left shoulder arthroscopic surgery on November 26, 2002. Appellant worked intermittently from the date of the injury until June 26, 2001 and was subsequently placed on the automatic rolls for total disability.

[2] Docket No. 03-2143 (issued February 19, 2004).

[3] Docket No. 05-1254 (issued September 22, 2005).

[4] The work schedule was for 32 hours per week initially.

On December 28, 2005 the Office advised appellant of its determination that the position of modified sales store checker was suitable and gave her 30 days to accept the position or provide a written explanation of her reasons for failing to accept it.

Appellant initially accepted the position on January 12, 2006 and requested the money for relocating be sent to her. She also noted that she had relocated from Bowling Rock, NC to Mountain City, TN.

In a letter dated January 19, 2006, the employing establishment informed the Office that no Commissary positions were available within appellant's new commuting area of Mountain City, TN.

Appellant subsequently changed her mind and declined the position on January 23, 2006, noting the position was impossible for her to perform, that she was awarded Social Security disability benefits, she was afraid her agency would fire her after accepting the position and relocating and that she had not been placed back on the periodic rolls for temporary total disability.

By letter dated January 30, 2006, the Office advised appellant that her reason for refusing to accept the modified sales store checker position was not valid and provided her with 15 days to accept the position. The Office informed her of the information required to reinstate her to the periodic rolls for temporary total disability.

In response to the Office's letter, appellant contended that her employment injury caused a thoracic and lumbar herniated disc and resubmitted evidence including a September 10, 2001 work status report and one page of a June 11, 2001 progress note by Dr. James W. Markworth, a treating Board-certified orthopedic surgeon; an August 29, 2001 magnetic resonance imaging (MRI) scan diagnosing a small T5-TG disc protrusion and a September 27, 2004 acceptance of her disability claim by the Social Security Administration. She informed the Office that the offered job was impossible for her to perform and she did not want to lose her social security benefits and money. Appellant also refused the position as she had not been placed back on the periodic rolls for temporary total disability and "[s]ocial [s]ecurity says I can[not] do the job with herniated disc [t]horacic and lumbar."

In a February 15, 2006 letter, the Office reviewed appellant's reasons for refusing the position and found that they were not acceptable.

By decision dated February 16, 2006, the Office terminated appellant's compensation effective that date on the grounds that she refused an offer of suitable work.

On February 22, 2006 appellant requested an oral hearing before an Office hearing representative and a telephonic hearing was held on February 6, 2007.

Subsequent to the hearing appellant submitted additional evidence. On February 5, 2007 Dr. Glen R. Liesegang, a treating Board-certified orthopedic surgeon, diagnosed a ruptured thoracic disc and cervical disc injury due to the 2001 employment injury. He noted that appellant was referred for a functional capacity evaluation to get "a more accurate determination of her incapacity." In concluding, Dr. Liesegang stated that his training did not "permit a precise

determination of [appellant]'s present limitations to perform various jobs" and recommended referral to a trained examiner/therapist to make this determination. In an attached work capacity evaluation (Form OWCP-5c), he stated that appellant was capable of working part time with restrictions. Dr. Liesegang noted that appellant was on pain and muscle spasm medication which "may interfere with judgment, coordination."

On April 30, 2007 the Office hearing representative affirmed the termination of appellant's compensation based on her refusal of an offer of suitable work.

LEGAL PRECEDENT

It is well settled that, once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[5] As the Office in this case terminated appellant's compensation under 5 U.S.C. § 8106(c), the Office must establish that appellant refused to work after suitable work was found for her. Section 8106(c) of the Federal Employees' Compensation Act[6] 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] Section 10.517 of the applicable regulations[8] provides that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of showing that such refusal or failure to work was reasonable or justified and shall be provided with the opportunity to make such showing before a determination is made with respect to termination of entitlement to compensation.[9] 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.[10]

Section 10.516 of the implementing regulations[11] provides in pertinent part:

> "[The Office] shall advise the employee that it has found the offered work to be suitable and afford the employee 30 days to accept the job or present any reasons to counter [the Office's] finding of suitability. If the employee presents such reasons and [the Office] determines that, the reasons are unacceptable, it will notify the employee of that determination and that he or she has 15 days in which to accept the offered work without penalty. At that point in time, [the Office]'s

[5] *K.H.*, 58 ECAB ___ (Docket No. 06-832, issued November 30, 2006); *Cary S. Brenner*, 55 ECAB 739 (2004); *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[6] 5 U.S.C. § 8106(c)(2).

[7] *See M.S.*, 58 ECAB ___ (Docket No. 06-797, issued January 31, 2007).

[8] 20 C.F.R. § 10.517.

[9] *See T.T.*, 58 ECAB ___ (Docket No. 06-1674, issued January 29, 2007).

[10] *Bryan O. Crane*, 56 ECAB 713 (2005); *Kathy E. Murray*, 55 ECAB 288 (2004); *Arthur C. Reck*, 47 ECAB 339 (1995).

[11] 5 U.S.C. §§ 8101-8193; 5 U.S.C. § 8106(c)(2).

notification need not state the reasons for finding that the employee's reasons are not acceptable."[12]

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 location.[13]

ANALYSIS

The Board finds that the Office properly terminated appellant's compensation and schedule award benefits under 5 U.S.C. § 8106(c)(2) for refusing an offer of suitable work.

In second opinion reports dated August 31, 2004 and June 1, 2005, Dr. Habashi, a Board-certified orthopedic surgeon, reported the history of appellant's May 20, 2001 injury and her medical treatment since that time. He indicated that appellant did not have any range of motion deficits in her upper extremities, but had limited range of motion in her cervical spine. Dr. Habashi concluded that appellant was capable of working with restrictions of no lifting more than 20 pounds and no "excessive repeated bending, excessive reaching above shoulder level and heavy pushing and pulling." The Board finds that the weight of medical evidence is represented by his reports, which were thorough and well rationalized. Dr. Habashi provided a comprehensive review of the factual and medical evidence, detailed his findings on physical examination of appellant and provided discussion for the conclusions he reached. The Board notes that there is no other contemporaneous medical evidence of record relevant to the issue of appellant's ability to perform the duties of the position offered by the employing establishment. On the basis of Dr. Habashi's report, the employing establishment properly identified a temporary, limited-duty assignment in appellant's original commuting area citing that there were "no Defense Commissary Agency commissaries in the commuting area of Bowling Rock, NC."[14] Physical requirements of the job required no lifting more than 20 pounds and no reaching above shoulder level, excessive repeated bending and heavy pulling or pushing, which were well within appellant's work restrictions. Furthermore, the offer was in writing, included a description of the duties of the position, the physical requirements of those duties and the date by which appellant was to either accept the offer or submit her reasons for refusal.[15] The Board finds that the Office met its burden to establish that the position was suitable.

The issue of whether an employee has the physical ability to perform the duties of a modified position offered by the employing establishment is primarily a medical question that

[12] *Sandra K. Cummings*, 54 ECAB 493 (2003); *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

[13] 20 C.F.R. § 10.508. This regulation applies to both those employees who are no longer on agency rolls and those employees who continue on the agency rolls.

[14] *See* 20 C.F.R. § 10.508. *Compare, Sharon L. Dean*, 56 ECAB 175 (2004) (where the employing establishment, among other things, did not attempt to determine whether suitable employment was available where appellant resided. The Board reversed the Office's termination of benefits).

[15] *See* 20 C.F.R. § 10.507.

must be resolved by the medical evidence.[16] In this case, the medical evidence provided by Dr. Habashi establishes the suitability of the offered position, in that the job offered satisfied his physical limitations.

Appellant also submitted a decision from the Social Security Administration. However, the findings of other administrative agencies are not determinative of appellant's disability under the Act.[17] The Social Security Act and the Federal Employees' Compensation Act have different standards of medical proof on the question of disability.[18] Thus, this evidence is not relevant with regard to appellant's claim under the Federal Employees' Compensation Act.

Appellant submitted a February 5, 2005 report and work capacity evaluation form by Dr. Liesegang who diagnosed a ruptured thoracic disc and cervical disc injury due to the 2001 employment injury. However, Dr. Liesegang did not discuss the offered position or provided a reasoned opinion on the issue presented. Moreover, he related that he believed he was unable to provide a determination on appellant's ability to perform a limited-duty job based on his training and recommended referral to a trained examiner/therapist to make this determination. As Dr. Liesegang stated that he believed he was not qualified to provide an opinion as to appellant's work capability, his opinion is speculative and of decreased probative value.[19] The Board finds that appellant has submitted no probative medical evidence providing support for her refusal of suitable work. Therefore, she has not established a reasonable basis for refusing the offered position.

In light of the foregoing, the Board finds that the job offered was medically and vocationally suitable and the Office followed its procedures prior to termination of compensation. Accordingly, the Board finds that the Office met its burden of proof to terminate compensation.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective February 16, 2006 for refusing a suitable job offer.

[16] *See Maurissa Mack*, 50 ECAB 498, 502 (1999).

[17] *Joseph R. Santos*, 57 ECAB 554 (2006); *Raj B. Thackurdeen*, 54 ECAB 396 (2003).

[18] *Dona M. Mahurin*, 54 ECAB 309 (2003).

[19] *D.D.*, 57 ECAB 734 (2006) (medical opinions that are speculative or equivocal in character are of diminished probative value).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 30, 2007 is affirmed.

Issued: June 2, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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