United States Department of Labor
Employees' Compensation Appeals Board

A.W., Appellant	)	
and	)	**Docket No. 08-1969**
	)	**Issued: March 20, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Richmond, VA, Employer	)	

Appearances:
Appellant, pro se
No appearance, for the Director

Oral Argument February 11, 2009

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 8, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated April 8, 2008. 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 pursuant to 5 U.S.C. § 8106(c).

FACTUAL HISTORY

Appellant filed claims for compensation based on forklift accidents on May 16 and September 1, 2005. The Office accepted lumbar and cervical strains, as well as displaced intervertebral C6 disc. Appellant underwent cervical surgery on January 25, 2006.

In a July 17, 2006 report, attending physician, Dr. David Urquia, an orthopedic surgeon, indicated that appellant could work sedentary duty. He completed a work capacity evaluation

(Form OWCP-5c) finding that appellant could work with a 10- to 15-pound lifting restriction, with no climbing and two-hour restrictions on pulling, pushing and squatting.

On August 10, 2006 the employing establishment offered appellant a full-time light-duty position as an "apps machine" worker. The physical requirements included eight hours of standing. On August 23, 2006 appellant submitted a duty status report (Form CA-17) from Dr. Brian Bittner, a family practitioner, who indicated that appellant was limited to two hours of standing, two to four hours of keyboarding or similar activity, with no standing. He indicated that he was rejecting the job offer.

By letter dated August 24, 2006, the Office advised appellant that it found the job offer suitable based on a July 17, 2006 report from Dr. Urquia. It stated that appellant was expected to arrange for his return to work or provide reasons for not accepting the position within 30 days. On August 28, 2006 appellant submitted a note from Dr. Bittner indicating that he had an appointment with Dr. William Broaddus, a neurosurgeon, and he should remain off work. In a letter dated September 29, 2006, the Office stated that appellant had not provided valid reasons for refusing the offered position. It indicated that appellant had 15 days to accept the position and arrange for a return to work or his compensation would be terminated.

The record indicates that on October 16, 2006 appellant reported for work. On October 20, 2006 the Office received an October 16, 2006 letter from appellant indicating that he was reporting for work, noting that he was on pain medications and submitting medical documentation. In an October 23, 2006 letter, appellant's representative stated that appellant reported for work on October 16, 2006 approximately 12:00 p.m. for a shift beginning at 1:00 p.m. He indicated that eventually appellant was taken to a machine where he was to pick up and throw mail. Appellant asked for a chair and after a short period of working he became weak and stopped working. A supervisor stated in an October 17, 2006 e-mail that appellant was on the machine for three to five minutes and a chair was not provided as this was not in his work restrictions. The employing establishment indicated that appellant left at about 3:50 p.m.

With respect to medical evidence, on October 16, 2006 the Office received a September 18, 2006 report from Dr. Broaddus, who stated that appellant did have a significant herniation prior to his cervical surgery in 2006. Dr. Broaddus recommended a new cervical magnetic resonance imaging (MRI) scan.

By decision dated October 20, 2006, the Office terminated appellant's entitlement to wage-loss compensation pursuant to 5 U.S.C. § 8106(c). It stated that the offered job suitable and "your employer verified on October 17, 2006 that your refusal of the offered position continues and the position remains available to you."

Appellant requested reconsideration by letter dated March 7, 2007. He submitted a May 14, 2007 report from Dr. Jeff Ericksen, a physiatrist, who provided a history and results on examination. In a report dated May 28, 2007, Dr. Stephen Melhorn, an osteoapth, diagnosed sacroilitis and coccydynia. Appellant also submitted an October 23, 2006 report from Dr. Broaddus, who reviewed a cervical MRI scan and stated that he did not see any pathology that correlated with his lumbar and cervical symptoms.

By decision dated June 28, 2007, the Office reviewed the case on its merits. It found the evidence was not sufficient to warrant modification.

Appellant again requested reconsideration and submitted additional evidence. In a report dated December 18, 2007, Dr. Ericksen stated that appellant continued to be unable to work due to his pain syndrome. Appellant also submitted medical evidence regarding treatment for sacrococcygeal pain and a notice of award dated October 13, 2007 from the Social Security Administration.

By decision dated April 8, 2008, the Office reviewed the case on its merits and denied modification.

LEGAL PRECEDENT

5 U.S.C. § 8106(c) 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." 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.[1] To justify such a termination, the Office must show that the work offered was suitable.[2] The Board has held that 5 U.S.C. § 8106(c) is a penalty provision and is narrowly construed.

ANALYSIS

The employing establishment offered appellant a position on August 10, 2006. The Office followed its procedures and notified appellant of the consequences of refusal to accept a suitable position and by letter dated September 29, 2006 afforded appellant a final opportunity to accept the position.[3] The October 20, 2006 Office decision makes a finding that appellant had refused an offer of suitable work.[4] The record indicates, however, he had reported for work on October 16, 2006. Appellant was at the employing establishment for several hours and attempted to perform assigned duties.

The Office may terminate compensation under 5 U.S.C. § 8106(c)(2) if a claimant "neglects to work" or, as the Office procedures states, "abandons" the job.[5] Such a termination,

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

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

[3] With respect to the procedural requirements of termination under section 8106(c), the Board has held that the Office must inform appellant of the consequences of refusal to accept suitable work and allow appellant an opportunity to provide reasons for refusing the offered position. If he presents reasons for refusing the offered position, the Office must inform the employee if it finds the reasons inadequate to justify the refusal of the offered position and afford appellant a final opportunity to accept the position. *Maggie L. Moore*, 42 ECAB 484 (1991); *reaff'd on recon.*, 43 ECAB 818 (1992).

[4] The Office refers to evidence from the employing establishment dated October 17, 2006, but it is not clear what evidence was reviewed. The October 17, 2006 e-mail was apparently not received until October 26, 2006.

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.10 (December 1995).

however, implicates additional procedural requirements. As the Board explained in *Coralisia L. Sims (Smith),* when a claimant returns to work, even for a brief period, she is entitled to notice and an opportunity to respond to the specific grounds for the termination.[6] As in the present case, in *Sims (Smith)* the Office had sent a letter regarding the consequences of refusal of suitable work, but did not provide notice or an opportunity to respond on the issue of neglecting or abandoning suitable work. Office procedures require that a claimant be advised of the consequences of abandoning a job under 5 U.S.C. § 8106(c)(2) and allowed 30 days to submit reasons for abandoning the job.[7]

In the present case, the Office should have sent appellant a letter in compliance with its procedures that allowed appellant an opportunity to present reasons for abandoning the job. It would then properly consider the relevant evidence on the issue. Since the Office did not follow its procedures for neglecting or abandoning suitable work, the Board finds that the Office did not properly terminate compensation under 5 U.S.C. § 8106(c)(2) in this case.

CONCLUSION

The Office did not meet its burden of proof to termination compensation pursuant to 5 U.S.C. § 8106(c)(2) on October 20, 2006.

[6] 46 ECAB 172 (1994). In this case, the claimant returned to work, was sent to a training session for approximately two hours, then was instructed to report to her job using a letter sorting machine. She stated the chair at the machine was unsuitable and stopped working.

[7] 5 U.S.C. § 8106 (c)(2).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 8, 2008 is reversed.

Issued: March 20, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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