United States Department of Labor
Employees' Compensation Appeals Board

S.G., Appellant	)	
and	)	**Docket No. 08-1992**
	)	**Issued: September 22, 2009**
U.S. POSTAL SERVICE, POST OFFICE, The Woodlands, TX, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 15, 2008 appellant timely appealed the May 13, 2008 nonmerit decision of the Office of Workers' Compensation Programs denying reconsideration of the August 1, 2007 merit decision which terminated her compensation for neglecting suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation pursuant to 5 U.S.C. § 8106(c)(2) for refusing suitable work; and (2) whether the Office properly denied appellant's April 29, 2008 request for reconsideration pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

Appellant, a 53-year-old letter carrier, sustained injuries to her cervical and lumbar spine in the performance of duty on March 17, 1997. The Office accepted her traumatic injury claim for cervical and lumbar strains and herniated nucleus pulposus at C4-5 and C5-6. Appellant received appropriate wage-loss compensation for temporary total disability. She returned to

work in a limited-duty capacity on October 13, 1998, but later sustained a recurrence of disability beginning January 15, 1999.

On October 25, 2005 the employing establishment offered appellant full-time work as a limited-duty carrier. This modified assignment was based on the July 13, 2005 physical restrictions advised by Dr. Martin L. Bloom, a Board-certified orthopedic surgeon and impartial medical examiner.[1] On November 21, 2005 appellant accepted the position "under duress." She did not report for work at that time.

On January 10, 2006 the Office advised appellant that it found the limited-duty carrier position suitable. Appellant was afforded 30 days to either accept the position or provide the Office with a written explanation for not accepting the position.

Appellant returned to work on February 10, 2006. On February 13, 2006 the Office advised her that it had "received notice that [her] refusal to accept, or report to, the job [she was] offered continues." It stated that it had "considered all reasons ... provided for refusing to accept the offered position, and [did] not find them to be valid." Appellant was given an additional 15 days to accept the position and make arrangements for a report date. The Office advised appellant that if she did not comply her wage-loss compensation and schedule award benefits would be terminated. It also noted that it would not consider any further reasons for refusal.

As noted, appellant returned to work on February 10, 2006. However, she did not work a full eight-hour shift as the offered position required. Appellant attempted to work an eight-hour shift on February 10 and 11, 2006, but was only able to complete six hours due to pain. Thereafter, she worked four-hour shifts. The employing establishment granted appellant leave to cover her absences commencing February 10, 2006.

In a decision dated June 14, 2006, the Office terminated appellant's compensation for refusing to accept suitable work. The decision found that she returned to work on March 3, 2006 working four hours per day as opposed to eight hours as required under the job offer. The Office considered appellant's part-time work schedule as a "refusal of the offered position...."

Following appellant's request for reconsideration, the Office reviewed the merits of the claim and issued an August 1, 2007 decision, which modified the June 14, 2006 decision. It acknowledged that appellant had returned to work on February 10, 2006 and not March 3, 2006 as noted in the prior decision. In view of her return to work on February 10, 2006, the Office's February 13, 2006 notification was "moot."[2] Additionally, it noted that appellant had not refused the offered position. The Office determined that termination of benefits under 5 U.S.C. § 8106(c)(2) was still appropriate in view of her part-time work schedule. It found that appellant neglected to work after an offered position had been found suitable.

[1] The Office declared a conflict of medical opinion based on the differing opinions of appellant's treating physician, Dr. Stephen I. Esses, a Board-certified orthopedic surgeon, and Dr. Bernard Z. Albina, a Board-certified orthopedic surgeon and Office referral physician. Dr. Esses disagreed with Dr. Albina's December 8, 2004 finding that appellant was capable of returning to work in a part-time, limited-duty capacity.

[2] The Office mistakenly characterized the February 13, 2006 correspondence as a decision terminating benefits rather than a 15-day notice.

On April 29, 2008 appellant requested reconsideration. By decision dated May 13, 2008, the Office denied reconsideration without further merit review.

LEGAL PRECEDENT

A disabled employee is obligated to perform such work as he or she can.[3] The Office's goal is to return each disabled employee to suitable work as soon as the employee is medically able.[4] A partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by, or secured for him or her is not entitled to compensation.[5]

Whether an employee has the physical or psychological ability to perform an offered position is primarily a medical question that must be resolved by the medical evidence.[6] In evaluating the suitability of a particular position, the Office must consider preexisting and subsequently acquired medical conditions.[7]

When the Office considers a job to be suitable, it shall advise the employee of its finding and afford her 30 days to either accept the job or present any reasons to counter the Office's finding of suitability.[8] If the employee presents such reasons and the Office determines that the reasons are unacceptable, it will notify the employee of that determination and further inform the employee that she has 15 days in which to accept the offered work without penalty.[9] After providing the 30-day and 15-day notices, the Office will terminate the employee's entitlement to further compensation.[10] However, the employee remains entitled to medical benefits.[11]

ANALYSIS

The Board finds that the Office improperly terminated appellant's compensation benefits. As a penalty provision, 5 U.S.C. § 8106(c) should be narrowly construed and not lightly

[3] 20 C.F.R. § 10.500(b) (2009).

[4] In determining what constitutes "suitable work" for a particular disabled employee, the Office considers the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work and other relevant factors. *Id.*

[5] 5 U.S.C. § 8106(c) (2006); 20 C.F.R. § 10.517.

[6] *Gayle Harris*, 52 ECAB 319, 321 (2001).

[7] *Id*.; *Martha A. McConnell*, 50 ECAB 129, 132 (1998).

[8] 20 C.F.R. § 10.516.

[9] *Id.* However, the 15-day notification need not explain why the Office found the employee's reasons for refusal unacceptable. *Id.*

[10] 20 C.F.R. § 10.517(b). This includes compensation for lost wages as well as compensation for any permanent loss of use of a schedule member. *Id.*; *see* 5 U.S.C. §§ 8105, 8106 and 8107.

[11] 20 C.F.R. § 10.517(b).

invoked.[12] The regulatory scheme for imposing this penalty provides for a two-tiered notification process.[13] The initial 30-day notification was issued on January 10, 2006 when the Office informed appellant that it found the limited-duty carrier position suitable. The Office advised appellant that she had 30 days to either accept the job or present, in writing, any reasons to counter its finding of suitability. The record shows that she returned to work on February 10, 2006. Appellant attempted to work an eight-hour shift on February 10 and 11, 2006, but was only able to complete six hours due to pain. In the following days, appellant's workday was reduced to four-hour shifts. The record shows that the employing establishment granted appellant leave -- either annual leave, sick leave or leave without pay -- to cover her absences.

The Office issued the 15-day pretermination notice on February 13, 2006.[14] However, it was issued on the apparent basis that appellant had not returned to work. The February 13, 2006 15-day notice stated in relevant part: "We have received notice that your refusal to accept, or report to, the job you were offered continues." The Office further indicated that it had "considered all reasons ... provided for refusing to accept the offered position, and [did] not find them to be valid."

When the Office issued the February 13, 2006 notice, it was unaware that appellant had returned to work three days prior. Because appellant had already returned to work, it could not have considered her reason for working only six hours on February 10 and 11, 2006 and the subsequent reduction to four hours. She continued to work a part-time schedule for approximately four months prior to issuance of the Office's June 14, 2006 decision terminating benefits. The Office never advised appellant of its consideration of her part-time work schedule. Appellant did not receive proper notification prior to the termination of benefits.[15]

Moreover, the employing establishment authorized appellant's part-time work schedule. A June 26, 2006 e-mail from the claims examiner noted that the employing establishment indicated that appellant had been taking leave (annual/sick) as earned together with leave without pay intermittently since February 10, 2006. Where the employing establishment authorizes a claimant's absence from duty, there is no basis for finding neglect of suitable work under 5 U.S.C. § 8106(c)(2).[16] Accordingly, the termination of appellant's compensation benefits effective June 14, 2006 is reversed.

[12] *Stephen A. Pasquale*, 57 ECAB 396, 402 (2006).

[13] 20 C.F.R. §§ 10.516, 10.517(b).

[14] *Id*. at § 10.516.

[15] *Id*. at §§ 10.516, 10.517(b).

[16] *Dawn L. Westmoreland*, 56 ECAB 446, 450 (2005).

CONCLUSION

The Board finds that the Office improperly terminated appellant's compensation benefits under section 8106(c)(2).[17]

ORDER

IT IS HEREBY ORDERED THAT the August 1, 2007 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 22, 2009
Washington, DC

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

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

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

[17] In light of the Board's disposition of the claim on the merits, the Office's May 13, 2008 decision denying reconsideration is rendered moot.