United States Department of Labor
Employees' Compensation Appeals Board

J.A., Appellant	)	
and	)	
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Denver, CO, Employer	)	**Docket No. 09-1582** **Issued: April 21, 2010**

Appearances:
John S. Evangelisti, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 1, 2009 appellant filed a timely appeal from a May 20, 2009 decision of the Office of Workers' Compensation Programs that affirmed the termination of his compensation benefits on the basis that he refused suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation on the grounds that he refused suitable work.

FACTUAL HISTORY

On March 16, 2003 appellant, then a 30-year-old supervisory transportation security screener, injured his back when he lifted a heavy bag for screening. He stopped work on March 16, 2003. The Office accepted the claim for lumbar strain and an aggravation of

preexisting lumbar degenerative disease. It authorized an anterior lumbar interbody fusion at L5-S1 which was performed on October 28, 2004.

An April 8, 2003 magnetic resonance imaging (MRI) scan of the lumbar spine revealed multiple level facet joint arthrosis, previous right hemilaminectomy at L5-S1 with associated scarring and granulation involving the right S1 nerve root and a small left sided shallow protrusion and annular tear abutting against the nerve root. Dr. Bryan J. Duke, a Board-certified orthopedic surgeon, noted a lumbar discogram dated April 1, 2004 revealed discogenic low back pain, positive and concordant at L5-S1. On October 28, 2004 he performed an anterior lumbar interbody fusion at L5-S1.

Appellant was also treated by Dr. David Reinhard, a Board-certified orthopedic surgeon. On June 23, 2005 Dr. Reinhard returned appellant to work part time with restrictions. Additional reports from Dr. Reinhard listed appellant's progress in physical therapy.

In reports dated January 25 to October 30, 2007, Dr. Richard L. Stieg, a Board-certified neurologist, diagnosed low back and leg pain secondary to disc degeneration at L5-S1, with evidence of S1 radiculopathy and physiological dependence on opioids. He noted that appellant reached maximum medical improvement and could return to work full time with restrictions of no repetitive lifting more than 25 pounds or single lifting more than 40 pounds, no repetitive stooping and no crawling or climbing.

On November 6, 2007 the employing establishment offered appellant a supervisory transportation security officer position full time subject to the restrictions of occasional lifting and carrying up to 10 pounds; occasional walking, not required for extended lengths; frequent sitting with the ability to alternate standing and sitting, pushing and pulling up to 20 pounds with no climbing, stooping, kneeling and crawling. The employer noted the restrictions were based on Dr. Stieg's recommendations.

In a December 11, 2007 letter, the Office advised appellant that the job offer constituted suitable work. Appellant was informed that he had 30 days to either accept the position or provide an explanation for refusing it; otherwise, he risked termination of his compensation benefits.

In an undated letter appellant declined the offered position. He noted that he continued to be in constant pain and experienced side effects of his medication. Appellant disagreed with Dr. Stieg that he could return to work full time.

In a January 14, 2008 letter, the Office notified appellant that his refusal of the offered position was unjustified. It found that the position was within his physical restrictions. The Office considered appellant's contentions and found his reasons insufficient to establish the position as unsuitable. It provided appellant with 15 days to accept the job.

Appellant submitted reports from Dr. Reinhard dated January 7 to February 6, 2008, who treated him for persistent right lower extremity and back pain. He reported being offered a full-time job with the employing establishment and declining it because of his constant pain, tingling in his right foot and the side effects of the medication. Dr. Reinhard recommended a functional capacity evaluation.

On February 12, 2008 the employing establishment offered appellant a transportation security officer position, full-time subject to the restrictions of occasional lifting and carrying up to 10 pounds, occasional walking, not required for extended lengths, frequent sitting may alternate standing and sitting, pushing and pulling up to 20 pounds with no climbing, stooping, kneeling, crawling. The position was effective March 30, 2008. On February 22, 2008 appellant accepted the position.

In a February 28, 2008 report, a vocational rehabilitation counselor advised that the employing establishment changed the job offer from a supervisory position to a transportation security officer position and appellant accepted the position. In an April 4, 2008 report, the rehabilitation counselor noted that appellant had accepted the job offer but had not yet started work because of administrative paperwork. On May 2, 2008 the counselor noted that appellant had not started work as he had been on vacation and had not returned an administrative form to the employing establishment.

Appellant submitted reports from Dr. Reinhard dated March 5 to May 5, 2008, who continued to treat him for low back and bilateral lower extremity pain.

In a telephone log dated May 15, 2008, the employing establishment advised that appellant was unable to return to work as he failed a routine background check that was required of all agency security screeners. Subsequently, the Office's vocational rehabilitation specialist contacted the claims examiner who confirmed that a due process 30-day letter and 15-day letter would need to be issued and that a failed background check was not an allowable reason for not returning to work. On June 2, 2008 the vocational rehabilitation counselor noted that the employing establishment advised that appellant's failed background check precluded his return to employment.

In a decision dated June 6, 2008, the Office terminated appellant's compensation under section 8106(c) effective June 8, 2008 on the grounds that he refused suitable work. It noted that appellant was offered a position as a supervisor transportation security officer on December 11, 2007, which he declined. On February 12, 2008 the employer offered appellant a position as a transportation security officer which he accepted on February 22, 2008. It noted that appellant failed a background check which was an administrative matter and did not invalidate the job offer. The Office further noted that he was given the opportunity to remediate the failed background check and failed to do so. The employing establishment confirmed the position was still available.

On June 27, 2008 appellant requested an oral hearing which was held on October 27, 2008. He testified that he failed the agency security background check because he underwent a foreclosure. Appellant submitted additional progress reports from Dr. Reinhard, who treated him for low back and bilateral lower extremity pain. He also submitted an August 11, 2008 functional capacity evaluation which revealed he was able to work three days a week for up to four hours a day in a sedentary to light work basis with restrictions.

In a January 8, 2009 decision, the hearing representative affirmed the June 6, 2008 termination of benefits.

On February 11, 2009 appellant's attorney requested reconsideration. Appellant submitted reports from Dr. Reinhard dated January 22 to April 17, 2009. Dr. Reinhard advised that the August 2008 functional capacity evaluation would be applicable at the time of the February 12, 2008 offer. He further noted that appellant's prescribed medications caused side effects, which would impair his ability to accurately perform the modified job.

In a decision dated May 20, 2009, the Office denied modification of the January 8, 2009 decision.

LEGAL PRECEDENT

Once the Office accepts a claim it has the burden of proving that the employee's disability has ceased or lessened before it may terminate or modify compensation benefits.[1] Section 8106(c)(2) of the Federal Employees' Compensation Act[2] provides that the Office may terminate the compensation of a disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.[3] The Board has recognized that section 8106(c) is a penalty provision which must be narrowly construed.[4]

The Board has held that due process and elementary fairness require that the Office observe certain procedures before terminating a claimant's monetary benefits under section 8106(c)(2) of the Act.[5] Section 10.516 of the Office's regulations state that the Office will advise the employee that the work offered is suitable and provide 30 days for the employee to accept the job or present any reasons to counter the Office's finding of suitability.[6] Before terminating compensation, the Office must review the employee's proffered reasons for refusing or neglecting to work.[7] If the employee presents such reasons and the Office finds them unreasonable, the Office will offer the employee an additional 15 days to accept the job without penalty.[8]

Once the Office establishes that the work offered was suitable, the burden of proof shifts to the employee who refuses to work to show that such refusal or failure to work was reasonable or justified.[9] The determination of whether an employee is physically capable of performing a

[1] *Karen L. Mayewski*, 45 ECAB 219, 221 (1993); *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

[2] 5 U.S.C. §§ 8101-8193 (1974); 5 U.S.C. § 8106(c)(2).

[3] *Camillo R. DeArcangelis*, 42 ECAB 941, 943 (1991).

[4] *Steven R. Lubin*, 43 ECAB 564, 573 (1992).

[5] *See also Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992); *see also Linda Hilton*, 52 ECAB 476 (2001).

[6] 20 C.F.R. § 10.516.

[7] *See Maggie L. Moore*, *supra* note 5.

[8] 20 C.F.R. § 10.516; *see Sandra K. Cummings*, 54 ECAB 493 (2003).

[9] *Id*. at § 10.517(a); *Deborah Hancock*, 49 ECAB 606, 608 (1998).

modified position is a medical question that must be resolved by medical evidence.[10] Office procedures state that acceptable reasons for refusing an offered position include medical evidence of inability to do the work or travel to the job.[11] Furthermore, if medical reports document a condition which has arisen since the compensable injury and the condition disables the employee, the job will be considered unsuitable.[12]

ANALYSIS

The Office failed to provide appellant proper notice prior to terminating compensation pursuant to 5 U.S.C. § 8106(c)(2). The employing establishment offered him a full-time supervisory transportation security officer position subject to the restrictions of his physician. On December 11, 2007 the Office advised appellant that the job offer constituted suitable work and allowed him 30 days to accept the position. Appellant declined the offered position and provided reasons for his refusal. On January 14, 2008 the Office informed him that his refusal of the offered position was unjustified and allowed him 15 days to accept the job without penalty.

On February 12, 2008, however, the employing establishment made a second job offer to appellant, as a transportation security officer which was also full-time subject to restrictions. On February 22, 2008 appellant accepted the position but subsequently failed a background check that was part of his reemployment. On June 6, 2008 the Office terminated appellant's compensation under section 8106(c) on the grounds that appellant refused suitable work. Its decision noted that appellant signed the changed job offer on March 18, 2008 but failed to formalize the paperwork.

The Board finds that the Office failed to provide the appropriate notice to appellant prior to terminating his compensation for neglect or refusal of the second offered position.[13] The notice provided by the Office pertained to the original job offer as a modified supervisor of transportation security. After appellant accepted the second job offer on February 22, 2008, but did not return to work, the Office did not make any suitability finding or notify him that he had 30 days to either return to work or provide reasons for not doing so. When appellant accepted the position on February 22, 2008 but subsequently failed the background check, the Office did not provide appellant notice as contemplated under its implementing regulations or Board precedent. It is well established that as a penalty provision, section 8106(c) will be narrowly construed. Accordingly, the Office improperly terminated appellant's compensation.

[10] *See Robert Dickerson*, 46 ECAB 1002 (1995).

[11] *Id.*, Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(5) (July 1997).

[12] *Id.; see Susan L. Dunnigan*, 49 ECAB 267 (1998).

[13] *E.H.*, 60 ECAB ___ (Docket No. 08-1862, issued July 8, 2009) (to properly terminate compensation under section 8106(c), the Office must provide the claimant notice of its finding that an offered position is suitable and give him an opportunity to accept or provide reasons for declining the position).

CONCLUSION

The Board finds that the Office improperly terminated appellant's compensation on the grounds that he refused suitable work.

ORDER

IT IS HEREBY ORDERED THAT the May 20 and January 8, 2009 decisions of the Office of Workers' Compensation Programs be reversed.

Issued: April 21, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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