United States Department of Labor
Employees' Compensation Appeals Board

K.H., Appellant	)	
and	)	**Docket No. 09-2319**
	)	**Issued: July 16, 2010**
DEPARTMENT OF VETERANS AFFAIRS, MICHAEL E. DeBAKEY MEDICAL CENTER, Houston, 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
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 21, 2009 appellant filed a timely appeal from the August 26, 2009 merit decision of the Office of Workers' Compensation Programs which terminated her compensation for refusing suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation under 5 U.S.C. § 8106(c)(2) for refusing an offer of suitable work.

FACTUAL HISTORY

On July 17, 2005 appellant, then a 57-year-old program support assistant, sustained an injury in the performance of duty when her right foot gave out and she fell. The Office accepted her claim for neck sprain and an open wound of the left knee, leg and ankle without

complications. It also accepted lumbar back sprain and cellulitis of the left leg, except foot. Appellant received compensation for temporary total disability on the periodic rolls.

The employer offered appellant a full-time limited-duty assignment as a modified program support assistant effective April 27, 2009. The offer set out the principle duties and responsibilities of the assignment as well as the physical demands. On April 23, 2009 appellant's attending orthopedic surgeon, Dr. Stephen I. Esses, reviewed the offer and cleared appellant to return to work: "I concur with the above light[-]duty assignment."

On April 27, 2009 Dr. Esses noted findings on examination and stated: "At this time, there is nothing further for me to offer this patient. She will follow up with her other physicians." On that same date, he completed a Texas Workers' Compensation Work Status Report, which indicated: "The injured employee's medical condition resulting from the workers' compensation injury has prevented and still prevents the employee from returning to work as of April 27, 2009 and is expected to continue through six months. The following describes how this injury prevents the employee from returning to work: [displacement of lumbar intervertebral disc without myelopathy]."

On May 12, 2009 the Office informed appellant of its finding that the offered job was suitable "in accordance with your medical limitations provided by Dr. Esses in his report dated April 23, 2009." It advised that she had 30 days to accept the position or to provide a written explanation for refusing. The Office notified appellant of the penalty provision in 5 U.S.C. § 8106(c)(2).

Appellant declined the limited-duty assignment "because according to my Texas Workers' Compensation Work Status Report I am still unable to return to work. I will be reassessed by Dr. Esses in 6 months." She explained that, after Dr. Esses released her to limited duty, he saw her for an appointment and gave her a work status report granting her six months off and returning her to the care of her other physicians.

On July 9, 2009 the Office informed appellant that her reasons for refusing to accept the offered position were not valid. It notified her that, if she did not accept the offer and make arrangements to report to work within 15 days, it would terminate her compensation under 5 U.S.C. § 8106(c)(2).

After the employer confirmed that appellant failed to report for duty, the Office issued a decision on August 26, 2009 terminating appellant's compensation under 5 U.S.C. § 8106(c)(2).

On appeal, appellant argues that she did not accept the May 12, 2009 job offer because she was still unable to return to work according to the Texas Workers' Compensation Work Status Report and was not scheduled to return to work until October 27, 2009. She offered other reasons and stated that she was not given the opportunity to file for a schedule award with any of her work injuries. Appellant noted that the Social Security Administration approved her disability on July 30, 2009.

LEGAL PRECEDENT

Section 8106(c)(2) of the Federal Employees' Compensation Act states that 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 her is not entitled to compensation.[1] The Office has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects suitable work when it is offered. 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, and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.[2] In other words, to justify termination of compensation under section 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused or neglected by appellant was suitable.[3]

ANALYSIS

The Office found that the limited-duty assignment of modified program support assistant was suitable "in accordance with your medical limitations provided by Dr. Esses in his report dated April 23, 2009." Indeed, on April 23, 2009 Dr. Esses, the attending orthopedic surgeon, reviewed the job offer and signed off on it, giving his approval for appellant to return to work. However, four days later he changed his mind. On April 27, 2009 Dr. Esses examined appellant and found that her employment injury still prevented her from returning to work. Moreover, he expected this to continue for six months. Appellant offered this evidence when she declined the limited-duty assignment, but the Office found it an invalid reason for refusing the offer.

The Board finds that appellant provided a valid reason or justification for refusing the offered position. The same physician who released her to return to work, and on whose opinion the Office based its suitability finding, changed his mind when he examined appellant a few days later. The Office did not explain why it would rely on the initial release and not seek clarification from the attending physician. It cannot discharge its burden of proof by arbitrarily selecting the evidence that supports suitability.

The weight of the medical evidence provided by Dr. Esses did not establish the work offered to and refused by appellant is suitable. The Board finds that the Office did not meet its burden of proof to terminate her monetary compensation. The Board will reverse the Office's August 26, 2009 decision.

On appeal, appellant repeated her argument that she was still unable to return to work according to the Texas Workers' Compensation Work Status Report Dr. Esses completed on April 27, 2009. As the Board explained, this was a valid reason for refusing the job offer. The Board need not address other reasons given, except to note that the Social Security

[1] 5 U.S.C. § 8106(c)(2).

[2] *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

[3] *Glen L. Sinclair*, 36 ECAB 664 (1985).

Administration defines disability differently than does the Office and has a different standard of medical proof, so entitlement to benefits under the Social Security Act does not establish entitlement to benefits under the Federal Employees' Compensation Act.[4]

CONCLUSION

The Board finds that the Office improperly terminated appellant's compensation as the medical opinion evidence does not establish the suitability of the offered position.

ORDER

IT IS HEREBY ORDERED THAT the August 26, 2009 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 16, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[4] *Hazelee K. Anderson*, 37 ECAB 277 (1986). The question of whether appellant may claim a schedule award is not before the Board in the present appeal. See 20 C.F.R. § 501.2.