United States Department of Labor
Employees' Compensation Appeals Board

E.W., Appellant	)	
and	)	**Docket No. 09-1876**
	)	**Issued: June 16, 2010**
U.S. POSTAL SERVICE, NORTH HOUSTON PROCESSING & DISTRIBUTION CENTER, Houston, TX, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On July 14, 2009[1] appellant filed a timely appeal from a January 16, 2009 decision of the Office of Workers' Compensation Programs terminating her monetary compensation benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether the Office properly terminated appellant's monetary compensation benefits effective November 27, 2004 under section 8106(c) of the Federal Employees' Compensation Act on the grounds that she neglected an offer of suitable work.

On appeal, appellant contends that her physicians did not release her to return to work.

[1] Appellant's request for appeal was postmarked July 14, 2009.

FACTUAL HISTORY

The Office accepted that on May 6, 2004 appellant, then a 42-year-old mail handler, sustained a right shoulder sprain/strain and cervical sprain/strain when struck by a falling postal container shelf. Appellant stopped work on May 8, 2004 and did not return. She received wage-loss compensation on the daily rolls effective June 21, 2004 and periodic rolls effective July 11, 2004. On July 13, 2004 the Office referred appellant to a medical management nurse.

Dr. Nolon W. Jones, an attending Board-certified family practitioner, held appellant off work from May 25 to July 27, 2004 due to the accepted injuries.[2] Dr. Andres H. Keichian, an attending neurologist, provided June 21 and July 22, 2004 reports diagnosing cervical spondylosis and status post cervical strain.

In a July 16, 2004 report, Dr. Sherwin J. Siff, an attending Board-certified orthopedic surgeon, diagnosed rotator cuff tendinitis and subacromial bursitis. He released appellant to return to work from July 19, 2004 onward with no heavy lifting. In an August 30, 2004 report, Dr. Siff found her able to work eight hours a day with restrictions against lifting more than 25 pounds, excessive reaching or reaching above the shoulder.

Dr. Carlos F. Hernandez, an attending Board-certified psychiatrist, held appellant off work from August 13 to 23, 2004.

On September 2, 2004 the employing establishment offered appellant a full-time modified-duty assignment as a modified flat sorter, opening containers and tubs for three hours, loading ergo-carts for three hours, separating "direct tub under 25 pounds" for three hours, standing and walking. The position was available that day.

In a September 17, 2004 email, the medical management nurse noted that appellant had signed the job offer but not returned it to the employing establishment.

In a September 20, 2004 letter, the Office advised appellant that the offered modified flat sorter position was suitable work within Dr. Siff's August 30, 2004 restrictions. It explained the Act's penalty provisions under 5 U.S.C. § 8106(c)(2) for neglecting or refusing an offer of suitable work, including termination of wage loss and schedule award compensation. The Office afforded appellant 30 days to report for work or submit valid reasons for neglecting to work.

Appellant accepted the job offer on September 27, 2004. She submitted additional medical evidence.

In a May 17, 2004 report, Dr. Gerard T. Gabel, an attending orthopedist, limited lifting to 25 pounds. Dr. Hernandez held appellant off work on September 15 and 16, 2004 and released her to work as of September 20, 2004. Dr. Castillo, an attending physician, held appellant off

[2] A May 13, 2004 magnetic resonance imaging (MRI) scan showed right subacromial-subdeltoid bursitis, moderate supraspinatus tendinisis and moderate degenerative changes of the acromioclavicular joint. A July 15, 2004 cervical MRI scan showed mild cervical degenerative disc disease with posterior bulges from C3 through C6 and slight foraminal encroachment.

work from September 10 to 13, 2004 "due to medical reasons." Dr. Siff provided reports from August 30 to October 15, 2004, finding her able to work eight hours a day with pushing, pulling and lifting restricted to 25 pounds and limited overhead work. Dr. Jones held appellant off work from October 4 to 31, 2004 due to shortness of breath and an anxiety disorder.

By decision dated November 4, 2004, the Office terminated appellant's monetary compensation benefits effective November 27, 2004 under section 8106(c) of the Act, on the grounds she refused an offer of suitable work. It found that she received proper notice that the offered position was suitable work. The Office further found that appellant did not provide good cause for failing to report for duty, although the offered position remained open and available to her. It noted that the position was within the restrictions prescribed by Dr. Siff on August 30, 2004.

In a November 13, 2004 letter, appellant requested reconsideration. She contended that she "never refused the offer" as she accepted the job on September 27, 2004. Appellant submitted a December 14, 2004 report, from Dr. L.S. Slaughter, an attending Board-certified family practitioner, finding her totally disabled for work from May 7, 2004 onward due to occupational low back and neck injuries.

In a December 23, 2004 letter, the employing establishment acknowledged that appellant accepted the September 2, 2004 job offer on September 27, 2004. However, appellant had not yet returned to work.

By decision dated February 27, 2005, the Office denied modification of the November 4, 2004 decision. It found that appellant neglected suitable work as she failed to report for duty after accepting the offered position.

In a May 18, 2005 letter, appellant requested reconsideration. She submitted additional evidence.[3]

In a February 14, 2005 report, Dr. J.L. Paterson, a licensed clinical psychologist, diagnosed major depression with psychotic features and panic disorder with agoraphobia. Dr. Cal K. Cohn, an attending psychiatrist, found appellant totally disabled for work as of October 17, 2006.[4]

Dr. Slaughter held appellant off work from April 6, 2005 to December 10, 2007 except for recommending a brief trial of light duty in February 2006. He noted that she was assaulted "by a postal employee" in October 2004 and developed major depression and post-traumatic stress disorder.

In January 12, 2006 reports, Dr. Gabel found that appellant attained maximum medical improvement. He opined that she had a l3 percent impairment of the right wrist according to the

[3] Appellant also submitted documents relating to a bankruptcy discharge, with the final decree entered on May 17, 2005.

[4] The Board notes that there is no claim of record for an emotional condition.

American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001).[5] Dr. Gabel released appellant to return to work as of September 7, 2006.

By decision dated January 16, 2009, the Office denied modification of the February 27, 2005 decision. It found that the evidence submitted on reconsideration did not demonstrate a work-related disability in September 2004 at the time appellant accepted the modified job offer. The Office further found that the termination remained justified as she neglected suitable work.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[6] In this case, it terminated appellant's compensation under section 8106(c)(2) of the Act, which 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] 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.[8] Section 8106(c) will be narrowly construed as it serves as a penalty provision, which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.[9]

Section 10.517(a) of the Act's implementing regulations provide that an employee who refuses or neglects to work after suitable work has been offered or secured by the employee, has the burden of showing that such refusal or failure to work was reasonable or justified.[10] Pursuant to section 10.516, the employee shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.[11]

Before terminating compensation, the Office must review the employee's proffered reasons for refusing or neglecting to work.[12] If the employee presents such reasons and the Office finds them unreasonable it will offer the employee an additional 15 days to accept the job without penalty. In cases where compensation is terminated pursuant to section 8106(c), the essential requirements of due process, notice and an opportunity to respond apply not only where

[5] The Board notes that there is no claim of record for a schedule award.

[6] *Linda D. Guerrero*, 54 ECAB 556 (2003); *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[7] 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

[8] *Ronald M. Jones*, 52 ECAB 190 (2000); *Arthur C. Reck*, 47 ECAB 339 (1995).

[9] *Joan F. Burke*, 54 ECAB 406 (2003); *see Robert Dickerson*, 46 ECAB 1002 (1995).

[10] 20 C.F.R. § 10.517(a); *see Ronald M. Jones*, *supra* note 8.

[11] *Id*. at § 10.516.

[12] *C.G.*, 61 ECAB ___ (Docket No. 09-247, issued January 26, 2010); *see Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

an employee refuses suitable work, but also apply where an employee neglects or abandons suitable work.[13]

ANALYSIS

The Office terminated appellant's monetary compensation benefits effective November 27, 2004 on the grounds that she refused a September 2, 2004 offer of suitable work. It found that the weight of the medical evidence established that the position was within appellant's physical capabilities. This evidence included August 30, 2004 work restrictions by Dr. Siff, an attending Board-certified orthopedic surgeon.

In a September 20, 2004 letter, the Office advised appellant of the Act's penalty provisions for refusing or neglecting suitable work and afforded her 30 days to report for duty or provide valid reasons for refusal. Appellant accepted the job offer on September 27, 2004 but provided new reports from Dr. Jones, an attending Board-certified family practitioner, and Dr. Hernandez, an attending Board-certified psychiatrist, holding her off work from September 10 to 13 and October 4 to 31, 2004. On appeal, appellant asserts that this evidence established that she was not medically released to return to work. However, without advising her of the sufficiency of this new evidence or offering her an additional 15 days to report for work, the Office issued its November 4, 2004 decision terminating her wage-loss compensation effective November 27, 2004.

The Board finds that the Office failed to comply with its own procedural requirements in terminating appellant's benefits under section 8106. It provided only a 30-day notice on September 20, 2004. Although appellant submitted new evidence after September 20, 2004, the Office terminated her wage-loss benefits effective November 27, 2004 without advising her that her reasons were unacceptable or that she had 15 days to report for duty.[14] The Office did not comply with the proper notice requirements prior to termination.

For this reason, the Office improperly terminated appellant's compensation benefits effective November 27, 2004 on the grounds that she neglected suitable work. Because the termination was improper, it must pay appellant all compensation due and owing to her from November 27, 2004 onward. The case will be returned to the Office for payment of appropriate compensation retroactive to November 27, 2004.

CONCLUSION

The Board finds that the Office did not meet its burden of poof to establish that appellant neglected suitable work.

[13] *C.G.*, *supra* note 12. *See Mary A. Howard*, 45 ECAB 646 (1994).

[14] *C.G.*, *supra* note 12. *See Kenneth R. Love*, 50 ECAB 193 (1998).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 16, 2009 is reversed.

Issued: June 16, 2010
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