United States Department of Labor
Employees' Compensation Appeals Board

J.P., Appellant	)	
and	)	**Docket No. 09-2076**
	)	**Issued: June 8, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Bigfork, MT, Employer	)	

Appearances:
Norman R. McNulty, Jr., Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 12, 2009 appellant, through her attorney, filed a timely appeal from an April 3, 2009 merit decision of an Office of Workers' Compensation Programs' hearing representative who affirmed the termination of her compensation benefits for refusing suitable work. 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 effective September 25, 2008 on the grounds that she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c).

On appeal, appellant's counsel contends that the Office failed to follow its procedures in terminating her benefits.

FACTUAL HISTORY

This is the second appeal before the Board. In a November 5, 2007 decision, the Board affirmed a September 12, 2006 Office decision that denied wage-loss compensation for intermittent periods of disability from February 22 to March 2 and 6, 2006. The Board found, however, that appellant was entitled to wage-loss compensation for March 3, 2006. The history of the case as set forth in the Board's prior decision is incorporated herein by reference.[1]

During the pendency of the prior appeal the issue of appellant's work capacity was under development. On January 12, 2007 appellant accepted a light-duty job offer working five hours a day with Sundays off. The listed job duties included one hour of manual mail distribution; one-half hour of express, registry and carrier checkout; and three and one-half hours of post office box distribution. Physical restrictions for the position were listed as five hours of standing and sitting; five hours of simple grasping and three hours of intermittent bending, stooping and twisting.

In a June 19, 2007 report, Dr. Kenneth V. Carpenter, a second opinion Board-certified orthopedic surgeon, diagnosed C4-5 degenerative disc disease. He noted that appellant continued to experience neck pain and headaches as a result of her accepted employment injury. Dr. Carpenter advised that appellant was currently working five hours a day, which was appropriate and he expected no change in her work hours. He stated, however, that, if appellant's duty was increased to eight hours a day, "increased restrictions would need to be placed upon her lifting, standing and walking activities." Dr. Carpenter based her work restrictions on a five-hour day when he completed the attached work capacity evaluation form. In addition to working and standing, he allowed up to two hours a day of reaching above the shoulder; no squatting; and up to four hours a day of pushing, pulling and lifting up to 10 pounds. Dr. Carpenter checked "yes" to the question of whether appellant was capable of working an eight-hour day on the work capacity evaluation form.

On June 22, 2007 Dr. Steven Johnson, an attending physician, concurred with the restrictions recommended by Dr. Carpenter's report. In a June 26, 2007 report, he agreed that appellant was capable of working five hours a day and restricted lifting to no more than 10 pounds.

On August 17, 2007 Dr. Johnson indicated that appellant was limited to working five hours per day with restrictions. Restrictions included intermittent lifting/carrying up to 10 pounds and intermittent sitting, standing, walking, climbing stairs, kneeling, driving, pushing/pulling, simple grasping and fine manipulation.

On November 5, 2007 the Office referred appellant to Dr. Michael Sousa, a Board-certified orthopedic surgeon, to resolve a conflict in medical opinion evidence between Dr. Johnson, her attending physician, and Dr. Carpenter, a second opinion Board-certified orthopedic surgeon, as to appellant's work restrictions.

[1] On February 2, 2001 appellant, then a 48-year-old postal clerk, filed an occupational disease claim alleging that her degenerative cervical disc disease had been caused or aggravated by her employment. The Office accepted the claim for cervical degenerative disc disease.

In a November 27, 2007 report, Dr. Sousa reviewed the history of injury and medical treatment, statement of accepted facts and provided findings on physical examination. He diagnosed cervical degenerative disc disease and found that appellant was capable of working a six-day work week for five hours a day with permanent restrictions including a 10-pound weight restriction. In an attached work capacity evaluation form, Dr. Sousa provided restrictions including two to three hours per day of walking and standing; up to one hour per day of reaching and reaching above the shoulder, no climbing; and two to four hours per day of pushing, pulling and lifting up to 10 pounds.

On June 3, 2008 the employing establishment offered appellant the position of mail processing clerk working five hours a day with Saturday and Sunday as her days off based on the work restrictions provided by Dr. Sousa. Physical requirements included lifting, pushing, pulling up to 10 pounds for nor more than two to four hours per day, no climbing, walking/standing no more than two to three hours and no reaching above the shoulder more than one hour. The duties of the position included opening unit-express registered/carrier/checkout, post office box distribution, NOV verification and manual letter distribution. It noted that appellant had been performing such duties since May 4, 2007 and that it was not available on a permanent basis to her. Appellant rejected the job offer on June 14, 2008 contending that the position required the repetitive work which was aggravating her condition.

On July 28, 2008 the Office received a March 24, 2008 report from Dr. Johnson, who noted that appellant was seen for complaint of increased neck pain which she attributed to her repetitive work duties. Dr. Johnson opined that appellant's repetitive work involved use of her arms at or above shoulder height while exacerbated her neck pain. He recommended that appellant's work duties be limited as to the repetitive motion required to minimize exacerbation of her neck pain.

In a July 1, 2008 letter, the Office notified appellant that it had reviewed the employing establishment's light-duty offer and found it suitable to her medical limitations. It confirmed that the position was available and notified her that she would be paid for any difference in pay between the offered position and her date-of-injury job. The Office advised appellant that she was expected to accept the position within 30 days or provide a written explanation of her reasons for rejecting the offer otherwise her compensation would be terminated.

In a letter dated July 23, 2008, appellant noted that her condition was inoperable and that Dr. Johnson had found that her repetitive work duties aggravated her cervical condition.

On August 22, 2008 the Office reviewed appellant's July 23, 2008 statement but noted that she did not provide a sufficient reason for refusing the offered position. It advised that the weight of the medical evidence rested with Dr. Sousa, who found that she was capable of limited duty within the provided restrictions. The Office notified appellant that she had 15 additional days to accept the offer or her benefits would be terminated.

The Office subsequently received letters dated August 12 and September 5, 2008 from appellant who advised that she had returned to work on July 31, 2008, but stopped work on August 12, 2008 due to pain.

In a September 23, 2008 memorandum to file, the employing establishment related that appellant had returned to work but refused to sign the job offer. It noted that she had a history of returning to work but then stopping. Appellant had also applied for disability retirement.

By decision dated September 25, 2008, the Office terminated appellant's compensation benefits effective that day on the grounds that she failed to accept suitable employment. It reviewed the offered light-duty position of customer representative and found that the position was suitable and within the work restrictions provided by Dr. Sousa, who represented the weight of the medical evidence.

On October 4, 2008 appellant requested an oral hearing before an Office hearing representative that was held on February 13, 2009. She was represented by counsel.

In an April 3, 2009 decision, the Office hearing representative affirmed the September 25, 2008 decision terminating appellant's compensation benefits based on her refusal of an offer of suitable work.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.[2] Under section 8106(c)(2) of the Act, the Office may terminate the compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.[3] To justify termination, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[4] 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.[5]

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.[6] 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.[7] After

[2] *A.W.*, 59 ECAB ___ (Docket No. 08-306, issued July 1, 2008).

[3] 5 U.S.C. § 8106(c)(2); *see also Mary E. Woodard*, 57 ECAB 211 (2005); *Geraldine Foster*, 54 ECAB 435 (2003).

[4] *T.S.*, 59 ECAB ___ (Docket No. 07-1686, issued April 24, 2008); *Ronald M. Jones*, 52 ECAB 190 (2000).

[5] *Richard P. Cortes*, 56 ECAB 200 (2004); *Joan F. Burke*, 54 ECAB 406 (2003).

[6] 20 C.F.R. § 10.516.

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

providing the 30-day and 15-day notices, the Office will terminate the employee's entitlement to further compensation.[8] However, the employee remains entitled to medical benefits.[9]

ANALYSIS

The employing establishment offered appellant a position on June 3, 2008. The Office found the position to be suitable to her work limitations and notified appellant of the consequences of refusal to accept a suitable position. By letter dated August 22, 2008, afforded appellant a final opportunity to accept the position.[10] The September 25, 2008 Office decision makes a finding that appellant had refused an offer of suitable work. The record indicates, however, that she returned to work on July 31, 2008 at the employing establishment and attempted to perform the assigned duties before stopping work eight days later.

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.[11] Such a termination, however, must follow appropriate procedural requirements. In *Coralisia L. Sims (Smith)*, the Board explained that, 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.[12] In *Sims (Smith)* the Office sent a letter to the employee regarding the consequences of refusing an offer of suitable work; however, the Office did not provide notice of an opportunity to respond to 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.[13]

As appellant had returned to work, the Office should have notified appellant and provided her with an opportunity to present reasons for abandoning the job. Since it did not follow its procedures for neglecting or abandoning suitable work, the Board finds that it did not properly terminate compensation under 5 U.S.C. § 8106(c)(2).

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[8] 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.

[9] 20 C.F.R. § 10.517(b).

[10] 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 she 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).

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

[12] 46 ECAB 172 (1994). The employee returned to work and was sent to a training session for approximately two hours before being instructed to report to her job using a letter sorting machine. She contended that the chair at the machine was unsuitable and stopped work.

[13] 5 U.S.C. § 8106 (c)(2).

CONCLUSION

The Office did not meet its burden of proof to terminate compensation pursuant to 5 U.S.C. § 8106(c)(2) on September 25, 2008.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 3, 2009 is reversed.

Issued: June 8, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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