

**United States Department of Labor
Employees' Compensation Appeals Board**

N.T., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS ADMINISTRATION MEDICAL)
CENTER, Oklahoma City, OK, Employer)

Docket No. 10-1648
Issued: June 16, 2011

Appearances:

Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 8, 2010 appellant, through his representative, filed a timely appeal from the May 13, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP), which affirmed the termination of her compensation benefits. Pursuant to the Federal Employees' Compensation Act (FECA),¹ and 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 OWCP properly terminated appellant's compensation benefits under 5 U.S.C. § 8106(c)(2) for refusing suitable work.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 7, 2007 appellant, then a 51-year-old dietician, sustained an injury in the performance of duty when she slipped and fell on a wet floor. OWCP accepted her claim for displacement of lumbar intervertebral disc without myelopathy. Appellant received compensation for temporary total disability on the periodic rolls.

OWCP found a conflict in medical opinion on the extent of appellant's injury-related disability. Dr. Scott de la Garza, an orthopedic surgeon, found that appellant could return to work eight hours a day with restrictions. Dr. Robert E. Holladay, IV, OWCP's referral orthopedic surgeon, found that the effects of the traumatic event had resolved but left appellant deconditioned. He concluded that she could return to full and unrestricted duty after a period of work hardening. Dr. C.L. Soo, a Board-certified orthopedic surgeon and the impartial medical specialist selected to resolve the conflict, found that appellant still suffered from the effects of the accepted work injury. He concluded that she could return to work as a dietician if she worked less than three hours a day. Dr. de la Garza concurred.

On May 1, 2009 OWCP wrote a memorandum indicating that appellant's work-related disability was too severe for employment and was unlikely to improve. It added that Dr. Soo indicated that appellant could work less than three hours a day "but does not indicate how much less." On May 12, 2009 OWCP agreed to change appellant's case status code to PN: Entitled to payment on periodic rolls; formally determined to have no wage-earning capacity or reemployment potential for indefinite future.²

On May 20, 2009 the employing establishment offered appellant a permanent limited-duty position as a program support assistant. On June 22, 2009 OWCP reviewed the job offer and found it to be suitable, in accordance with her medical limitations as provided by Dr. Soo. Appellant gave reasons to the contrary, but OWCP did not find these reasons valid and provided her an opportunity to accept the offered position within 15 days.

Appellant wrote to her employing establishment and stated that she was forced to accept the position. She emphasized that the position was not consistent with her medical limitations, but she asked the employing establishment to notify her of the report date. Appellant also wrote OWCP to advise that she had accepted the position within the 15 days provided. She submitted a copy of her acceptance letter to the employing establishment.

On October 19, 2009 OWCP terminated appellant's compensation benefits under 5 U.S.C. § 8106(c)(2) for refusing an offer of suitable work. Appellant requested a review of the written record by OWCP's hearing representative. She advised that she did not refuse the offer. Appellant provided OWCP with another copy of her letter of acceptance to the employing establishment.

In a decision dated November 2, 2009, OWCP terminated appellant's compensation benefits effective November 22, 2009 for refusing an offer of suitable work.

² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Automated System Support for Case Actions*, Chapter 2.401.6 (September 2009).

On November 9, 2009 the employing establishment acknowledged receipt of appellant's letter of acceptance and advised appellant that she was expected to report to Human Resources, Room 1B104 at 9:30 a.m. on November 23, 2009. It further advised that her tour would last until 12:30 a.m., which included a 15-minute break.

In a decision dated May 13, 2010, OWCP's hearing representative affirmed the October 19 and November 2, 2009 decisions terminating appellant's compensation benefits.

LEGAL PRECEDENT

Section 8106(c)(2) of FECA 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.³

Before compensation can be terminated, however, OWCP 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.⁴ In other words, to justify termination of compensation under section 8106(c)(2), which is a penalty provision, OWCP has the burden of showing that the work offered to and refused or neglected by appellant was suitable.⁵

ANALYSIS

Dr. Soo, the impartial medical specialist selected to resolve the conflict regarding the extent of appellant's injury-related disability, concluded that appellant could return to work as a dietician if she worked less than three hours a day. Based on this report, OWCP found that appellant's work-related disability was too severe for employment and was unlikely to improve. It agreed to change her case status code to reflect that she was formally determined to have no wage-earning capacity or reemployment potential for indefinite future.

The employing establishment offered appellant a permanent limited-duty position, which OWCP found to be suitable. OWCP did not attempt to reconcile this suitability finding with its very recent and seemingly inconsistent determination that appellant's disability was too severe for employment and that she had no wage-earning capacity or reemployment potential for the indefinite future. In light of that determination, it needed to provide sound rationale for the change of disposition.

Further, Dr. Soo did not conclude that appellant could work three hours a day; he found that she could work less. As OWCP noted, he did not say how much less. So an offer to work three hours a day was not in keeping with the opinion of the impartial medical specialist.

³ 5 U.S.C. § 8106(c)(2).

⁴ *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

⁵ *Glen L. Sinclair*, 36 ECAB 664 (1985).

Because OWCP recognized that Dr. Soo did not provide a definite number of hours that appellant was permitted to work, it should have requested clarification before making a suitability determination and subjecting appellant to the penalty provision of section 8106(c)(2).

The Board finds that OWCP has not met its burden of proof. It has not shown that the work offered to and refused or neglected by appellant was medically suitable. The Board will therefore reverse the hearing representative's May 13, 2010 decision affirming the termination of appellant's compensation benefits.

CONCLUSION

The Board finds that OWCP improperly terminated appellant's compensation benefits under 5 U.S.C. § 8106(c)(2). The evidence does not establish that the offered position was suitable.

ORDER

IT IS HEREBY ORDERED THAT the May 13, 2010 decision of the Office of Workers' Compensation Programs is reversed and the case remanded for reinstatement of appellant's compensation benefits.

Issued: June 16, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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