United States Department of Labor
Employees' Compensation Appeals Board

L.B., Appellant	)	
	)	
and	)	**Docket No. 10-1310**
	)	**Issued: March 23, 2011**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS HEALTH ADMINISTRATION, Bronx, NY, Employer	)	

Appearances:
Alan J. Shapiro, 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 April 12, 2010 appellant, through her representative, filed a timely appeal from a March 19, 2010 merit decision of the Office of Workers' Compensation Programs which terminated her entitlement to monetary compensation benefits based on her refusal of an offer of suitable employment. Pursuant to the Federal Employees' Compensation Act[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether the Office properly terminated appellant's entitlement to monetary compensation effective October 25, 2009 on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

[1] 5 U.S.C. § 8101 *et seq.*

On November 29, 1993 appellant, then a 60-year-old clerk typist, was injured when she tripped over a coat on the back of a chair and fell onto a desk. The Office accepted a left ankle strain and lumbosacral strain and a herniated lumbar disc. Appellant stopped work on November 29, 1993 and has not returned. The Office placed her on the periodic compensation rolls. Appellant relocated from New York to California.

In a November 13, 2008 report, Dr. Shirley Yee, an attending Board-certified family practitioner, noted that appellant had not previously been seen since August 2004. Appellant had mild to moderate pain with respect to her back and leg symptoms that interfered with the activities of daily living. She resided alone, was dependant on family and friends for assistance in cleaning, grocery shopping and could only tolerate half an hour at most of any activity before needing to rest or stop. Appellant usually used a front wheel walker for ambulation. Dr. Yee diagnosed sciatica and chronic radicular pain, which was likely precipitated by her work-related injury. In an accompanying duty status report, she stated that appellant was considered permanent and stationary on May 25, 2004 and was totally disabled with restrictions on all activities of no more than 30 minutes a day.

The Office referred appellant to Dr. Thomas J. Sabourin, a Board-certified orthopedic surgeon, for a second opinion regarding her ability to work. In a June 11, 2009 report, Dr. Sabourin reviewed the history of injury, a statement of accepted facts, the medical records and the video surveillance reports. On examination, he listed an impression of degenerative disc disease, most notably at L3-4 and L4-5, with history of herniated nucleus pulpous by magnetic resonance imaging (MRI) scan, facet hypertrophy at L5-S1 and mild to moderate bilateral knee osteoarthritis. Dr. Sabourin found that appellant had residuals of her L4-5 herniated disc condition, but her subjective complaints of significant inability to walk without assistive devices or inability to sit greater than 30 minutes were contrary to her activities on the videos he reviewed. Appellant could work in a limited-duty position for eight hours a day with permanent restrictions of no more than two hours of walking and standing, no more than one-hour intermittent bending/stooping, no more than two hours of pushing, pulling and lifting more than 10 pounds, and no twisting, squatting, kneeling or climbing.

On June 22, 2009 the Office provided a copy of Dr. Sabourin's report to Dr. Yee.

On July 6, 2009 the employing establishment offered appellant a job as a program clerk. The position was located in Bronx, New York and involved answering telephones, taking messages and forwarding messages to the appropriate individual, light filing, errands within the medical center, copying documents and light typing. The position was classified as a sedentary job with no more than two hours standing, sitting and walking and no more than two hours of pushing, pulling and lifting more than 10 pounds and 15-minute breaks every four hours. The job was available beginning July 21, 2009.

On July 15, 2009 the Office provided Dr. Yee a copy of the job offer of program clerk and requested comments regarding appellant's disability status and her ability to perform the offered position. In an August 14, 2009 report, Dr. Yee noted review of Dr. Sabourin's report and agreed with his opinion regarding appellant's disability status and her ability to perform the duties.

On August 20, 2009 the employing establishment noted the job offer was permanent and remained available.

In an August 27, 2009 letter, the Office advised appellant of its determination that the program clerk job offer in New York was suitable. It informed her that monetary compensation would be terminated if she did not accept the position or provide good cause for not doing so within 30 days. The Office noted that appellant was not entitled to relocation expenses as she was still an active employee of the employing establishment.[2]

On September 22, 2009 a telephone conference was held regarding the suitability of the program clerk position in New York. The memorandum of the telephone conference noted appellant would accept the offered position, but had not established a report date. Appellant also wanted to know more about Office of Personnel Management (OPM) retirement and her options prior to making a decision. She was informed that the Office was not a retirement program and that, if she wanted to retire, she needed to apply for retirement benefits with OPM. Appellant was also informed that retirement was not an acceptable reason for refusal of a job offer.

In a September 24, 2009 report of telephone call, the employing establishment indicated that appellant had accepted the job but was delaying the start date. The Office advised that she needed to respond in writing to the job offer. It further advised that the employing establishment need not provide a new job offer for different start dates as the same position was being offered to appellant.

In a September 25, 2009 letter, the Office enclosed a copy of the memorandum of conference summarizing the information provided during the conference call. Appellant was requested to respond with any comments or corrections within 15 days from the date of the letter.

In a September 29, 2009 letter, the Office notified appellant that the offered position was suitable and she had not provided a valid reason for refusing to accept the offered position. It advised that a request to retire was not an acceptable reason to refuse a job offer. Appellant had 15 additional days to accept the position and make specific arrangements to report to work or her entitlement to monetary benefits would be terminated.

In a September 30, 2009 letter, appellant, through her attorney, stated she had accepted the job offer in writing and contacted the employing establishment regarding reporting times. She stated the employing establishment told her to retire and alleged the Office conspired with the employing establishment to bar her from future benefits.

In an October 19, 2009 letter, the employing establishment advised the Office that appellant failed to respond to the job offer. In an October 22, 2009 letter and October 23, 2009 telephone call, the employing establishment noted that the job offer remained open and available.

[2] On August 26, 2009 the employing establishment noted that appellant had not separated from employment since her November 29, 1993 injury and that she remained an active employee.

By decision dated October 26, 2009, the Office terminated appellant's monetary compensation effective October 25, 2009 on the grounds that she refused an offer of suitable work.

On November 4, 2009 appellant disagreed with the decision and requested a telephonic hearing, which was held February 1, 2010. She contented that she had accepted the job offer in writing. Appellant called the employing establishment noting her problem in finding a place to live and was informed that she had alternatives available to her as opposed to coming back to work. She received a letter in October which noted she was entitled to a civil service retirement. Appellant stated she did not return to work because she could retire. She indicated that she never filed for retirement. Counsel argued that appellant never had a start date as the employing establishment was arranging for a date to report. He also alleged that the Office never made it clear to her that retirement was not a valid excuse for refusal of a suitable job offer.

By decision dated March 19, 2010, an Office hearing representative affirmed the October 26, 2009 decision. The hearing representative found that there was no evidence of record that appellant had accepted the job offer in writing. Further, appellant was clearly advised in the September 25, 2009 letter that retirement was not an acceptable reason for refusal of a job offer.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[3] Section 8106(c)(2) of the Act[4] provide 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.[5] The Office may not terminate compensation without establishing that the disability ceased or that it is no longer related to the employment.[6] The Board has stated that monetary compensation payable to an employee under section 8107 are payments made from the Employees' Compensation Fund and are, therefore, subject to penalty provision of section 8106(c).[7]

Section 10.517(a) of the Act's implementing regulations provide that an employee who refuses to work after suitable work has been offered to or secured for the employee has the burden of showing that such refusal or failure to work was reasonable or justified.[8] Pursuant to

[3] *Barry Neutach*, 54 ECAB 313 (2003); *Lawrence D. Price*, 47 ECAB 120 (1995).

[4] 5 U.S.C. §§ 8101-8193.

[5] *Id.* at § 8106(c)(2); *see also Linda D. Guerrero*, 54 ECAB 556 (2003).

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

[7] *Sandra A. Sutphen*, 49 ECAB 174 (1997); *Stephen R. Lubin*, 43 ECAB 564 (1992).

[8] 20 C.F.R. § 10.517(a); *see Ronald M. Jones, supra* note 6.

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.[9]

ANALYSIS

The Office accepted that appellant sustained a left ankle strain, lumbosacral strain and herniated lumbar disc as a result of the November 29, 1993 work injury. It terminated monetary compensation benefits finding that she refused an offer of suitable work. The Office determined that the position offered to appellant of program clerk was suitable, that she never responded to the position in writing and that her consideration of retirement was not an acceptable reason for refusal of a job offer.

In finding the offered position suitable, the Office relied upon the report of Dr. Sabourin, the Office referral specialist, with whom appellant's treating physician, Dr. Yee, agreed. Dr. Sabourin reviewed appellant's medical history and video surveillance reports along with a statement of accepted facts and provided detailed findings on physical examination. He noted that she had some residuals of her L4-5 accepted herniated disc condition in addition to facet hypertrophy at L5-S1 and mild to moderate bilateral knee osteoarthritis. Given her current conditions, Dr. Sabourin found that appellant could work in a limited-duty position for eight hours a day with permanent restrictions of no more than two hours of walking and standing, no more than one-hour intermittent bending/stooping, no more than two hours of pushing, pulling and lifting more than 10 pounds, and no twisting, squatting, kneeling or climbing. The Board finds that his report is based on a complete and accurate factual and medical background and addressed both the accepted and other condition of record.[10] Furthermore, it is based on all of appellant's medical conditions, whether work related or not. The duties of the modified program clerk position are within the work restrictions provided by Dr. Sabourin. There is no medical evidence to establish that appellant was physically incapable of performing the position. Rather, Dr. Yee, an attending physician, agreed with Dr. Sabourin regarding her ability to work. The Office properly determined that the position offered to appellant constituted suitable work within her physical limitations.

While appellant advised that she had accepted the position, an Office hearing representative properly found the record does not contain any written confirmation from appellant regarding the job offer. The employing establishment changed the start date of the job offer several times to accommodate her. It noted that the position offered remained available. As to consideration of retirement, the Office hearing representative found, and the record supports, that appellant was clearly informed in the Office's memorandum of conference of the September 22, 2009 conference call and the Office's letter of September 29, 2009 that retirement or a request to retire was not in and of itself an acceptable reason for refusing a suitable work job

[9] *Id*. at § 10.516; *see Kathy E. Murray*, 55 ECAB 288 (2004).

[10] The Board notes that Dr. Sabourin relied on 58 minutes of surveillance video in making his determination that appellant could work. While this evidence does not appear to have been decisive, it was significant. The Board has held that where the Office provides videotape evidence to a medical expert, it is obligated to inform the claimant of that fact, to provide a copy if requested and to afford the claimant a reasonable opportunity to explain or comment on the accuracy of the videotape evidence. The Office should document the record to verify that this was done. *J.M.*, 58 ECAB 478 (2007).

offer.[11] The Board has carefully reviewed the evidence and arguments raised by appellant and finds, given the circumstances of this case, that the Office properly terminated her compensation effective October 25, 2009 on the grounds that she refused an offer of suitable work.[12]

CONCLUSION

The Board finds that the Office met its burden to terminate appellant's compensation benefits effective October 25, 2009 on the grounds that she refused an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated March 19, 2010 is affirmed.

Issued: March 23, 2011
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

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, Reemployment*: Determining Wage-Earning Capacity*, Chapter 2.814.5(c) (July 1997) (provides that retirement is an unacceptable reason for refusing an offered job).

[12] The Board further finds that the Office complied with its procedural requirements prior to terminating appellant's compensation, including providing her with an opportunity to accept the program clerk position after informing her that her reasons for initially refusing the position were not valid. *See generally reaff'd on recon.*, 43 ECAB 818 (1992); *Maggie L. Moore*, 42 ECAB 484 (1991).