

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

N.W., Appellant)

and)

U.S. POSTAL SERVICE, STATISTICAL)
PROGRAMS, Pittsburgh, PA, Employer)

**Docket No. 12-1618
Issued: January 18, 2013**

Appearances:

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 25, 2012 appellant, through counsel, filed a timely appeal from a June 26, 2012 decision of the Office of Workers' Compensation Programs (OWCP) concerning the termination of her monetary compensation based on her refusal of suitable work. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 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 OWCP properly terminated appellant's monetary compensation effective January 30, 2012 on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

On August 21, 2001 appellant, then a 41-year-old data collections technician, injured her back while leaning over and reaching for a tray of mail. She stopped work on August 22, 2001

¹ 5 U.S.C. § 8101 *et seq.*

and returned to part-time limited-duty work on August 12, 2002. OWCP accepted the claim for lumbar strain, an L3-4 herniated disc and enthesopathy of the hip region and authorized an exploratory L3-4 lumbar decompression/discectomy surgery and fusion, which was performed on June 3, 2003. It accepted appellant's September 30, 2002 and June 25, 2007 recurrence claims. Appellant returned to part-time limited-duty work on August 9, 2010 and stopped work on March 28, 2011.

In a September 20, 2011 report, Dr. Daniel T. Altman a second opinion Board-certified orthopedic surgeon, reviewed the medical evidence, history of injury and set forth findings on physical examination. He diagnosed an L3-4 herniated disc requiring multiple surgeries and fusion. Dr. Altman noted that a spinal cord stimulator was not unreasonable. As to appellant's work capability, he found that she could work four hours a day with restrictions. The restrictions set by Dr. Altman included no lifting more than five pounds, frequent change position, occasional bending and sitting and walking restrictions.

On November 15, 2011 the employing establishment offered appellant the modified position of data collection technician/clerk working four hours a day. The duties of the position were described as "Combo Primary." Under the section for physical restrictions, the employing establishment noted limited standing and sitting as necessary and minimal up to 10 pounds lifting. On December 8, 2011 the employing establishment reoffered the position to appellant with the lifting requirement reduced to five pounds based on the restrictions set by Dr. Altman. Under section labeled Part IV Documentation of the job offer, it noted that as she had reached maximum medical improvement (MMI), but had not gone through the National Reassessment Process (NRP), the job offer was "an interim assignment until" reassessment "under the NRP Phase 2 MMI process." Under Part IV of the December 8, 2011 job offer, the employing establishment stated that "if necessary work is not available on any day" she would be asked to complete a form for the hours not worked.

By letter dated December 16, 2011, OWCP advised appellant of its determination that the modified data collection technician/clerk position offered by the employing establishment was suitable. It noted that the position was based upon the opinion of Dr. Altman who stated that appellant was capable of working part time with restrictions. OWCP noted that he also concurred with her treating physician that a spinal cord stimulator would be beneficial. It informed appellant that her monetary compensation would be terminated if she did not accept the position or provide good cause for not doing so within 30 days. Appellant did not respond.

In a January 31, 2012 decision, OWCP terminated appellant's compensation effective January 30, 2012 on the grounds that she refused an offer of suitable work. It noted that she did not respond to the December 16, 2011 letter or provide any reasons as to why she was refusing the offered position.

By letter dated February 6, 2012, counsel requested a telephonic hearing with an OWCP hearing representative, which occurred on May 8, 2012.

In a February 27, 2012 report, Dr. Shelana Gibbs-McElvy, a treating Board-certified physiatrist, provided physical findings, diagnosed failed laminectomy syndrome and

recommended a neurostimulator trial. She stated that if appellant has a successful neurostimulator trial, then it would be appropriate for her to return to work.

In a June 26, 2012 decision, OWCP's hearing representative affirmed OWCP's January 31, 2012 decision finding that appellant had refused an offer of suitable work.²

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 him is not entitled to compensation.³ Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits under section 8106(c) for refusing to accept or neglecting to perform suitable work.⁴ The Board has recognized that section 8106(c) serves as a penalty provision as it may bar an employee's entitlement to future compensation and, for this reason, will be narrowly construed.⁵ To justify termination, OWCP must show that the work offered was suitable and that appellant was informed of the consequences of her refusal to accept such employment.⁶ According to OWCP procedure, a job offer must be in writing and contain a description of the duties to be performed and the specific physical requirements of the position.⁷ Section 10.516 of the Code of Federal Regulations⁸ provides that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of showing that such refusal or failure to work was reasonable or justified, and shall be provided with the opportunity to make such showing before a determination is made with respect to termination of entitlement to compensation.⁹

ANALYSIS

OWCP accepted that appellant sustained L3-4 herniated disc and enthesopathy of the hip region as the result of her accepted August 21, 2001 employment injury and authorized back surgery. Appellant was offered the modified job of data collection technician/clerk by the

² The Board notes that, following the June 26, 2012 hearing representative's decision, OWCP received additional evidence. However, the Board may only review evidence that was in the record at the time OWCP issued its final decision. *See* 20 C.F.R. §§ 501.2(c)(1); *M.B.*, Docket No. 09-176 (issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

³ 5 U.S.C. § 8106(c)(2).

⁴ *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

⁵ *H. Adrian Osborne*, 48 ECAB 556 (1997).

⁶ *T.S.*, 59 ECAB 490 (2008); *Ronald M. Jones*, 52 ECAB 190 (2000).

⁷ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(a) (July 1997).

⁸ 20 C.F.R. § 10.516.

⁹ *See Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

employing establishment on November 15 and December 8, 2011. By letter dated December 16, 2011, OWCP advised her of its determination that the modified data collection technician/clerk position offered by the employing establishment was suitable. Appellant did not respond to OWCP's December 16, 2011 letter or accept the offered position. By decision dated January 31, 2012, OWCP terminated her compensation on the grounds that she refused an offer of suitable work. As appellant did not respond to the December 16, 2011 notification, OWCP complied with its procedural requirements when issuing its decision on January 31, 2012.¹⁰

On November 15, 2011 the employing establishment offered appellant the modified position of data collection technician/clerk working four hours a day with restrictions including no lifting more than 10 pounds. On December 8, 2011 it reoffered her the modified position, but reduced the lifting restriction to five pounds. The duties of the position in both the November 15 and December 8, 2011 job offers were listed as "Combo Primary." No description of the position or the job duties were provided by the employing establishment. The record contains no information or description as to what duties are encompassed under "Combo Primary."

OWCP procedures provide that any offer of modified duty must include a description of the duties to be performed.¹¹ This information was not included in the employing establishment's November 15 and December 8, 2011 job offers to appellant of the data collection technician/clerk. There is no evidence to show that OWCP attempted to obtain a description of the job duties for the offered position.

The Board must also consider the kind of appointment in determining whether the offered position is suitable. It is unclear from a review of the November 15 and December 8, 2011 job offers whether the job offered was intended to be permanent or temporary. Under the section labeled Part IV Documentation of the November 15, 2011 job offer, the employing establishment indicated that the job offer was an interim assignment until appellant was reassessed under the NRP process. The December 8, 2011 job offer noted that if work was not available for appellant would be required to complete a form for the hours not worked. The record is devoid of any evidence that OWCP requested clarification from the employing establishment as to whether the position was temporary based on the information provided in section IV of the job offers. These procedural errors are sufficient to reverse OWCP's determination that appellant refused an offer of suitable work.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to establish that appellant refused an offer of suitable work.

¹⁰ See *Gayle Harris*, 52 ECAB 319 (2001).

¹¹ *Supra* note 7 at Chapter 2.814.4(a)(1) (July 1997).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 26, 2012 is reversed.

Issued: January 18, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

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