U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GLENN M. FORD and DEPARTMENT OF AGRICULTURE, PLUMAS NATIONAL FOREST, Quincy, CA

Docket No. 00-1844; Submitted on the Record;
Issued March 12, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's entitlement to monetary compensation, effective February 22, 1999, on the grounds that he refused an offer of suitable work.

On February 4, 1991 appellant, then a 49-year-old civil engineer, was injured in a motor vehicle accident while in the performance of duty. The Office accepted appellant's claim for the conditions of cranium contusions, contusion of the right elbow, left rib fracture, abrasions of both hands, headaches, vertigo, blurred vision and postconcussion syndrome. Appellant received appropriate compensation and eventually returned to a light-duty position at the employing establishment. In April 1994, the employing establishment ceased to provide appellant with light-duty work. Appellant was placed in a leave-without-pay (LWOP) status effective April 17, 1994. Appellant was subsequently paid wage-loss compensation retroactive to April 17, 1994.

Appellant relocated to Albuquerque, New Mexico in March 1995.

In an April 3, 1998 medical report, Dr. Kathleen A. Padilla, a clinical psychologist, wrote to Dr. John Henry Sloan, a Board-certified physical medicine and rehabilitation specialist, regarding her recommendations for appellant's return to work. Dr. Padilla advised that the standard considerations for a person who sustained a brain injury, such as appellant, include: a gradual return to work; a low stimulation environment with support from a coworker who can provide appropriate supervision; allowance for frequent breaks; continued psychological and psychiatric services; and use of extensive previous education and job experience in the job placement.

In a work release form dated April 10, 1998, Dr. Sloan indicated that appellant was capable of working sedentary, light, or medium duty work with restrictions. He incorporated all of Dr. Padilla's recommendations and advised that appellant could work two hours per day

initially and would advance as medically determined to be possible. Dr. Sloan also stated that vocational services would be very helpful and that he would recommend a job in the Albuquerque area so appellant could be by his support system.

In an April 27, 1998 medical report, he listed appellant's diagnoses as traumatic brain injury, adjustment reaction secondary to the traumatic brain injury. On April 10, 1998 he filled out a work release which limited appellant in terms of physical labor with lifting no greater than 50 pounds. Additional restrictions included a gradual return to work, two hours a day initially and then advance as medically possible, low stimulation environment with supportive coworkers and frequent breaks. Dr. Sloan stated that he would like appellant to be able to continue to attend psychology or psychiatric visits. He also reiterated his previous suggestion of having vocational services available to take advantage of appellant's previous extensive education, job experience and job placement. Dr. Sloan reiterated his recommendation that appellant get a job in the Albuquerque area.

By letter dated June 25, 1998, the employing establishment offered appellant the position of office helper/clerical assistant working initially two hours a day, five days a week with provisions for gradually increasing the work hours when so recommended by appellant's physician. The position description, which was included with the job offer, was in compliance with appellant's work limitations. The position was located in Quincy, California, at or near appellant's date-of-injury position location. The employing establishment indicated that "payment of relocation expenses to the original duty station may be considered by the agency."

In a letter dated July 20, 1998, the Office advised appellant that the position of office helper/clerical assistant was found suitable to his work capabilities. Appellant was advised he would be paid the difference, if any, between the offered job and the current pay of his date-of-injury job. Appellant was advised of the provisions of 5 U.S.C. § 8106(c) and given 30 days to either accept the position or provide reasons for refusing the position.

In a letter dated August 18, 1998, appellant's attorney stated that appellant refused to accept the office helper/clerical assistant position offered to him. He noted that appellant's application for disability retirement was approved by the Office of Personnel Management (OPM) on January 12, 1995. He advised that the employing establishment paid appellant for all unused annual leave as of February 4, 1995, transferred his health benefits to OPM and that appellant was no longer on the employing establishment's rolls. Appellant's attorney argued that appellant's return to Quincy, California was contradicted by his medical condition as the job failed to take into account his accepted condition of postconcussion syndrome and no consideration was provided for appellant's psychological factors. Additional argument pertained to the fact that as Quincy, California was a small rural community where appellant would not receive adequate physical and psychological care. He further argued that, regardless of the job's location, appellant's current treating team of physicians and psychologists did not believe that the job offered was suitable for appellant.

Appellant's attorney submitted additional medical reports from appellant's treating physicians. In an August 7, 1998 letter, Dr. Padilla advised that there had been a miscommunication regarding the meaning of the recommendation for a low stimulation environment for appellant. Dr. Padilla advised that a low stimulation environment should not be

interpreted as providing a job with little "intellectual" stimulation. A "low stimulation environment" refers to a work situation which would provide few external noise distractions. Dr. Padilla advised that appellant should return to a position which provided as much intellectual stimulation as appellant had in his previous position. Regarding appellant's return to California to work, she advised that he would have to establish new relationships with a new rehabilitation team and that such services were not readily available to appellant at the California location. Dr. Padilla noted that appellant had not worked for five years and any return to work would be stressful and that appellant should have training before such return. She opined that if appellant was required to accept the current job offer without the recommended support from appropriate rehabilitation specialists, he would most likely fail primarily as a result of an inadequate vocational plan.

Also submitted was an August 12, 1998 letter from Dr. Stephen Chiulli, a clinical neuropsychologist, who had previously examined appellant on February 25, 1998. As a result of the examination, he advised that appellant was employable. Dr. Chiulli opined, however, that placing appellant in a simple clerical job would undermine the return to the work effort as appellant would not find the job sufficiently challenging and satisfying, which would be likely to increase his depression and frustration. In his August 12, 1998 letter, Dr. Chiulli opined that appellant was being asked to take a job with "no mental demands," which he felt was inappropriate and would result in failure.

In a letter dated September 3, 1998, the employing establishment reoffered appellant the position of office helper/clerical assistant in Quincy, California. The employing establishment stated that the job was still available and indicated that it would be willing to pay appellant's relocation expenses.

By letter dated September 8, 1998, the Office advised appellant that the position of office helper/clerical assistant was suitable to his work capabilities. Appellant was further advised of the provisions of 5 U.S.C. § 8106(c) and given 30 days to either accept the position or provide reasons for refusing the position.

In a letter dated October 21, 1998, appellant's attorney acknowledged the employing establishment's offer to pay relocation costs, but stated that appellant was refusing the position for reasons delineated in his previous letters.

In a letter dated October 27, 1998, the Office advised that the reasons appellant provided for refusing the position were not acceptable. Appellant was provided 15 additional days from the date of the letter, in which to accept the position without penalty. Appellant was advised that no further reasons for refusal would be considered.

By decision dated February 24, 1999, the Office terminated appellant's monetary compensation effective February 22, 1999 on the grounds that he had refused an offer of suitable work. The Office addressed the reasons provided by appellant for his refusal to accept the offered position and found that his refusal was not justified.

Appellant requested a hearing before an Office hearing representative.

In a decision dated March 20, 2000, the Office hearing representative affirmed the February 24, 1999 decision. The hearing representative found that the Office properly followed its procedures in invoking the penalty provisions of 5 U.S.C. § 8106(c) to terminate appellant's entitlement to further monetary compensation benefits. The hearing representative found that appellant's objections to the offered position, were not valid reasons for his refusal of a suitable job and the evidence of record failed to establish that appellant's medical condition contraindicated his return to the area of residence at the time of injury.[1]

The Board finds that the Office met its burden of proof to terminate appellant's monetary compensation benefits.

Once the Office accepts a claim, it has the burden of proving that the employee's disability has ceased or lessened before it may terminate or modify compensation benefits.[2] Section 8106(c)(2) of the Federal Employees' Compensation Act[3] provides that the Office may terminate the compensation of a disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[4] The Board has recognized that section 8106(c) is a penalty provision which must be narrowly construed.[5]

The implementing regulation[6] 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 a refusal or failure to work was reasonable or justified and shall be provided with the opportunity to make such a showing before entitlement to compensation is terminated.[7] To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of its refusal to accept such employment.[8]

Office procedures state that acceptable reasons for refusing an offered position when the claimant is no longer on the agency's rolls include the claimant losing health insurance coverage by accepting the job; the claimant is already working and the job fairly and reasonably represents his wage-earning capacity; or the claimant has moved and a medical condition of the claimant or a family member contraindicates return to the area of residence at the time of the injury.[9]

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[1] By decision dated March 20, 2000, an Office hearing representative also determined that appellant was not entitled to reimbursement of his attorney's fees. As this decision is not contested on appeal, the Board will not address the merits of this decision.

[2] *Karen L. Mayewski*, 45 ECAB 219, 221 (1993); *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

[3] 5 U.S.C. §§ 8101-8193; 5 U.S.C. § 8106(c)(2).

[4] *Camillo R. DeArcangelis*, 42 ECAB 941, 943 (1991).

[5] *See Stephen R. Lubin*, 43 ECAB 564, 568 (1992).

[6] 20 C.F.R. § 10.124(c) (1998).

[7] *John E. Lemker*, 45 ECAB 258, 263 (1993).

[8] *Maggie L. Moore*, 42 ECAB 484, 487 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[9] *C.W. Hopkins*, 47 ECAB 725 (1996); *see Patsy R. Tatum*, 44 ECAB 490, 495 (1993); Federal (FECA)

Unacceptable reasons include claimant's preference for the area in which he resides; personal dislike of the position offered or the work hours scheduled; lack of promotion potential or job security.[10]

On September 3, 1998 the employing establishment offered appellant the position of office helper/clerical assistant. The position was consistent with the restrictions set forth by Dr. Sloan on April 10, 1998. The Office advised appellant, by letter dated September 8, 1998, that it found the position to be suitable and that the employing establishment could pay his relocation expenses from New Mexico to California. The Office additionally notified appellant of the provisions of 5 U.S.C. § 8106(c) and allowed 30 days to either accept the position or provide reasons for refusing the position. Appellant responded by contending that he could not relocate because his return to the Quincy, California area was contraindicated by his medical condition and the offered position was not "challenging" enough for him. In a letter dated October 27, 1998, the Office notified appellant that his reasons for refusal were unacceptable and was provided 15 additional days to accept the offered position without penalty or, if the job was not accepted, his compensation benefits would be terminated under 5 U.S.C. § 8106(c). The Board finds that no procedural deficiencies with the termination pursuant to 5 U.S.C. § 8106(c) in this case.[11]

The offered position of office helper/clerical assistant is consistent with appellant's physical restrictions as indicated by Dr. Sloan's April 10, 1998 work release. Appellant has not argued, nor submitted supporting evidence, that he is medically or vocationally unable to perform the duties of the offered position. Both appellant and his physicians have expressed opinions that the job was "too simple," failed to account for appellant's educational/vocational background and would not result in a successful return to work. However, a desire to be offered a different type of work and/or a personal dislike of the position offered, are not acceptable reasons for refusing a suitable job offer.[12] Appellant's physicians recommended a job which takes into account appellant's educational and vocational background and have opined that the offered position would likely increase appellant's depression and frustration and would not result in a successful return to work. Their opinions, however, are not based on a finding that appellant was not physically or mentally incapable of performing the offered position, but rather on the speculation that appellant would not find the duties to be satisfying and a negative outcome would result. Regardless that appellant or his physicians felt the job was beneath his abilities or appellant's desire to do some other type of work, does not make the job offer unsuitable or constitute a valid reason for refusing the position.

Procedural Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(b) (July 1996).

[10] *Arthur C. Reck*, 47 ECAB 339 (1996); Federal (FECA) Procedure Manual, Chapter 2.814.5(c) (July 1996).

[11] *See Maggie L. Moore*, *supra* note 8.

[12] *See Arthur C. Reck*, *supra* note 10.

The offered position required appellant to relocate from Albuquerque, New Mexico to Quincy, California. Appellant has argued that he prefers the Albuquerque area, he should not be separated from the physicians who are treating him in Albuquerque and that adequate medical care would not be available if he moved back to Quincy, California. The Office's procedure manual indicates that for claimants no longer on the employing establishment's rolls, an acceptable reason for refusing a suitable job offer includes: "The claimant has moved and a medical condition (either preexisting or subsequent to the injury) of the claimant or a family member contraindicates return to the area of residence at the time of injury."[13] In this case, however, appellant has not submitted any medical evidence documenting that a medical condition contraindicates his return to Quincy, California. Appellant maintains that he should not be separated from the physicians who are treating him in Albuquerque and that adequate medical care would not be available if he moved back to Quincy. The record reflects that appellant was under continuous medical treatment following his original injury until he moved to Albuquerque in March 1995. There is no indication that the medical care appellant received was inadequate during that period. Although appellant requires continuous care, he has not submitted probative evidence that his required care would be unavailable or inadequate if he moved back to Quincy. A desire to remain with his current support group of attending physicians in Albuquerque does not constitute a valid reason for refusing a suitable job in Quincy. Although any change is inherently stressful, appellant has not submitted a probative medical report to establish that his relocation to Quincy is medically contraindicated. Appellant has not raised an acceptable reason for refusing the offered position.

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(b)(3) (December 1993). Chapter 814.5(b)(3) is applicable to claimants that have been "separated by formal personnel action" from the employing establishment. *Id.* at Chapter 2.814.5(b). The record indicates that appellant had been separated from employment by formal personnel action.

The March 20, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
March 12, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member