United States Department of Labor
Employees' Compensation Appeals Board

YVONNE BROWN, Appellant	)	
and	)	**Docket No. 05-1254**
	)	**Issued: September 22, 2005**
DEPARTMENT OF DEFENSE, DEFENSE COMMISSARY AGENCY, Virginia Beach, VA, Employer	)	

Appearances:
Yvonne Brown, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 21, 2005 appellant filed a timely appeal of the Office of Workers' Compensation Programs' decision dated April 5, 2005, which terminated her compensation benefits for refusing an offer of suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly terminated appellant's wage-loss compensation effective April 5, 2005 under 5 U.S.C. § 8106(c) on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

This is the second appeal in this case. The Board issued a decision[1] on February 19, 2004 in which it reversed an August 22, 2003 decision of the Office on the grounds that the Office

[1] Docket No. 03-2143 (issued February 19, 2004).

improperly terminated appellant's compensation effective August 20, 2003 because she neglected to work after suitable work was offered to her.[2] The Board found that the Office failed to notify appellant that she had 15 days in which to accept the offered work without penalty. Furthermore, the Board found that the evidence of record was unclear as to whether the position was open and available to appellant. The facts and the circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

In a letter dated April 28, 2004, appellant informed the Office that she had relocated to Blowing Rock, North Carolina.

In a letter dated May 24, 2004, the Office referred appellant and the case record to Dr. Maher Fahim Habashi, a Board-certified orthopedic surgeon, for a second opinion examination and an opinion regarding the extent of her employment-related disability. In a report dated August 31, 2004, Dr. Habashi reported the history of appellant's May 20, 2001 injury and her medical treatment since that time. He indicated that appellant did not have any range of motion deficits in her upper extremities. Dr. Habashi reported that appellant had "pain on stress of rotator cuff right shoulder." He concluded that appellant was capable of working with restrictions on overhead lifting and "excessive repeated bending, excessive reaching above shoulder level and heavy pushing and pulling."

On November 3, 2004 the Office referred appellant for vocational rehabilitation services.

On January 27, 2005 the employing establishment offered appellant a position as a modified sales store checker at Camp Lejeune Commissary.[3] The employing establishment noted that this position was consistent with previous job offers and with the restrictions noted by Dr. Habashi and prior physicians and that the position was immediately available. Appellant was informed that relocation expenses would be provided.

On February 15, 2005 the Office advised appellant of its determination that the position of a modified sales store checker was suitable and gave her 30 days to accept the position or provide a written explanation of her reasons for failing to accept it. Appellant declined the position on February 26, 2005, noting that she had been found disabled by the Social Security Administration on July 23, 2003 and submitted the disability finding by social security. By letter dated March 15, 2005, the Office advised appellant that her reason for refusing to accept the modified sales store checker position was not valid and provided her with 15 days to accept the position.

By decision dated April 5, 2005, the Office terminated appellant's compensation effective that date on the grounds that she refused an offer of suitable work.

[2] On May 23, 2001 appellant, then a 52-year-old cashier, sustained shoulder, arm, back and neck injuries on May 20, 2001 while participating in a team exercise. The Office accepted the claim for thoracic strain, scalp/head contusion and left shoulder/arm contusion. Subsequently, the Office authorized left shoulder arthroscopy with subacromial decompression and bursectomy on May 14, 2002 and left shoulder arthroscopic surgery on November 26, 2002. Appellant worked intermittently from the date of the injury until June 26, 2001 and was subsequently placed on the periodic rolls for total disability.

[3] The work schedule was for 32 hours per week.

LEGAL PRECEDENT

It is well settled that, once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[4] As the Office in this case terminated appellant's compensation under 5 U.S.C. § 8106(c), the Office must establish that appellant refused to work after suitable work was found for her. Section 8106(c) of the Federal Employees' Compensation Act[5] provides 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. Section 10.517 of the applicable regulations[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 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. To justify termination of compensation, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[7]

Section 10.516 of the implementing regulation[8] provides in pertinent part:

> "[The Office] shall advise the employee that it has found the offered work to be suitable and afford the employee 30 days to accept the job or present any reasons to counter [the Office's] finding of suitability. If the employee presents such reasons and [the Office] determines that the reasons are unacceptable, it will notify the employee of that determination and that he or she has 15 days in which to accept the offered work without penalty. At that point in time, [the Office]'s notification need not state the reasons for finding that the employee's reasons are not acceptable."[9]

If possible, the employer should offer suitable reemployment in the location where the employee currently resides. If this is not practical, the employer may offer suitable reemployment at the employee's former duty station or other location.[10]

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[4] *Cary S. Brenner*, 55 ECAB ___ (Docket No. 04-1117, issued September 30, 2004); *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[5] 5 U.S.C. § 8106(c)(2).

[6] 20 C.F.R. § 10.517.

[7] *Kathy E. Murray*, 55 ECAB ___ (Docket No. 03-1889, issued January 26, 2004); *Arthur C. Reck*, 47 ECAB 339 (1995).

[8] 5 U.S.C. §§ 8101-8193; 5 U.S.C. § 8106(c)(2).

[9] *Sandra K. Cummings*, 54 ECAB ___ (Docket No. 03-101, issued March 13, 2003); *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

[10] 20 C.F.R. § 10.508. This regulation applies to both those employees who are no longer on agency rolls and those employees who continue on the agency rolls.

ANALYSIS

In this case, the Board finds that the Office did not meet its burden of proof to terminate appellant's wage-loss compensation benefits on the grounds that she refused an offer of suitable work and/or refused to report after a suitable job had been secured for appellant.

The employing establishment offered appellant, who lives in Blowing Rock, North Carolina, a limited-duty position as a modified sales store checker at Camp Lejeune, North Carolina. The Office, by letter dated February 15, 2004, found that the position was suitable and allowed appellant 30 days to accept the position or offer reasons for her refusal. By regulation, when an employee would need to move to accept an offer of reemployment, the employing establishment should, if possible, offer suitable reemployment in the location where the employee currently resides.[11] The record contains no evidence that the employing establishment made any effort to determine whether such reemployment was possible in North Carolina near appellant's residence. The Office, knowing that appellant would have to move to another part of North Carolina to accept the offer, should have developed this aspect of the case before finding the offer suitable.

In 1987 the pertinent regulation applied only to former employees, employees who were terminated from the agency's employment rolls:

> "Where an injured employee relocates after having been terminated from the agency's employment rolls, the Office encourages employing agencies to offer suitable reemployment in the location where the former employee currently resides. If this is not practical, the agency may offer suitable employment at the employee's former duty station or other alternate location."[12]

The regulation in effect since 1999 contains no such restrictive language. The regulation now states that the employer should offer suitable reemployment where the employee currently resides, if possible.[13] Under the circumstances of this case, where appellant would need to move to accept a position in Camp Lejeune, North Carolina, the Board finds that the Office should have developed the issue of whether suitable reemployment was possible in or around Blowing Rock, North Carolina. It was reversible error for the Office to terminate appellant's compensation benefits without positive evidence showing that such an offer was not possible or practical.[14]

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[11] *See* 20 C.F.R. § 10.508; *see also Sharon L. Dean,* 56 ECAB ___ (Docket No. 04-1707, issued December 9, 2004).

[12] 20 C.F.R. § 10.123(f).

[13] 20 C.F.R. § 10.508.

[14] *See Sharon L. Dean*, *supra* note 11.

CONCLUSION

The Board finds that the Office failed to meet its burden of proof to terminate appellant's compensation benefits on the grounds that she refused an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 5, 2005 is reversed.

Issued: September 22, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

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