U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICIA A. GRAVES and U.S. POSTAL SERVICE,
POST OFFICE, Jacksonville, Fla.

Docket No. 96-785; Submitted on the Record;
Issued June 4, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective August 19, 1995 on the grounds that she refused an offer of suitable work.

In the present case, the Office accepted appellant's occupational disease claim for bilateral carpal tunnel syndrome beginning March 25, 1991. On December 6, 1991 appellant underwent surgery to release the right carpal tunnel. She underwent left carpal tunnel release surgery on March 31, 1992. On August 20, 1992 and July 6, 1994 appellant underwent repeat right carpal tunnel release surgery. Appellant worked intermittently between surgeries and was paid appropriate compensation for all periods of temporary total disability.

On March 8, 1995 the Office referred appellant to Dr. Jerome K. Jones, a Board-certified orthopedic surgeon, for a second opinion examination and opinion. In a report dated March 19, 1995, Dr. Jones diagnosed bilateral carpal tunnel syndrome with some involvement of the ulnar nerve on the right. He indicated that appellant had reached maximum medical improvement and did have some permanent impairment of her extremities. Dr. Jones provided the following restrictions: no grasping, computer keyboard use, lifting over five pounds or fine manipulation with the right hand and no repetitive motion activities; no restrictions on the use of the left hand.

On May 18, 1995 the employing establishment advised appellant that it had developed a limited-duty position within her physical limitation. The duties involved required no lifting or carrying over five pounds with her right hand, no grasping, fine manipulation or computer keyboard activity with the right hand, and no repetitive motion activities with the right hand.

On May 22, 1995 the Office sent a copy of the March 19, 1995 report by Dr. Jones to Dr. Robert J. Kleinhans, a Board-certified orthopedic surgeon and appellant's treating physician, with a copy of the proposed job offer.

By letter dated June 6, 1995, the Office informed appellant that it found the proposed modified-clerk position suitable and informed her of the penalty provision of 5 U.S.C. § 8106(c). The Office allowed appellant 30 days to provide an explanation if she refused the offer. On July 3, 1995 appellant refused the position and submitted a letter dated June 27, 1995 by Dr. Kleinhans as a basis for her refusal. In his letter, Dr. Kleinhans placed appellant on permanent restriction with no repetitive use or computer keying in either hand, no lifting over five pounds and indicated that she should start working for only four hours a day.

By letter dated July 26, 1995, the Office noted that Dr. Kleinhans had added a restriction limiting appellant to working four hours a day and requested that he medically explain the basis for the four-hour restriction. On July 26, 1995 the Office also advised appellant that she had 15 days to accept the modified-clerk position or her compensation benefits would be terminated as her physician had not provided any rationale for his conclusion that she could not work more than four hours a day.

In response appellant accepted the position by letter dated August 10, 1995, "pending review of medical documentation Dr. Kleinhans and Dr. Levine turned in on [August 9, 1995]." In a letter dated August 9, 1995, Dr. Kleinhans reiterated appellant's permanent restrictions for both hands and indicated that appellant's restriction to working four hours a day was due to residual numbness and pain from repetitive motion involved in her job. Appellant also submitted a report by Dr. William H. Noran, a Board-certified neurologist, who administered nerve conduction studies and advised that there had been some digression in appellant's symptoms since her tests in July 1992. He agreed with Dr. Kleinhans's permanent restrictions for both hands and that appellant should start working at four hours a day.

In a decision dated August 17, 1995, the Office terminated appellant's compensation effective August 19, 1995 on the grounds that she refused an offer of suitable work. In a decision dated October 3, 1995, the Office denied merit review of appellant's case on the grounds that the evidence submitted with her request was repetitive.

The Board finds that the Office improperly terminated appellant's compensation benefits on the grounds that she refused an offer of suitable work.

Under the Federal Employees' Compensation Act,[1] once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of compensation.[2] In this case, the Office terminated appellant compensation under 5 U.S.C. § 8106(c) of the Federal Employees' Compensation Act which provides in pertinent part, "A partially disabled employee who … (2) refuses or neglects to work after suitable work is offered … is not entitled

[1] 5 U.S.C. § 8101 *et seq.* (1974).

[2] *William Kandel*, 43 ECAB 1011 (1992).

to compensation."[3] However, to justify such termination, the Office must show that the work offered is suitable.[4] An employee who refuses or neglects to work after suitable work has been offered to him or her has the burden of showing that such refusal of work was justified.[5] The regulations governing the Act provide several steps that must be followed prior to the determination that the position offered is suitable. Section 10.124(b) of the Office's regulation states in pertinent part:

> "Where an employee has been advised by the employing establishment in writing of the existence of specific alternative positions within the agency, the employee shall furnish the description and physical requirements of such alternative positions to the attending physician and inquire whether and when the employee will be able to perform such duties."[6]

In this case, the Office terminated appellant's compensation on August 19, 1995 on the grounds that she refused an offer of suitable work. The Office did not follow the regulations in effect at the time of its August 1995 decision in reaching this decision. The record does not contain an opinion from Dr. Kleinhans that appellant could perform the position offered. Rather, Dr. Kleinhans and Dr. Levine both imposed physical restrictions on both hands for appellant and the proffered position restricted movement in the right hand alone. Contrary to the memorandum in the file, Dr. Kleinhans did respond to the Office's request that he explain the basis for restricting appellant to working only four hours a day and did provide an explanation for his other physical restrictions as the record contains a report by Dr. Kleinhans that is date stamped August 9, 1995. As the record contains conflicting medical reports concerning whether appellant was capable of performing the duties of the modified-clerk position and specifically does not contain a report by appellant's treating physician deeming her capable of performing the work required in the proposed position, the Office improperly determined that appellant refused an offer of suitable work. The Office has failed to meet its burden of proof in terminating appellant's compensation for failure to accept suitable work.

[3] 5 U.S.C. § 8106(c)(2).

[4] *David P. Comacho*, 40 ECAB 267 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341 (1981).

[5] 20 C.F.R. § 10.124; *see Catherine G. Hammond*, 41 ECAB 375 (1990).

[6] 20 C.F.R. § 10.124(b).

The decisions of the Office of Workers' Compensation Programs dated October 3 and August 17, 1995 are hereby reversed.

Dated, Washington, D.C.
June 4, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member