

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EDWARD J. STABELL and U.S. POSTAL SERVICE,
POST OFFICE, Corfu, N.Y.

*Docket No. 96-1249; Submitted on the Record;
Issued June 15, 1998*

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 compensation benefits on the grounds that he refused an offer of suitable work.

On January 11, 1990 appellant, then a 31-year-old rural carrier, filed an occupational disease claim alleging that he sustained tendinitis of the right elbow due to his mailhandling duties. The Office accepted that he sustained medial epicondylitis of the right elbow in the performance of duty. Appellant was released to return to work on February 22, 1990 with the restriction that he use only his left hand.¹

By letter dated December 23, 1991, appellant was notified that he had been placed on the periodic compensation roll to receive compensation benefits for temporary total disability.

In a report dated January 15, 1992, Dr. Donald P. Douglas, a Board-certified orthopedic surgeon, stated that appellant had work-related cubital tunnel syndrome, bilaterally, which precluded him from performing even clerical-type work.

In a report dated January 20, 1992, Dr. Michael S. Feinberg, a Board-certified orthopedic surgeon, provided findings on examination and stated that appellant was disabled from work as a mail carrier because of bilateral cubital tunnel syndrome, right worse than left, which was most likely related to his work.

In a report dated June 9, 1992, Dr. Douglas diagnosed bilateral cubital tunnel syndrome and recommended surgery.

In a rehabilitation assessment dated July 14, 1992 and addressed to the employing establishment, Phyllis A. Ferrentino, a registered nurse and a rehabilitation coordinator, noted in

¹ On September 25, 1990, appellant filed a claim for a left arm injury which was denied by the Office.

the medical history portion of a report that appellant had retinitis pigmentosa, a chronic progressive disease characterized by degeneration of retinal tissue, atrophy of the optic nerve, and widespread changes in the retina with no specific treatment available. She noted that appellant had trouble seeing at night, tunnel vision, and peripheral vision difficulties.

Appellant underwent surgery on his right arm on August 13, 1992.

In a report dated March 30, 1993, Dr. Douglas stated that appellant was capable of performing clerical-type work with no lifting over 10 pounds and no repetitive wrist-type motion.

By letter dated April 15, 1993, the employing establishment offered appellant a modified position as a distribution clerk and stated that his duties would include responding to customer inquiries, providing information regarding available services and rates, and completing and filing forms. The employing establishment noted that the work activities required simple grasping ability and normal handling of objects weighing up to 10 pounds with no lifting of heavy objects and no repetitive-type motion. The employing establishment noted that the work activities were basically sedentary with the ability to change positions and with minimal walking. The employing establishment stated that the position was based on the physical limitations set forth in Dr. Douglas's March 30, 1993 report. The record shows that appellant rejected this position on April 26, 1993 and wrote as the reason "due to blindness."

By letter dated May 20, 1993, the Office asked Dr. Douglas to review the modified job offer made to appellant and to provide his opinion as to whether the job was in line with the work restrictions set forth in his March 30, 1993 report. On June 27, 1993 Dr. Douglas indicated that appellant's right elbow injury did not prevent him from performing the modified job.

By letter dated May 24, 1993, the Office advised appellant of its proposal to terminate his compensation benefits on the grounds that he had refused an offer of suitable work.

By decision dated November 10, 1993, the Office terminated appellant's compensation benefits effective September 19, 1993 for the reason that appellant's treating physician had certified that appellant was capable of performing the modified-duty position offered by the employing establishment but appellant had refused the position.

In a letter dated November 26, 1993, the employing establishment noted that appellant had recently been approved for disability retirement due to blindness under the Civil Service Retirement System.

In a report dated June 16, 1995, Dr. Douglas diagnosed chronic lateral epicondylitis and cubital tunnel syndrome and recommended surgery. He included a copy of a work capacity evaluation which indicated that appellant was limited in the use of his right arm except for very light manipulation on an occasional basis. The evaluation noted that appellant was not working due to his eye disease, retinitis pigmentosa.

By decision dated June 28, 1995, the Office denied appellant's claim for a schedule award.

By decision dated October 3, 1995, the Office vacated its June 28, 1995 decision stating that it was inappropriate for the Office to consider any compensation award subsequent to the issuance of the November 10, 1993 decision terminating all entitlement to compensation as a result of appellant's refusal of a valid job offer.² The Office stated that the restrictions on appellant's entitlement to receive compensation, as outlined in the Office's November 10, 1993 decision terminating all entitlement to compensation, were reinstated in full.

By letter dated December 27, 1995, appellant requested reconsideration of the Office's termination of his compensation benefits and submitted additional evidence.

In a letter dated June 8, 1993, John B. Palau, Ph.D., a state vocational rehabilitation counselor, stated that appellant was registered as a legally blind person under federal guidelines due to retinitis pigmentosa and cataracts. He stated:

"It is not clear whether or not [appellant] will ever be able to return to competitive work. His statutory blindness is a significant and severe vocational handicap. It can be very misleading to notice that under very controlled circumstances and with some slowness, [appellant] can demonstrate a fair degree of visual function. However, in a work environment, his severely restricted fields [of vision] render him severely impaired. He is likely to put himself at risk and potentially put other people at risk. You may think of his visual impairment as such that he can see through a quarter held at arm's distance. Even so, on top of his Retinitis Pigmentosa, he also has cataracts. [Appellant] also has near total blindness for dim dark situations, no night vision, and a very slow accommodation from light to dark and dark to light areas."

By decision dated February 12, 1996, the Office denied modification of its prior decision.

The Board finds that the Office of Workers' Compensation Programs has not met its burden of proof in terminating appellant's compensation benefits.

Once the Office accepts a claim it has the burden of proving that the disability has ceased or lessened before it may terminate or modify compensation benefits.³

Under section 8106(c)(2) of the Federal Employees' Compensation Act⁴ the Office may terminate the compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.⁵ Section 10.124(c) of Part 20 of the Code of Federal Regulations⁶ provides that an employee who refuses or neglects to

² The June 28, 1995 decision was later reinstated.

³ *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

⁴ 5 U.S.C. § 8106(c)(2).

⁵ *Camillo DeArcangelis*, 42 ECAB 941 (1991).

⁶ 20 C.F.R. § 10.124(c).

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 a showing before a determination is made with respect to termination of entitlement to compensation.⁷ To justify termination, the Office must show that the work offered was suitable⁸ and must inform the employee of the consequences of refusal to accept such employment.⁹

In the present case, the Office has not met its burden of proof. On April 15, 1992, the employing establishment offered appellant a modified position as a distribution clerk. In a report dated June 27, 1993, Dr. Douglas, appellant's attending physician, reviewed the position description and opined that appellant's employment-related right elbow injury did not prevent him from performing the position. The record shows that appellant rejected this position on April 26, 1993 and wrote as the reason, "due to blindness."

In a rehabilitation assessment dated July 14, 1992 and addressed to the employing establishment, Phyllis A. Ferrentino, a registered nurse and a rehabilitation coordinator, noted in the medical history portion of her report that appellant had retinitis pigmentosa, a chronic progressive disease characterized by degeneration of retinal tissue, atrophy of the optic nerve, and widespread changes in the retina with no specific treatment available. She noted that appellant had trouble seeing at night, tunnel vision, and peripheral vision difficulties.

In a letter dated November 26, 1993, the employing establishment noted that appellant had recently been approved for disability retirement due to blindness under the Civil Service Retirement System.

In a report dated June 16, 1995, Dr. Douglas noted that appellant was not working due to the eye disease, retinitis pigmentosa.

In a letter dated June 8, 1993, Dr. Palau, Ph.D., a state vocational rehabilitation counselor, stated that appellant was registered as a legally blind person under federal guidelines due to retinitis pigmentosa and cataracts. He stated:

"It is not clear whether or not [appellant] will ever be able to return to competitive work. His statutory blindness is a significant and severe vocational handicap.... [I]n a work environment, his severely restricted fields [of vision] render him severely impaired. He is likely to put himself at risk and potentially put other people at risk. You may think of his visual impairment as such that he can see through a quarter held at arm's distance. Even so, on top of his Retinitis Pigmentosa, he also has cataracts. [Appellant] also has near total blindness for

⁷ *Camillo R. DeArcangelis*, *supra* note 5; see 20 C.F.R. § 10.124(e).

⁸ See *Carl W. Putzier*, 37 ECAB 691, 700 (1986); *Herbert R. Oldham*, 35 ECAB 339, 346 (1983).

⁹ See *Maggie Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(c) (December 1993).

dim dark situations, no night vision, and a very slow accommodation from light to dark and dark to light areas.”

The Office failed to consider whether appellant could perform the modified distribution clerk position in light of his eye conditions, retinitis pigmentosa condition and cataracts. Appellant advised the employing establishment that he was refusing the offered position because of his eye condition. All of appellant’s impairments, whether work-related or not, must be considered in assessing the suitability of the position.¹⁰ Therefore, the Office improperly determined that appellant rejected an offer of suitable employment.

¹⁰ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(4) (December 1993) which provides that “If medical reports in the file document a condition which has arisen since the compensable injury, and this condition disables the claimant from the offered job, the job will be considered unsuitable even if the subsequently-acquired condition is not work-related.”

The February 12, 1996 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, D.C.
June 15, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member