U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RODERICK PERRY and U.S. POSTAL SERVICE,
POST OFFICE, Cleveland, Ohio

Docket No. 95-2713; Submitted on the Record;
Issued March 19, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion in terminating appellant's compensation under 5 U.S.C. § 8106(c) based on his refusal to accept suitable employment as offered by the employing establishment.

The Board has duly reviewed the case on appeal and finds that the Office met its burden to terminate appellant's compensation benefits based on his refusal to accept suitable employment.

On September 27, 1982 appellant, then a 51-year-old letter carrier, sustained employment-related lumbar myofibrositis, herniated disc at L5-S1 and right knee injury for which he received appropriate compensation. Following further development by the Office, Dr. Ralph J. Kovach, a Board-certified orthopedic surgeon, provided a second opinion evaluation dated July 19, 1993 in which he advised that appellant could work four hours per day with restrictions. Appellant submitted an October 12, 1993 report in which Dr. George Smirnoff, a Board-certified family practitioner, advised that appellant was permanently disabled due to the September 27, 1982 employment injury. On December 22, 1993 the employing establishment offered appellant a modified mailhandler position, based on Dr. Kovach's restrictions, which he rejected on December 30, 1993 and submitted a note from Dr. Smirnoff who advised that it was inadvisable for appellant to return to work "under any circumstances." By decision dated April 29, 1994, the Office terminated appellant's wage-loss compensation on the grounds that he declined an offer of suitable work. Following appellant's request, a hearing was held on February 1, 1995. In a June 12, 1995 decision, an Office hearing representative affirmed the prior decision.

Section 8106(c)(2) of the Federal Employees' Compensation Act[1] provides in pertinent part, "a partially disabled employee who ... refuses or neglects to work after suitable work is

[1] 5 U.S.C. §§ 8101-8193.

offered ... is not entitled to compensation."[2] To prevail under this provision, the Office must show that the work offered was suitable and must inform the employee of the consequences of refusal to accept such employment. An employee who refuses or neglects to work after suitable work has been offered has the burden of showing that such refusal to work was justified.[3]

In the present case, the record reflects that on December 22, 1993 the employing establishment offered appellant reemployment in a modified-duty position, four hours per day. There is nothing in Dr. Kovach's medical restrictions that would preclude appellant from performing the offered position. While Dr. Smirnoff advised that appellant was totally disabled due to the employment injury, this is insufficient to overcome, or create a conflict with the weight of the medical evidence as represented by Dr. Kovach's opinion as Dr. Smirnoff provided no rationale to support his conclusion.[4] Accordingly, the Board finds that the medical evidence of record establishes that appellant was capable of performing the modified position.

Given that the Office has shown that the limited-duty position offered to appellant was suitable based on his work restrictions, the burden shifts to appellant to show that his refusal to work in that position was justified.[5] At the February 15, 1995 hearing, appellant testified that he rejected the offer because he did not like the hours offered, that he would have difficulty getting to work as he did not own a car and lived in the city and the job offered was in the suburbs and that he had no training for the job offered. An appellant's preference for the area in which he or she resides and a personal dislike for the position offered or the work hours scheduled are unacceptable reasons for refusal of a suitable work offer.[6] Other than his hearing testimony regarding the availability of public transportation, there is no evidence that appellant could not make travel arrangements for transportation to the job.[7] Likewise, the evidence indicates that the modified mailhandler position required no specialized preemployment training. Thus, there is no evidence to indicate that appellant, who had been a letter carrier, was not vocationally prepared for the job; thus, the Board finds that appellant has not provided an acceptable reason for refusal of a suitable position.

Lastly, the record indicates that the Office properly followed the procedural requirements under section 8106 and gave appellant an opportunity to accept or provide reasons for declining the offered position.[8] In order to properly terminate appellant's compensation under 5 U.S.C. § 8106, the Office must provide appellant notice of its finding that an offered position is suitable

[2] 5 U.S.C. § 8106(c)(2).

[3] *See Michael I. Schaffer*, 46 ECAB 845 (1995).

[4] *See Ern Reynolds*, 45 ECAB 690 (1994).

[5] *See Henry P. Gilmore*, 46 ECAB 709 (1995).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-earning Capacity*, Chapter 2.814.5(c) (1996).

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

[8] *Id.*

and give appellant an opportunity to accept or provide reasons for declining the position.[9] Following the December 22, 1993 job offer, by letter dated January 4, 1994, the Office advised appellant that the offered position was found to be suitable and allotted him 30 days to either accept or provide reasons for refusing the position and by letter dated February 7, 1994, appellant was given an additional 15 days in which to respond. The Office, therefore, provided appellant with proper notice and there is no evidence of a procedural defect in this case.

The record, therefore, establishes that appellant was offered a suitable position by the employing establishment and such offer was refused. Under 5 U.S.C. § 8106 his compensation was properly terminated.

The decision of the Office of Workers' Compensation Programs dated August 2, 1995 is hereby affirmed.

Dated, Washington, D.C.
March 19, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

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