U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SUSAN M. SPOONER and U.S. POSTAL SERVICE,
POST OFFICE, Springfield, Mass.

Docket No. 96-833; Submitted on the Record;
Issued October 19, 1998

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's monetary compensation under 5 U.S.C. § 8106(c)(2) on the grounds that she refused an offer of suitable work.

On April 16, 1979 appellant, a clerk, sustained an injury in the performance of duty. The Office accepted her claim for back strain and herniated disc at L5-S1, for which she underwent surgery. The Office paid compensation for temporary total disability on the periodic rolls.

On March 29, 1994 the Office advised appellant that the offered position of modified manual mark-up clerk was suitable and currently available and that she had 30 days from the date of the letter to either accept the position or to provide an explanation of the reasons for refusing it. Appellant signed her acceptance of the offer on April 11, 1994. The Office received this acceptance on April 15, 1994.

On April 19, 1994 the Office contacted the employing establishment to inquire if it was aware of appellant's acceptance. The employing establishment replied that it was, that it would be speaking with appellant soon to set up a specific date for her return to work, likely on April 30, 1994, and that it would advise the Office when it knew for certain.

In a statement dated April 28, 1994, a human resource specialist at the employing establishment indicated that he met with appellant on April 26, 1994 to review her return to work. He stated that appellant did not think she could do the job, that the drive to and from work, together with working four hours a day, was too much for her. The human resource specialist stated that he advised appellant that, if she was refusing the job, she would have to provide medical rationale to support her refusal. Appellant stated that she had a doctor's appointment on May 10, 1994 and would submit medical evidence.

On May 5, 1994 the Office advised appellant that her refusal of the offered position, on the grounds that she felt that she was not physically capable of performing the job requirements, was unacceptable. The Office advised her that she had 15 days from the date of the letter to write to the Office to accept the position of modified manual mark-up clerk and that the Office would not consider any further reasons for refusal. "If you fail to accept this modified duty job within 15 days from the date of this letter," the Office advised, "termination of compensation will commence."

On May 13, 1994 appellant wrote to the Office as follows: "In response to your letter of May 5[, 1994] I will accept the position but feel you must know I am still experiencing physical problems. Dr. Davignon [the attending orthopedic surgeon] had to reschedule my May 10[, 1994] appointment to May 18[, 1994]."

In a statement dated June 16, 1994, a second human resource specialist at the employing establishment informed the Office that she spoke with appellant on May 16, 1994. She stated that appellant indicated that she had 15 days to accept the position, that she did not want her compensation terminated, but that she did not feel that she could accept the position offered due to the long drive from home. Appellant, she stated, could not get out of bed due to her back pain. The human resource specialist advised appellant that she had to contact the Office prior to the deadline and advise of her intention.

On May 18, 1994 appellant sent to the Office a note from her attending orthopedic surgeon to show that she had an appointment that day and that she would be having an anesthesia consultation on May 31, 1994 followed by a nerve block and follow-up examination. Appellant stated: "I won't be able to do anything until after this procedure is done."

On June 23, 1994 the Office contacted the employing establishment to learn whether appellant had made any further attempt to begin work. The employing establishment responded that she had not, nor had she contacted the employing establishment since May 18, [sic] 1994.

In a decision dated July 29, 1994, the Office terminated appellant's compensation effective August 21, 1994 for failing to accept a valid offer of employment.

Appellant requested an oral hearing before an Office hearing representative. At the hearing, which was held on July 6, 1995, appellant testified that she did not refuse the position, that everything she did was in writing "like they asked me to" and that she was never given a time and a day to show up for the job. She testified that in the April 26, 1994 meeting with the first human resource specialist she was told that it "does not matter whether you come right now or not." She stated that the human resource specialist advised her to wait until after her doctor's appointment if she was "in this much pain," that "you do not want to make anything worse" and that it "will not make any difference because your job will be waiting for you." Appellant explained that she did not advise that she was refusing anything. Her husband indicated that he was with her that day. He stated that the human resource specialist advised appellant that it would be best that she see her physician before accepting the job, that it would not make a difference, that her job "would be here waiting." Regarding her conversation with the second human resource specialist, appellant explained that she did not state that she was refusing the

position, only that she was having problems and had to go to the doctor. Summarizing her position, appellant testified as follows:

> "If they had given me a day and a time and said look, that little note from [my attending orthopedic specialist] was not sufficient. You be to work Monday at eight o'clock. I would have crawled there if I had to, but I wasn't given that opportunity. Now, whether there's a lot of miscommunication, but everything that I have, and I don't know if you've got, I don't have any copy of it and I know I never refused the job."

In a decision dated October 16, 1995, the Office affirmed the termination of appellant's monetary compensation. The Office found that appellant's statements to the human resource specialists "were tantamount to a refusal of the position offered to her."

The Board finds that the Office improperly terminated appellant's monetary compensation.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[1] After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[2]

Section 8106(c)(2) of the Federal Employees' Compensation Act states that a partially disabled employee who refuses to seek suitable work, or refuses or neglects to work after suitable work is offered to, procured by, or secured for him is not entitled to compensation.[3]

The evidence in this case is insufficient to establish that appellant refused an offer of suitable work. In direct response, the Office's formal letters of March 29 and May 5, 1994, advising appellant of the suitability of the offered position and asking her to write to the Office either to accept or refuse, appellant wrote to the Office and formally accepted. The hearing representative found that appellant's oral statements to the human resource specialists, as reported by the specialists, were tantamount to a refusal, but record shows that there is an issue concerning what was and was not said during these conversations. Appellant's testimony at the oral hearing on July 6, 1995 was that she did not advise that she was refusing anything, and her husband's testimony supports this, at least with respect to the meeting with the first human resource specialist. The Office made no attempt to clarify the matter by requesting supplemental statements from the human resource specialists themselves. On balance, where the record

[1] *Harold S. McGough*, 36 ECAB 332 (1984).

[2] *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

[3] 5 U.S.C. § 8106(c)(2).

contains clear documentary evidence of appellant's acceptance together with questionable parol evidence of refusal, greater weight must be given to the former.[4]

Nothing in the record shows that appellant's actions were inconsistent with her written acceptance. On April 19, 1994 the employing establishment informed the Office that it would be speaking with appellant soon to set up a specific date for her return to work, likely on April 30, 1994, and that it would advise the Office when it knew for certain. It appears, however, that the employing establishment never set a specific date for appellant's return to work and therefore never followed up with the Office. Without a specific date and time to report to work, appellant's absence from the employing establishment cannot be viewed as a refusal or neglect to work after suitable work was offered to, procured by or secured for her.

Because the weight of the evidence fails to support the Office's finding that appellant refused an offer of suitable work under 5 U.S.C. § 8106(c)(2), the Board finds that the Office has not met its burden of proof to justify the termination of appellant's monetary compensation.

The October 16, 1995 decision of the Office of Workers' Compensation Programs is reversed.

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

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

[4] *See William H. Erickson*, 6 ECAB 341 (1953) (parol evidence of a hearsay character is not sufficient to controvert or materially weaken the force of the doctor's written statements); *Frederick Nightingale*, 6 ECAB 268 (1953) (parol evidence not of sufficient substance to controvert written statement).