

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MABEL M. DREW and DEPARTMENT OF THE NAVY,
NAVAL AIR STATION, Lemoore, Calif.

*Docket No. 96-483; Submitted on the Record;
Issued September 10, 1998*

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's benefits for refusing to accept suitable work.

On July 24, 1989 appellant, then a 43-year-old computer operator, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that the pain in her left shoulder, arm and hand was due to factors of her employment. The Office accepted appellant's claim for left carpal tunnel syndrome and left rotator cuff tendinitis on May 3, 1990. Appellant resigned effective November 2, 1990. The Office authorized left carpal tunnel surgery. Appellant was placed on the periodic rolls for temporary disability on December 9, 1991.

In a report and return to work note dated May 13, 1993, Dr. Roger W. Wilson, a Board-certified orthopedic surgeon, indicated that appellant could return to work on May 17, 1993 providing that she avoided repetitive forceful gripping with left hand and avoiding lifting over 10 pounds. In a subsequent report dated June 10, 1993, Dr. Wilson again stated that appellant was capable of working providing she avoid typing or lifting greater than 10 pounds with her left hand.

In reports dated July 22 and November 16, 1993, Dr. Wilson, based upon a physical examination, opined that appellant was "permanent and stationary as of July 22, 1993." Dr. Wilson opined that appellant could perform work provided she did not perform forceful or repetitive gripping or lifting with the left hand of more than 10 pounds.

By letter dated October 14, 1993, the employing establishment offered appellant a permanent full-time position of secretary (office automation) at the Navy Automation Facility in Lemoore, California. The employing establishment stated that all assigned duties would be in strict compliance with appellant's work restrictions. It warned appellant that if she refused the position, the refusal would be reported to the Office. The employing establishment enclosed a job description for a secretarial position and indicated that excessive or repetitive typing was not

required and she would not be required to lift more than seven pounds or perform forceful gripping. The employing establishment also advised appellant that relocation expenses to the Lemoore area would be provided.

On October 17, 1993 appellant declined the offered position on the basis that she was no longer living in Lemoore and would have to relocate back there to accept the position.

By letter dated November 4, 1993, the Office informed appellant that it had reviewed the position description and found it suitable to appellant's disability. The Office stated that if appellant did not accept the job or provide a good reason she would forfeit her right to compensation.

By letter dated December 15, 1993, the Office advised appellant that the position of secretary was found to be suitable to her work capabilities. The Office advised that her reason for declining the position was not considered a valid reason for refusing the position. The Office informed appellant that she had 15 days from the receipt of the letter to accept the position and if she failed to accept the position, then her compensation benefits would be terminated.

In a letter dated December 20, 1993, appellant responded to the Office's December 15, 1993 letter. Appellant stated that she could not perform automation work and requested to be allowed to continue with vocational rehabilitation to locate a job in her current living region.

By decision dated January 6, 1994, the Office terminated appellant's compensation benefits for refusing to accept a suitable job offer by the employing establishment.

By letter dated February 4, 1994, appellant requested a hearing before an Office hearing representative and enclosed evidence in support of her request.

In a report dated March 14, 1994, Dr. Israel Chambi, Assistant Professor, Department of Neurological Surgery, University of California, Irvine Medical Center, noted that appellant was scheduled for surgery on March 31, 1994. Dr. Chambi opined that appellant was temporarily totally disabled.

In reports dated April 8, May 16, June 13, July 18, August 22, September 19 and October 10, 1994, Dr. Chambi opined that appellant remained temporarily totally disabled.

In a letter dated December 7, 1994, Dr. Chambi reviewed the job description of the position offered to appellant and advised that she is totally disabled. Dr. Chambi opined that appellant might be able to return to a modified position in three to four months.

After a hearing held on November 14, 1994 the hearing representative on January 4, 1995 affirmed the Office decision terminating appellant's benefits for failure to accept suitable work. The hearing representative noted that the employing establishment offered to pay appellant's relocation expenses. The hearing representative, however, noted that appellant had submitted

medical evidence subsequent to the date of the hearing and advised the Office to develop the case file in light of this new medical evidence.¹

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

Section 8106(c)(2) of the Federal Employees' Compensation Act² 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 10.124(c) of the Office's regulations³ provides that an employee who refuses or neglects to work after suitable work has been offered or secured has the burden of showing that such refusal or failure to work was reasonable or justified and shall be provided with an opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.

The Board has required that if an employee presents reasons for refusing an offered position, the Office must inform the employee if it finds the reasons inadequate to justify the refusal of the offered position and afford appellant one final opportunity to accept the position.⁴ Appellant was advised by the employing establishment that it would pay any relocation expenses she incurred. In this case, the Office has already afforded appellant the procedural protection envisioned by the Board's decision in *Maggie L. Moore* as it considered Dr. Roger W. Wilson's reports. Once the Office advises a claimant that his or her reasons for refusing an offered position are unacceptable and he or she is given the opportunity to accept the position or have compensation terminated, the claimant submits further reasons and supporting evidence at his or her own risk.⁵ Appellant submitted further evidence after the termination of compensation in a request for reconsideration and hearing before Office hearings representative. The hearing representative considered the evidence, Dr. Chambi's reports, and concluded that the case needed to be remanded for further development of the evidence. As the Office met its burden of proof, it is not required to reinstate appellant's compensation merely because she submitted new evidence which was of such a nature as to lead the Office to conclude that further inquiry was necessary.

¹ Following the hearing representative's January 4, 1995 decision, appellant submitted additional new evidence. As the hearing representative did not review this evidence in reaching a final decision, the Board may not consider it for the first time on appeal; *see* 20 C.F.R. § 501.2(c).

² 5 U.S.C. § 8106(c)(2).

³ 20 C.F.R. § 10.124(c).

⁴ *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

⁵ *C.W. Hopkins*, 47 ECAB ____ (Docket No. 94-1025, issued August 23, 1996).

The decision of the Office of Workers' Compensation Programs dated January 4, 1995 is hereby affirmed.

Dated, Washington, D.C.
September 10, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member