

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DIANE M. CLARK and U.S. POSTAL SERVICE,
BRENTWOOD POST OFFICE, Washington, D.C.

*Docket No. 98-1348; Oral Argument Held February 11, 1999;
Issued June 2, 1999*

Appearances: *Diane M. Clark, pro se; Cornelius S. Donoghue, Jr., Esq.,
for the Director, Office of Workers' Compensation Programs.*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for an oral hearing as untimely filed and whether the Office properly terminated appellant's disability compensation because she refused an offer of suitable work.

On November 5, 1991 appellant, then a 37-year-old distribution clerk, filed a notice of traumatic injury after an overhead mail conveyor belt malfunctioned on October 31, 1991, creating screaming sounds and steam. Dr. Adrienne Smith, a neurologist, diagnosed headache and binaural sensorineural hearing loss, noting that appellant had atypical headaches before the accident and was advised to avoid exposure to loud noise. The Office accepted the claim for tinnitus and acoustic trauma -- temporary hearing loss -- and appellant received continuation of pay and then disability compensation.

In response to an Office inquiry, Dr. Smith explained that appellant had a traumatic head injury prior to the October 30, 1991 incident at work, which left her with atypical face pain and headaches. She stated that the work incident precipitated a traumatic hearing loss and a recurrence of her headaches. Subsequently, the Office accepted appellant's headache condition.

The Office referred appellant to Dr. Bruce A. Feldman, a Board-certified otolaryngologist, who stated in a November 7, 1992 report that appellant's hearing was within the normal range as was her audiogram except for a slight high frequency loss in both ears. In a March 21, 1994 report, he stated that appellant's "claims of severe hearing handicap are not reflected" in the objective testing. She suffered a mild amount of high frequency hearing loss and tinnitus from the accident but was not disabled and could work in a quiet environment.

The Office also referred appellant to Dr. Richard N. Edelson, a Board-certified neurologist, who stated in a February 18, 1994 report, that he had no medical explanation for why appellant could not work, that her headaches were a subjective symptom and that her neurological examination was normal.

Because the opinions of Drs. Edelson and Feldman that appellant could work contradicted that of Dr. Smith, who felt that appellant's headaches prevented her from working, the Office referred appellant to Dr. Nirmala Khot Fernbach, a neurologist, and to Dr. Christopher P. Mesick, a Board-certified otolaryngologist.¹

Based on their reports, the Office informed appellant on November 3, 1997 that the position of modified distribution clerk had been found to be suitable and was currently available. The Office provided appellant with 30 days either to accept the offered position or explain her reasons for refusing it. The Office warned that failure to accept the position or justify her refusal would result in the termination of compensation.

On November 6, 1997 a memorandum of appellant's telephone call to the Office indicated that she would not be accepting the offered position because of her blackouts and headaches, which prevented her from driving to work. The Office reminded appellant of the 30-day deadline for providing her reasons for refusal.

On November 7, 1997 the employing establishment informed appellant that she was scheduled for a reemployment interview on November 14, 1997 at which she would be presented with the modified job. The employing establishment stated that it was required to provide a suitable job for injured employees who are able to return to work in any capacity and warned appellant that failure to attend the interview could result in termination of compensation.

Appellant responded on November 12, 1997, stating that the November 7, 1997 letter was the same as the May 5, 1997 letter she had received² and that the Office had told her then just to send the employing establishment "a letter on my position in this appointment." Appellant added that "this matter had already been addressed" by the Office and the employing establishment's November 7, 1997 letter did not consider appellant's limited capacity to work.

By letter dated November 14, 1997, the employing establishment reported to the Office that appellant had been asked to attend a reemployment interview and she had refused to participate. The employing establishment added that the job to be offered adhered to the recommendations of Dr. Mesick.

¹ See *Shirley L. Steib*, 46 ECAB 309, 316 (1994) (noting that 5 U.S.C. § 8123 of the Federal Employees' Compensation Act provides that if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination).

² In a letter dated May 8, 1997 to the employing establishment, appellant responded to a May 7, 1997 job offer, stating that she would not sign anything because she had accepted a light-duty job previously -- she had reported for work, was unable to do the job, had passed out and hurt herself and the employing establishment had refused to pay because she did not have her physician's permission to return to work. Appellant added that she would report if the employing establishment or the Office took total responsibility for anything that happened to her at work, but would not sign any papers.

Appellant responded to the November 3, 1997 Office letter, stating that the job offer did not address her medical problems or limited abilities. Appellant also criticized Dr. Fernbach's examination and report, explaining that she had not read appellant's medical file and had her facts wrong.

Appellant stated: "I will report, but I will not sign anything relating to a job position." She added that she would not be blamed again for returning to work without Dr. Smith's permission and included several letters she had previously sent to the Office as well as an October 29, 1997 form report from him stating that appellant had been put on permanent medical disability.

On December 3, 1997 the Office informed appellant that her reasons for refusing the job offer were unacceptable, that she had 15 additional days to accept the offered position without a penalty, that the Office would not consider any further reasons for refusal of the offer and that if she accepted the offer, she should send a copy of her acceptance to the employing establishment and cooperate with any of their instructions about starting the position.

In response, appellant requested a hearing, stating that she had been evaluated by a physician with false information and that the Office's medical evaluations had not addressed her headache condition. Appellant also stated that facial pain may be the cause of her headaches, that Dr. Smith wanted to refer appellant to a dentist and that she was restricted from driving far from her home because of the medication she took.

On December 30, 1997 the Office terminated appellant's compensation, effective January 4, 1998, on the grounds that appellant had refused an offer of suitable work. The Office noted that not one of the physicians who treated appellant had imposed any driving restrictions upon her.

On February 23, 1998 the Office denied appellant's request for an oral hearing as untimely filed. The Office found that the issue of whether appellant's reasons for refusing the offered position were substantive enough to warrant revocation of the job offer could be equally well addressed by requesting reconsideration and submitting evidence not previously considered.³

Initially, the Board finds that the Office did not abuse its discretion in denying appellant's request for a hearing as untimely filed.

³ Appellant subsequently requested that her case be sent for an oral hearing and the Office repeated its denial in a letter dated March 23, 1998.

The Act⁴ is unequivocal in that a claimant not satisfied with a decision of the Office has a right, upon timely request, to a hearing before a representative of the Office.⁵ The statutory right to a hearing pursuant to section 8124(b)(1) follows an initial decision of the Office.⁶ Because subsection (b)(1) is unequivocal on the time limitation for requesting a hearing, a claimant is not entitled to such hearing as a matter of right unless his or her request is made within the requisite 30 days.⁷

The Office's procedures implementing this section of the Act are found in Chapter 2.1601 of the Federal (FECA) Procedure Manual. The manual provides for a preliminary review of a case by an Office hearing representative to determine whether the hearing request is timely and, if not, whether a discretionary hearing should be granted; if the Office declines to grant a discretionary hearing, the claimant will be advised of the reasons.⁸ The Board has held that the only limitation on the Office's authority is reasonableness⁹ and that abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from known facts.¹⁰

In this case, appellant's first request for a hearing was made in a letter hand-delivered to the Office on December 10, 1997. Appellant sought the help of the President in obtaining a hearing in a letter dated December 19, 1997. These requests were premature inasmuch as no final decision had yet been issued by the Office.¹¹

Appellant's next request came in a letter dated February 6, 1998, more than a month after the December 30, 1997 decision of the Office terminating her compensation. Attached to the decision was a statement outlining appellant's options regarding appeal and explaining clearly that the request for a hearing must be made within 30 days of the date of the decision.

Appellant subsequently argued that she did not receive the December 30, 1997 decision until February 2, 1998 when she called the Office to inquire about the status of her case.

⁴ 5 U.S.C. §§ 8101-8193.

⁵ 5 U.S.C. § 8124(b); *Joe Brewer*, 48 ECAB ____ (Docket No. 95-603, issued March 21, 1997); *Coral Falcon*, 43 ECAB 915, 917 (1992).

⁶ *Eileen A. Nelson*, 46 ECAB 377, 379 (1994); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.10(b) (July 1993).

⁷ *William F. Osborne*, 46 ECAB 198, 202 (1994).

⁸ *Belinda J. Lewis*, 43 ECAB 552, 558 (1992); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4.b.(3) (October 1992).

⁹ *Wanda L. Campbell*, 44 ECAB 633, 640 (1993).

¹⁰ *Wilson L. Clow*, 44 ECAB 157, 175 (1992).

¹¹ See *Eileen A. Nelson*, *supra* note 6 at 381 (finding that the Office's Branch of Hearings and Review may not assume jurisdiction in the claims process absent a final adverse decision by the Director, which has not been previously reviewed).

Appellant stated that she had moved in December 1997 and had not realized that she had to notify the Office directly of a change in address.

The record reveals no change of address submitted by appellant in December 1997 or January 1998, yet does contain a letter from appellant dated November 14, 1994 informing the Office that her address had changed to 2703 Hale Court, Waldorf, Maryland. The December 30, 1997 decision was mailed to this address, as were the Office's various letters dated in November and December 1997.

Further, a copy of appellant's letter dated December 19, 1997 to the President, which was hand-delivered to the Office on December 22, 1997, contained the Waldorf address. Finally, there is no evidence that the December 30, 1997 decision mailed to appellant was returned as undeliverable.

Inasmuch as the Board has held that, absent evidence to the contrary, it is presumed that a notice mailed to an individual in the ordinary course of business was received by that individual,¹² the Board finds that appellant received the December 30, 1997 decision in a timely manner. Therefore, appellant was not entitled to a hearing as a matter of right.

Nonetheless, even when the hearing request is not timely, the Office has the discretion to grant a hearing and must exercise that discretion.¹³ Here, the Office informed appellant in its February 23, 1998 decision, which was reissued on March 23, 1998, that it had considered the timeliness matter in relation to the issue involved and denied appellant's hearing request on the basis that additional evidence on whether appellant's reasons for refusing an offer of suitable work were justifiable could be fully considered through a request for reconsideration.

In this case, nothing in the record indicates that the Office committed any act in denying appellant's hearing request which could be found to be an abuse of discretion. Further, appellant was advised that she could request reconsideration and submit additional medical evidence. Finally, appellant offered no argument to justify further discretionary review by the Office.¹⁴ Thus, the Board finds that the Office properly denied appellant's request for a hearing.

The Board also finds that the Office met its burden of proof in terminating appellant's compensation because she refused an offer of suitable work.

Once the Office accepts a claim it has the burden of proving that the employee's disability has ceased or lessened before it may terminate or modify compensation benefits.¹⁵

¹² *Charles R. Hibbs*, 43 ECAB 699, 701 (1992).

¹³ *Frederick D. Richardson*, 45 ECAB 454, 465 (1994).

¹⁴ *Cf. Brian R. Leonard*, 43 ECAB 255, 258 (1992) (finding that the Office abused its discretion by failing to consider appellant's explanation regarding the untimely filing of his hearing request).

¹⁵ *Karen L. Mayewski*, 45 ECAB 219, 221 (1993); *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

Section 8106(c)(2) of the Act¹⁶ provides that 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.¹⁷ The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.¹⁸

The implementing regulation¹⁹ provides that an employee who refuses or neglects to 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 entitlement to compensation is terminated.²⁰ To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of her refusal to accept such employment.²¹

Office procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.²² The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by medical evidence.²³

In this case, appellant offered two main contentions at oral argument before the Board -- first, that the offered position was not medically suitable for her physical capabilities and, second, that she did not actually refuse the job offer.

The Board finds that the evidence of record establishes that the sedentary position offered to appellant was medically suitable and that the Office complied with its required procedures.

On August 19, 1997 Dr. Mesick stated that appellant's residual tinnitus and hearing "trouble" did not prevent her from being gainfully employed and that her headaches were not related to her ears. He found zero percent hearing handicap, unchanged since 1994 and stated that appellant should avoid exposure to loud noises, preferably working in a quiet area and wearing ear protection if necessary.

¹⁶ 5 U.S.C. § 8106(c)(2).

¹⁷ *Camillo R. DeArcangelis*, 42 ECAB 941, 943 (1991).

¹⁸ *Stephen R. Lubin*, 43 ECAB 564, 573 (1992).

¹⁹ 20 C.F.R. § 10.124(c).

²⁰ *John E. Lemker*, 45 ECAB 258, 263 (1993).

²¹ *Maggie L. Moore*, 42 ECAB 484, 487 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

²² *C.W. Hopkins*, 47 ECAB 725, 727 (1996); *see Patsy R. Tatum*, 44 ECAB 490, 495 (1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5 (May 1996).

²³ *Marilyn D. Polk*, 44 ECAB 673, 680 (1993).

On December 3, 1996 Dr. Fernbach reviewed appellant's medical history and treatment and noted no neurological deficits on physical examination. She stated that appellant's headaches were not related to the 1991 incident but appeared to be psychological. Dr. Fernbach concluded that appellant should be able to work full time without problems, perhaps in a less noisy or crowded atmosphere.

Similarly, Dr. Edelson reported a normal neurological examination on February 18, 1994, basically unchanged since September 1992 and found no medical reason why appellant could not work. Dr. Feldman stated on March 21, 1994 that appellant's tinnitus, a subjective symptom and not possible to quantify exactly, should not keep appellant from working. He added that her mild high frequency hearing loss did not disable her and concluded that she could work in a quiet environment.

Thus, four physicians found appellant capable of working if she was not exposed to loud noises, the same prohibition she had worked under prior to the October 30, 1991 incident. The employing establishment's job offer specifically stated that appellant could not be exposed to excessive workplace noise and was authorized to use noise protection if needed.

Further, none of the physicians, including Dr. Smith, imposed any driving restrictions on appellant so as to prevent her from reporting to work. In fact, appellant stated repeatedly that she would report for work, if only under certain conditions. Therefore, the Board finds that the offered position was medically suitable.²⁴

Appellant stated at oral argument that she was willing to work and thus did not refuse suitable work. She contended that her November 12, 1997 letter responding to the Office's November 3, 1997 finding of suitability, stated twice that she would report to work but would not sign anything or take responsibility for returning to work without Dr. Smith's permission. Appellant pointed out that she had no set date to report for work.

The Board finds that appellant's conditional and ambivalent responses to the Office's November 3, 1997 notice are insufficient to show that she did not refuse an offer of suitable work. First, appellant told the Office by telephone that she could not drive to get to work and could not work because of her blackouts and headaches. Appellant provided no medical evidence supporting her inability to perform the sedentary duties of the offered position on these bases.

Second, appellant failed to attend the November 14, 1997 interview scheduled by the employing establishment to discuss her return to work. She informed the employing establishment that the Office had already addressed "this matter" but provided no reasons for her nonparticipation.

Third, while appellant reiterated in her November 12, 1997 letter that she would report for work, she also stated that she would not sign the job offer and would report only on someone

²⁴ See *Michael I. Schaffer*, 46 ECAB 845, 855 (1995) (finding the medical evidence sufficient to establish that appellant was physically capable of performing the duties of the offered modified position).

else's authorization. However, there is no evidence in this record that appellant actually accepted the offered position. Saying that she would accept the job is not the same as actually accepting it.²⁵

Finally, after the Office rejected her reasons for refusing the job offer as unjustified on December 3, 1997, appellant was provided with 15 days to accept the position without penalty. Although the Office warned appellant that it would not consider any further reasons for refusal, appellant responded to the December 3, 1997 letter by requesting an oral hearing, disputing Dr. Fernbach's factual information and arguing that the offered position did not address her ability. At no time did appellant state in writing that she would accept the position. Therefore, the Board rejects appellant's arguments.²⁶

The March 23 and February 23, 1998 and the December 30, 1997 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
June 2, 1999

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

²⁵ See *Henry W. Shepherd, III*, 48 ECAB ____ (Docket No. 96-814, issued March 3, 1997) (finding that appellant's compensation was properly terminated after the Office found his reasons for refusing suitable work -- appellant argued that the CA-1049 form required the employing establishment to "process" appellant back to work and the medical evidence was in conflict, thereby requiring referral to an impartial medical examiner -- unacceptable).

²⁶ See *C.W. Hopkins*, *supra* note 22 at 727 (finding that once the Office advises a claimant that his or her reasons for refusing an offered position are unacceptable and that he or she has 15 days to accept the position or be terminated, a claimant submits further reasons and supporting evidence at his or her own risk).