

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of LAURA PENZO and U.S. POSTAL SERVICE,  
POST OFFICE, Elmsford, N.Y.

*Docket No. 97-1842; Submitted on the Record;  
Issued May 11, 1999*

---

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
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 her 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 did not meet its burden of proof to terminate appellant's compensation benefits.

On October 20, 1993 appellant, then a 50-year-old window/distribution clerk, sustained an employment-related lumbosacral strain. This case has a complex procedural history and the most recent case over which the Board has jurisdiction<sup>1</sup> is a March 3, 1997 decision, of an Office hearing representative in which he affirmed a June 12, 1996 decision, finding that appellant's wage-loss compensation was properly terminated pursuant to 5 U.S.C. § 8106 based on her refusal of suitable work. The facts of this case as set forth in the hearing representative's decision are hereby incorporated by reference.

Section 8106(c)(2) of the Federal Employees' Compensation Act<sup>2</sup> provides in pertinent part, "A partially disabled employee who ... refuses or neglects to work after suitable work is offered ... is not entitled to compensation."<sup>3</sup> To prevail under this provision, the Office must show that the work offered was suitable and must inform the employee of the consequences of

---

<sup>1</sup> The Board notes that the Office issued a decision dated May 16, 1997, after an appeal was filed with the Board. The Board and the Office may not have concurrent jurisdiction over the same issue in the same case. *Douglas E. Billings*, 41 ECAB 880 (1990). As the May 16, 1997 decision, was a denial of a request for reconsideration of the prior decision over which the Board has jurisdiction, the decision addressed the same issues that would be addressed by the Board on appeal. The May 16, 1997 Office decision is, therefore, null and void.

<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> 5 U.S.C. § 8106(c)(2).

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.<sup>4</sup> The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.<sup>5</sup>

The implementing regulation<sup>6</sup> 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.<sup>7</sup> To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.<sup>8</sup>

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.<sup>9</sup> In assessing medical evidence, the number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for and the thoroughness of physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.<sup>10</sup>

In the present case, the record reflects that the modified distribution clerk position offered to appellant on August 18, 1995 was reviewed by Dr. Eduardo Alvarez, a Board-certified orthopedic surgeon, who submitted a report dated October 16, 1995, in which he advised that the position was suitable. The record, however, also contains reports from appellant's treating Board-certified family practitioner, Dr. George Stanescu who advised in reports dated January 11 and July 2, 1996, that appellant was totally disabled for any type work. Furthermore, Dr. Richard Peress, appellant's treating Board-certified orthopedic surgeon, also advised that appellant was totally disabled. Likewise, Dr. Richard Radna, a Board-certified neurosurgeon, provided reports dated August 9, 1994 and July 23, 1996, in which he advised that appellant was totally disabled.

---

<sup>4</sup> See *Michael I. Schaffer*, 46 ECAB 845 (1995).

<sup>5</sup> See *Stephen R. Lubin*, 43 ECAB 564 (1992).

<sup>6</sup> 20 C.F.R. § 10.124(c).

<sup>7</sup> See *John E. Lemker*, 45 ECAB 258 (1993).

<sup>8</sup> *Maggie L. Moore*, 42 ECAB 484 (1991), *aff'd on recon.*, 43 ECAB 818 (1992).

<sup>9</sup> See *Marilyn D. Polk*, 44 ECAB 673 (1993).

<sup>10</sup> See *Connie Johns*, 44 ECAB 560 (1993).

When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial specialist, pursuant to section 8123(a) of the Act,<sup>11</sup> to resolve the conflict in the medical opinion. In this case, while Dr. Alvarez opined that appellant could return to work in the modified distribution clerk position, Drs. Stanescu, Peress and Radna continued to advise that appellant was totally disabled. The Board, therefore, finds that a conflict exists regarding this matter. Consequently, the Office did not meet its burden of proof in terminating appellant's wage-loss compensation.<sup>12</sup>

The decisions of the Office of Workers' Compensation Programs dated March 3, 1997 and June 12, 1996 are hereby reversed.

Dated, Washington, D.C.  
May 11, 1999

Michael J. Walsh  
Chairman

David S. Gerson  
Member

A. Peter Kanjorski  
Alternate Member

---

<sup>11</sup> 5 U.S.C. § 8123(a).

<sup>12</sup> See *Gail D. Painton*, 41 ECAB 492 (1990).