

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ROBERT J. COOK, JR. and U.S. POSTAL SERVICE,  
MAIN POST OFFICE, Atlanta, Ga.

*Docket No. 97-2171; Submitted on the Record;  
Issued May 13, 1999*

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DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs has met its burden of proof to terminate appellant's compensation benefits on the grounds that he abandoned suitable employment as offered by the employing establishment; and (2) whether the Office properly denied appellant's request for merit review.

The Board has duly reviewed the case record and concludes that the Office did not meet its burden of proof to terminate appellant's compensation benefits effective November 9, 1996 on the grounds that he abandoned suitable work.

In this case, the Office accepted appellant's claim for left knee strain, internal derangement left knee and left arthroscopy and paid compensation. The employing establishment offered appellant the limited-duty position of modified clerk beginning August 17, 1996 which appellant accepted on August 14, 1996. Appellant returned to work on August 17, 1996, but abandoned the job. On September 2, 1996 Dr. Ralph D'Auria<sup>1</sup> certified that appellant was capable of performing the offered position, which included the work hours of 00:30 to 09:00.

On September 5, 1996 the Office advised appellant that it had found the position of modified clerk to be suitable to his work capabilities and apprised appellant of the penalty provision of 5 U.S.C. § 8106(c)(2). Appellant was further advised that he had 30 days to either accept the position or provide an explanation for refusing it. Additionally, the Office advised that, at the expiration of the 30 days, a final decision would be made, if appellant did not accept the position, as to whether the reasons for refusing the position were justified. Appellant was advised that if he failed to accept the offered position and the reasons for refusing were not justified, his compensation would be terminated.

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<sup>1</sup> Appellant's attending Board-certified physician in physical medicine and rehabilitation.

Appellant submitted attending physician's reports (Form CA-20a) dated September 24 and October 9, 1996, and a claim for continuing compensation (Form CA-8) dated October 9, 1996. In the Forms CA-20a, Dr. D'Auria indicated that appellant should only work during the day.

By decision dated November 6, 1996, the Office terminated compensation benefits effective November 9, 1996 finding that appellant had abandoned suitable employment.

On November 22, 1996 appellant requested reconsideration and submitted a November 20, 1996 report from Dr. D'Auria and an August 20, 1996 report from Dr. Thomas P. Branch.

On December 13, 1996 the Office denied appellant's application for review.

On January 7, 1997 appellant requested reconsideration of the termination of his benefits and submitted evidence in support of his request.

On February 5, 1997 the Office denied appellant's application for review.

On March 5, 1997 appellant requested reconsideration and submitted additional information in support of his request.

In a letter dated April 7, 1997 and received by the Office on April 14, 1997, appellant requested reconsideration and submitted additional information in support of his request.

On April 11, 1997 the Office denied appellant's application for review dated March 5, 1997.

On May 16, 1997 the Office denied appellant's April 7, 1997 application for review of the merits.

It is well settled that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>2</sup> As the Office in this case terminated appellant's compensation under 5 U.S.C. § 8106(c), the Office must establish that appellant refused an offer of suitable work.

Section 8106(c) of the Federal Employees' Compensation Act<sup>3</sup> 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 regulations<sup>4</sup> 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 the opportunity to make such showing before a

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<sup>2</sup> *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

<sup>3</sup> 5 U.S.C. § 8106(c)(2).

<sup>4</sup> 20 C.F.R. § 10.124(c).

determination is made with respect to termination of entitlement of compensation. At the time of the Office's September 5, 1996 decision, the Office's procedure manual provided that, after determining that the position is suitable, the Office must advise appellant that he or she has 30 days to accept the job or provide an explanation of the reasons for refusing it.<sup>5</sup> The Board has stated, "If a claimant chooses to respond within 30 days and give reasons for not accepting, the Office must consider those reasons before it can make a final determination on the issue of suitability."<sup>6</sup>

The Board finds that the Office denied appellant a reasonable opportunity to comply with 5 U.S.C. § 8106. When the Office informed appellant in its September 5, 1996 notification that it had determined the position offered to be suitable, it informed him of a preliminary determination. By inviting him to write and give reasons for not accepting, the Office acknowledged that its determination was not yet final, and that a reasonable explanation would justify his refusal and result in the continuation of his compensation for disability.

If a claimant chooses to respond within 30 days and gives reasons for not accepting the offered position, the Office must consider these reasons before it can make a final determination on the issue of suitability. Only after it has made a final determination on the issue of suitability can the Office afford the claimant an opportunity to accept or refuse an offer of suitable work. And only after it has finalized its decision on suitability can the Office notify the claimant that refusal to accept shall result in the termination of compensation, as the language of 5 U.S.C. § 8106(c) clearly mandates.<sup>7</sup>

In reaching its decision to terminate appellant's benefits, the Office did not afford appellant an opportunity to accept the position offered after making a final determination that the position was suitable. The Office therefore denied appellant a reasonable opportunity to accept an offer of "suitable" work. Without such an opportunity, appellant cannot be held to have refused an offer of suitable work within the meaning of 5 U.S.C. § 8106(c). Appellant submitted two Form CA-20a signed by Dr. D'Auria indicating that appellant could only work during the day as well as a claim for continuing compensation dated October 9, 1996 to support his abandoning the position. On November 6, 1996 the Office issued a decision in which the Office determined that the reasons submitted by appellant in support of his abandonment of the suitable position were unacceptable, and in doing so it finalized its preliminary decision on suitability. At the same instant, however, the Office terminated appellant's compensation for disability, thereby denying him an opportunity to accept the position after determining it to be suitable.

In view of the foregoing, the Board finds that the Office has not met its burden of justifying termination of appellant's compensation for disability.

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<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.813.11(c) (December 1991).

<sup>6</sup> *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

<sup>7</sup> *Id.*

In light of the Board's resolution of the first issue, the Board need not address the second issue in this case.

The decisions of the Office of Workers' Compensation Programs dated May 16, April 11 and February 5, 1997 and December 13 and November 6, 1996 are hereby reversed.

Dated, Washington, D.C.  
May 13, 1999

George E. Rivers  
Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member