

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIE WEBB and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Phoenix, AZ

*Docket No. 98-2267; Submitted on the Record;
Issued April 7, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation benefits effective August 25, 1997 on the grounds that she refused an offer of suitable work.

This is the second appeal in the present case. In a December 31, 1990 decision, the Board reversed the Office's termination of compensation and, in a September 12, 1991 decision, the Board granted a petition for reconsideration and reaffirmed its December 31, 1990 decision as modified.¹ The Board found that the report of a designated impartial medical specialist was improperly obtained and should have been excluded from the record. The facts and circumstances of the case up to that point are set forth in the Board's prior decision and incorporated herein by reference.

In a medical report dated April 11, 1995, Dr. Ted Stuart, a Board-certified family practitioner, indicated that he had been treating appellant since 1989. Dr. Stuart determined that appellant was disabled due to acute and chronic cervical strain, separation of her right shoulder and chronic left ankle sprain. In a work restriction evaluation, he indicated that appellant was unable to use a keyboard and could not lift more than 15 pounds or do any weight-bearing or ambulatory activities. Dr. Stuart further noted that her current conditions were due to the injury of August 30, 1984. On August 23, 1995 the Office referred appellant to Dr. Stephen Stein, a Board-certified orthopedist, for a second opinion. Dr. Stein examined appellant on September 28, 1995 and noted that the objective findings supported her subjective complaints and that her condition was not the result of the natural progression of degenerative disc disease and osteoarthritis. He concluded that appellant could not lift 70 pounds, as her original machine distribution clerk position had required but could participate in activities such as sitting at a desk and sorting mail. Dr. Stein believed she could lift 10 to 15 pounds without difficulty.

¹ Docket No. 90-803 (December 31, 1990); *reaff'd on recon.*, (September 12, 1991).

In a February 7, 1997 report, appellant's treating physician Dr. Mary Moyer, a Board-certified family practitioner, indicated that appellant was unable to do overhead work or do lifting greater than five pounds or do clerical/computer work. She further noted that these were life-long restrictions.

By letter dated March 8, 1997, the employing establishment offered appellant a position of general clerk (modified) PTF. The position required intermittent lifting of 6 to 15 pounds and frequent lifting of 0 to 5 pounds for 2 to 4 hours per day; intermittent to continuous standing; intermittent walking; no climbing, kneeling; intermittent bending for ½ to 1 hour per day; continuous simple grasping; intermittent fine manipulation and intermittent reaching above the shoulder. In a letter dated March 19, 1997, the Office found that the position was suitable and informed appellant that she had 30 days to respond. By letter dated April 3, 1997, appellant informed the Office that she wanted her physician to review the position. On April 10, 1997 Dr. Moyer reviewed the position description and Dr. Stein's report. She disagreed with the Office's finding that the position was medically suitable as she concluded that appellant was totally disabled to do that job. Dr. Moyer noted appellant could not manually sort mail since it required repetitive movement of the arms, no lifting greater than 5 pounds on a frequent basis and 15 pounds on an occasional basis. Dr. Moyer further advised against twisting, working above the shoulder level and repetitive movement of the upper extremities.

By letter dated April 16, 1997, appellant presented reasons for declining the job offer. On April 17, 1997 Drs. Moyer and Stuart, appellant's treating physicians, were presented with the modified job offer and approved it with certain restrictions.² Dr. Moyer approved the position as long as appellant did not do above shoulder work and restricted twisting to the right side.

On May 5, 1997 the employing establishment withdrew its previous job offer and offered appellant a new position as a manual distribution clerk (modified). The physical requirements of the job required no overhead lifting and twisting was restricted to the right side only.³ The employing establishment advised appellant that reimbursement of relocation expenses would be authorized according to regulations of the General Services Administration (GSA). By letter dated June 25, 1997, the Office notified appellant that the position was found to be suitable and informed appellant that she had 30 days to either 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.

In a letter dated July 21, 1997, appellant stated that the position was unsuitable and that she was opting for disability retirement. On July 24, 1997 the Office found that appellant's reasons for declining the position were unacceptable and again advised her of the penalty for refusing suitable work under section 8106(c). The Office gave her 15 days, in which to accept the job and further advised her that no further reasons for refusal would be considered.

² On April 3, 1997 postal inspectors conducted video surveillance of appellant and showed the footage to her treating physicians on April 17, 1997.

³ The other physical requirements were identical to the position of general clerk (modified) offered to appellant on March 8, 1997.

On August 1, 1997 appellant accepted the job offer but requested clarification of the employing establishment's offer to purchase her home and listed questions regarding relocation expenses.⁴ In a memorandum of an August 8, 1997 telephone conference between appellant, her representative, the Office, and the employing establishment, appellant was informed that the employing establishment would not purchase her home but would pay relocation expenses, including closing costs and temporary housing for 30 days. By letter dated August 8, 1997, the Office advised appellant that she had until August 25, 1997 to communicate her intent regarding the job. Appellant requested clarification of the relocation costs and inquired whether there were available positions closer to her home in an August 13, 1997 letter. By letter dated August 19, 1997, appellant's representative contended that appellant "per her statement August 1, 1997, accepts the agency's job offer and requests that the Office render a very clear appealable decision in regards to her request for relocation expenses."

By decision dated August 25, 1997, the Office terminated appellant's compensation as appellant had refused an offer of suitable work under section 8106(c) of the Federal Employees' Compensation Act. In an accompanying memorandum, the Office found that appellant did not indicate a bona fide effort to accept the job offer, but only a conditional one since she requested that the employing establishment purchase her home.

Appellant disagreed with the decision and requested a review of the written record. In support, she contended that she did not decline the job offer but rather had just sought clarification of the relocation expenses issue.

By decision dated June 2, 1998, the hearing representative found that the Office properly terminated appellant's compensation since she neglected to work after suitable work was offered. The hearing representative found that appellant's treating physicians had determined that the position was medically suitable and that the only issue involved relocation expenses. The hearing representative found that appellant's reasons for not taking the job were not justified.

The Board finds that the Office improperly terminated appellant's wage-loss compensation effective August 25, 1997, on the grounds that she refused an offer of suitable work under section 8106(c) of the Act.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits. This burden of proof is applicable if the Office terminates compensation under 5 U.S.C. § 8106(c) for refusal to accept suitable work. The Office has not met its burden in the present case.

Under section 8106(c)(2) of the Act,⁵ the Office may terminate the compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to,

⁴ The record reveals that the offered position was in Phoenix, Arizona, where appellant had worked at the time of injury. In April 1990, appellant moved to Dewey, Arizona approximately 100 miles from Phoenix. At the time of her move, appellant was no longer on the employing establishment's rolls.

⁵ 5 U.S.C. § 8106(c)(2).

procured by, or secured for the employee.⁶ Section 10.124(c) of the Code of Federal Regulations⁷ 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 showing before a determination is made with respect to termination of entitlement to compensation.⁸ To justify termination of compensation, the Office must show that the work offered was suitable⁹ and must inform appellant of the consequences of refusal to accept such employment.¹⁰

The record demonstrates that the modified distribution clerk position was developed by the employing establishment in conformance with the work restrictions set forth by Drs. Moyer and Stuart, appellant's attending physicians. Both physicians reviewed a copy of the position description and approved the position as suitable on April 17, 1997. The employing establishment offered appellant the position by May 5, 1997 letter. The Board has reviewed the evidence of record and finds that there is no medical evidence of record, which would contraindicate appellant's ability to perform the position offered as suitable work. The Board also notes that appellant has not indicated that she could not medically perform the position. The Board, therefore, concludes that the position was within appellant's medical restrictions and was suitable work.¹¹

The Board, however, finds that the Office improperly found that appellant refused the job. To the contrary, a review of the record reveals that appellant accepted the position. Although appellant initially refused the modified light-duty position on July 21, 1997, she accepted the position on August 1, 1997 but requested clarification of relocation expenses. On August 8, 1997 the Office held a conference with appellant, her representative and an official from the employing establishment regarding the relocation expenses. Appellant was advised that the employing establishment would not purchase her home, but would pay for the cost of temporary housing for 30 days. In a letter of that same date, appellant was advised that she had until August 25, 1997 to express her intention regarding the position. While appellant's August 13, 1997 letter requested further clarification of what relocation expenses the employing establishment would pay for, *i.e.*, security deposits for utilities, rentals, moving expenses, etc., the August 19, 1997 letter from appellant's representative's clearly stated that appellant had accepted the position.

⁶ *Arthur C. Reck*, 47 ECAB 339, 341 (1996).

⁷ 20 C.F.R. § 10.124(c).

⁸ *Arthur C. Reck*, *supra* note 6.

⁹ *See Carl W. Putzier*, 37 ECAB 691 (1986); *Herbert R. Oldham*, 35 ECAB 339 (1983).

¹⁰ *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1982); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-earning Capacity*, Chapter 2.813.11(c) (December 1991).

¹¹ *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 medical position).

The Board finds that, while appellant may have expressed some concern for the financial costs of moving and sought clarification of such, she did not refuse the position. On three occasions appellant stated in writing that she would accept the job. Although appellant may have had some more questions and reservations regarding the financial implications of the move, the record does not reveal that her acceptance was conditional upon the employing establishment paying all of the requested relocation costs. Office procedures provide that the Office is responsible for resolving any dispute between a claimant and the employing establishment regarding allowable relocation costs in accordance with regulations of the General Services Administration.¹² There is no indication that appellant failed to appear on a specific date set by the employing establishment for a return to work or that she abandoned the position shortly after returning to work. As appellant did not decline an offer of suitable work, the Office improperly terminated compensation.

The June 2, 1998 and August 25, 1997 decisions of the Office of Workers' Compensation Programs are hereby reversed.

Dated, Washington, D.C.
April 7, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

¹² Federal (FECA) Procedural Manual, Part 2 -- Claims, *Reemployment and Determining Wage-earning Capacity*, Chapter 2.814.6(d)(4) (December 1995).