U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HENRY C. GARZA and U.S. POSTAL SERVICE,
POST OFFICE, Albuquerque, NM

Docket No. 99-1074; Submitted on the Record;
Issued January 10, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective December 7, 1997 for refusing to perform suitable work.

The Office accepted that appellant sustained a left ankle sprain on December 2, 1993 and that the left ankle arthrotomy and removal of loose bodies appellant underwent on February 21, 1994 was related to his December 2, 1993 employment injury. Appellant received compensation for temporary total disability from February 20, 1994 until he returned to part-time limited duty on October 3, 1994 and compensation for disability until he returned to full-time limited duty on October 31, 1994.

Appellant again stopped work on June 11, 1996 and the Office, after initially finding that he had refused suitable work beginning that date, ultimately accepted that appellant sustained a recurrence of disability beginning June 11, 1996. The Office resumed payment of compensation for temporary total disability beginning June 12, 1996.

On April 15, 1997 the employing establishment offered appellant a temporary limited-duty position requiring lifting up to ten pounds for up to eight hours per day, pushing or pulling up to ten pounds for up to four hours per day and walking up to four hours per day, no more than one-half hour at a time. Appellant's attending physician, Dr. Jeffrie Felter, reviewed this job offer and stated that appellant's walking was limited to two hours per day, intermittently. On April 28, 1997 the employing establishment offered appellant essentially the same temporary limited-duty position, but with walking limited to two hours per day, one-half hour at a time. By letter dated July 9, 1997, the Office advised the employing establishment that it could not offer appellant a temporary position if he was a permanent employee at the time of his injury.

On July 15, 1997 the employing establishment offered appellant a position as a modified letter carrier, with the following duties: "Assist the office by overseeing misdeliveries & centralized forwarding mail for the office, answer [tele]phones and customer complaints, give parcels to customers, perform lobby 'sweeps' for the window section, pull down routes for

delivery, sweep the 'rework' mail, gas-up vehicles as needed, be back-up for DSIS/AVIS/Timekeeping computer input information and other duties may be assigned to you within your physical limitations." The physical requirements were lifting up to 10 pounds intermittently up to eight hours per day; standing up to one hour per day, intermittently for one-half hour at a time; walking up to two hours per day, intermittently for one-half hour at a time; pushing or pulling up to 10 pounds, intermittently up to four hours per day; no climbing or kneeling; and no restriction on bending, stooping, reaching over the shoulder, or twisting. The offer stated that the job allowed "frequent position changes while working if required." In a letter dated July 14, 1997, the employing establishment advised the Office that the modified position would be available to appellant as long as he continued to have work restrictions.

By letter dated September 18, 1997, the Office advised appellant that it had determined that the employing establishment's July 15, 1997 offer was suitable and that he had 30 days to accept the position or provide an explanation of his reasons for refusing it. The Office also advised appellant that section 8106(c)(2) of the Federal Employees' Compensation Act provides that an employee who refuses an offer of suitable employment is not entitled to further compensation for wage loss.

By letter dated October 9, 1997, appellant contended that the employing establishment's July 15, 1997 offer was not suitable and stated that he had obtained other employment and must refuse the job offer. Appellant submitted a report from Dr. Felter dated August 12, 1997 that stated in its entirety: "I have read the latest job description offered to my patient Henry Garza and I do not feel that it (the job) follows my recommendations and have advised Mr. Garza not to accept that job."

By letter dated November 13, 1997, the Office advised appellant that the reasons he provided for refusing the employing establishment's offer were unacceptable and that he had 15 days to accept the position or have his compensation terminated. By letter dated November 16, 1997, appellant stated that he could not accept the employing establishment's offer. Appellant submitted a copy of an October 25, 1997 decision of an administrative judge for the Merit Systems Protection Board (MSPB), finding that appellant had proven his entitlement to disability retirement benefits. This administrative judge found that the employing establishment's July 1997 offer of employment did not accommodate appellant's limitations on lifting, pushing and pulling and that appellant had proven that the employing establishment did not accommodate his condition.

By decision dated November 28, 1997, the Office terminated appellant's compensation effective December 7, 1997 on the basis that he refused suitable employment. The Office found that the job appellant had obtained as a school bus driver did not represent his wage-earning capacity as it was seasonal and only afforded two to three hours of work per day, that the employing establishment's offer was medically and vocationally suitable and that appellant's move from New Mexico to Colorado was not an acceptable reason for refusing the offered position.

Appellant requested a hearing before an Office hearing representative, which was held on December 10, 1997. By decision dated February 19, 1998, an Office hearing representative found that appellant's employment as a school bus driver did not represent his wage-earning

capacity, that the employing establishment's offer was suitable and that appellant's move from New Mexico to Colorado was not an acceptable reason for refusing the offered position.[1]

The Board finds that the Office properly terminated appellant's compensation effective December 7, 1997 for refusing to perform suitable work.

Under section 8106(c)(2) of the Act, the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[2] To justify termination of compensation, the Office must establish that the work offered was suitable.[3]

The position of modified letter carrier, offered to appellant by the employing establishment on July 15, 1997 was suitable. The physical requirements of this position were within the work tolerance limitations set forth by appellant's attending physician, Dr. Felter, in a July 2, 1996 report. Although Dr. Felter stated in an August 12, 1997 report that he had reviewed the employing establishment's latest job offer and that it did follow his recommendations, it is not clear what job offer Dr. Felter reviewed, as three were made between April 14 and July 15, 1997. Appellant contends that the job offer was not suitable because its requirements for lifting, pushing and pulling exceeded the work tolerance limitations set forth by Dr. Emmett Thorpe in a February 8, 1995 report. The Board finds Dr. Thorpe's February 8, 1995 limitations to be of little probative value. Appellant was referred to him for an evaluation of any permanent impairment of his left ankle and the doctor's November 16, 1994 report indicates this was the only area Dr. Thorpe examined.[4] In this report, he deferred to Dr. Felter regarding work tolerance limitations. In addition, the July 15, 1997 offer contained the same requirements for lifting, pushing and pulling as the employing establishment's April 1997 offers, which were presented to Dr. Felter, whose only objection to the April 1997 offers was that they required four hours of walking.

Appellant did not offer an acceptable reason for refusing the suitable employment offered by the employing establishment. Having found other work can be an acceptable reason for

[1] By this decision, the Office hearing representative also found that appellant was at fault in creating an overpayment of compensation in the amount of $3,206.27. On appeal appellant expresses a desire to appeal only that part of the decision terminating his compensation for refusing suitable work.

[2] 5 U.S.C. § 8106(c)(2) provides in pertinent part: "A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered to, procured by, or secured for him; is not entitled to compensation."

[3] *David P. Camacho*, 40 ECAB 267 (1988).

[4] The Board notes that determinations of other administrative agencies with respect to whether or not an employee is disabled are not binding on the Office or the Board with respect to whether the individual is disabled under the Act. *Constance G. Mills*, 41 ECAB 317 (1988). Thus, the October 25, 1997 decision of an administrative judge of the MSPB that the employing establishment's July 1997 offer did not accommodate appellant's condition does not mandate a finding by the Office or Board that the July 1997 employing establishment offer was not suitable.

refusing an offer of suitable employment, but only if the other work represents the employee's wage-earning capacity.[5] The Office properly determined that appellant's earnings as a school bus driver did not represent his wage-earning capacity. As pointed out by the Office, this position is seasonal and affords employment for only two or three hours per day. The medical evidence establishes that appellant is capable of working eight hours per day, with limitations only on walking and standing.

Appellant's preference for the area to which he moved after the employment injury or financial advantage in remaining there also is not an acceptable reason for refusing the offer of suitable employment.[6] This could be an acceptable reason only if appellant were no longer on the employing establishment's rolls, but the evidence establishes that he still was on these rolls at the time of the Office's decisions.

The decision of the Office of Workers' Compensation Programs dated February 19, 1998 is affirmed with regard to the termination of appellant's compensation for refusal of suitable employment.

Dated, Washington, DC
January 10, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member

[5] *Michael I Schaffer*, 46 ECAB 845 (1995); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(2) (July 1997).

[6] *Fred L. Nelly*, 46 ECAB 142 (1994).