

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LOUIS R. DiMARIA and U.S. POSTAL SERVICE,
POST OFFICE, Lancaster, PA

*Docket No. 99-1579; Submitted on the Record;
Issued January 8, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
VALERIE D. EVANS-HARRELL

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective March 7, 1997 on the grounds that he refused an offer of suitable work.

The Board finds that the Office improperly terminated appellant's compensation effective March 7, 1997 on the grounds that he refused an offer of suitable work.

Section 8106(c)(2) of the Federal Employees' Compensation Act provides in pertinent part, "A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation."¹ However, to justify such termination, the Office must show that the work offered was suitable.² An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.³

In March 1994 appellant, then a 53-year-old postmaster, filed an occupational disease claim alleging that he sustained a stress-related condition due to various factors including his lack of experience and training to handle the "complexities" of his job. The Office accepted that appellant sustained employment-related depression.⁴

¹ 5 U.S.C. § 8106(c)(2).

² *David P. Camacho*, 40 ECAB 267, 275 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341, 345 (1981).

³ 20 C.F.R. § 10.517; *see Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

⁴ The record reflects that appellant, who had previously worked as a safety and health manager for the employing establishment, became a postmaster in February 1993 after a reorganization was instituted and his prior job was eliminated. The Office accepted that appellant sustained an emotional condition because he did not have adequate knowledge of the duties of the postmaster position and was unable to satisfactorily perform the position. He stopped work in March 1994.

In November 1996 the employing establishment offered appellant a limited-duty position as an associate office accident coordinator.⁵ In December 1996 the Office advised him it had determined that the offered position of associate office accident coordinator was suitable. Appellant refused the position offered by the employing establishment and indicated that he was medically unable to perform the position. By decision dated March 7, 1997, the Office terminated his compensation effective that date on the grounds that he had refused an offer of suitable employment. By decision dated and finalized May 7, 1998, an Office hearing representative affirmed the Office's March 7, 1997 decision. By decision dated March 4, 1999, the Office denied modification of its prior decisions.

The Office did not meet its burden of proof to show that appellant was capable of performing the position of associate office accident coordinator. In determining that he was medically capable of performing the position, the Office relied in part on the opinion of Dr. David M. Sachs, a Board-certified psychiatrist to whom it referred appellant.⁶ In his January 7, 1995 report, Dr. Sachs indicated that appellant's behavior was consistent with a paranoid personality but did not warrant a diagnosis of paranoid schizophrenia. He noted that depression did not seem to be appellant's primary diagnosis and indicated that appellant continued to suffer from stress related to his postmaster job at the employing establishment. Dr. Sachs indicated that appellant could not return to his job as a postmaster for the employing establishment and stated:

"It is unclear whether or not [appellant] can return to any type of job because he takes an inconsistent view towards his own capacities. On the one hand, he believes he could do a job for which he is qualified, but he thinks it is doubtful that any such job would be available that meets his requirements. On the other hand, [appellant] reconsidered his willingness to take a job for which he qualified, and said that he is no longer confident of his own abilities as a result of the chronic stress reaction from which he suffers. There is no way for an outside observer to determine whether or not [appellant's] decision would always go against taking a job. This would depend on the particular details of the job offered and the benefit to risk ratio [appellant] believes he faces. My suggestion

⁵ The position involved monitoring and providing feedback regarding compliance with procedures for reporting motor vehicle accidents at the employing establishment. The employing establishment had previously offered appellant other positions, but these offers were withdrawn because the positions were temporary or the medical evidence did not show appellant was able to perform them.

⁶ The Office had indicated that Dr. Sachs served as an impartial medical examiner. However, there was no conflict in the medical evidence at the time of appellant's referral to Dr. Sachs and, therefore, he served as an Office referral physician; see *William C. Bush*, 40 ECAB 1064, 1975 (1989); 5 U.S.C. § 8123(a). In its job description, the employing establishment noted that the position of associate office accident coordinator was within the restrictions recommended by Dr. Sachs.

would be to continue to offer jobs in the hope that one would appeal to his wish to benefit himself by working more than he is benefited by not working.”

* * *

“From a psychiatric point of view, [appellant] would be benefited by being able to work because he would be able to lose the secondary gains his illness makes available. These gains now have a primary value to him and it is difficult to know whether or not he would risk failing again, facing more stress and being confronted with the need to adjust to authority figures -- an aspect of any imaginable job. It is possible that [appellant] might be more agreeable to considering a job if his anxiety were greatly diminished. This suggests that a trial of therapy be given that is directed at his anxiety directly and that the anti-depressive medication be decreased as his anxiety is brought under control. This would require sensitive and thoughtful management by an experienced psychopharmacologist who agrees with my impression that his primary diagnosis is paranoid personality rather than depression. I do not believe that [appellant] can be required to take a job because I think he would see this as forcing him to submit to an authority that does not appreciate his symptoms and would exacerbate them. For this reason I think that any job opportunity should be presented to him with the attitude that the pros and cons can be negotiated to some degree. This might make him feel that he was not being ‘set up for failure’ and would be more possible if he were not as anxious as he was in my office.”

The Board notes that the January 7, 1995 report of Dr. Sachs is vague and equivocal regarding appellant’s ability to work and does not provide a clear opinion that appellant was medically capable of performing the position of associate office accident coordinator.⁷ Dr. Sachs indicated that appellant continued to suffer effects of his employment-related emotional condition and suggested that he required further psychological treatment before he would be prepared to perform any employment. Moreover, Dr. Sachs’ opinion does not provide a clear picture of appellant’s condition and ability to work around the time the position was offered in late 1997 in that his opinion was rendered approximately two years prior to that time period.

In making its suitability determination, the Office also relied on an August 10, 1994 report of Dr. Gladys Fenichel, a Board-certified psychiatrist to whom it referred appellant. In her report, Dr. Fenichel detailed appellant’s emotional condition and stated:

“At the time of this evaluation, there were no psychiatric contraindications to [appellant] returning to work. If, however, [appellant] returns to work as a postmaster, given his lack of training in this area and his failure to perform in the Chalfont postal service, [the evidence] suggests that he will not succeed and problems with depression will return. It will be helpful to identify a job for [appellant] that is compatible with his expertise.”

⁷ See *Leonard J. O’Keefe*, 14 ECAB 42, 48 (1962); *James P. Reed*, 9 ECAB 193, 195 (1956) (finding that a report which contains an opinion which is equivocal is of limited probative value).

Although Dr. Fenichel indicated that appellant could return to some job other than that of postmaster, she did not provide a clear opinion that he would be able to perform the position of associate office accident coordinator. Moreover, Dr. Fenichel's opinion does not provide a clear picture of appellant's condition and ability to work around the time the position was offered in late 1997 in that her opinion was rendered over two years prior to that time period.⁸

In addition, the record contains other evidence which indicates that appellant was not medically capable of performing the position of associate office accident coordinator. In a report dated November 27, 1996, Dr. Norman M. Werther, an attending Board-certified family practitioner, indicated that appellant was "psychologically totally incapacitated and unable to return to work" and noted that appellant could not handle the position of associate office accident coordinator due to his emotional state.⁹ In a report dated September 23, 1997, Dr. Joseph DiGiacomo, an attending Board-certified psychiatrist, noted appellant's potential to lose control and indicated that he was unable to work.¹⁰ In a report dated October 5, 1998, Dr. Charles H. Blonstein, an attending clinical psychologist, indicated that appellant had been totally disabled since leaving the postmaster position in March 1994.¹¹

The evidence of record does not show that appellant was capable of performing the position of associate office accident coordinator when it was offered by the employing establishment in late 1996 and therefore the Office did not establish that the position was suitable. For these reasons, the Office did not meet its burden of proof to terminate appellant's compensation effective March 7, 1999 on the grounds that he refused an offer of suitable work.

⁸ The Office also appeared to have based its suitability determination on reports, dated in July and August 1994, of Dr. Perry A. Berman, a Board-certified psychiatrist who served as a fitness-for-duty physician for the employing establishment. He indicated that appellant could perform some form of work, but he did not clearly describe the extent of appellant's ability to work and his opinion was rendered over two years prior to the time that appellant was offered the position of associate office accident coordinator. Moreover, the opinions of fitness-for-duty physicians are not generally relied upon in determinations relating to termination of compensation. *See generally* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.9b (March 1995); *Mary Lou Barragy*, 46 ECAB 781, 787-88 (1995).

⁹ The Office had earlier accepted appellant's employment-related emotional condition based on the opinion of Dr. Werther. In 1997 and 1998, he continued to produce reports in which he indicated that appellant's employment-related emotional condition disabled him from work.

¹⁰ Dr. DiGiacomo diagnosed post-traumatic stress disorder and paranoid personality.

¹¹ Dr. Blonstein diagnosed post-traumatic stress disorder and major depressive disorder.

The decisions of the Office of Workers' Compensation Programs dated March 4, 1999 and dated and finalized May 7, 1998 are reversed.

Dated, Washington, DC
January 8, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Valerie D. Evans-Harrell
Alternate Member