

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ELOISE N. DANIEL and DEPARTMENT OF THE ARMY,  
TANK AUTOMOTIVE COMMANDE, Warren, MI

*Docket No. 99-1337; Submitted on the Record;  
Issued March 2, 2001*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits on the grounds that she refused an offer of suitable work; and (2) whether the Office abused its discretion by refusing to reopen appellant's claim for consideration of the merits on March 9, 1999.

Appellant, a 49-year-old computer technician, filed a notice of occupational disease on August 7, 1979 alleging that she developed carpal tunnel syndrome in her left hand due to factors of her federal employment. On February 4, 1980 the Office accepted her claim for left carpal tunnel syndrome. Appellant filed a similar claim for her right hand in 1980. She retired and received disability benefits in 1980. The Office initially denied the claim for right carpal tunnel syndrome. On April 2, 1981 appellant received a schedule award for 35 percent impairment of her left hand. By decision dated September 11, 1987, the Office accepted her claim for bilateral carpal tunnel syndrome with left tenosynovitis. Appellant elected to receive compensation benefits and on July 20, 1988 the Office entered her on the periodic rolls.

The employing establishment offered appellant a limited-duty position on February 5, 1998. The Office found that this position was suitable on March 2, 1998 and allowed her 30 days to accept the position or offer her reasons for refusal. Appellant underwent surgery on her shoulder on March 17, 1998. By letter dated October 16, 1998, the Office stated that she had not established that her subsequent shoulder condition prevented her from performing the duties of the offered position, noted that the offered position was still available and allowed appellant 15 days to accept the position. By decision dated December 17, 1998, the Office terminated appellant's compensation benefits finding that she refused an offer of suitable

work. She requested reconsideration of this decision on February 10, 1999. By decision dated March 9, 1999, the Office declined to reopen appellant's claim for consideration of the merits.<sup>1</sup>

The Board finds that the Office failed to meet its burden of proof to terminate appellant's compensation benefits.

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 applicable regulations<sup>4</sup> provides that an employee who refuses or neglects to work after suitable work has been offered or secure 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. To justify termination of compensation, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.<sup>5</sup>

The Office's procedure manual states in Chapter 2.814.4(b)(4) on assessing whether a position is suitable to an employee's partially disabled condition:

"If medical reports in file document a condition which has arisen since the compensable injury and this condition disables the claimant from the offered job, the job will be considered unsuitable (even if the subsequently acquired condition is not work related)."<sup>6</sup>

In this case, appellant's attending physician, Dr. Jeffrey M. Hall, a Board-certified surgeon, reviewed the offered job description of clerk on February 12, 1998 and stated that appellant could perform these duties. The Office found the offered position suitable and allowed appellant 30 days to accept on March 2, 1998.

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<sup>1</sup> Following the Office's March 9, 1999 decision appellant submitted additional evidence. As the Office did not consider this evidence in reaching a final decision, the Board will not review the evidence for the first time on appeal. 20 C.F.R. § 501.2(c).

<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).

<sup>5</sup> *Arthur C. Reck*, 47 ECAB 339, 341-42 (1995).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(4) (December 1993).

Appellant's attorney responded on March 17, 1998 and stated that appellant had undergone surgery on her shoulder. In a letter dated April 9, 1998, the Office requested additional medical evidence regarding appellant's shoulder condition. In response, she submitted a March 2, 1998 report from Dr. Martin L. Weissman, a Board-certified orthopedic surgeon, on April 24, 1998. In this note he stated that appellant had a full-thickness tear of the left rotator cuff and that he recommended arthroscopic decompression.

In a report dated August 10, 1998, Dr. Hall stated that appellant had undergone rotator cuff surgery of the left shoulder and that she was going through therapy. He stated, "I believe that she could work as an assistant clerk, not taking into account her shoulder."

By letter dated October 16, 1998, the Office stated that the medical evidence submitted was not sufficient to justify declining the offered position. The Office stated, "The evidence, in fact, continues to support your ability to perform the position offered. It does not address whether your shoulder condition requires work restrictions, over and above those required by your work injury, that would prevent you from performing the position offered." The Office allowed appellant 15 days to accept the offered position.

Subsequent to her employment and to the determination that appellant could perform the duties of the offered position, appellant underwent surgery for a nonemployment-related left shoulder condition. She submitted medical evidence supporting a new medical condition to the Office.<sup>7</sup> The Office failed to consider whether appellant could perform the duties of a clerk in light of her shoulder condition. There is no evidence in the record establishing that she is capable of performing the duties of the offered position given her subsequent left rotator cuff tear and her resulting surgery. All of appellant's impairments, whether work related or not, must be considered in assessing the suitability of the position.<sup>8</sup> The Office failed to meet its burden of proof to terminate appellant's compensation benefits.<sup>9</sup>

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<sup>7</sup> *Martha A. McConnell*, 50 ECAB \_\_\_\_ (Docket No. 98-1505, issued November 3, 1998).

<sup>8</sup> *Edward J. Stabell*, 49 ECAB 566 (1998) (the Board reversed an Office termination decision when after the initial suitability determination and 30-day letter, appellant refused the position due to nonemployment-related blindness).

<sup>9</sup> Due to the disposition of this issue, it is not necessary for the Board to consider whether the Office abused its discretion by refusing to reopen appellant's claim for consideration of the merits.

The December 17, 1998 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC  
March 2, 2001

David S. Gerson  
Member

Willie T.C. Thomas  
Member

Michael E. Groom  
Alternate Member