

U. S. DEPARTMENT OF LABOR
Employees' Compensation Appeals Board

In the Matter of SHIRLEY A. BOYLE and U.S. POSTAL SERVICE,
POST OFFICE, West Palm Beach, FL

*Docket No. 99-1870; Submitted on the Record;
Issued March 20, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective July 25, 1997 on the grounds that she refused an offer of suitable work.

The Board finds that the Office properly terminated appellant's compensation effective July 25, 1997 on the grounds that she 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

On September 5, 1989 appellant, then a 39-year-old mail carrier, sustained an employment-related right knee strain, chondral defect of the medial femoral condyle with secondary degenerative changes of the right knee and deltoid ligament tear of the right ankle.⁴ Appellant did not return to work after her September 5, 1989 injury and the Office paid compensation for periods of disability.

In early 1997 the employing establishment offered appellant a position in West Palm Beach as a modified distribution clerk. The position required engaging in fine manipulation for

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. § 10.124; *See Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

⁴ The Office had earlier accepted that appellant sustained cervical lumbar and right shoulder strains. She underwent several right knee and ankle surgeries, which were authorized by the Office.

eight hours per day, sitting for eight hours per day, continuous bending and intermittent reaching above the shoulder.⁵ By letter dated February 18, 1997, the Office advised appellant of its determination that the modified clerk position offered by the employing establishment was suitable. By decision dated July 25, 1997, the Office terminated appellant's compensation effective July 25, 1997 on the grounds that she refused a suitable offer of work. The Office based its suitability determination on the December 6, 1996 report of Dr. Michael X. Rohan, a Board-certified orthopedic surgeon, to whom it referred appellant for a second opinion.⁶ By decision dated and finalized September 2, 1998, an Office hearing representative affirmed the Office's July 25, 1997 decision.⁷

The Board finds that the evidence of record establishes that appellant is capable of performing the modified clerk position offered by the employing establishment and determined to be suitable by the Office.⁸ In determining that appellant was physically capable of performing the position, the Office properly relied on the opinion of Dr. Rohan. In his report dated December 6, 1996, Dr. Rohan diagnosed cervical and lumbar spondylosis, probable right shoulder impingement, degenerative disease of the right knee, postoperative ligamentous injury of the right ankle. He noted that he had reviewed the requirements of the modified clerk position and found that appellant was capable of performing the position.⁹

Appellant argued that the results of her functional capacity test in 1993 showed that she could not perform the modified clerk position. However, the report of these test results does not constitute probative medical evidence in that it was prepared by a physical therapist.¹⁰ Moreover, the 1993 report would not be relevant to appellant's physical condition in early 1997 when she refused the position. The Office requested an opinion regarding appellant's ability to work from an attending Board-certified neurosurgeon, but the physician responded that he was unable to provide such an opinion. The record contains a May 1998 report in which an attending osteopath recommended work restrictions, but this report would not be relevant to appellant's ability to work at the time she refused the modified clerk position in early 1997.

Appellant has argued that she could not accept the modified clerk position because she had moved away from the location of the employing establishment. The record contains evidence, which suggests that in 1990 appellant moved approximately 400 miles from the location of the employing establishment for medical reasons related to the health of her

⁵ The position was initially was offered in late 1994, but it appears that it was reoffered in early 1997.

⁶ The Office initially terminated appellant's compensation by decision dated March 27, 1997, but vacated the decision after it was determined that she did not have an adequate opportunity to present her reasons for refusing the offered position.

⁷ The Office hearing representative inadvertently misidentified the Office's prior decision as being dated November 18, 1996.

⁸ The record does not reveal that the position was temporary or seasonal in nature; see Federal (FECA) Procedure Manual, Part 2 -- Claim, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4b (July 1997).

⁹ Dr. Rohan indicated that appellant could only reach above with her right shoulder for two hours per day. This restriction would be consistent with the requirements of the modified clerk position.

¹⁰ See *Arnold A. Alley*, 44 ECAB 912, 920-21 (1993).

husband.¹¹ Office procedure provides that if the employee has left the agency rolls, a move from the location of the employing establishment necessitated by a medical condition of a family member may give rise to an acceptable reason for refusing a position offered by the agency.¹² However, the record contains evidence which shows that appellant was on the agency rolls when she was offered the modified clerk position.

The Board notes that, therefore, the Office has established that the modified clerk position offered by the employing establishment was suitable. As noted above, once the Office has established that a particular position is suitable, 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. The Board has carefully reviewed the evidence and arguments submitted by appellant in support of her refusal of the modified clerk position and notes that they are not sufficient to justify her refusal of the position. For these reasons, the Office properly terminated appellant's compensation effective July 25, 1997 on the grounds that she refused an offer of suitable work.¹³

The decision of the Office of Workers' Compensation Programs dated and finalized September 2, 1998 is hereby affirmed.

Dated, Washington, DC
March 20, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

¹¹ Appellant moved from West Palm Beach to Greenwood, Florida.

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5b(3) (July 1997).

¹³ The Board notes that the Office complied with its procedural requirements prior to terminating appellant's compensation, including providing appellant with an opportunity to accept the offered position after informing her that her reasons for initially refusing the position were not valid. *See generally* *Maggie L. Moore*, 42 ECAB 484 (1991); *reaff'd on recon.*, 43 ECAB 818 (1992).