

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of LONNIE WILLIAMSON and U.S. POSTAL SERVICE,  
MAIN POST OFFICE, New Orleans, LA

*Docket No. 00-615; Submitted on the Record;  
Issued March 14, 2002*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation on the grounds that he refused suitable work pursuant to 5 U.S.C. § 8106(c).

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

On April 4, 1992 appellant, then a 35-year-old mailhandler, filed a traumatic injury claim alleging that on that date he hurt his lower back while taking a tray of mail off a truck. He stopped work on April 4, 1992.

The Office accepted appellant's claim for lumbar strain, cervical strain, a herniated nucleus pulposus at L4-5, L3-4 and C5-6 and consequential dysthemic disorder.

Appellant returned to limited-duty work in May 1992. He worked full time until he reduced his hours to four hours a day on March 9, 1993.<sup>1</sup> Appellant stopped work on November 22, 1994 and returned to work in the limited-duty position of modified distribution clerk on November 22, 1996. He stopped work again on January 4, 1997.

The Office received a May 8, 1997 investigative memorandum from the employing establishment's inspection service revealing that appellant had been videotaped while working on and underneath his car on several occasions over a period of nine days. The report also revealed that appellant was bending, stooping and squatting on a repetitive basis. The Office noted that, although appellant came to its injury compensation office limping and using a cane during this time, he did not use a cane while working on his car.

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<sup>1</sup> By decision dated December 17, 1993, the Office found that appellant's employment as a mailhandler for four hours per day fairly and reasonably represented his wage-earning capacity.

By letter dated August 26, 1997, the Office referred appellant along with medical records, a statement of accepted facts and a list of specific questions to Dr. James T. Williams, a Board-certified orthopedic surgeon, for a second opinion examination. Dr. Williams submitted a September 17, 1997 report revealing appellant's physical limitations and opinion that appellant was capable of performing light-duty work.

On November 14, 1997 the employing establishment prepared an offer for the position of full-time permanent modified distribution clerk and sent it to the Office for approval. By letter dated December 1, 1997, the Office determined that the position was medically suitable for appellant based on a September 29, 1997 report of Dr. John R. Macgregor, a psychiatrist, revealing that appellant was partially disabled due to his emotional condition and his psychiatric/psychological limitations, the April 29, 1997 statement of Dr. George A. Murphy, a Board-certified orthopedic surgeon, finding that appellant could work eight hours a day with some restrictions and Dr. Williams' opinion. The Office advised appellant that he had 30 days in which to accept the offered position or to provide an explanation of the reasons for refusing the job along with relevant medical reports supportive of the refusal. The Office further advised appellant of the penalties for refusing an offer of suitable work under section 8106 of the Federal Employees' Compensation Act.

In a December 22, 1997 response, appellant stated that he did not accept the offered position because he had attempted to work in the same position from November 22, 1996 until January 4, 1997 and that he was unable to do so due to his emotional and physical conditions.

The Office found a conflict in the medical opinion evidence between Dr. Murphy who rescinded his opinion that appellant could perform light-duty work and Dr. Williams. Due to the conflict, the Office referred appellant to Dr. Harry Hoerner, a Board-certified orthopedic surgeon, for an impartial medical examination by letter dated January 16, 1998. In a January 29, 1998 report, Dr. Hoerner agreed with Drs. Murphy and Williams that appellant still continued to experience residuals of his April 1992 employment injury. Dr. Hoerner, however, reviewed a description of the position of modified distribution clerk and opined that appellant was capable of performing the duties of this position. In an addendum of the same date, Dr. Hoerner indicated that appellant had many psychological problems that should be addressed and that his report only pertained to appellant's orthopedic problems and his ability to perform certain activities.

Based on Dr. Hoerner's report, the Office advised appellant by letter dated February 11, 1998 that he had an additional 15 days in which to accept the offered position. Appellant refused the offered position.

By decision dated March 2, 1998, the Office terminated appellant's compensation on the grounds that appellant refused suitable work effective March 29, 1998 based on the opinions of Drs. Hoerner and Macgregor. In a March 27, 1998 letter, appellant requested an oral hearing before an Office representative.

In an August 11, 1999 decision, the hearing representative affirmed the Office's decision. The hearing representative found that Dr. Macgregor's reports did not establish that appellant

was disabled by an emotional condition. Further, the hearing representative accorded greater weight to Dr. Hoerner's opinion that appellant could perform the duties of the offered position.

5 U.S.C. § 8106(c) 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." It is the Office's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.<sup>2</sup> To justify such a termination, the Office must show that the work offered was suitable.<sup>3</sup> 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.<sup>4</sup>

In terminating appellant's compensation, the Office relied on the impartial medical opinion of Dr. Hoerner that appellant could perform the duties of the offered position of modified distribution clerk from an orthopedic perspective. The Office also relied on Dr. Macgregor's reports finding that they did not establish that appellant was disabled from work due to his accepted employment-related consequential emotional condition.

In a March 1, 1999 report, Dr. Macgregor stated that appellant's "periodic exacerbations appeared to be precipitated by flare ups in his orthopedic condition, which in turn aggravated his psychiatric one." He noted that, at the time of his examination, appellant was experiencing another exacerbation and he was struggling to overcome it. Dr. Macgregor noted that the symptoms regarding appellant's exacerbations included:

"Depressive moods, pent up anger and irritability, strained interpersonal relationships, decreased libido, relative social isolation and withdrawal, loss of interest in previously enjoyed activities, nocturnal insomnia (compounded by his orthopedic problems), lowered self-esteem and self-confidence, feelings of hopelessness and helplessness, worry and apprehension about his future, easy fatigability and lack of energy, hypersensitivity to guilt feelings, heightened feelings of self-criticism, and self-disparagement, apathy and anhedonia, lowered frustration-tolerance, feelings of estrangement from others, fleeting suicidal ideation, periodic anxiety and generalized nervous tension. (With regards to his suicidal ideation, [appellant] denied any serious plans or intentions, but described it more like feeling he would be better off dead.)"<sup>5</sup>

The position of modified distribution clerk involved sedentary-type work, no lifting above 10 pounds intermittently, no climbing and frequent lifting, alternate sitting and standing, no working with arms overhead and limited communication with others.

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<sup>2</sup> *Henry P. Gilmore*, 46 ECAB 709 (1995).

<sup>3</sup> *John E. Lemker*, 45 ECAB 258 (1993).

<sup>4</sup> *Catherine G. Hammond*, 41 ECAB 375, 385 (1990); 20 C.F.R. § 10.517(a).

<sup>5</sup> Dr. Macgregor reiterated appellant's symptoms in subsequent reports dated April 1 and July 1, 1999.

The Office did not provide Dr. Macgregor with a job description of the modified distribution clerk position or obtain an opinion from Dr. Macgregor addressing whether the above-noted residuals of appellant's emotional condition prevented him from performing the duties of the offered position. Further, Dr. Hoerner's January 28, 1998 addendum indicating that "[appellant] obviously has many psychiatric problems which should be addressed.... I would certainly be concerned about hospitalities expressed by many of the psychiatrists who have evaluated this gentleman" raises the question about appellant's ability to return to work from a psychiatric standpoint. There is no medical evidence of record establishing that appellant could return to work notwithstanding his residuals from both his employment-related orthopedic conditions and consequential emotional condition. It is the Office's burden of proof to establish the suitability of the position and it has not met its burden in this case.

The August 11, 1999 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC  
March 14, 2002

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member