

**United States Department of Labor
Employees' Compensation Appeals Board**

MARCIA A. HANNAH, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Denver, CO, Employer**

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**Docket No. 03-1956
Issued: April 22, 2004**

Appearances:
Gregory A. Hall, Esq. for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On August 4, 2003 appellant, through her attorney, filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated May 5, 2003. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue on appeal is whether the Office met its burden of proof to terminate appellant's compensation benefits effective June 17, 2000 on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

On April 14, 1997 appellant, then a 48-year-old supervisor, filed a notice of occupational disease for an emotional condition, which she attributed to her federal employment. She stated that she first became aware of her condition in approximately August 1992. The Office accepted her claim for an aggravation of a dysthymic disorder and anxiety disorder. Appellant received compensation on the periodic rolls. She retired from the employing establishment on June 18, 2000.

Following a 1998 job offer from the employing establishment, John Disorbio, Ed.D., appellant's clinical psychologist, advised that appellant would benefit from working in another institution or business other than the employing establishment. In a December 27, 1998 rehabilitation plan, the rehabilitation counselor recommended that appellant was able to work so long as she had no supervisory functions and only occasional interactions with others. On September 21, 1999 the Office recommended appellant for vocational rehabilitation services. The Office noted that appellant had been released for work with restrictions, which precluded a return to work with the employing establishment.

On February 2, 2000 the employing establishment offered appellant a job as a modified supervisor in the western area office. The position was based on a November 12, 1997 second opinion examination by Dr. Laura J. Klein, a Board-certified psychiatrist, who opined that appellant should not work at her usual workplace.¹ The position offered was not in a postal station, like appellant used to work in, but was in the western area office in downtown Denver. Appellant's duties included producing reports, letters and other documentation, reviewing materials for manager's signature, screening, logging and routing office mail and other clerical duties such as developing spreadsheets and power point presentations, establishing and maintaining office filing system, planning, scheduling and arranging meetings and working cooperatively with coworkers and customers.

On March 14, 2000 Dr. Disorbio approved the job offer. In a separate letter dated March 14, 2000, he opined that a six-to-eight-week work trial was indicated and recommended that appellant start with a six-hour day schedule.

In a letter dated March 20, 2000, the employing establishment modified the February 2, 2000 job offer to provide that appellant would work six hours a day until the time she was medically released to an eight-hour workday.

In a letter dated March 29, 2000, appellant stated that Dr. Disorbio had opined that she should not be returned to any position offered within the employing establishment. She further noted that, when the Office of Personnel Management (OPM) had approved her application for disability retirement, the employing establishment had terminated her employment. She advised that she wished to receive Civil Service Retirement System (CSRS) benefits.

In an April 6, 2000 letter, the Office informed appellant that the offered position for 6 hours a day was suitable to her limitations and allowed her 30 days to accept the position or offer her reasons for refusal. The Office informed appellant of the penalty provisions of the Federal Employees' Compensation Act. The Office informed appellant that the fact that she sought benefits through the CSRS was not a valid reason for declining the offered position.²

¹ In her November 12, 1997 report, Dr. Klein noted the results of her October 16, 1997 second opinion examination of appellant. She indicated that appellant's condition should have abated by April and no later than July 1998. Appellant further indicated, on a Form OWCP-5, that she was able to perform all functions listed on the form with the exception of working in her usual workplace.

² In a May 8, 2000 letter, appellant advised the Office that the effective date of her election of benefits through the CSRS was June 18, 2000.

By letter dated May 10, 2000, the Office noted that appellant had not responded to the job offer, which was found suitable. The Office advised her that an election to receive benefits from OPM was not an acceptable reason for refusing a suitable job offer and allowed her an additional 15 days to accept the position. Appellant did not accept the position.

By decision dated May 31, 2000, the Office terminated appellant's compensation benefits effective June 17, 2000, finding that the position of modified supervisor was suitable work.

In a letter dated May 29, 2001, appellant disagreed with the decision and requested reconsideration. Appellant, through counsel, argued that the offered position was not medically suitable and that the Office erroneously interpreted the medical evidence of file.

In a December 10, 2000 report, Dr. Disorbio stated that he did not understand the legal significance of the signature that he provided on the February 21, 2000 form for appellant to return to work in a trial supervisor clerical position. He stated that it was his position and had been for well over four years, that it was in appellant's best interest to be removed from any involvement or job offers at the employing establishment due to her post-traumatic stress responses of personality decompensation and deterioration, which occurred when there was any discussion and/or attempt to return to the employing establishment. Dr. Disorbio stated that, from a psychological risk perspective, appellant would decompensate significantly if she were to perform the duties in the offered position. He opined that appellant's depressive symptoms would escalate with the potential of complete social withdrawal, psychomotoric retardation, dysphoria, disinterest, disruption in her interpersonal life both at home and with coworkers, as well as potential suicidal risk. Dr. Disorbio opined that, if appellant's legal problems were resolved, she could return to some sort of gainful, meaningful employment in the future, but not at the employing establishment. He opined that appellant needed further treatment from both a psychopharmacologic and psychotherapeutic perspective in order to become stabilized and to plan for some form of meaningful employment outside the employing establishment.

In a decision dated September 14, 2001, the Office denied modification of the May 31, 2000 decision.

Appellant, through counsel, requested reconsideration by letter dated September 13, 2002.

In a September 1, 2002 medical report, Dr. Marita J. Keeling, a Board-certified psychiatrist, noted the history of injury and the events leading up to and after the job offer in March 2000. A diagnosis of major depressive episode, single, partial remission and anxiety disorder was provided. Dr. Keeling opined that, in spite of considerable treatment with medication and psychotherapy, appellant had not improved to the degree where she was able to return to work. She indicated that appellant had only responded partially to treatment for reasons unrelated to appellant's work. Dr. Keeling opined that the March 2000 position was totally unsuitable and, at this time, appellant was still not able to return to work.³

In a decision dated May 5, 2003, the Office denied modification of its prior decision.

³ Treatment notes from Dr. Disorbio dated January 22 and June 4, 2002, were also provided.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.⁴ 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)(2) of the Act 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.⁵ The Board has recognized that section 8106(c) is a penalty provision, which must be narrowly construed.⁶

Section 10.517 of the applicable regulation 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.⁷ 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.⁸

ANALYSIS

On February 2, 2000 the employing establishment offered appellant a job as a modified supervisor, which it amended on March 20, 2000 to provide a six-hour workday until the time she was medically released to an eight-hour workday. This was based on the recommendation of appellant's treating clinical psychologist, Dr. Disorbio, who found the job suitable and advised that appellant should work a trial period of six to eight weeks and then be reassessed.⁹ Appellant retired on June 18, 2000.

In this case, the Office properly followed its procedures in terminating appellant's compensation. The Office advised appellant, by letter dated April 6, 2000, that the position was suitable to her accepted limitations based on her dysthymic disorder and anxiety. The Office warned appellant that she had only 30 days to respond to its April 6, 2000 letter and that her compensation would be terminated if she did not respond. She was also advised that her desire to retire and elect retirement benefits was not a valid reason for refusing the position. Appellant

⁴ *Karen L. Mayewski*, 45 ECAB 219, 221 (1993); *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

⁵ 5 U.S.C. § 8106(c)(2).

⁶ *See Stephen R. Lubin*, 43 ECAB 564, 568 (1992).

⁷ 20 C.F.R. § 10.517(a).

⁸ *Arthur C. Reck*, 47 ECAB 339, 341-42 (1995).

⁹ Section 8101(2) of the Act provides that the term "physician" includes "clinical psychologists" within the scope of their practice as defined by state law. Dr. Disorbio is a licensed psychologist in Colorado and meets the Colorado State Board of Psychologist Examiners' rules for being a clinical psychologist. Dr. Disorbio's credentials meet the definition of "clinical psychologist" accepted by the Office. *See Jacqueline E. Brown*, 54 ECAB ____ (Docket No. 02-284, issued May 16, 2003).

responded to this letter by noting that she was retiring effective June 18, 2000. In a letter dated May 10, 2000, the Office again notified her that her election of benefits was an unacceptable reason for refusing the offered position and provided her an additional 15 days to accept the offered position without penalty. Appellant did not respond to this letter and the Office ensured that the position was still available before terminating compensation effective June 17, 2000. The Board finds that the Office properly followed its procedures in advising appellant that her compensation would be terminated if she refused suitable employment.¹⁰

The Office properly found that appellant's reason for refusing the position was not valid. She chose to retire on medical disability than to attempt the offered position. The Board has long held that the personal decision to retire from all employment is not a valid reason for refusing an offer of a position found to be suitable.¹¹

The determination of whether appellant is capable of performing the offered position is a medical question that must be resolved by probative medical evidence.¹² The Board finds that Dr. Klein's November 12, 1997 opinion that appellant's conditions should have resolved no later than July 1998, in conjunction with Dr. Disorbio's March 13, 2000 opinion, that appellant was able to work six hours in the modified supervisor position, was sufficient medical evidence to establish that appellant was capable of performing the duties of the modified supervisor position which the Office found to be suitable work on April 6, 2000. At the time the position was offered, there was no showing that appellant would have been unable to perform the requirements of the offered position from either a vocational, physical or psychological component. Appellant's own physician, Dr. Disorbio, approved the offered position in a March 13, 2000 report and the offered position was at a site other than appellant's usual employment, which was within the parameters delineated by Dr. Klein in a November 12, 1997 report. The Board notes that, although Dr. Disorbio had previously opined that appellant would benefit from not working at the employing establishment,¹³ there was no current medical opinion evidence from the physician at the time of the suitability determination to indicate that he was still of that opinion. Therefore, the Board finds that the position offered to appellant was properly found to be suitable at the time her benefits were terminated.

Appellant's counsel has argued that the offered position contradicted the Office's rehabilitation plan of December 27, 1998 whereby the rehabilitation counselor recommended no supervisory functions and only occasional interaction with others. The Board notes, however, that the 1998 vocational rehabilitation counselor opinion was premised on the medical evidence then of record. The Board has held that the opinion of a physician who has specialized training in a particular field of medicine has greater probative value on issues involving that particular

¹⁰ See *Cheryl D. Hedblum*, 47 ECAB 215, 219 (1995) (finding that because appellant neither responded to the Office's notice of termination of compensation nor accepted the offered position within the 30-day deadline, the Office properly terminated her compensation).

¹¹ See *Stephen R. Lubin*, *supra* note 6 (finding that appellant's decision to accept retirement benefits did not justify his refusal of a position found to be suitable work).

¹² *Marilyn D. Polk*, 44 ECAB 673 (1993), *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

¹³ The Board notes that Dr. Disorbio had noted such opinion in November and December 1998 reports.

field than opinions of other physicians.¹⁴ As previously discussed, there was no showing at the time appellant's benefits were terminated that appellant was vocationally or medically unable to perform the duties of the offered position. Accordingly, the Board finds that the Office properly terminated appellant's compensation effective June 17, 2000, based on a rejection of suitable employment.¹⁵

Where the Office shows that an offered limited-duty position was suitable based on the claimant's work restrictions at that time, the burden shifts to the claimant to show that his or her refusal to work in that position was justified.¹⁶ Subsequent to the Office's termination of compensation, appellant submitted medical evidence contending that she could not perform the offered position.

The Office relied upon the opinions expressed in Dr. Disorbio's March 14, 2000 report, in conjunction with Dr. Klein's November 12, 1997 report, to find the offered position suitable. In a December 10, 2000 report, Dr. Disorbio advised that he did not understand the legal significance of his signature when he approved appellant to return to work in the offered position. Legal standards, however, are outside the realm of expertise of a physician.¹⁷ Although Dr. Disorbio opined that appellant should be removed from any involvement or job offers at the employing establishment because of post-traumatic stress responses of personality decompensation and deterioration, which occurred when there was any discussion and/or attempt to return to the employing establishment, the fear of future injury is not compensable under the Act.¹⁸ The Board notes that the offered position was in a different site based on Dr. Klein's 1997 opinion that appellant should not work at her "usual workplace." Additionally, Dr. Disorbio addressed the psychological component on terms of post-traumatic stress, not the accepted psychological conditions.

Appellant's counsel argued that the Office improperly confused the issues of continuing disability with the determination of whether the job offer was medically suitable.¹⁹ He has further alleged that the offered position was not suitable. The issue of continuing disability is separate from a determination of whether a job offer was medically suitable. In this case, the Board notes that both Dr. Disorbio, in his December 10, 2000 report and Dr. Keeling, in her September 1, 2002 report, have opined that the offered position was unsuitable as it would not result in a successful return to work. Dr. Disorbio expressed his opinion that appellant would decompensate significantly if she were to perform the duties in the offered position, without

¹⁴ See generally *Effie Davenport (James O. Davenport)*, 8 ECAB 136 (1955).

¹⁵ See *Henry W. Shepherd, III*, 48 ECAB 382 (1997) (finding that appellant's compensation was properly terminated after the Office found his reasons for refusing suitable work unacceptable).

¹⁶ *Deborah Hancock*, 49 ECAB 606 (1998).

¹⁷ *Jimmie H. Duckett*, 52 ECAB 332 (2001).

¹⁸ *Manuel Gill*, 52 ECAB 282 (2001).

¹⁹ Counsel noted that the September 14, 2001 decision stated: "If the claimant's medical condition worsened at a future date, this would not generate a later entitlement to compensation due to the earlier finding of refusal of acceptable work."

reasonable medical certainty. Although Dr. Disorbio noted appellant's post-traumatic stress responses to discussions and/or attempts to return to the employing establishment, his opinion is based on what would happen to appellant if she were to return to the employing establishment, which the Board finds to be speculative and not one of reasonable medical certainty.²⁰ Although Dr. Keeling opined that the position was unsuitable and that appellant had not improved to the degree where she was able to return to work, no medical rationale or objective evidence has been provided to support her conclusion that appellant remained totally disabled.²¹ Therefore, neither report is sufficient to establish that appellant was not physically capable of performing the duties of the modified supervisor position offered in this case.

The medical evidence does not establish that appellant was unable to perform the position offered in this case. A proper invocation of section 8106(c) serves as a bar to further compensation for disability arising from the accepted employment injury.²²

CONCLUSION

The Board finds that the Office met its burden of proof in terminating appellant's compensation benefits effective June 17, 2000 on the grounds that she refused an offer of suitable work.

²⁰ See *Ricky S. Storms*, 52 ECAB 349 (2001) (while the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty); see also *Jennifer L. Sharp*, 48 ECAB 209 (1996) (medical opinions which are speculative or equivocal in character have little probative value).

²¹ See *Lucrecia M. Nielsen*, 42 ECAB 583 (1991) (where the Board held that medical opinions must be supported by medical rationale to be of sufficient probative value).

²² 5 U.S.C. § 8106(c)(2); see *Stephen R. Lubin*, *supra* note 6 (finding that, based on claimant's refusal of suitable work, the Act and implementing regulations serve as a bar to the receipt of further monetary compensation, including compensation granted under 5 U.S.C. § 8107 for a schedule award); see also 20 C.F.R. § 10.517(b).

ORDER

IT IS HEREBY ORDERED THAT the May 5, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 22, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member