United States Department of Labor
Employees' Compensation Appeals Board

PAULA M. SCANNELL, Appellant	)	
and	)	**Docket No. 04-1987**
	)	**Issued: January 11, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Bedford Park, IL, Employer	)	

Appearances:
Paula M. Scannell, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On August 5, 2004 appellant filed a timely appeal from the May 6, 2004 merit decision of the Office of Workers' Compensation Programs, which terminated her compensation for refusing an offer of suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this termination.

ISSUE

The issue is whether the Office properly terminated appellant's compensation under 5 U.S.C. § 8106(c)(2) for refusing an offer of suitable work.

FACTUAL HISTORY

On September 5, 2000 appellant, then a 45-year-old distribution clerk, injured her low back in the performance of duty when she lost her footing on a waxed floor in the lunchroom and fell. The Office accepted her claim for sciatica and disc herniation at the L4-5 and L5-S1 levels. Appellant received compensation for temporary total disability.

On January 29, 2003 Dr. Daniel J. Harrison, appellant's neurosurgeon, released her to return to work with no lifting or straining. On February 4, 2003 the employing establishment offered her a modified job as a full-time regular mark-up clerk based on his January 29, 2003 report. On February 10, 2003 the Office sent a copy of the job offer to Dr. Harrison and asked whether appellant was capable of performing that work. The Office also asked for a more detailed listing of her work tolerance limitations. He did not respond.

On October 17, 2003 the Office notified appellant that the offered position was suitable in accordance with Dr. Harrison's January 29, 2003 report and that as of September 17, 2003 the position remained available. The Office informed her that she had 30 days to accept the offer or provide a written explanation for refusing it. The Office informed appellant of the consequences for refusing an offer of suitable work.

On October 26, 2003 appellant responded that she could not accept the modified job: "I have applied for total Disability/Social Security Benefits due to my injury on September 5, 2000." Also, she stated that she felt her disability would interfere in performing any job on a regular basis.

On November 7, 2003 the Office notified appellant that she did not provide a valid reason for not accepting the job offer. The Office informed her that if she did not accept the offer and arrange for a report date within 15 days, her entitlement to wage loss and schedule award benefits would be terminated.

In a decision dated May 6, 2004, the Office terminated appellant's compensation under 5 U.S.C. § 8106(c)(2) for refusing an offer of suitable work. The Office noted that the job offer was suitable "in accordance with your medical limitations provided by Dr. Daniel Harrison in the report dated January 29, 2003."

LEGAL PRECEDENT

Section 8106(c)(2) of the Federal Employees' Compensation Act states that a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or secured for her is not entitled to compensation.[1] The Office has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects suitable work when it is offered. Before compensation can be terminated, however, the Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.[2] To justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused or neglected by appellant was suitable.[3]

[1] 5 U.S.C. § 8106(c)(2).

[2] *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

[3] *Glen L. Sinclair*, 36 ECAB 664 (1985).

ANALYSIS

Dr. Harrison completed a disability certificate on January 29, 2003 indicating that appellant was sufficiently recovering to return to work with the following limitations: "No lifting or straining." But when the employing establishment offered her a limited-duty job "based on medical [report] dated January 29, 2003," it offered a job that required lifting five pounds. On its face, then, the job offer appears inconsistent with the limitations Dr. Harrison reported on January 29, 2003. The Office claims examiner recognized this on February 10, 2003 when he wrote to the field nurse assigned to appellant's case:

> "I do see that the claimant was issued a job offer by the [employing establishment]. I am unable to rule that it's a suitable job. I do see that the lifting limit is five pounds. However, Dr. Harrison said no lifting or straining. I would like to know whether Dr. Harrison feels the job offer made to the claimant is suitable. I'll mail him a copy of the job offer and ask for his opinion."

The Office sought Dr. Harrison's opinion but received no response. On September 15, 2003 the employing establishment wrote to the Office to advise that, despite twice requesting comment, it had received no response from Dr. Harrison since he released appellant to return to work on January 29, 2003.

Because the job offer appears inconsistent on its face with the limitations reported by Dr. Harrison on January 29, 2003 and because the Office was unable to obtain any further comment or clarification from Dr. Harrison, the Board finds that the medical evidence does not support the Office's finding of suitability. The Office did not meet its burden of proof to establish that the position offered was within appellant's work restrictions. The Board will reverse the Office's May 6, 2004 decision terminating appellant's compensation under 5 U.S.C. § 8106(c)(2).

CONCLUSION

The Office improperly terminated appellant's compensation under 5 U.S.C. § 8106(c)(2). The Office did not meet its burden to show that the work offered was suitable.

ORDER

IT IS HEREBY ORDERED THAT the May 6, 2004 decision of the Office of Workers' Compensation Programs is reversed.

Issued: January 11, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member