U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARILYN J. BUOB and U.S. POSTAL SERVICE,
POST OFFICE, Coulee City, WA

Docket No. 99-523; Submitted on the Record;
Issued August 2, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits on November 24, 1997 on the grounds that she refused an offer of suitable work pursuant to section 8106(c) of the Federal Employees' Compensation Act.

The Board has duly reviewed the case record in the present appeal and finds that the Office properly terminated appellant's compensation benefits on November 24, 1997 on the grounds that she refused an offer of suitable work pursuant to section 8106(c) of the Act.

It is well settled that once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits.[1] 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 10.124(c)[2] of the Office's regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured 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 a showing before a determination is made with respect to termination of entitlement to compensation.[3] To justify termination of compensation, the Office must show that the work offered was suitable and must inform appellant of the consequences of the refusal to accept such employment.[4]

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[1] *Arthur C. Reck*, 47 ECAB 339 (1996); *Barbara R. Bryant*, 47 ECAB 715 (1996).

[2] 20 C.F.R. § 10.124(c).

[3] *Arthur C. Reck*, *supra* note 1.

[4] *Id.*

In the present case, on September 11, 1995 the Office accepted that appellant, then a part-time flexible clerk, sustained a permanent aggravation of adjustment disorder in the performance of duty. Based on the opinions of appellant's treating physicians, Dr. Cook and Dr. Thomas Rowe, a psychologist, and Dr. Peter Rutherford, a Board-certified internist, as well as the opinion of the Office referral physician, Dr. David D. Bot, that appellant could return to work at any time providing that Shirley Armstrong, the postmaster of the employing establishment, was not in any way able to come into physical contact with appellant, or be in a position to evaluate, monitor or observe appellant's work activities, the employing establishment identified the position of part-time flexible general clerk at the Wilbur Post Office as a possible suitable job for appellant. The employing establishment forwarded a copy of the position description, as well as the physical requirements of the job, to appellant's attending physician, Dr. Rutherford, for his review and approval. On April 4, 1997, after reviewing the physical requirements of the position, Dr. Rutherford approved the position.

The employing establishment offered appellant the position of part-time flexible general clerk on May 12, 1997. Appellant responded that she was neither accepting nor refusing the offered position, but preferred to wait until the Office had determined whether the position was suitable before making a decision. Due to the nature of appellant's accepted condition, the description of the position offered was forwarded to Dr. Rowe for his review. In his response dated August 11, 1997, Dr. Rowe stated that the position was likely to exacerbate appellant's condition. He noted that the position called for appellant to work, when scheduled, as few as two or as many as eight hours per day and would require a 70-mile round trip commute from Coulee City to Wilbur, Washington. Dr. Rowe stated the commute involved indicated "a very high probability that [appellant's] workday would be extended more than 50 percent with this additional time spent driving rural roads which, in winter, can be exceptionally hazardous.

By letter dated August 13, 1997, the Office contacted Dr. Rowe and advised him that the commute from appellant's home to the offered position at Wilbur, Washington was considered to be within a reasonable commuting distance and in accordance with Office procedures.[5] The Office also stated that to conclude that appellant's commute would extend her day by 50 percent as a result of rural roads and winter weather conditions was conjectural. Finally, the Office noted that the position, which guaranteed appellant, when scheduled, two hours work per day and as many as eight hours a day, offered comparable hours to those worked by appellant at the Coulee City station. The Office then asked that Dr. Rowe again provide his opinion as to whether appellant could perform the job as offered.

In his letter of response dated September 15, 1997, Dr. Rowe stated that he found the position offered to be comparable with the one previously performed by appellant, with the exception being that appellant would have no contact with Ms. Armstrong at the employing establishment. Dr. Rowe again stated that he felt that the commute to the new position,

[5] At the time of the Office's letter to Dr. Rowe, the Office was operating under the mistaken impression that appellant lived in Hartline, Washington, a distance of approximately 31 miles from Wilbur. After receiving a copy of the Office's letter to Dr. Rowe, appellant contacted the Office and informed it that while she had changed her mailing address to Hartline, Washington, she continued to reside in Coulee City.

approximately 70 miles round trip, was not comparable to appellant's prior commute of only 3 miles and reiterated his concerns about winter driving conditions in rural Washington.

By letter dated September 29, 1997, the Office complied with its procedural requirements by advising appellant that the position of part-time flexible general clerk was suitable, that the position was currently available, that appellant would have 30 days to accept the position or provide an explanation for refusing it, that it would consider any explanation provided by her prior to making a decision as to whether she was justified in refusing the offered position and that her wage-loss compensation would be terminated if she refused suitable work and did not provide a valid reason for doing so.

In response to the Office's letter, on October 15, 1997 appellant's counsel asserted that the Office had failed to confirm that the position was still open to appellant and had further erred in operating under the mistaken impression that appellant lived in Hartline, Washington, rather than Coulee City. Counsel also asserted that appellant should be entitled to compensation for the increased commute. Finally, counsel asked the Office to confirm a rumor that Ms. Armstrong was planning on leaving her position at the employing establishment. In a letter dated October 19, 1997, in addition to the objections already raised by counsel, appellant stated that she did not believe that the position was comparable to the one she left in Coulee City, "because of the extra 70-mile drive." Appellant stated that she was afraid to drive in poor weather and further thought that the extra length of the drive would allow her more time to dwell on the unfairness, the fact that while Ms. Armstrong was to blame for her condition, she herself was the one punished by having to leave her accustomed place of employment.

By letter dated November 6, 1997, the Office advised appellant that the reasons she had provided for refusing the position had been considered and found not to be valid and that she had an additional 15 days to accept the position or her compensation benefits would be terminated.

In a decision dated November 24, 1997, after determining that appellant had neither returned to work nor contacted the employing establishment, the Office terminated appellant's compensation on the grounds that she had refused suitable work.

The Board finds that the evidence of record establishes that appellant is capable of performing the duties of the part-time flexible clerk position which was offered to her by the employing establishment's Wilbur branch. Drs. Rutherford and Rowe reported that appellant was able to return to the type of work she had previously performed with the sole restriction that there be no possibility that she come into contact with Ms. Armstrong. The position of part-time flexible clerk at the Wilbur Post Office location, which is essentially the same position she performed at the employing establishment, fits within this restriction. In addition, the record reflects that prior to finding the position suitable, the Office telephonically confirmed that the position was still available.

In rejecting this offer of employment, appellant relied principally on the fact that the position was located in Wilbur, Washington, approximately 35 miles from her home in Coulee City. However the Board finds that the 70-mile round trip commute did not place the position outside appellant's commuting area. The Board has not set a maximum commuting distance to be used by the Office when it evaluates an offer of suitable work. It has, instead, frequently

explained that the determination of whether a job offer is within a claimant's commuting area must be made by examination of a particular claimant's ability to get to and from the work site.[6] Neither appellant nor her physician has stated that appellant is not physically capable of driving to Wilbur. In addition, while Dr. Rowe expressed concern that the longer commute could lead to an extended workday for appellant and appellant stated that the longer commute will give her more time to dwell on her situation, the Board notes that the possibility of future injury is not a basis for the payment of compensation.[7]

The weight of the medical evidence indicates that the position offered is consistent with appellant's physical abilities and her sole limitation that she not be exposed to Ms. Armstrong. Therefore, the refusal of the job offer cannot be deemed reasonable or justified and the Office properly terminated appellant's compensation.

The November 24, 1997 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.
August 2, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

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

[7] *Gaetan F. Valenza*, 39 ECAB 1349 (1988).