U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DOROTHY L. GATSON and U.S. POSTAL SERVICE,
POST OFFICE, Detroit, MI

Docket No. 99-260; Submitted on the Record;
Issued July 20, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits on the basis that she refused suitable work.

The Board has duly reviewed the case on appeal and finds that the Office failed to meet its burden of proof to terminate appellant's compensation benefits.

Appellant filed a claim alleging on February 7, 1992 she injured her left lower back in the performance of duty. Appellant filed a notice of occupational disease on June 1, 1992 and stated that further work exposure resulted in continuous pain. The Office accepted appellant's claim for lumbar radiculopathy on July 30, 1992. Appellant filed claims alleging recurrences of disability on March 3 and September 24, 1994 and March 8, 1995 which the Office accepted.

In this case, appellant returned to work on July 5, 1995 working four hours a day. Her limited-duty position entailed limited standing and walking, no prolonged sitting, no lifting over 10 pounds and no stair climbing. Appellant cased mail and did not deliver mail, occasionally she delivered express mail. Appellant increased her hours to five hours a day by November 9, 1995. Appellant increased to six hours a day on November 11, 1996.

The medical evidence consisting of reports from appellant's attending physicians, Dr. Sarah L. Rosso, a Board-certified internist, Dr. Norman L. Pollack, an Office referral physician and Dr. Michael G. Sperl, a physician Board-certified in physical medicine and rehabilitation and employing establishment physician, indicated that appellant could work at least six hours a day with restrictions including standing up to four hours, walking up to four hours, climbing, kneeling, bending, stooping, twisting, pushing and pulling less than one hour each.

The employing establishment offered appellant a permanent light-duty position as a modified city carrier on February 4, 1997. This position required appellant to work six hours a

day with no lifting over 10 pounds, no frequent bending and sitting or standing at will. Appellant's duties included delivering express mail, picking up express mail from the hub, casing mail and other carrier duties as prescribed by the supervisor. The Office informed appellant on February 13, 1997 that the position was suitable, informed her of the penalty provision of section 8106 and allowed her 30 days to accept the position or offer her reasons for refusal.

Appellant stated on February 11, 1997 that she refused the position as it would require her to continually drive and to enter and exit the vehicle. Appellant also stated that the routes to be cased were not arranged for much sitting. Appellant noted that her current position allowed her to sit and case her letters, that she had the proper stool for back support and that beginning March 1, 1997 she would be able to work eight hours a day in her current position.

On February 24, 1997 appellant's attending physician, Dr. Rosso, released appellant to work eight hours a day with restrictions. These included standing six hours a day, walking four to six hours a day, climbing less than four hours, bending or stooping less than two hours, fine manipulation three and one half hours and reaching above the shoulder for three hours. Dr. Rosso indicated that appellant could drive a vehicle.

In a telephone memorandum, the Office noted that appellant returned to full-time work on March 8, 1997 in her light-duty position.

The Office informed appellant by letter dated March 18, 1997 that her reasons for refusing the offered position were not acceptable and allowed her an additional 15 days to accept the position. By decision dated April 18, 1997, the Office terminated appellant's compensation benefits as she refused an offer of suitable work. The Office noted that the employing establishment continued to allow appellant to work in the light-duty position which she had held since July 5, 1995.

Appellant requested an oral hearing and on March 31, 1998 she testified that the employing establishment separated her as she was only able to carry four hours in the field. Appellant submitted additional medical evidence from Dr. Rosso dated May 12 and September 16, 1997 and March 28, 1998. On May 12, 1997 Dr. Rosso noted her objections to appellant's regular duty position. On September 16, 1997 Dr. Rosso indicated that appellant could work outside four hours a day and on March 28, 1998 she noted that appellant returned to full work and described minimal restrictions. By decision dated August 5, 1998, the hearing representative affirmed the Office's April 18, 1997 decision.

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 8106(c) of the Federal Employees' Compensation Act[2] provides that a partially disabled employee who refuses or neglects to work after suitable

[1] *Mohamed Yunis,* 42 ECAB 325, 334 (1991).

[2] 5 U.S.C. § 8106(c)(2).

work is offered to, procured by, or secured for the employee is not entitled to compensation. Section 10.124(c) of the applicable regulations[3] 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. 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.[4]

The initial question is whether the Office properly determined that the offered position was suitable. Appellant argued that the duties of the offered position would aggravate her employment condition. However, appellant did not submit any medical evidence that indicated that she could not perform the limited-duty position. The medical evidence from Dr. Rosso indicates that she felt that appellant could not return to her date-of-injury position, not that the offered position was not suitable.

The Board finds that the medical evidence establishes that appellant was physically capable of performing the duties of the modified city carrier position as offered. The Office's procedure manual indicates that, once a claimant has been informed that the Office finds the job offered is suitable and that compensation will be terminated if the job offer is not accepted, there are some acceptable reasons for refusing to accept an offer of suitable employment. One reason is, "the claimant has found other work which fairly and reasonably represents his or her earning capacity (in which case, compensation would be adjusted or terminated based on actual earnings)."[5]

In addition to arguing that the offered position was not suitable, appellant rejected the job offer because she was already working a light-duty job at the employing establishment and she had just been released to return to work eight hours a day rather than the six provided in the offered position. The Office can reject this reason only by finding that the job appellant had did not fairly and reasonably represent her wage-earning capacity.[6]

The Office did not address whether appellant's limited-duty position which she had held for two years and in which appellant began working eight hours a day in the light-duty position beginning March 8, 1997 fairly and reasonably represented her wage-earning capacity. Due to its failure to make a determination of whether appellant's light-duty position fairly and reasonably represented her wage-earning capacity, the Office has not shown that appellant's refusal to accept the modified city carrier position offered by the employing establishment provided sufficient reason to terminate appellant's compensation. Section 8106(c) of the Act is

[3] 20 C.F.R. § 10.124(c).

[4] *Arthur C. Reck,* 47 ECAB 339 (1995).

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity,* Chapter 2.814.5(a)(2) (July 1997).

[6] *Michael I. Schaffer,* 46 ECAB 845, 855 (1995).

intended to penalize partially disabled claimants who refuse to seek and perform suitable work. The record does not establish that appellant refused to perform suitable work. The Office, therefore, has not met its burden of proof to terminate appellant's compensation benefits.

The decision of the Office of Workers' Compensation Programs dated August 5, 1998 is hereby reversed.

Dated, Washington, D.C.
July 20, 1999

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member