

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KEWEL S. KHALSA and U.S. POSTAL SERVICE,
RINCON STATION, San Francisco, Calif.

*Docket No. 97-2404; Submitted on the Record;
Issued June 15, 1999*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation for refusal to accept suitable work.

On January 23, 1995 appellant, then a 61-year-old manual clerk, was casing flats when he felt pain in his right arm near the elbow. He stopped working on February 2, 1995. The Office accepted appellant's claim for right lateral epicondylitis and began payment of temporary total disability compensation effective February 3, 1995. On February 20, 1996 appellant underwent surgery for a right extensor tendon release. In a January 9, 1997 decision, the Office terminated appellant's compensation, effective October 17, 1996, the day before he elected Civil Service retirement benefits, on the grounds that he failed to accept an offer of suitable employment.

The Board finds that the Office improperly terminated appellant's compensation.

Section 8106(c)(2) of the Federal Employees' Compensation Act states: "a partially disabled employee who: (1) refused to seek suitable work; or (2) refuses or neglects to work after suitable work is offered is not entitled to compensation."¹ 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.²

In a June 1, 1995 report, Dr. John C. Kofoed, a Board-certified orthopedic surgeon, selected by the Office to give a second opinion, diagnosed moderate to severe lateral epicondylitis of the right elbow. He stated that appellant had temporary partial disability with a restriction of no use of the right arm. Dr. Kofoed indicated that appellant's condition was

¹ 5 U.S.C. § 8106(c)(2).

² 20 C.F.R. § 10.124.

permanent and stationary as of August 1, 1995. He limited appellant to daily driving of one hour a day but indicated that he could work eight hours a day with these restrictions.

In a July 26, 1995 letter, the employing establishment offered appellant a position as a distribution clerk, in which he would sort flats using his left hand only. In an August 14, 1995 note, Dr. Franklyn Seabrooks, an orthopedic surgeon and appellant's treating physician, approved the offered position. In an August 17, 1995 response appellant, declined the job because he was still receiving physical therapy and was restricted from driving long distances. In a September 25, 1995 letter, the Office authorized appellant's elbow surgery. In an October 3, 1995 letter, the employing establishment forwarded the job offer to the Office and requested a determination on its suitability for appellant. In a January 5, 1996 letter, the Office indicated that it had deferred the light-duty job offer, pending the outcome of appellant's elbow surgery.

In an April 8, 1996 work restriction evaluation, Dr. Seabrooks indicated that appellant could do no lifting with the right arm and no climbing. He reported that appellant could perform all other activities, including, sitting, standing and walking, for eight hours a day. He stated that appellant could not work eight hours a day because he could not drive himself. In a June 24, 1996 report, Dr. Seabrooks related that appellant felt he was unable to do any lifting with his right arm. He stated that appellant could try to go back to work and see what he could do with his left arm. Dr. Seabrooks indicated that any lifting, reaching, pulling or pushing with the right arm should be precluded.

In an August 9, 1996 letter, the employing establishment again offered appellant a position as a modified distribution clerk. The employing establishment stated that the job would involve sorting mail with the left hand only. It indicated that appellant would work eight hours a day, would do no lifting, reaching, pulling or pushing with the right hand, would be able to sit or stand intermittently, would be able to reach above the shoulder with the left arm only, would lift no more than 20 pounds with the left arm only and could stand or sit at will. On August 25, 1996 Dr. Seabrooks signed the job offer to indicate that he approved it. In a September 4, 1996 letter, appellant declined the job. He stated that he was right handed and, therefore, had more pain in that hand while driving. Appellant commented that he had already hurt his right arm and did not want to hurt his left arm particularly as he would be performing the same duties as when he injured his right arm. He noted that his right arm would become numb at night and had constant pain. Appellant indicated that he, therefore, was retiring.

In an October 8, 1996 letter, the Office informed appellant that it found the position of modified distribution clerk to be suitable and indicated that the position was still available at the employing establishment. The Office indicated that appellant still had the opportunity to accept the position at no penalty. The Office stated that appellant had 30 days to accept the position or provide an explanation for refusing it. The Office further stated that without further notice, at the end of 30 days, a final decision on the issue would be made. The Office indicated that if appellant failed to accept the position, any explanation or evidence which he provided would be considered prior to determining whether his reasons for refusing the job were justified. In an October 18, 1996 response, appellant stated that he had already applied for retirement. He indicated that his right arm remained painful and it was hard to work eight hours a day with his left arm only. Appellant noted that he could no longer take pressure because he had many

headaches, which caused a hemorrhage in the left eye and the loss of most of his eyesight in that eye.

The Office terminated appellant's compensation in the January 9, 1997 decision, finding that pain while driving, fear of finding it hard to work with the left hand and fear that returning to work would cause more health problems were not acceptable reasons for refusing the offered position. The Office's letter and decision in this case, however, was contrary to the Office's procedures. The Office's procedures require that, if appellant gives reasons for his refusal to accept an offer of suitable work, the Office must consider those reasons and, if they find the reasons unacceptable, must inform appellant of that determination and give him an additional 15 days to accept the position before terminating compensation.³ The Office's action, in finding appellant's reasons unacceptable in the same decision, in which it terminated appellant's compensation, is contrary to the Office's procedures and to due process.⁴ The Office, therefore, improperly terminated appellant's compensation.

The decision of the Office of Workers' Compensation Programs, dated January 9, 1997, is hereby reversed.

Dated, Washington, D.C.
June 15, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(1) (December 1993).

⁴ *Maggie Moore*, 41 ECAB 334 (1989), *reaff'd on recon.*, 42 ECAB 484 (1991).