

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JERRY BARNETT and U.S. POSTAL SERVICE,
POST OFFICE, Tampa, Fla.

*Docket No. 97-2308; Submitted on the Record;
Issued May 19, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation benefits effective March 2, 1997 on the grounds that he 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 this appeal and finds that the Office did not meet its burden of proof in terminating appellant's compensation benefits effective March 2, 1997 on the grounds that he refused an offer of suitable work pursuant to section 8106(c) of the Act.

On April 5, 1989 appellant, then a clerk, filed a traumatic injury claim (Form CA-1) alleging that on that date he hit his right knee on a metal tub.

The Office accepted appellant's claim for a contusion of the right knee and internal derangement of the right knee

By letter dated October 27, 1995, the Office referred appellant along with a statement of accepted facts, medical records and a list of specific questions to Dr. Robert Yamokoski, a Board-certified orthopedic surgeon, for a second opinion examination to determine whether any employment-related condition remained. By letter of the same date, the Office advised Dr. Yamokoski of the referral. Dr. Yamokoski submitted a November 7, 1997 medical report, indicating that appellant could work with physical restrictions.

In a September 27, 1996 letter, the employing establishment provided Dr. Yamokoski with a description of the duties of the modified distribution clerk position which it intended to offer appellant and asked him to provide an opinion on the issue of whether appellant was

capable of performing the duties of the position.¹ On October 8, 1996 Dr. Yamokoski indicated that he had reviewed the position description and approved of the assignment

In letters dated October 17 and 23, 1996, the employing establishment offered appellant the position of modified distribution clerk based on Dr. Yamokoski's opinion. The employing establishment advised appellant that his assignment would remain within the physical restrictions furnished by Dr. Yamokoski and that he was not to exceed these restrictions. On October 30, 1996 appellant rejected the employing establishment's job offer due to his medical condition.

In a letter dated January 28, 1997, the Office advised appellant that the offered position of modified distribution clerk was suitable to his work capabilities based on Dr. Yamokoski's medical opinion. The Office also advised appellant that he had 30 days in which to accept the offered position or to provide an explanation of the reasons for refusing the job. The Office further advised appellant of the penalties for refusing an offer of suitable work under section 8106 of the Act.

By decision dated February 28, 1997, the Office terminated appellant's compensation effective March 2, 1997 based on his refusal of an offer of suitable employment.

Appellant requested reconsideration of the Office's decision. By decision dated April 7, 1997, the Office denied appellant's request for modification based on a merit review of the claim.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. This includes cases in which the Office terminates compensation under 5 U.S.C § 8106(c) for refusal to accept suitable work.² Under section 8106(c)(2) of the Act, the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.³ Section 10.124(c) of the Office's implementing 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 showing before a determination is made with respect to termination of entitlement to compensation.⁴ To justify termination, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.⁵

¹ The position of modified distribution clerk consists of casing letter mail at a mail receptacle containing 77 cells straight ahead and 28 cells to the immediate right. Moving trays of mail weighing 15 to 20 pounds.

² *Shirley B. Livingston*, 42 ECAB 855 (1991).

³ *Patrick A. Santucci*, 40 ECAB 151 (1988).

⁴ 20 C.F.R. § 10.124(c); *see also Catherine G. Hammond*, 41 ECAB 375 (1990).

⁵ *Maggie L. Moore*, 42 ECAB 484 (1991); *reaff'd. on recon.*, 43 ECAB 818 (1992).

The Board has previously recognized in *Maggie Moore*⁶ that due process and elementary fairness require that the Office observe certain procedures before terminating a claimant's monetary benefits under section 8106(c)(2) of the Act. In order to ensure regularity and impartiality in adjudicating claims, and secure similar treatment of similar cases, the Office must not only inform each claimant of the provisions of the above statute, but also inform him or her that a specific position offered is suitable; the consequences of refusal of the position; and thereafter allow the claimant a reasonable period to accept or reject the position or submit reasons why the position is not suitable and cannot be accepted.

If a claimant submits reasons, evidence, or both for rejecting the offer of suitable work, the Office must evaluate the new evidence or reasons submitted and inform the claimant of its final decision regarding suitability. The claimant must then be given an opportunity to accept or reject the position. This procedure provides claimants the opportunity to make an informed decision as to whether to accept or reject a job offer deemed valid by the Office prior to having his or her benefits terminated permanently.⁷

In this case, the Office did not afford appellant a proper opportunity to accept the offered position of modified distribution clerk. In its February 28, 1997 decision, the Office found that appellant had not responded to its January 28, 1997 suitability letter. However, the record reveals that appellant did in fact respond to the Office's January 28, 1997 letter within 30 days. Appellant submitted a letter dated February 25, 1997, which was received by the Office on February 26, 1997, indicating that he was neither accepting or refusing the offered position, but that due to the seriousness of his condition, as indicated in an accompanying February 11, 1997 medical report of Dr. Edward N. Feldman, an orthopedic surgeon and appellant's treating physician, he was leaving this decision to the Office's discretion. In his medical report Dr. Feldman indicated that appellant had chronic lumbosacral sprain, status post-arthroscopic surgery x2 of the right knee and degenerative osteoarthritis of the right knee that were causally related to the work-related accident of December 9, 1989 and that they were permanent.

In a March 6, 1997 memorandum to the file, the Office indicated that appellant explained in a telephone conversation that he did respond to its January 28, 1997 letter by submitting additional evidence. The Office also indicated that it reviewed the medical evidence submitted by appellant and advised him that Dr. Yamokoski's medical opinion still constituted the weight of the medical opinion evidence. The Office then advised appellant to exercise his appeal rights.

The Office rendered its April 7, 1997 decision denying appellant's request for modification of its February 28, 1997 decision without allowing appellant the opportunity to accept the job offer after Dr. Feldman's medical report had been judged unacceptable. The Board finds that this procedure is inconsistent with the Federal (FECA) Procedure Manual, Chapter 2.814.5⁸ and therefore, the Office has not met its burden of proof in terminating appellant's compensation effective March 2, 1997.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

The April 7 and February 28, 1997 decisions of the Office of Workers' Compensation Programs are hereby reversed.

Dated, Washington, D.C.
May 19, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member