

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOANNE M. OSKAY and U.S. POSTAL SERVICE,
CALL CENTER, Miami, FL

*Docket No. 98-2231; Submitted on the Record;
Issued March 6, 2000*

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to establish that appellant neglected suitable work and therefore is barred from receipt of further benefits under 5 U.S.C. § 8106(c).

The Board finds that the Office properly invoked section 8106 to terminate appellant's compensation benefits for abandonment of suitable work.

Section 8106(c)(2) of the Federal Employees' Compensation Act provides in pertinent part, "a partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation."¹ However, to justify such termination, the Office must show that the work offered was suitable.² An employee who refuses or neglects to work after suitable work has been offered to her has the burden of showing that such refusal to work was justified.³

On September 13, 1991 appellant filed a claim for an injury to her right knee, right side and front and back rib area when she slipped and fell on a porch. The Office accepted the claim for lumbosacral strain, right knee strain and torn medial meniscus as a result of appellant's September 13, 1991 employment injury. Appellant's request for back surgery was authorized by the Office on October 31, 1994. Appellant underwent vocational rehabilitation and was intermittently disabled. The record indicates that appellant resided in Miami, Florida on the date

¹ 5 U.S.C. § 8106(c)(2).

² *David P. Camacho*, 40 ECAB 267, 275 (1988); *Harry P. Topping, Jr.*, 33 ECAB 341, 345 (1981).

³ *Carl N. Curts*, 45 ECAB 374 (1994); 20 C.F.R. § 10.124(c).

of the employment injury, but had relocated to Okeechobee, Florida from Sunrise, Florida by March 1995.⁴

Dr. Reed Stone, a second opinion Board-certified neurologist, in a report dated November 14, 1995, opined that appellant had reached maximum medical improvement and was capable of performing the position of modified carrier. In a work capacity evaluation dated December 6, 1995, Dr. Stone indicated that appellant was capable of working 4 hours per day with restrictions on kneeling, bending, excessive twisting, no lifting over 10 pounds, limited standing of 30 minutes at one time and no reaching over her head.

In a report dated December 20, 1995, Dr. Alfred O. Bonati, appellant's attending physician, indicated that appellant was capable of working provided there was no prolonged periods of sitting or standing, no heavy lifting, no pushing or pulling and no prolonged periods of driving. Dr. Bonati indicated that the position of modified carrier was consistent with appellant's restrictions.

By letter dated January 31, 1996, the Office noted that appellant had been offered the position of call center associate in a telephone conference that day. The Office advised appellant that the position was found to be suitable and that she had 30 days from the date of the letter to either accept the position or provide reasons for refusing the position.

By letter dated February 1, 1996, the employing establishment offered appellant the position of part-time flexible clerk (call center associate) working four hours per day initially and within the restrictions noted by Dr. Stone.

On February 20, 1996 appellant accepted the position under protest. Appellant returned to work on September 3, 1996, but left work on September 4, 1996, complaining of back pain.

Dr. Stone, in response to a request from the Office, opined in an April 5, 1996 letter that appellant was capable of driving 35 miles one way to Miami. However, Dr. Stone stated that appellant would not be able to drive to Miami from Okeechobee in her present condition and that her medical restrictions included that she not drive more than 45 to 60 minutes without a rest period.

Dr. Tagrid Adili, an attending physician, in his August 27, 1996 report, indicated that the position as call center associate would not be within the restrictions noted by Dr. Bonati which restricted appellant's driving to no more than 35 minutes. Dr. Adili indicated that appellant could not travel two and a half hours from her home in Okeechobee, Florida to Miami, Florida to go to work. In a report dated September 6, 1996, Dr. Adili reiterated his opinion that the offered position as a call center associate would exacerbate her symptoms. Dr. Adili stated that appellant "was barely able to drive 30 minutes to her sister's home in Miami, FL."

⁴ Appellant lived in Miami, Florida on the date of the employment injury, notified the Office in July 1993 that she relocated first to Captiva, Florida, then to Ft. Myers Beach, Florida, then to Plantation, Florida and in June 1994 to Sunrise, Florida.

The evidence of record establishes that appellant was issued a notice of proposed termination dated September 6, 1996.⁵ In the proposed notice, the Office informed appellant of its finding that she had abandoned suitable work and appellant was provided with the opportunity to justify her abandonment of work prior to the termination of her compensation benefits and implementation of 5 U.S.C. § 8106(c).

By letter dated November 22, 1996, the Office advised appellant that her reason for abandoning her position was unacceptable. In finding her reason unacceptable, the Office informed appellant that her argument that due to her relocation she is beyond the driving distance allowed by her physician was not justifiable as she had elected to move to an area 75 miles from her workplace.

By decision dated December 9, 1996, the Office terminated appellant's monetary compensation benefits on the grounds that appellant was terminated from employment for cause and, thus, abandoned suitable work under 5 U.S.C. § 8106. The Office advised appellant that she remained entitled to medical benefits for her work-related injuries.

Appellant requested a hearing and the hearing representative found that appellant had abandoned suitable employment and affirmed the Office's December 9, 1996 decision terminating benefits in a decision dated June 14, 1998. In reaching this decision, the hearing representative found the exacerbation of appellant's back pain was due to the length of time required to drive from her residence to her duty station and not the duties in her position. The hearing representative found, based upon the Office procedure manual, that when an employee voluntarily moves to an area with limited job opportunities that the area of residence at the time of injury would be considered for purposes of the job being offered or accepted.

In the present case, the Office has established that the offered position was suitable. Both Drs. Stone and Bonati indicated that appellant was capable of performing the modified carrier position. By letter dated January 31, 1996, the Office advised appellant that the position of modified clerk had been found suitable after the telephone conference of that day and review of the medical reports of Drs. Stone and Bonati. By letter dated February 1, 1996, the employing establishment offered appellant reemployment in a modified-duty position four hours per day. The Board finds that the Office properly concluded that the offered position was medically suitable.

Regarding appellant's contention that she properly abandoned the position of modified carrier as she was medically restricted from commuting from Okeechobee, Florida to her job in

⁵ Subsequent to the proposed notice of termination, appellant filed a claim for a recurrence of disability on September 4, 1996. On the reverse side of the form, the Office noted that appellant stopped work on September 4, 1996 and had not returned to her limited-duty position. The Office also noted that appellant had voluntarily left her job in Miami, Florida when she relocated to Okeechobee, Florida. In a decision dated November 22, 1996, the Office found the evidence insufficient to establish that appellant was totally disabled on or after September 4, 1996 due to her accepted September 13, 1991 employment injury. In a letter dated November 22, 1996, the Office also advised appellant that she had been issued a letter informing her that the offered position had been deemed suitable and gave her 30 days to advise why she had abandoned the position and that her recurrence claim cannot be accepted.

Miami, Florida, the Board notes that under the Office's procedures,⁶ as appellant was still on the employing establishment's rolls at the time she abandoned the suitable work, the only justifiable reasons for refusing the offered position were medical inability to perform the duties of the offered position, withdrawal of the offered position, or if she had already found other work fairly and reasonably representing her wage-earning capacity. While Drs. Stone, Bonati and Adili all indicate that she is unable to drive from Okeechobee to Miami, this pertains to appellant's choice of relocating to Okeechobee and not any inability to perform the duties of the position. As appellant chose to relocate to Okeechobee, any difficulty she may have had in driving to Miami is not dispositive to the suitability determination, as the commute would have been by her own choice. Drs. Stone and Bonati both opined that the duties of the modified carrier position were within her physical restrictions. In addition, Dr. Adili's opinion is insufficient to establish that the position was outside her restrictions as he refers to Dr. Bonati's report and seems to rely on the fact that appellant's driving more than 35 minutes made the offered position unacceptable. Thus, appellant has not submitted medical evidence indicating that she was incapable of performing the duties of the offered suitable work position of modified carrier. As appellant abandoned the offer of suitable work after one day, the Office properly terminated her compensation, but not her medical benefits.

The decision of the Office of Workers' Compensation Programs dated June 14, 1998 is affirmed.

Dated, Washington, D.C.
March 6, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁶ Federal (FECA) Procedure Manual, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.815(5)(a) (July 1997).