

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CHARLES W. RICHARD and U.S. POSTAL SERVICE,  
PITTSBURGH BULK MAIL CENTER, Wexford, PA

*Docket No. 00-390; Submitted on the Record;  
Issued May 23, 2000*

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DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's entitlement to wage-loss compensation on the grounds that he refused an offer of suitable work.

In the present case, the Office accepted that on August 31, 1977 appellant, then a 28-year-old regular clerk, sustained an employment-related left shoulder injury in the performance of duty. Appellant stopped work on that date and returned to work on October 7, 1977. The Office accepted appellant's claim for left shoulder dislocation and surgery and paid appropriate compensation benefits. Appellant continued to work, performing both regular and light duty, but missed intermittent periods since that time.

On December 23, 1997 appellant suffered a recurrence of disability, which was accepted by the Office on May 20, 1998. In a report dated January 16, 1998, appellant's treating physician, Dr. Jeffrey D. Lemberg, a Board-certified physiatrist, released appellant for light-duty work, with permanent restrictions on lifting or carrying more than 50 pounds above the chest level and no repetitive reaching above the eye level. Appellant returned to light duty on January 27, 1998. The Office found that the medical evidence, particularly that submitted by appellant's treating physician, Dr. Lemberg, supported appellant's continuing need for such light duty and, therefore, asked the employing establishment to submit a copy of appellant's light-duty job description, with physical requirements, so that the Office could determine whether the job was suitable employment.

In compliance with the Office's request, the employing establishment submitted a copy of the job description for Office review and also submitted a copy of the description and illustrative

photographs to Dr. Lemberg for his opinion as to appellant's ability to perform the job.<sup>1</sup> In a letter dated July 8, 1998, he stated that he had reviewed the basic functions, duties and responsibilities and physical requirements of the position, as well as photographs of the work station, and that he felt "confident" that the position was in compliance with the physical restrictions Dr. Lemberg had assigned to appellant and that appellant could perform the job.

On July 22, 1998 the Office advised appellant that the full-time distribution clerk position had been found to be suitable to his capabilities, had been approved by his physician and was currently available. Appellant was advised that he should accept the position or provide an explanation for refusing the position within 30 days. Finally, the Office informed appellant that if he failed to accept the offered position and failed to demonstrate that the failure was justified, his entitlement to further compensation would be jeopardized.

By letter dated August 21, 1998, appellant requested an extension of time for response, stating that he had some concerns about the position and had scheduled a meeting with the employing establishment to obtain additional information. Appellant did not submit any additional evidence at this time.

By letter dated August 25, 1998, the Office informed appellant that his reasons for failing to accept the position were not acceptable and that he had 15 days to accept the position.

By letter dated September 1, 1998, appellant refused the position. Appellant delineated his reasons for refusing the job offered and submitted additional factual and medical evidence. Appellant stated that he felt the offered position was not a rehabilitation assignment and would, in actuality if not on paper, require him to work outside of his restrictions and that he had not had an opportunity to discuss the position with Dr. Lemberg prior to the physician's approval of the job. Appellant submitted photographs of the work station to illustrate his arguments and to counter those pictures of the work station sent by the employing establishment to Dr. Lemberg for review. Appellant also submitted a letter from him, dated August 14, 1998, in which the physician stated that appellant had provided him with photographs of the position's work station

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<sup>1</sup> The position identified by the employing establishment is that of distribution clerk (rehabilitated). The duties and responsibilities are described as follows: "Checks zip codes on mail from chute (shown in attached photographs). Retrieves parcels which occasionally bounce out of chute or become jammed. Jammed parcels are freed with a boat hook or by notifying supervisor that assistance is needed. Removes mail from chute and places in sacks or ERM C mail container, or in-house container depending on size of article. Weight of filled sacks and height of mail stacked in containers is controlled by the employee. Parcels will generally not weigh more than 35 pounds, with an occasional parcel weighing up to 50 pounds. None need be lifted above chest level. Closes and pulls down filled sacks and places on in-house container for dispatch with parcels too large for sacks. Dispatches in-house container by pushing the container a few feet to engage the tow pin in the tow line, as shown in one of the attached photographs. Rehangs and labels empty sacks to begin the described process over again. All of the above activities, with the exception of retrieving jammed parcels with a boat hook, are illustrated in the attachments. Other, similar clerical duties within physical restrictions as assigned by supervisor." The physical requirements of the position are described as follows: "Lifting no more than 50 pounds; no lifting greater than 50 pounds to chest level. No overhead lifting required."

and had described the duties of the position as being far greater than the duties delineated in the job description earlier reviewed by him. Dr. Lemberg concluded:

“This clearly appears to be a dispute between employee and employer concerning this position and the only thing that I can state at this point is that he [i]s under certain restrictions and he [i]s not to return back to gainful employment at a job that exceeds those restrictions for fear of exacerbation of shoulder problems and/or further injury.”

After determining that the offered job remained available, by decision dated September 16, 1998, the Office terminated appellant’s entitlement to wage-loss compensation benefits finding that he refused an offer of suitable work. Appellant requested an oral hearing and submitted additional documentary evidence in support of his claim, primarily consisting of statements from coworkers who attested to the strenuous nature of the offered job. In a decision dated August 6, 1999, an Office hearing representative, having reviewed all of the additional evidence and arguments, affirmed the Office’s prior decision.

The Board finds that the Office properly terminated appellant’s compensation on the grounds that he refused an offer of suitable work.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits.<sup>2</sup> This includes cases in which the Office terminates compensation under section 8106(c)(2) of the Federal Employees’ Compensation Act for refusal to accept suitable work.<sup>3</sup>

Section 8106(c)(2)<sup>4</sup> of the Act provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee is not entitled to compensation. Section 10.124(e)<sup>5</sup> of the Office’s regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured 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.<sup>6</sup> To justify termination, the Office must show that the work offered was suitable,<sup>7</sup> and must inform appellant of the consequences of refusal to accept such employment.<sup>8</sup> According to Office procedures, certain explanations for refusing an offer of suitable work are considered acceptable.<sup>9</sup>

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<sup>2</sup> *Barbara R. Bryant*, 47 ECAB 715 (1996); *Arthur C. Reck*, 47 ECAB 339 (1996).

<sup>3</sup> *Id.*

<sup>4</sup> 5 U.S.C. § 8106(c)(2).

<sup>5</sup> 20 C.F.R. § 10.124(c).

<sup>6</sup> *Maggie L. Moore*, 42 ECAB 484, 488 (1991); *reaff’d on recon.*, 43 ECAB 818 (1992).

<sup>7</sup> *See Carl W. Putzier*, 37 ECAB 691 (1986); *Herbert R. Oldham*, 35 ECAB 339 (1983).

<sup>8</sup> *See Maggie L. Moore*, *supra* note 6; *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment*:

The Office properly terminated appellant's compensation benefits for neglecting to work after suitable work was procured for him. The employing establishment identified a distribution clerk position within the restrictions delineated by Dr. Lemberg and advised appellant of the offered position. The Office reviewed the position description and medical evidence and notified appellant of its determination by July 22, 1998 letter, stating that the offered position was within his capabilities. The Office further advised appellant that if he refused to accept the position his compensation could be terminated. After reviewing appellant's reasons for refusal and finding them unjustified, the Office allowed appellant an additional 15 days to accept the position.

Appellant asserted that the position of distribution clerk is far more strenuous than the description provided by the employing establishment to Dr. Lemberg for his review and approval. Appellant stated that he had performed this position in the past as a regular bid position and that it required both lifting over 70 pounds of weight above the chest level as well as repeated reaching above the eye or chest level. Appellant submitted photographs showing mailbags filled to capacity with letters and parcels and mail carts piled above chest level with additional mailbags and parcels. Appellant also submitted numerous statements from coworkers who supported his assertions. The job description provided by the employing establishment clearly states, however, that as the employee is responsible for filling the sacks and stacking them on the cart, both the weight of the sacks and the height they are stacked on the cart is controlled by the employee and that, therefore, the position did not require any lifting above the chest level or overhead reaching. In a supplemental letter dated September 15, 1998, the employing establishment reiterated that the employee himself controls the number of parcels loaded into each mailbag before it is sent on its way and further controls the height to which mail and parcels are placed on the wheeled mail carts. The employing establishment acknowledged that appellant's work area could be full of overloaded mailbags and high stacks of parcels left by the prior shift, such as those shown in appellant's photographs, but stated that should this occur, a supervisor would provide the necessary help to clean up the area and from that point in, appellant would again have complete control of the work area and could limit his work to within his restrictions. The employing establishment added that should appellant encounter a parcel he suspected of being outside his lifting restriction, he could again request assistance from the supervisor, rather than trying to lift the parcel himself. Therefore, the Board finds that the position is within the restrictions delineated by appellant's treating physician, Dr. Lemberg. In addition, he himself reviewed the duties as described by the Office and stated that he was confident that appellant could perform these duties.

As the medical evidence indicates that the position offered is consistent with appellant's physical limitations and there is no evidence in the record that the duties of the described position are inconsistent with those reviewed and approved by Dr. Lemberg, appellant's refusal

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*Determining Wage-Earning Capacity*, Chapter 2.814.5(d)(1) (July 1996).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(1)-(5) (July 1996).

of the job offer cannot be deemed reasonable or justified and the Office properly terminated appellant's entitlement to wage-loss compensation.

The decision of the Office of Workers' Compensation Programs dated August 6, 1999 is hereby affirmed.

Dated, Washington, D.C.  
May 23, 2000

David S. Gerson  
Member

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member