

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DEBORAH TONETTI and U.S. POSTAL SERVICE,  
POST OFFICE, Manasquan, NJ

*Docket No. 02-498; Submitted on the Record;  
Issued July 29, 2002*

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DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective January 3, 2001, because she refused an offer of suitable work pursuant to section 8106 of the Federal Employees' Compensation Act.<sup>1</sup>

On January 8, 1999 appellant, then a 43-year-old carrier, filed a claim alleging that on December 17, 1998 she slipped and fell while delivering the mail. She eventually stopped work on April 2, 1999 and the Office accepted the claim for a left shoulder sprain. Appellant underwent surgery on April 2 and August 27, 1999 and the Office accepted a left rotator cuff tear.

On November 30, 1999 Dr. Clint C. Ferez, a Board-certified orthopedic surgeon and appellant's treating physician, stated that she was making "slow progress" with her left shoulder and was likely to have permanent deficits in overhead motion and lifting capacity. On February 8, 2000 he stated that appellant had residual deficits in her left shoulder, which precluded her from carrying a mailbag. Appellant would be able to return to light duty but should avoid use of her left arm.

The Office referred appellant for vocational rehabilitation and the employing establishment offered a limited-duty position, which was later revised to reflect the physical limitations imposed by Dr. Ferez after he reviewed an April 3, 2000 functional capacity evaluation.<sup>2</sup> The position's duties were described as casing mail with the right hand; a clerk or supervisor would place the mail in front of appellant. The requirements limited reaching above

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> The report stated that appellant "demonstrated significant submaximum effort" in a "conscious" attempt to portray work ability below actual ability and the results were "compatible with a strong symptom magnification."

the shoulder and repetitive movements of the wrists and left elbow with no pushing, pulling, lifting or climbing with the left arm.

On June 12, 2000 the Office informed appellant that the position had been found to be suitable and that she had 30 days to accept the job or provide her reasons for refusing. On July 6, 2000 appellant accepted the offer<sup>3</sup> and the Office reduced her compensation to zero effective July 17, 2000. She failed to report to work, but the Office rescinded its reduction of compensation and the employing establishment revised the job offer to reflect full-time work, which was approved by Dr. Ferenz.

On November 14, 2000 appellant accepted the revised job offer and reported to work on November 18, 2000. Shortly thereafter, she submitted a letter of resignation and went home “for medical reasons.”

On November 29, 2000 the Office issued a notice of proposed termination of compensation on the grounds that appellant had refused an offer of suitable work. She objected on the grounds that she had not refused to work but had returned to work and attempted to do the job. On January 3, 2001 the Office terminated appellant’s compensation on the grounds that she had failed to provide valid reasons for abandoning the offered position.

Appellant requested a hearing, which was held on June 12, 2001. By decision dated August 16, 2001, the hearing representative found that appellant was capable of working in the offered position and that she failed to establish that she made a good-faith effort to perform the duties of the medically suitable job.

The Board finds that the Office met its burden of proof in terminating appellant’s compensation because she refused an offer of suitable work.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation, including cases in which the Office terminates compensation under section 8106(c) for refusal to accept suitable work.<sup>4</sup>

Under section 8106(c)(2) of the Act,<sup>5</sup> the Office may terminate compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.<sup>6</sup> However, to justify such termination, the Office must show that the

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<sup>3</sup> The document appellant signed showed her workday to be four hours.

<sup>4</sup> 5 U.S.C. § 8106(c); *Henry W. Sheperd, III*, 48 ECAB 382, 385 (1997); *Shirley B. Livingston*, 42 ECAB 855, 861 (1991).

<sup>5</sup> 5 U.S.C. § 8106(c)(2).

<sup>6</sup> *Martha A. McConnell*, 50 ECAB 129, 131 (1998).

work offered was suitable<sup>7</sup> and must inform the employee of the consequences of a refusal to accept employment deemed suitable.<sup>8</sup>

Once the Office establishes that the work offered was suitable, the burden of proof shifts to the employee who refuses to work to show that such refusal was reasonable or justified.<sup>9</sup> An employee who returns to work but then abandons such employment must prove through reliable medical evidence that she is unable to continue working because of a work-related disability.<sup>10</sup> The issue of whether an employee has the physical ability to perform the duties of the position offered is a medical question that must be resolved by medical evidence.<sup>11</sup>

The limited-duty offer was revised several times to ensure that the physical limitations involving appellant's left upper extremity were met. Dr. Ferenz stated that on October 10, 2000 he had reviewed the job description, which was "essentially sedentary" and involved "very limited overhead use" of appellant's left arm and shoulder. He concluded that appellant was "able to function" on this job for an eight-hour day.

On June 12 and November 29, 2000 the Office complied with the procedural requirements by advising appellant that the position offered was suitable, that the job remained available to her, that the penalty for refusing the offered position was termination of compensation and that she had 30 days to accept the position or explain her refusal. Appellant twice accepted the position offered and worked one day on November 18, 2000. After resigning for medical reasons, she failed to provide any medical evidence showing that she was unable to perform the duties of the offered position.<sup>12</sup>

Appellant's attorney argued on appeal that the limited-duty job was beyond Dr. Ferenz' limitations because appellant testified that while casing mail she had to stand constantly and use her left arm to hold magazines and catalogs. Therefore, the job was not sedentary and contravened Dr. Ferenz' prohibition against use of appellant's left arm. She has provided no evidence that the employing establishment compelled her to use her left arm. The job description stated that the mail would be placed in front of her on a table for her to case. Appellant testified that she could case mail using her right arm only and that a stool was available for her to sit.

Dr. Ferenz' opinion establishes that appellant is capable of performing the duties of the offered position and the record establishes that the Office followed the requisite procedures in

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<sup>7</sup> *Marie Fryer*, 50 ECAB 190, 191 (1998).

<sup>8</sup> *Ronald M. Jones*, 48 ECAB 600, 602 (1997).

<sup>9</sup> *Deborah Hancock*, 49 ECAB 606, 608 (1998).

<sup>10</sup> *Robert M. O'Donnell*, 48 ECAB (1997).

<sup>11</sup> *Marilyn D. Polk*, 44 ECAB 673, 680 (1993).

<sup>12</sup> The Office referred appellant to Dr. Andrew B. Weiss, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated October 11, 2000, he concluded that appellant could return to her preinjury job as a mail carrier.

determining that the job offer represented suitable work. Therefore, the Board finds that the Office properly terminated appellant's wage-loss compensation.<sup>13</sup>

The August 16, 2001 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC  
July 29, 2002

Alec J. Koromilas  
Member

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>13</sup> See *Linda Blue*, 50 ECAB 227, 228 (1999) (finding that the Office properly terminated appellant's compensation after she refused to return to work despite her treating physician's opinion that she could use her left hand for data-entry duties in a limited-duty position).