

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JEANNE M. HOROWITZ and U.S. POSTAL SERVICE,  
POST OFFICE, South Fallsburg, NY

*Docket No. 02-2080; Submitted on the Record;  
Issued July 18, 2003*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation pursuant to 5 U.S.C. § 8106(c)(2) on the grounds that she refused suitable work.

On December 27, 1999 appellant, then a 45-year-old distribution/window clerk, filed an occupational disease claim alleging that she developed bilateral carpal tunnel syndrome due to the repetitive motion activities required in her job. The Office accepted her claim for bilateral carpal tunnel syndrome sustained on July 1, 1999.<sup>1</sup> Effective September 30, 2000 appellant was placed on the periodic compensation rolls for temporary total disability.

On January 26, 2001 the employing establishment offered appellant a position as a modified distribution/window clerk with duties that included answering the telephone, processing changes of address, verifying addresses and filing. The position did not require reaching above shoulder level, lifting over 10 pounds or repetitive motion and it involved minimal writing. Dr. James R. Miller, appellant's attending physician, indicated on January 23, 2001 that he had reviewed the position description and found it to be in compliance with appellant's medical restrictions.

In notes dated January 29 and May 21, 2001, Dr. Miller indicated that appellant's bilateral carpal tunnel syndrome symptoms had improved following surgery but that she had neck and back pain for which she was seeing a neurologist.

Appellant rejected the employing establishment's job offer on January 31, 2001, stating that she had neck and back pain.<sup>2</sup> She indicated that she had not yet undergone rehabilitation

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<sup>1</sup> Appellant underwent surgery on her hands on August 23 and November 28, 2000.

<sup>2</sup> The record shows that appellant sustained a work-related left shoulder and cervical strain on May 23, 1989 that is the subject of a separate claim.

treatment for her spinal condition prescribed by her attending neurologist and he had not evaluated her work capacity.

By letter dated March 1, 2001, the Office advised appellant that the position of modified distribution/window clerk was suitable as it was within appellant's commuting area and was consistent with her medical restrictions. The Office advised appellant that the job remained open and she had 30 days to either accept the position or provide a reasonable explanation for refusing the offer. She was advised that her compensation would be terminated if she refused the job offer without reasonable cause.

By letter dated March 26, 2001, appellant's attorney advised the Office that appellant would not accept the position offered by the employing establishment because of medical reasons. He advised that medical evidence would be forthcoming.<sup>3</sup>

On April 19, 2001 the Office advised appellant that the position offered to appellant was consistent with the medical restrictions contained in the medical evidence of record and no contrary medical evidence had been submitted by appellant. The Office advised appellant that her compensation would be terminated within 15 days if she refused the job offer or failed to report for duty. Appellant was advised that her entitlement to medical benefits remained.

By decision dated May 25, 2001, the Office terminated appellant's compensation effective that date on the grounds that she refused an offer of suitable work.<sup>4</sup> The Office noted that appellant refused the position because of her neck and back pain but stated, "[t]his case was not accepted for a spinal condition as arising from the work injury of July 1, 1999."

Appellant requested reconsideration. By decision dated June 28, 2002, the Office denied modification of its May 25, 2001 decision.

The Board finds that the Office did not meet its burden of proof in terminating appellant's compensation.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>5</sup> As the Office in this case terminated appellant's compensation under section 8106(c) of the Act, the Office must establish that appellant refused an offer of suitable work. Section 8106(c)(2) 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."<sup>6</sup> Section 10.517(a) of the applicable regulations<sup>7</sup>

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<sup>3</sup> The attorney also indicated that the Office's proposed termination of compensation was "procedurally improper pursuant to the Federal Employees' Compensation Act" but did not explain.

<sup>4</sup> This record contains additional evidence submitted subsequent to the Office's June 28, 2002 decision. However, the Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. See 20 C.F.R. § 501.2(c).

<sup>5</sup> *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

<sup>6</sup> 5 U.S.C. § 8106(c)(2).

<sup>7</sup> 20 C.F.R. § 10.517(a).

provides that an employee who refuses or neglects to work after suitable work has been offered or secured by the employee, has the burden of showing that such refusal or failure to work was reasonable or justified and, pursuant to section 10.516, shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation. To justify termination of compensation, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.<sup>8</sup>

The Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.<sup>9</sup> In this case, the record shows that appellant had a preexisting work-related cervical strain and left shoulder strain. Dr. Miller, appellant's attending physician, indicated with a check mark that the position description from the employing establishment was in compliance with her medical restrictions. However, there is no indication that he had considered appellant's preexisting cervical and left shoulder strains in determining that the position offered by the employing establishment was suitable, in addition to the carpal tunnel condition for which he had treated her.<sup>10</sup> In notes dated January 29 and May 21, 2001, Dr. Miller indicated that appellant's bilateral carpal tunnel syndrome symptoms had improved following surgery but noted that she had neck and back pain for which she was seeing a neurologist. In its May 25, 2001 decision, the Office rejected appellant's neck and back pain as acceptable reasons for refusing the job offer, stating that these conditions were not part of the accepted July 1, 1999 employment injury. However, as noted above, the Office must consider preexisting conditions in its determination of the suitability of a position. In this case, that would include consideration of appellant's preexisting cervical and left shoulder conditions. As it is not clear from the evidence of record that the position offered by the employing establishment was suitable in terms of appellant's preexisting cervical and left shoulder strains, the Office did not meet its burden of proof in terminating her compensation.

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<sup>8</sup> *Arthur C. Reck*, 47 ECAB 339, 341-42 (1995).

<sup>9</sup> *Gayle Harris*, 52 ECAB 319 (2001).

<sup>10</sup> It appears that Dr. Miller treated appellant only for her carpal tunnel condition.

The decision of the Office of Workers' Compensation Programs dated June 28, 2002 is reversed.

Dated, Washington, DC  
July 18, 2003

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member