

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JUAN A. DEJESUS and U.S. POSTAL SERVICE,
POST OFFICE, El Paso, TX

*Docket No. 03-1307; Submitted on the Record;
Issued July 16, 2003*

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly made a retroactive determination that appellant's light-duty position from November 12, 1996 to January 30, 1997 represented his wage-earning capacity; and (2) whether the Office properly determined that appellant abandoned suitable work.

There are two relevant claims in this case that have been administratively combined. On December 6, 1994 appellant, then a 37-year-old letter carrier, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1), alleging that on that date he felt a sharp persistent pain in his neck and shoulder. The Office accepted the claim for cervical strain, bilateral shoulder strain and right carpal tunnel syndrome. Appellant returned to a light-duty position. Effective November 2, 1996, he was offered a light-duty position at a different work site. Appellant asserted that the position was outside his work restrictions and he was offered a light-duty position at his former workstation as of November 12, 1996. He worked in the position until January 30, 1997, he did not return to work and his retirement was effective August 31, 1998.

On July 23, 1997 appellant filed a notice of occupational disease and claim for compensation (Form CA-2), for a post-traumatic sleeping disorder, right hand sympathetic dystrophy and cervical sprain, as a result of his work activities during the first week in November 1996. This claim was before the Board on a prior appeal. By decision dated November 14, 2000, the Board remanded the case for further development of the medical evidence as to whether appellant had sustained an injury causally related to factors of his federal employment.¹

After further development of the evidence, the Office accepted degenerative disc disease of the neck. On September 27, 2002 appellant filed a claim for compensation (Form CA-7),

¹ Docket No. 00-44.

commencing January 30, 1997, the date he stopped working. He submitted a medical report from Dr. Joseph Neustein, an orthopedic surgeon, indicating that he was totally disabled from January 30, 1997.

By decision dated April 4, 2003, the Office determined that appellant's light-duty job, held from approximately November 12, 1996 to January 30, 1997, represented his wage-earning capacity. The Office determined that the actual earnings met or exceeded the date of injury and, therefore, appellant had no loss of wage-earning capacity as of November 12, 1996.

By separate decision dated April 4, 2003, the Office determined that appellant had neglected suitable work under 5 U.S.C. § 8106(c).

The Board finds that the Office improperly determined that appellant's light-duty position fairly and reasonably represented his wage-earning capacity.

There are situations, when a retroactive wage-earning capacity determination may be appropriate. The Office's procedure manual provides that a retroactive determination may be made where the claimant worked in the position for at least 60 days, the employment fairly and reasonably represents wage-earning capacity and the work stoppage did not occur because of any change in the claimant's injury-related condition affecting his ability to work.² In this case, appellant has filed a claim for compensation as of the date he stopped working and is alleging that he was totally disabled from January 30, 1997 as a result of an employment-related condition. He is, therefore, alleging that the work stoppage did occur as a result of a change in his employment-related condition. As the Board indicated in *William M. Bailey*, it is inappropriate to issue a retroactive wage-earning capacity determination, when there is a pending claim for compensation from the time of the work stoppage.³ The Board notes that the procedure manual directs the claims examiner to request information from the claimant regarding the work stoppage and develop the record appropriately.⁴ In the present case the Office should have adjudicated the claim for compensation as of January 30, 1997 based on the relevant medical evidence, rather than issue a retroactive wage-earning capacity determination.

The Board further finds that the Office improperly determined that appellant had neglected suitable work.

Section 8106(c) 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." It is the Office's burden to terminate compensation under section 8106(c) for refusing to accept

² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.7(e) (May 1997); *see also Elbert Hicks*, 49 ECAB 283 (1998).

³ *William M. Bailey*, 51 ECAB 197 (1999) (appellant had filed a claim for recurrence of disability prior to the wage-earning capacity determination).

⁴ If the reasons for the work stoppage constitute an argument for a recurrence of disability, appropriate development and evaluation of the medical evidence will be undertaken. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.9(b) (December 1995).

suitable work or neglecting to perform suitable work.⁵ To justify such a termination, the Office must show that the work offered was suitable.⁶ An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.⁷

It is well established that there are procedural requirements that are attached to the provisions of section 8106(c). Essential due process principles require that a claimant have notice and an opportunity to respond prior to termination under section 8106(c).⁸ These requirements apply to both refusal of suitable work determinations and to abandonment of suitable work determinations.⁹ The record contains no evidence that the Office followed any of the established procedures prior to the April 4, 2003 decision. Appellant was not provided notice or an opportunity to respond with respect to a determination that he neglected suitable work.¹⁰

The Board accordingly finds that the Office did not meet its burden of proof to terminate compensation pursuant to section 8106(c). The case will be remanded to the Office for proper adjudication of appellant's claim for compensation commencing January 30, 1997.

⁵ *Henry P. Gilmore*, 46 ECAB 709 (1995).

⁶ *John E. Lemker*, 45 ECAB 258 (1993).

⁷ *Catherine G. Hammond*, 41 ECAB 375, 385 (1990); 20 C.F.R. § 10.517(a).

⁸ *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

⁹ *See Mary A. Howard*, 45 ECAB 646 (1994).

¹⁰ *See William M. Bailey*, *supra* note 3 (in addition to finding that the Office had failed to follow the procedural requirements of section 8106(c), the Board again noted that the case should have been developed as a recurrence of disability claim).

The decisions of the Office of Workers' Compensation Programs dated April 4, 2003 are reversed.

Dated, Washington, DC
July 16, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member