

**United States Department of Labor
Employees' Compensation Appeals Board**

DAWN L. WESTMORELAND, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Santa Rosa, CA, Employer**

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**Docket No. 05-167
Issued: April 12, 2005**

Appearances:
Valerie Schropp, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On October 20, 2004 appellant filed a timely appeal from the January 27 and July 21, 2004 merit decisions of the Office of Workers' Compensation Programs, which denied modification of an earlier decision to terminate her compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the termination issue.

ISSUE

The issue is whether the Office properly terminated appellant's compensation under 5 U.S.C. § 8106(c) for refusing or neglecting suitable work.

FACTUAL HISTORY

On April 18, 1984 appellant, then a 34-year-old letter sorting machine clerk, filed a claim alleging that her wrist and arm disorder was a result of her federal employment. The Office accepted her claim for bilateral carpal tunnel syndrome and myofascitis of the left neck and shoulder. She received compensation for temporary total disability.

On March 15, 2002 appellant's physician, Dr. Andrew Davidson, a specialist in medical acupuncture and family medicine, supported a recurrence of disability beginning November 26, 2001. On April 16, 2002 Dr. Jerrold M. Sherman, an orthopedic surgeon and Office referral physician, found that appellant had no period of total disability due to work-related conditions and was able to do full work without restrictions eight hours a day, though he limited her to four hours of repetitive wrist movement. The Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. Alan Kimelman, an orthopedic surgeon, to resolve the conflict.¹

On August 27, 2002 Dr. Kimelman reported that appellant continued to experience residuals of her employment injury, albeit to a lesser degree. He stated that the period of temporary total disability reported by Dr. Davidson was reasonable and he offered his opinion on the nature and extent of appellant's disability for work and states:

"I do not agree with Dr. Davidson that [appellant] is limited to four hours of work per day, but feel that she is able to work at eight hours per day. I do agree with Dr. Davidson that [she] requires the freedom to move more freely. I feel that she requires the freedom of movement to rotate her neck and trunk at no more than an occasional frequency and the need to reach with her left arm at no more than an occasional frequency. I agree with Dr. Sherman that repetitive wrist movements are to be limited to no more than four hours a day."

On December 17, 2002 the employing establishment offered appellant a limited-duty assignment as a data conversion operator working eight hours a day.² Appellant, who was at that time working six hours a day in the NIXE unit, accepted the offer on December 18, 2002. The record indicates that she worked six hours a day in the new position and took leave without pay (LWOP) for the other two.³

On February 13, 2003 the Office notified appellant that the offered position was suitable and remained available. The Office advised that she had 30 days to accept the position or provide an explanation for refusing it. The Office informed her of the penalty for refusing or neglecting suitable work under 5 U.S.C. § 8106(c)(2). Having received "no reasons for refusing this position from you or your physician," the Office notified appellant on April 2, 2003 that she had an additional 15 days to accept the position without penalty.

¹ The Office's Medical Conflict Statement described the nature of the conflict: "There is a conflict in the medical evidence in the claim as noted below: The treating physician supports continued residuals of this March 28, 1984 work-related condition and supports a recurrence of total disability from November 26, 2001 to March 1, 2002. The second opinion examiner supports no residuals of the March 28, 1984 work-related condition. He released the claimant to work with no period of total disability from work to support recurrent disability on November 26, 2001."

² Appellant would be required to read addresses into a headset microphone as individual pieces of mail were displayed on a computer screen. She would be able to sit or stand as needed for comfort. She would receive a 5-minute break every hour and a 30-minute lunch. The offer stated that the job required no use of the upper extremities.

³ She covered some absences by taking eight hours of annual leave or six hours of annual leave with two hours of LWOP.

The Office received a March 27, 2003 report from Dr. Davidson, who reported a change in appellant's status "due to her diminished function secondary to increased pain stemming from her job activities." Dr. Davidson explained:

"As you know over the last six months [appellant] has been employed in a section of the post office wherein she sits in front of a computer screen entering and logging zip codes and addresses of mail through a voice activated software system. It does not involve keyboard entry. However, the job does require that she maintain a fixed position of her head, neck and shoulders at all times in order to accomplish the task. This restriction and limitation of motion has caused a gradual and increasing exacerbation of her documented cervicothoracic pain. She has in the last month or two been required to miss some periods of work because of the severity of the pain. She has also increased the intake of her pain medication.

"It is not surprising that [she] has experienced an increase in her pain and a decrease in her functionality. It certainly goes along with the findings of Dr. Allen Kimelman, [who] found in his report that [she] would be able to work at 8 hours per day at the job station that she had back in August 2002 at the time of her interview with Dr. Kimelman. Her job at that time involved working in the NIXE unit, which as you know involves the repair of mail wherein the worker proceeds at their own pace with frequent breaks for stretching and with highly individualized restrictions on what kinds of motions they can and cannot do. Dr. Kimelman's restrictions of motion at that time were that [appellant] continued to work in the NIXE unit and that she is able to move her neck and body more freely with less restriction in her body movements.

"While Dr. Kimelman's assessment of her restrictions may have been appropriate for when she was working in the NIXE unit, I believe that they did not in the end result in adequately protecting [her] in her new job description of working in front of the computer screen."

Dr. Davidson stated that he did not believe appellant would be able to work eight or even six hours, as she was currently doing, without experiencing a worsening of her pain syndrome. He recommended a return to the NIXE unit, where she could work more at her own pace and with freedom of movement, as recommended by Dr. Kimelman.

In a decision dated April 30, 2003, the Office terminated appellant's compensation under 5 U.S.C. § 8106(c) "as the claimant has refused suitable work." The Office noted that appellant accepted the job offer on December 18, 2002, but "she did not return to full-time work and continued to work [six] hours a day."

In a decision dated January 27, 2004, the Office reviewed the merits of appellant's case and denied modification of its prior decision: "You were advised of the provisions of sect[ion] 8106(c) but continued working [six] hours a day, essentially neglecting the other two hours."

In a decision dated July 21, 2004, the Office again reviewed the merits of appellant's case and denied modification of its prior decision: "The fact that the claimant was placed in a leave or nonleave status for the two hours is irrelevant. The claimant was provided with an eight[-]hour job offer and on her own accord neglected to work the eight hours without medical justification."

LEGAL PRECEDENT

Section 8106(c)(2) of the Federal Employees' Compensation Act states that a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or secured for her is not entitled to compensation.⁴ The Office has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects suitable work. Once the Office accepts a claim, however, it has the burden of proof to justify termination or modification of compensation benefits.⁵

ANALYSIS

The Office terminated appellant's compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, because she worked in the offered position for only six hours a day and took LWOP, "essentially neglecting the other two hours." According to the U.S. Postal Service's *Employee and Labor Management Manual*, Issue 17.9, Chapter 5 -- Employee Benefits, *Leave Without Pay*, subchapter 514 (January 20, 2005), LWOP is an authorized absence from duty in a nonpay status. It may be granted upon the employee's request and covers only those hours that the employee would normally work or for which the employee would normally be paid. LWOP is different from absent without leave, which is a nonpay status due to a determination that no kind of leave can be granted either because the employee did not obtain advance authorization or the employee's request for leave was denied. Each request for LWOP is examined closely and a decision is made based on the needs of the employee, the needs of the Postal Service and the cost to the Postal Service. The granting of LWOP is a matter of administrative discretion and is not granted on the employee's demand except in certain situations.

In this case, the official day-by-day breakdown of hours shows that after appellant accepted the job offer and returned to work as a data conversion operator on December 18, 2002 the employing establishment routinely granted LWOP for two hours a day. In other words, the employing establishment closely examined appellant's requests for LWOP and, taking various factors into consideration, authorized her absence from duty. The Office found that appellant's leave status was irrelevant, but the Board disagrees: Where the employing establishment authorizes a claimant's absence from duty, there is no basis for finding neglect of suitable work under 5 U.S.C. § 8106(c)(2). Indeed, the Board can no more find neglect in this case than if the employing establishment had authorized the use of annual leave to cover the absences in question.

⁴ 5 U.S.C. § 8106(c)(2).

⁵ *Harold S. McGough*, 36 ECAB 332 (1984).

As the evidence fails to support the Office's application of 5 U.S.C. § 8106(c)(2), the Board will reverse the Office's January 27 and July 21, 2004 decisions denying modification of the termination of appellant's compensation. The Board notes that following the termination of her compensation, the Office advised appellant that it could not process any CA-7 forms because she was sanctioned from monetary benefits. On remand, therefore, and after such further development as may be necessary, the Office shall issue an appropriate final decision on any outstanding claims for compensation.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to justify the termination of appellant's compensation under 5 U.S.C. § 8106(c)(2). The evidence does not support the Office's finding that appellant neglected suitable work where the employing establishment authorized her absence from duty.

ORDER

IT IS HEREBY ORDERED THAT the July 21 and January 27, 2004 decisions of the Office of Workers' Compensation Programs are reversed. The case is remanded for further action consistent with this opinion.

Issued: April 12, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member