

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ANNETTE QUIMBY and U.S. POSTAL SERVICE,  
POST OFFICE, Portsmouth, N.H.

*Docket No. 97-317; Oral Argument Held November 14, 1997;  
Issued January 30, 1998*

Appearances: *Francis X. Quinn, Jr., Esq.*, for appellant; *Paul J. Klingenberg, Esq.*,  
for the Director, Office of Workers' Compensation Programs.

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DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation on the grounds that she refused an offer of suitable work.

In the present case, appellant filed a claim on October 31, 1991 alleging that she sustained a cubital tunnel syndrome in the right arm causally related to factors of her federal employment. The Office accepted the claim for a cubital tunnel syndrome and appellant returned to a light-duty position. An attending physician, Dr. Robert L. Swiggett, Jr., an orthopedic surgeon, indicated in a treatment note dated November 21, 1994 that appellant had tried to return to her letter sorter duties, but had a recurrence of symptoms. Dr. Swiggett indicated that appellant needed to work in a position with no repetitive flexion and extension of the elbows and wrists.

The employing establishment advised appellant by letter dated March 14, 1995 that it could no longer provide a light-duty position within her restrictions.<sup>1</sup> On March 22, 1995 the employing establishment offered appellant a position as a modified clerk. The Office stated in the offer letter that the offered position was based on examination by Dr. Swiggett on November 21, 1994 and "the conversation between the Plant Manager, Dave Kenyon and your doctor."

In a letter dated June 16, 1995, the Office advised appellant that it considered the offered position to be suitable. Appellant was allotted 30 days to accept the position or provide reasons for refusing the position. In a letter dated July 11, 1995, appellant stated that Dr. John Bartley,

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<sup>1</sup> The record indicates that appellant did work in a per diem position after March 14, 1995 at another employing establishment facility.

in a fitness-for-duty examination, had required referral to a specialist and appellant requested that a second opinion examination be scheduled. By letter dated July 24, 1995, the Office responded that the position offered was based on the recommendations of Dr. Swiggett and was found to be suitable. Appellant was advised that she had 15 days to accept the position or her benefits would be terminated.

By decision dated September 14, 1995, the Office terminated appellant's compensation as of that date on the grounds that she had refused an offer of suitable work. An Office hearing representative affirmed this decision on July 18, 1996.

The Board has reviewed the record and finds that the Office did not properly terminate appellant's compensation.

Section 8106(c)(2) of the Federal Employees' Compensation Act 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."<sup>2</sup> However, to justify such termination, the Office must show that the work offered was suitable.<sup>3</sup> 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.<sup>4</sup>

In the present case, the Director asserts that the medical evidence was sufficient to establish that the offered position was within appellant's physical restrictions. The Board finds, however, that the medical evidence is not of sufficient probative value on the issue presented to establish that the offered position was medically suitable.

Dr. Swiggett provided a November 21, 1994 form report (OWCP 5c) outlining appellant's physical restrictions. He indicated that appellant should limit flexion and extension of elbows and wrists to no more than 10 minutes per hour. The modified clerk position offer states that repetitive flexion and extension will be limited, although it is not clear from the brief description of the job duties which of the duties did not involve flexion and extension. Office procedures require that if the medical evidence is not "clear and unequivocal," the Office should seek medical advice from the attending physician or an Office medical adviser.<sup>5</sup> It is not clear from the record whether the March 22, 1995 offer letter was actually sent to Dr. Swiggett. In a June 28, 1995 treatment note Dr. Swiggett states, "My interpretation of the offered job appears such that given the restrictions that the [employing establishment] appears to be proposing, that it [i]s my opinion that she should be able to perform the duty." The Board is unable to accord significant probative value to this statement because it is not clear what Dr. Swiggett understood with respect to the offered position. There is reference in the offer letter to a conversation between Dr. Swiggett and a plant manager, the nature of which is not apparent from the record.

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<sup>2</sup> 5 U.S.C. § 8106(c)(2).

<sup>3</sup> *Harry B. Topping, Jr.*, 41 ECAB 375, 385 (1990); *David P. Camacho*, 40 ECAB 267, 275 (1988).

<sup>4</sup> *Carl N. Curts*, 45 ECAB 374 (1994); 20 C.F.R. § 10.124(c).

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.8(d) (December 1995).

Since the Board is unable to determine what Dr. Swiggett's interpretation of the offered job was, his June 28, 1995 opinion is not sufficient to establish that the offered position was suitable.

The Board also notes that appellant was examined by Dr. Bartley in a fitness-for-duty examination. In his March 22, 1995 form report, Dr. Bartley checks a box for "specialist exam[ination] required" and he also checked a box stating that claimant "would be medically qualified to perform essential function of position only if below noted limitations/restrictions can be accommodated." The specific limitations listed were limiting wrist and elbow flexion to 10 minutes per hour and a second opinion. The report also contains handwritten notes indicating that appellant needed diagnostic tests such as a magnetic resonance imaging scan and an electromyogram, and referral to an orthopedic surgeon. Dr. Bartley therefore does not provide an opinion that appellant can perform the offered position, but rather his report supports the need for additional medical evidence.

The burden of proof is, as noted above, on the Office to establish that the offered position was suitable. The Board finds that the medical evidence is not sufficient to establish that the offered position was suitable in this case. Since the position offered is not found to be suitable, appellant's compensation cannot be terminated under 5 U.S.C. § 8106(c) on the grounds that she refused suitable work.

The decision of the Office of Workers' Compensation Programs dated July 18, 1996 is reversed.

Dated, Washington, D.C.  
January 28, 1998

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member