U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KAREN BORDOK and U.S. POSTAL SERVICE,
POST OFFICE, Houma, La.

Docket No. 96-891; Submitted on the Record;
Issued May 27, 1998

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 on the grounds that she had refused an offer of suitable work.

On August 9, 1991 appellant, a substitute carrier, filed a claim alleging that she sustained injuries in a motor vehicle accident in the performance of duty on August 8, 1991. The Office accepted the claim for lumbar and cervical strains. Appellant returned to a light-duty position at eight hours per week on November 6, 1993.[1] On June 24, 1994, the employing establishment offered appellant a light-duty position at 20 hours per week; the job offer indicated that it was sedentary work with no lifting above 20 pounds. Appellant rejected the job offer on July 14, 1994, stating that she was physically unable to perform the offered job.

In a letter dated August 2, 1994, the Office advised appellant that the offered job was suitable, and she had 30 days to accept the position or provide reasons for refusing the offer. In a letter dated August 19, 1994, appellant again indicated that she was physically unable to perform the position. By letter dated November 23, 1994, the Office advised appellant that the stated reasons for refusing the position were unacceptable, and she was given an additional 15 days to accept the position.

By decision dated December 7, 1994, the Office terminated appellant's compensation on the grounds that she had refused an offer of suitable work. In a decision dated October 26, 1995, an Office hearing representative affirmed the termination decision.

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

[1] She stopped working on December 8, 1993 and returned to work on January 3, 1994.

5 U.S.C. § 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 suitable work or neglecting to perform suitable work.[2] To justify such a termination, the Office must show that the work offered was suitable.[3] 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.[4]

The initial question presented in a refusal of suitable work case is whether the Office has established that the offered position was suitable. The job offered to appellant in this case required lifting of up to 20 pounds. The medical record, however, is not clear on the extent of appellant's lifting restrictions. A treating physician, Dr. Edna Doyle, a specialist in physical medicine and rehabilitation, indicated in a report (Form OWCP-5) dated April 5, 1994 that appellant was capable of lifting 10 to 20 pounds frequently. A second opinion referral physician, Dr. Gordon Nutik, an orthopedic surgeon, also completed a report (Form OWCP-5c) on April 5, 1994, but he indicated that appellant was able to lift 5 pounds frequently, and 10 pounds occasionally. Since the offered position required lifting of up to 20 pounds, it is important to clarify the extent of appellant's lifting restrictions. The Office did send Dr. Nutik's narrative report to Dr. Doyle, but the Office only asked Dr. Doyle to comment on appellant's ability to work 20 hours per week, without noting the conflicting restrictions on lifting.[5]

There is no indication that the Office sent a job description of the offered position[6] to Dr. Nutik, or otherwise clarified that appellant was capable of performing the offered job with the stated 20-pound lifting requirement.[7] Since the Office has failed to clarify the medical evidence as to appellant's lifting restrictions, it has not met its burden of proof in establishing that the offered job was suitable.

The decision of the Office of Workers' Compensation Programs dated October 26, 1995 is reversed.

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[2] *Henry P. Gilmore*, 46 ECAB 709 (1995).

[3] *John E. Lemker*, 45 ECAB 258 (1993).

[4] *Catherine G. Hammond*, 41 ECAB 375, 385 (1990); 20 C.F.R. § 10.124(c).

[5] Dr. Doyle stated in a May 6, 1994 report that she saw no reason why appellant could not work 20 hours per week; she did not comment on the lifting restrictions.

[6] It appears that the Office had previously sent Dr. Doyle a copy of an October 29, 1993 job offer, which was limited to 10 pounds lifting and 8 hours per week, but there is no indication that any physician reviewed the June 24, 1994 job offer.

[7] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(d) (December 1995), which indicates that if the medical evidence is not clear and unequivocal, the Office should seek appropriate medical advice from the treating physician, second opinion physician, or Office medical adviser as to the medical suitability of a position.

Dated, Washington, D.C.
May 27, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member