

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARIA E. SHEA and U.S. POSTAL SERVICE,
POST OFFICE, Hicksville, N.Y.

*Docket No. 96-2536; Submitted on the Record;
Issued November 2, 1998*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation for refusal to accept suitable work.

The Office accepted appellant's claim for a bruised left knee with sprain and traumatic patella chondromalacia and subluxation. The Office authorized surgery on the left knee on October 17, 1988, an arthroscopy on April 10, 1987 and a lateral patella ligament release and patella removal in 1990. Appellant, then a 22-year-old letter carrier, sustained her employment-related injury on January 17, 1987. She stopped work on January 22, 1987 and returned to work March 26 to September 25, 1990 for four hours a day performing sedentary duty. Appellant filed a claim for a recurrence occurring on September 24, 1990 and has not worked since September 25, 1990.

On January 27, 1995 the employing establishment performed a functional capacity evaluation on appellant and determined that appellant could work 6 hours a day and could sit for that time period for 60 minute durations with regular breaks. The evaluation also showed that appellant could stand and walk one to two hours and could occasionally bend but could not squat, crawl, crouch or kneel. Appellant also had limited lifting ability.

Based on the January 27, 1995 functional capacity evaluation, the employing establishment compiled a job description of a modified letter carrier which was available and involved placing letter size mail into sorting slots. The job description stated that the work could be performed while standing or sitting in a high chair with back support, that there was no bending, stooping, squatting or crouching, and the lifting was restricted to 7 pounds for one hand and 20 pounds for two hands above the waist. The description also stated that help would be given for heavy trays, that the work would normally be performed five hours per day, and that intermittent work would be assigned if necessary for comfort. The job description stated that the sitting would be continuous for one to six hours, the walking and standing would be intermittent for one to two hours, and the lifting would be intermittent one to five hours.

By letter dated April 12, 1995, the Office submitted the January 27, 1995 functional capacity evaluation and the job description of the modified letter carrier to appellant's treating physician, Dr. David S. Menche, a Board-certified orthopedic surgeon, asking him to indicate whether the job was suitable. On April 12, 1995 Dr. Menche checked that he read the attached job description and found it suitable.

By letter dated April 28, 1995, the employing establishment offered appellant the position of modified letter carrier and requested that appellant respond within five days.

By letter dated May 2, 1995, the Office stated that the employing establishment had offered appellant the job of modified letter carrier which was found to be within appellant's capabilities based on the January 27, 1995 functional capacity evaluation and Dr. Menche's job suitability authorization dated April 12, 1995. The Office also stated that the job was available. The Office informed appellant that she had 30 days to respond and that if she failed to accept the offered position, and failed to demonstrate that the failure was justified, her compensation would be terminated.

Appellant submitted a report from Dr. Menche dated June 2, 1995 in which he stated that appellant was under his care for status post left patellectomy, was disabled and was unable to return to work.

The Office referred appellant to Dr. Leon Sultan, a Board-certified orthopedic surgeon, for a second opinion. In a report dated July 3, 1995, Dr. Sultan considered appellant's history of injury, performed a physical examination and reviewed the results of a magnetic resonance imaging (MRI) test dated February 26, 1994 which showed mild degenerative change, Grade I-II signal involving the posterior horn of the medial meniscus and evidence of patellectomy. He diagnosed status post internal derangement of the left knee with post-traumatic reflex sympathetic dystrophy syndrome and arthrofibrosis along with post-traumatic patellar chondromalacia and subluxation. Dr. Sultan stated that appellant's current disability was due to the January 17, 1987 employment injury because all her problems began after the injury and she had no preexisting history of knee problems. He stated that appellant could perform work on a part-time basis as a modified letter carrier which involved casing mail while standing or sitting in addition to her answering telephones. In an attached work restriction form, Dr. Sultan indicated that appellant was limited in kneeling, standing, bending and crawling and that appellant could work four to six hours a day.

By letter dated September 18, 1995, the Office informed appellant that the Office considered Dr. Menche's June 2, 1995 disability note [although the Office did not refer to the note by name or date] and stated that the note contained no medical explanation or basis why Dr. Menche changed the number of work hours from five to zero per day and that it was of no probative value and was discrepant with Dr. Menche's medical opinion submitted two months earlier. The Office informed appellant that if she refused the job offer, her compensation would be terminated within 15 days. Appellant did not accept the job or return to work during that period.

By decision dated October 3, 1995, the Office terminated appellant's benefits effective October 15, 1995 based on her refusal to work.

The Board finds that the Office properly terminated compensation.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits. This includes cases in which the Office terminates compensation under 5 U.S.C. § 8106(c) for refusal to accept suitable work.¹

Under section 8106(2) of Federal Employees' Compensation Act,² the Office may terminate compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.³ Section 10.124(c) of the Office's regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured has the burden of showing that such refusal or failure to work was reasonable or justified, and shall be provided with the opportunity to make such showing before a determination is made with respect to termination of entitlement to compensation.⁴ To justify termination, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.⁵ The Board has required that if an employee presents reasons for refusing an offered position, the Office must inform the employee if it finds the reasons inadequate to justify the refusal of the offered position and afford appellant one final opportunity to accept the position.⁶

In the present case, the Office properly exercised its authority granted under the Act and the implementing federal regulations. Based on the January 27, 1995 functional capacity evaluation indicating that appellant could work six hours a day with limited sitting, walking and lifting, the employing establishment compiled a job description of a modified letter carrier which was available and involved sorting mail five hours per day. The job description stated that appellant could stand or sit in a high chair with back support, that there was no bending, stooping, squatting or crouching, and the lifting was restricted to 7 pounds for one hand and 20 pounds for two hands above the waist. The job description that the sitting would be continuous for one to six hours, the walking and standing would be intermittent for one to two hours, and the lifting would be intermittent one to five hours. On April 12, 1995 Dr. Menche, appellant's treating physician and a Board-certified orthopedic surgeon, signed a statement submitted to him by the Office indicating that he had read the job description and the job was suitable for appellant. On April 28, 1995 the employing establishment offered appellant the position of modified letter carrier. On May 2, 1995 the Office complied with the procedural requirements by advising appellant of the suitability of the position offered, that the job remained open, and

¹ *Henry W. Sheperd, III*, 48 ECAB ____ (Docket No. 96-814, issued March 3, 1997); *Shirley B. Livingston*, 24 ECAB 855 (1991).

² 5 U.S.C. §§ 8101-8193.

³ *Henry W. Sheperd, III*, *supra* note 1; *Patrick A. Santucci*, 40 ECAB 151 (1988).

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

⁵ *Karen L. Mayewski*, 45 ECAB 219 (1993).

⁶ *Rosie E. Garner*, 48 ECAB ____ (Docket No. 95-74, issued December 6, 1996); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

that appellant's failure to accept the offer, without justification, would result in the termination of her compensation. The Office provided appellant 30 days within which to accept the position offered or submit her reasons for refusal.

Appellant subsequently submitted Dr. Menche's June 2, 1995 report in which Dr. Menche stated that appellant was under his care for status post left patellectomy, was disabled and was unable to return to work. The Office referred appellant to Dr. Sultan, a second opinion physician and a Board-certified orthopedic surgeon, who opined on July 3, 1995 that appellant could perform the work of a modified letter carrier on a part-time basis. He based his opinion on appellant's history of injury, a physical examination, and the results of the MRI scan. He provided kneeling, standing, bending and crawling restrictions for appellant and stated that appellant could work four to six hours a day. By letter dated September 18, 1995, the Office informed appellant that Dr. Menche's June 2, 1995 report was not probative because Dr. Menche provided no rational explanation for his opinion and did not explain the change in his opinion from his April 12, 1995 authorization approving appellant's return to part-time work. The Office gave appellant fifteen days to accept the job offer. Appellant did not accept the job offer. Thereafter, the Office terminated appellant's compensation benefits effective October 15, 1995.

The Board finds that appellant's refusal to work was not justified. The job description of modified letter carrier was available and complied within the physical restrictions described in the January 27, 1995 functional capacities evaluation of limited sitting, standing and lifting. On April 12, 1995 Dr. Menche, appellant's treating physician, approved the position for appellant. His subsequent report dated June 2, 1995 in which he summarily stated that appellant could not work is not sufficiently rationalized to establish that appellant could not work or to explain the change in his opinion since April 12, 1995. The Board has held that a medical opinion consisting solely of a conclusory statement regarding disability, without supporting rationale, is of little probative value.⁷ Moreover, the July 3, 1995 report of Dr. Sultan, the second opinion physician, is well rationalized and stated that appellant could perform the work of the modified letter carrier. His opinion, in conjunction with the January 27, 1995 functional capacities evaluation and Dr. Menche's April 12, 1995 suitability authorization, constitutes the weight of the evidence. The Office provided appellant with an opportunity to submit evidence to justify her refusal to work but appellant did not comply. The evidence of record establishes that appellant could perform the work of a modified letter carrier, that it was available and within her physical restrictions. The Office, therefore, properly terminated benefits based on appellant's refusal to perform suitable alternate work.

⁷ See *Marilyn D. Polk*, 44 ECAB 673, 680 (1993).

The decision of the Office of Workers' Compensation Programs dated October 3, 1995 is hereby affirmed.

Dated, Washington, D.C.
November 2, 1998

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member