U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GENEVIEVE H. ABAS and U.S. POSTAL SERVICE,
POST OFFICE, San Diego, Calif.

Docket No. 97-297; Submitted on the Record;
Issued September 29, 1998

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective July 11, 1996 on the grounds that she refused an offer of suitable work.

On July 22, 1992 appellant, then a 26-year-old letter carrier, filed a claim alleging that she injured her neck and back on July 8, 1992 while delivering mail.[1] Appellant stopped work. On September 15, 1992 appellant returned to a limited-duty position with a restriction of not returning to her route. Thereafter, appellant's physician, James L. Stakely, a general practitioner, advised that appellant could alternate between casing mail and answering the telephone for eight hours a day. On December 10, 1992 the Office accepted appellant's claim for cervical-thoracic strain. Beginning December 1993, appellant stopped work on the advice of her physician.

On May 9, 1995 appellant filed a claim for compensation for the period of December 20, 1993 to May 9, 1995. By letter dated June 1, 1995, the Office advised appellant that it was deferring a determination on whether she was entitled to wage-loss compensation for the aforementioned time period until after an examination by an Office referral physician. After examination by Dr. Gordon L. Clark, a Board-certified orthopedic surgeon, on April 26, 1996, the Office advised appellant that she had been offered a position as a modified letter carrier which it found suitable and within her work capabilities. The Office advised appellant of the penalty provisions set forth in 5 U.S.C. § 8106(c)(2) and allowed appellant 30 days to provide an explanation if she refused the offer. However, on May 2, 1996 the Office advised appellant that she was entitled to compensation for a period during 1994 after a review of the record revealed that there was no job offer in the record from the employing establishment.

[1] Appellant filed a claim for recurrence as she had previously sustained an on-the-job injury in 1989 which had been accepted for cervical and thoracic strains. The Office treated appellant's July 1996 claim as an occupational disease claim.

Subsequently, the employing establishment submitted to the Office a copy of an offer for a modified letter carrier position. This offer was dated April 26, 1996 and provided that appellant's accepted condition was cervical strain, there was no accepted medical condition related to her hands, appellant could lift up to 25 pounds and she must avoid repetitive head movements up or down and overhead work. Appellant accepted this offer on May 26, 1996, noting that this was without a doctor's release, but requested that the employing establishment provide a statement in writing that it would be responsible for her health and well-being if she returned to work. On June 10, 1996 appellant returned to work as scheduled; however, she left for a 10:30 a.m. doctor's appointment and did not return to work. By letter dated June 13, 1996, the Office advised appellant that her stipulation for returning to work was not an acceptable reason for refusing an offer of suitable work and advised appellant that she had 15 days to accept the job offer. In a decision dated July 11, 1996, the Office terminated appellant's compensation on the grounds that she had refused an offer of suitable work.

The Board finds that the Office improperly terminated appellant's compensation benefits on the grounds that she refused an offer of suitable work.

Under the Federal Employees' Compensation Act,[2] once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of compensation.[3] Section 8106(c)(2) of the 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."[4] However, to justify such termination, the Office must show that the work offered is suitable.[5] An employee who refuses or neglects to work after suitable work has been offered to him or her has the burden of showing that such refusal of work was justified.[6]

The regulations governing the Act provide several steps that must be followed prior to a determination that the position offered is suitable. Section 10.124(b) of the Office's regulation reads as follows:

> "Where an employee has been advised by the employing agency in writing of the existence of specific alternative positions within the agency, the employee shall furnish the description and physical requirements of such alternative positions to the attending physician and inquire whether and when the employee will be able to perform such duties."[7]

[2] 5 U.S.C. §8101 *et seq.*

[3] *William Kandel*, 43 ECAB 1011 (1992).

[4] 5 U.S.C. § 8106(c)(2).

[5] *David P. Comacho*, 40 ECAB 267 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341 (1981).

[6] 20 C.F.R. § 10.124; *see Catherine G. Hammond*, 41 ECAB 375 (1990).

[7] 20 C.F.R. § 10.124(b).

In this case, the Office terminated appellant's compensation benefits on the grounds that she refused an offer of suitable work; however, the Office did not follow the regulations in effect at the time of its July 11, 1996 decision in reaching this decision. Initially, the Board notes that a review of the record reveals that the Office did not have a copy of any written modified job offer from the employing establishment at the time it determined that the position offered was suitable. Thus, the Office had no basis for its suitability finding and it must be reversed. It is further noted that the record did not contain any reports from any of appellant's treating physicians which indicated that she could perform the position offered. Rather, a review of the record reveals that appellant submitted a form disability statement from Dr. Stakely which indicated that appellant should be off work until further notice. As there is no indication in the record that appellant's physician was ever consulted concerning the modified letter carrier position or the physical requirements of this position, the Office also did not follow proper procedure in continuing to find the modified letter carrier position suitable and improperly issued a 15-day warning letter when appellant's physician had not been consulted and the original letter finding the position suitable was faulty. The Office has not met its burden of proof in terminating appellant's compensation benefits.

The decision of the Office of Workers' Compensation Programs dated July 11, 1996 is hereby reversed.

Dated, Washington, D.C.
September 29, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member