

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LURA L. CORNELIUS and U.S. POSTAL SERVICE,
POST OFFICE, Salisbury, MD

*Docket No. 97-1707; Submitted on the Record;
Issued December 22, 1999*

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 or after June 26, 1996 on the grounds that she refused an offer of suitable work pursuant to section 8106(c) of the Federal Employees' Compensation Act.

On April 3, 1992 appellant, then a 39-year-old clerk, filed a claim for an occupational disease (Form CA-2) alleging that she first became aware of the pain in her elbows on March 18, 1992. She further alleged that she first realized that the pain in her elbows was caused or aggravated by her employment on March 20, 1992. Appellant stopped work on April 23, 1992.

By letter dated June 25, 1992, the Office accepted appellant's claim for bilateral lateral epicondylitis.

The Office referred appellant to a vocational rehabilitation counselor who submitted several reports regarding appellant's ability to return to work and the progress of appellant's rehabilitation effort.

By letter dated January 25, 1995, the Office referred appellant along with a statement of accepted facts, medical records and a list of specific questions to Dr. Eli Lippman, a Board-certified orthopedic surgeon, for a second opinion examination.

Dr. Lippman submitted a March 28, 1995 medical report reviewing a history of appellant's medical treatment, a diagnosis of bilateral epicondylitis, a review of medical records and his findings on physical and objective examination. He stated that he was in accord with the consultation of Dr. Gaylord Clark, a Board-certified orthopedic surgeon and appellant's treating physician. Dr. Lippman opined that appellant could not return to her former employment and that no carpal tunnel syndrome was found at that time. In an accompanying work capacity evaluation for musculoskeletal conditions (Form OWCP-5) dated March 30, 1995, he indicated

that appellant could work eight hours per day with limited reaching and lifting and no repetitive movement of the wrists, elbows and arms.

In an April 7, 1995 letter, the Office advised Dr. Clark to comment on Dr. Lippman's opinion. In an April 25, 1995 response letter, Dr. Clark stated that appellant could not return to her employment unless she had restrictions on the use of both hands. He further stated that if the employing establishment could find work as described by Dr. Lippman, this would be ideal and hopefully appellant could be reemployed.

By letters dated March 8 and 21, 1996, the employing establishment offered appellant the modified position of distribution dispatch clerk based on the reports of Dr. Clark and Dr. Lippman. This position required appellant to review undeliverable bulk business mail which involved intermittent standing and sitting for approximately four hours per eight-hour day, and handling one piece of mail at a time. This position also required appellant to perform mail preparation in the "CFS" unit which involved standing approximately three hours, regular breaks and handling only one piece of mail at a time. In addition, this position required appellant to perform truck receipt and dispatch verification which involved no more than 1 hour of standing within an 8-hour tour, infrequent writing (15 minutes within an 8-hour tour) of register/dispatch forms and applying a seal to the back door of a truck. The physical restrictions involved no lifting more than seven pounds and no repetitive hand motions.

In a March 27, 1996 report, the vocational rehabilitation counselor indicated that he visited the proposed worksite on March 26, 1996 and provided a description of the worksite, as well as appellant's duties in the offered position. The vocational rehabilitation counselor also indicated that appellant refused to accept the offered position.

In an April 2, 1996 letter, the Office advised appellant that the modified position of distribution dispatch clerk was suitable work within her physical restrictions. The Office also advised appellant that she had 30 days in which to accept the offered modified position of dispatch clerk or to provide an explanation of the reasons for refusing the job along with relevant medical reports supportive of the refusal.

In an April 18, 1996 response letter, appellant declined the job offer stating that her physician did not approve of the job, that she did not receive due process because she was only given one-day notice of the job offer and the physical requirements of the offered position exceeded the physical restrictions of a functional capacity assessment and whole body assessment performed on September 25, 1995 by Regina Beatus, a licensed physical therapist.

By decision dated May 20, 1996, the Office terminated appellant's compensation effective May 25, 1996 on the grounds that she refused suitable work pursuant to section 8106 of the Act. The Office stated that Dr. Lippman's March 30, 1995 work restriction evaluation indicated that appellant could return to limited-duty work with certain physical restrictions.

By decision dated May 29, 1996, the Office vacated its May 20, 1996 decision due to an administrative error. The Office found that it failed to follow its procedures by not reviewing appellant's reasons for rejecting the job offer and not making findings of fact. The Office also found that it did not allow appellant an additional 15 days to accept the offered position after her

rejection of the offer. In letters of the same date, the Office advised appellant of the opportunity to accept the offered position within 15 days. The Office further advised appellant of the penalties for refusing an offer of suitable work under section 8106 of the Act. Appellant did not respond.

In a June 25, 1996 decision, the Office terminated appellant's compensation effective June 22, 1996 on the grounds that she failed to accept suitable work. In an accompanying memorandum, the Office stated that it received notification from the employing establishment on June 17, 1996 that appellant had failed to return to work.

In a July 8, 1996 letter, appellant requested an oral hearing before an Office representative.

At the hearing held on December 19, 1996, appellant testified that she reported to work on June 13, 1996. She further testified that she worked bulk mail for approximately three hours on that date and that this work was outside of her physical restrictions. Appellant then testified that she left work due to severe pain in her arms.

Subsequent to the hearing, the Office received factual and medical evidence from appellant's United States Senator. The factual evidence included correspondence between appellant and her congressional representative, between appellant and the employing establishment and between the Office and appellant's treating physician. Regarding the medical evidence, the Office received an October 16, 1992 medical report from Dr. Bong S. Lee, a Board-certified orthopedic surgeon, indicating a history of appellant's employment injury and medical treatment, his findings on physical and neurological examination, and a diagnosis of chronic epicondylitis of both elbows. Dr. Lee opined that, until appellant's condition resolved, she should be placed on limited duty with restrictions of barely using both hands. The Office also received Dr. Clark's August 4, 1993 medical report providing a history of appellant's employment injury and medical treatment, his findings on physical and objective examination, a diagnosis of chronic lateral epicondylitis bilaterally involving the extensor in each forearm. He recommended that appellant permanently stop work at the employing establishment or to cease repetitive use of her hands and wrists. In addition, the Office received an October 11, 1993 medical report of Dr. William L. Montague, Jr., a Board-certified orthopedic surgeon, indicating a history of appellant's medical treatment and a diagnosis of bilateral lateral epicondylitis. Dr. Montague stated that appellant's prognosis was poor and that she was unable to return to her former position which involved repetitive use of the upper extremities and a keyboard. In a March 21, 1994 Form OWCP-5, Dr. Montague indicated appellant's restriction on repetitive tasks. The Office received Dr. Lippman's March 28, 1995 medical report and his March 30, 1995 Form OWCP-5 previously of record. In an August 2, 1994 attending physician's supplemental report (Form CA-20a), Dr. Clark indicated a diagnosis of chronic lateral epicondylitis and carpal tunnel syndrome noting that appellant could not return to the work she performed prior to her complaints at that time. Dr. Clark's August 5, 1994 medical report provided appellant's complaints and his findings on physical examination. Dr. Clark stated that every treatment suggested had been tried and failed. He further stated that he did not see any necessity to pursue further management and recommended that appellant consider retirement from the employing establishment. Dr. Clark then stated that he did not believe it was

appropriate to work on rehabilitation or other job assignments and that appellant could carry them out without complaints. The Office received Dr. Clark's April 25, 1995 letter previously of record. Dr. Clark's August 18, 1995 medical report revealed appellant's complaints and findings on physical examination. Dr. Clark opined that he was not optimistic about appellant's return to work, but if work could be found that appellant was capable of performing, a work capacity study was worthwhile. In a September 11, 1995 medical report, Dr. Clark reiterated his opinion as stated in his August 18, 1995 report. The Office received Ms. Beatus' September 25, 1995 functional capacity assessment and whole body assessment findings previously of record.

In response to its review of the hearing transcript, the employing establishment submitted correspondence between appellant's counsel and vocational rehabilitation counselor and evidence previously of record. The employing establishment also submitted a June 13, 1996 statement from Albert Owens, an employing establishment acting supervisor of customer service who stated that, when he arrived at work and saw appellant, she told him that she was reporting for duty by this date because she would not receive any more benefits. He stated that appellant showed him a letter revealing what type of work she was capable of performing which was considered light-duty work. Mr. Owens then stated that checking and disposing of throw away mail was one of the things that appellant could do so that was where he assigned her to work. He further stated that appellant performed her duties for no more than two hours, and that appellant told him that she was hurting and she had to go home. Mr. Owens concluded that appellant completed a PS Form 3971, a request for/or notification of leave, and left the building. The employing establishment submitted Dr. Clark's August 6, 1996 medical report revealing that he still agreed with his previous opinion that appellant should permanently stop work at the employing establishment or to cease repetitive use of her hands and wrists. Dr. Clark stated that he did not think it was appropriate to reassign appellant any type of work at the employing establishment. He noted that appellant did try to return to light-duty work, but that this was unsuccessful bearing out his original observation.

By decision dated March 13, 1997, the hearing representative affirmed the Office's June 25, 1996 decision.

The Board finds that the Office properly terminated appellant's compensation on or after June 26, 1996 on the grounds that she refused an offer of suitable work pursuant to section 8106(c) of the Act.

It is well settled that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.¹ This includes cases in which the Office terminates compensation under section 8106(c)(2) of the Act for refusal to accept suitable work.

Section 8106(c)(2)² of the Act provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee is not entitled to compensation. Section 10.124(e)³ of the Office's regulations provides that an

¹ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

² 5 U.S.C. § 8106(c)(2).

³ 20 C.F.R. § 10.124(e).

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,⁵ and must inform appellant of the consequences of refusal to accept such employment.⁶ According to Office procedures, certain explanations for refusing an offer of suitable work are considered acceptable.⁷

In this case, Dr. Lippman opined that appellant could work eight hours per day with physical restrictions. The employing establishment identified the modified position of distribution dispatch clerk and advised appellant of the offered position on March 8, 1996. With respect to the procedural requirements for termination under section 8106(c), the Office advised appellant by letter dated April 2, 1996 that the modified distribution dispatch clerk position offered by the employing establishment was found to be suitable and that appellant had 30 days to either accept the offer or provide reasons for refusing the offer. Following receipt of appellant's March 26, 1996 refusal to accept the offered position and based on its May 29, 1996 decision vacating its May 20, 1996 decision terminating appellant's compensation due to an administrative error, the Office, by letter dated May 29, 1996, advised appellant that the reason for refusing the job offer was unacceptable. The Office also advised appellant that she had 15 days to either accept the job offer or compensation would be terminated. The Board, therefore, finds that the Office properly followed the procedural requirements for termination under section 8106(c) of the Act.

Appellant's primary reason for declining the modified distribution dispatch clerk position offered by the employing establishment was her physical inability to perform the position. The determination of whether an employee is physically capable of performing the job is a medical question that must be resolved by medical evidence.⁸ An employee's contention that the proposed work would aggravate his or her physical condition is of no probative value and will not be deemed a reasonable or justifiable ground for refusing suitable work where the medical evidence of record indicates that the position offered is consistent with appellant's physical limitations.⁹

The Board has stated that the weight of medical evidence is determined by its reliability, its probative value and its convincing quality. The opportunity for and thoroughness of

⁴ *Maggie L. Moore*, 42 ECAB 484, 488 (1991); *reaff'd on recon.*, 43 ECAB 818 (1992).

⁵ *See Carl W. Putzier*, 37 ECAB 691 (1986); *Herbert R. Oldham*, 35 ECAB 339 (1983).

⁶ *See Maggie L. Moore*, *supra* note 4; *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(d)(1).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(1)-(5).

⁸ *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

⁹ *Id.*

examination, the accuracy and completeness of the doctor's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the doctor's opinion are factors which enter into such evaluation.¹⁰

The Board finds that the opinion of Dr. Lippman, to whom the Office referred appellant and a Board-certified orthopedic surgeon, constitutes the weight of the medical evidence on the question of whether appellant can perform the offered modified position of distribution dispatch clerk. In his March 28, 1995 medical report, Dr. Lippman provided a history of appellant's medical treatment, a diagnosis of bilateral epicondylitis, a review of medical records, and his findings on physical and objective examination. He opined that appellant could not return to her former employment. Dr. Lippman also opined that the only treatment was diminished use of both upper extremities. In a March 30, 1995 work restriction evaluation, he indicated that appellant could work eight hours per day with limited reaching and lifting, and no repetitive movement of the wrists, elbows and arms. Dr. Lippman submitted a thorough and well-rationalized opinion explaining that appellant was capable of working eight hours per day with physical restrictions.

Although appellant alleged that she was unable to perform the duties of the modified distribution dispatch clerk position due to her elbow condition, she did not submit sufficient medical evidence to substantiate her claimed inability to perform the duties of this position as offered to her by the employing establishment. In her April 18, 1996 response to the Office's April 2, 1996 letter advising her that the offered position was suitable, appellant alleged that Dr. Clark, a Board-certified orthopedic surgeon and her treating physician, did not approve of the offered position and the physical requirements of the offered position were incompatible with the results of a functional capacity assessment and whole body assessment performed by Ms. Beatus, a licensed physical therapist. Although Dr. Clark did not review a description of the offered position, he stated in an April 25, 1995 letter that appellant could be reemployed if the employing establishment could find work as described by Dr. Lippman. Further, Ms. Beatus' report is of no probative value inasmuch as a physical therapist is not a physician under the Act and therefore is not competent to give a medical opinion.¹¹ For this same reason, Ms. Beatus' November 6, 1995 Form CA-17 revealing appellant's physical restrictions does not constitute competent medical evidence.

The medical opinions of Dr. Lee, a Board-certified orthopedic surgeon, Dr. Clark and Dr. Montague, a Board-certified orthopedic surgeon, which were submitted by appellant's congressional representative and revealed that appellant was restricted from repetitive use of her hands are consistent with the requirements of the modified position of distribution dispatch clerk. Dr. Clark stated in his August 5, 1994 and August 6, 1996 medical reports that it was not appropriate to reassign appellant any type of work at the employing establishment. In the latter medical report, Dr. Clark noted that appellant did try to return to light-duty work, but that this

¹⁰ *Melvina Jackson*, 38 ECAB 43 (1987); *Naomi A. Lilly*, 10 ECAB 560 (1959).

¹¹ 5 U.S.C. § 8101(2); *see also Jerre R. Rinehart*, 45 ECAB 518 (1994); *Barbara J. Williams*, 40 ECAB 649 (1989); *Jane A. White*, 34 ECAB 515 (1983).

was unsuccessful. He, however, failed to provide any medical rationale explaining how or why appellant would be unable to perform the duties of the modified distribution dispatch clerk.

The Board finds that the medical evidence indicates that the modified position of distribution dispatch clerk offered to appellant by the employing establishment is consistent with appellant's physical restrictions of limited reaching and lifting, and no repetitive movement of the wrists, elbows and arms. Further, there is insufficient support for appellant's stated reason in declining the job offer. Therefore, appellant's refusal of the modified job offer cannot be deemed reasonable or justified, and the Office properly terminated appellant's compensation.

The March 13, 1997, June 25, May 20 and 29, 1996 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.
December 22, 1999

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member