

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DEBRA K. HADENFELDT and U.S. POSTAL SERVICE,
POST OFFICE, Des Moines, IA

*Docket No. 98-1447; Submitted on the Record;
Issued December 28, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits by finding that she abandoned suitable work; and (2) whether the Office abused its discretion by refusing to reopen appellant's claim for consideration of the merits.

The Board has duly reviewed the case on appeal and finds that the Office met its burden of proof to terminate appellant's compensation benefits.

Appellant, then a 36-year-old part-time flexible letter carrier, filed a claim alleging on December 13, 1995 she injured her back in the performance of duty. She returned to limited-duty work on January 20, 1996. The Office accepted her claim on February 12, 1996 for lumbar strain. Appellant stopped work on July 17, 1996. By letter dated September 30, 1996, the Office informed appellant that her light-duty position was suitable work and allowed 30 days for her to respond. By decision dated November 5, 1996, the Office terminated appellant's compensation benefits effective July 18, 1996 finding that she abandoned suitable work. Appellant, through her attorney requested a review of the written record on December 4, 1996. By decision dated April 16, 1997, the hearing representative affirmed the Office's November 5, 1996 decision regarding the abandonment of suitable work and remanded the case for determination of appellant's correct pay rate.¹ Appellant requested reconsideration on February 20, 1998 and by decision dated March 23, 1998, the Office refused to reopen appellant's claim for consideration of the merits.

It is well settled that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.² As the Office in this case terminated

¹ As the Office has not issued a final decision on this issue, the Board will not address it on appeal. 20 C.F.R. § 501.2(c).

² *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

appellant's compensation under 5 U.S.C. § 8106(c), the Office must establish that appellant abandoned suitable work. Section 8106(c) of the Federal Employees' Compensation Act³ 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(c) of the applicable regulations⁴ provides that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee, 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. To justify termination of compensation, the Office must show that the work offered was suitable and must inform appellant of the consequences of abandonment of such employment.⁵

Appellant's attending physician, Dr. William A. Roberts, a Board-certified orthopedic surgeon, released her to limited duty on January 10, 1996 with restrictions on lifting over 20 pounds, repetitive bending, twisting and sitting. Appellant returned to light-duty work on January 20, 1996 in a position which required her to case city mail on Saturday through Friday for two to three hours a day. She was also required to perform administrative tasks such as inventory, letter writing and computer work. Appellant's work restrictions included no lifting over 20 pounds, no repetitive bending or twisting and no prolonged sitting.

Appellant stopped work on July 17, 1996. Her supervisor submitted a statement indicating that appellant stopped work in order to file for disability retirement. By letter dated July 18, 1996, the employing establishment informed appellant that limited-duty work was still available.

The Office informed appellant that the limited-duty position was suitable work and allowed 30 days for a response. Appellant did not respond and by decision dated November 5, 1996, the Office terminated appellant's compensation benefits.

Following the Office's November 5, 1996 decision, appellant requested a review of the written record and submitted additional evidence. She submitted a report dated June 26, 1996 from Dr. Laurence S. Krain, a Board-certified neurologist. He reviewed appellant's history of injury and diagnosed persistent chronic pain and paresthesias secondary to post-traumatic musculoskeletal injury. Dr. Krain did not state that appellant was totally disabled and noted her 20-pound lifting limitation. This report does not establish that the limited-duty position was no longer medically suitable for appellant.

On September 17, 1996 Dr. Roberts stated that appellant's restrictions remained the same and that she was not fit for full duty. This report does not indicate that appellant was no longer capable of performing her light-duty position nor that the light-duty work was no longer suitable.

³ 5 U.S.C. § 8106(c)(2).

⁴ 20 C.F.R. § 10.124(c).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.10 (December 1995); *Arthur C. Reck*, 47 ECAB 339, 341-42 (1995).

There is no medical evidence establishing that the light-duty position was no longer suitable for appellant after July 17, 1996.

Appellant stated that her work stoppage was due to harassment by coworkers and as the light-duty position violated the collective bargaining agreement as it required her to perform duties in another craft. She did not submit any evidence in support of these allegations at the time of the Office's April 16, 1997 decision. For harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.⁶ As the hearing representative noted, appellant submitted no evidence that she was harassed.

The Board further finds that the Office abused its discretion by refusing to reopen appellant's claim for consideration of the merits.

Section 10.138(b)(1) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.⁷ Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.⁸

Prior to the hearing representative's April 16, 1997 decision, appellant alleged that she was harassed by coworkers. In the April 16, 1997 decision, the hearing representative noted that appellant failed to submit any evidence in support of this allegation. Appellant requested reconsideration on February 20, 1998. In her reconsideration request she stated that she abandoned the suitable light-duty position due to harassment from coworkers. Appellant stated that she stopped work in order to save her life and self-respect. She also stated that she did not feel that she was contributing to the employing establishment. In support of her claim of harassment, appellant submitted a witness, statement dated February 16, 1998. Donna Schulte, a letter carrier at the employing establishment, stated that Dianne Kinzenbaw, a coworker, made negative comments about appellant and that she misrepresented facts regarding appellant's injury to investigators. Appellant submitted a detailed narrative of incidents occurring at work.

Appellant also submitted a report from Dr. John S. Koch, a Board-certified orthopedic surgeon, noting that appellant had difficulty maintaining her composure relating to investigations by the employing establishment.

⁶ *Alice M. Washington*, 46 ECAB 382 (1994).

⁷ 20 C.F.R. § 10.138(b)(1).

⁸ 20 C.F.R. § 10.138(b)(2).

Appellant has submitted new evidence relevant to the issue of whether she stopped work due to a subsequent work-related emotional condition. As the Office's procedure manual provides that a subsequent work-related condition is an acceptable reason for abandoning suitable work,⁹ appellant has submitted relevant new evidence which requires the Office to reopen her claim for consideration of the merits.

The April 16, 1997 decision of the Office of Workers' Compensation Programs is hereby affirmed. The March 23, 1998 decision of the Office is hereby set aside and remanded for further development consistent with this opinion.

Dated, Washington, D.C.
December 28, 1999

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.10 (December 1995).