

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOYCE L. PAULIN and U.S. POSTAL SERVICE,
ST. MATTHEWS BRANCH, Louisville, Ky.

*Docket No. 97-106; Submitted on the Record;
Issued February 16, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

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

On March 2, 1993 appellant, then a 59-year-old window servicing technician, sustained bilateral carpal tunnel syndrome in the performance of her federal duties. On April 22 and August 17, 1993 appellant underwent surgery on her right hand and left hand, respectively.

In notes dated December 1, 1993, Dr. Daniel T. Maurer, appellant's attending Board-certified orthopedic surgeon, stated that appellant continued to have significant symptoms involving both wrists including discomfort, hypesthesias and paresthesias.

By letter dated December 13, 1993, the Office advised appellant that she had been placed on the periodic compensation rolls to receive compensation benefits for temporary total disability effective April 13, 1993.

In a report dated December 23, 1993, Dr. Thomas M. Marshall, an Office referral physician and a Board-certified neurosurgeon, provided a history of appellant's condition and a summary of the medical records and findings on examination. Dr. Marshall stated that the neurological examination did not reveal any objective neurological impairment. He diagnosed bilateral carpal tunnel syndrome with persistent residual dysfunction due to the long-standing nature of her condition. In an accompanying work restriction evaluation form he indicated that appellant was able to work six hours per day with certain limitations including no more than three hours of intermittent sitting, walking, standing, no lifting, bending, squatting, climbing, kneeling and twisting.

In a report dated January 5, 1994, Dr. Maurer indicated that appellant was totally disabled.

In notes dated April 6, 1994, Dr. Maurer related that appellant had some symptoms involving her wrist and forearms. He stated his opinion that appellant could not tolerate any type

of continuous over-use activity such as typing, keyboarding, fine manipulation or grasping but could tolerate light, intermittent activities depending upon the job description.

In a duty status report dated April 6, 1994, Dr. Maurer indicated that appellant could work only three hours a day and listed certain restrictions.

In a report dated April 22, 1994, Dr. Maurer indicated that appellant was totally disabled.

By letter dated May 20, 1994, the employing establishment offered appellant a temporary¹ limited-duty job commencing on May 31, 1994, consisting of answering the telephone and transferring calls or writing messages, with intermittent sitting, walking and standing limited to 3 hours per day, no bending, squatting, climbing, kneeling or twisting, no lifting over 10 pounds, and "restrictions of simple grasping, pushing/pulling and fine manipulation." The employing establishment indicated that the limited-duty position was for six hours per day.

In a June 17, 1994 memorandum to an Office claims examiner, the rehabilitation specialist assigned to appellant's case, noted that appellant had not responded to the job offer from the employing establishment which the rehabilitation specialist had found suitable based upon the work restrictions of Dr. Marshall.

By letter dated June 23, 1994, the Office advised appellant that the temporary limited-duty position offered by the employing establishment was suitable to her work capabilities and advised appellant that she had 30 days to either accept the position or provide an explanation of her reasons for refusing it.

By letter dated July 12, 1994, appellant responded to the Office's June 23, 1994 letter regarding the job offer by stating that she had provided a report from Dr. Maurer which stated that she could not return to work.

By letter dated July 26, 1994, the Office advised appellant that it had reviewed her July 12, 1994 letter and found that her reasons for not accepting the temporary limited-duty position were not justified. The Office advised appellant that she would be allowed an additional 15 days to accept the job offer but that if she failed to accept the offered position her compensation benefits would be terminated.

By decision dated August 15, 1994, the Office terminated appellant's compensation benefits on the grounds that she had refused to accept an offer of suitable work.

In an August 29, 1994 response to the limited-duty offer of the employing establishment, appellant indicated that she would report for duty on September 6, 1994 but would only work for three hours a day based upon Dr. Maurer's work restrictions.

By letter dated September 9, 1994, appellant, through her representative, requested an oral hearing before an Office hearing representative and submitted additional evidence.

¹ In an Office memorandum dated June 23, 1994, an Office claims examiner noted that the temporary position offered to appellant was available to appellant as long as needed according to the employing establishment and was denoted as "temporary" because it was not a "permanent rehabilitation position."

In a report dated April 6, 1994, Dr. Maurer indicated that appellant should not work until her next examination scheduled for October 1994.

A functional capacities evaluation dated July 13, 1994 and performed for Dr. Maurer provided physical findings and indicated that appellant could not perform the limited-duty offer from the employing establishment as appellant was able to work only three to four hours a day rather than eight hours and could not write messages regarding telephone calls continuously or frequently, noting that she could record messages only intermittently. The report included recommended work restrictions of sitting and standing limited to one to two hours a day, walking limited to three to four hours a day with sitting, standing and walking alternated frequently through the workshift, no stair climbing, limitations on lifting, and no repetitive firm grasping or fine manipulation.

In notes dated August 17, 1994, Dr. Maurer related that appellant had ongoing symptoms involving both upper extremities. He indicated that appellant could return to work for no more than three hours a day with the work restrictions listed in the functional capacities evaluation report.

In a report dated October 5, 1994, Dr. Maurer, stated that appellant was unable to use her hands for work activities without marked increased in her symptoms of pain, numbness and paresthesias.

On October 24, 1995 a hearing was held before an Office hearing representative at which time appellant testified.

By decision dated June 14, 1996, the Office hearing representative affirmed the Office's August 15, 1994 decision.²

The Board finds that the Office improperly terminated appellant's compensation benefits.

Once the Office accepts a claim it has the burden of proving that the disability has ceased or lessened before it may terminate or modify compensation benefits.³

Under section 8106(c)(2) of the Federal Employees' Compensation Act⁴ the Office may terminate the compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.⁵ Section 10.124(c), Part 20 of the Code of Federal Regulations⁶ 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

² The Board notes that this record contains additional evidence which was not before the Office at the time it issued its June 14, 1996 and August 15, 1994 decisions, and therefore the Board has no jurisdiction to review this evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952).

³ *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 239, 241 (1984).

⁴ 5 U.S.C. § 8106(c)(2).

⁵ *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

⁶ 20 C.F.R. § 10.124(c).

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.⁷ To justify termination, the Office must show that the work offered was suitable⁸ and must inform appellant of the consequences of refusal to accept such employment.⁹

In the present case, following the Office's acceptance of appellant's claim, the Office paid appropriate benefits and medical expenses. In a report dated December 23, 1993, Dr. Marshall, an Office referral physician and a Board-certified neurosurgeon, indicated that appellant was able to work six hours per day with certain limitations including no more than three hours of intermittent sitting, walking and standing, and no lifting, bending, squatting, climbing, kneeling and twisting.

Based upon Dr. Marshall's report and work restrictions, the employing establishment offered appellant a limited-duty position for six hours a day consisting of answering the telephone and transferring calls or writing messages, commencing on May 31, 1994. The Office found that the position was suitable for appellant.

On June 23, 1994 the Office provided appellant 30 days within which to either accept the position offered or submit her reasons for refusal. By letter dated July 12, 1994, appellant responded by stating that she had provided a report from Dr. Maurer, her attending Board-certified orthopedic surgeon, which stated that she could not return to work.

On July 26, 1994 the Office advised appellant that it had reviewed her July 12, 1994 letter and found that her reasons for not accepting the temporary limited-duty position were not justified. The Office advised appellant that she would be allowed an additional 15 days to accept the job offer. Appellant did not accept the job offer. Thereafter, by decision dated August 15, 1994, the Office terminated appellant's compensation benefits on the grounds that she had refused to accept an offer of suitable work.

The Board finds that the Office improperly determined that the offered position was suitable for appellant. The December 23, 1993 report of Dr. Marshall, upon which the Office based its determination that the position was suitable, was provided to the Office five months before the employing establishment offered the limited-duty position to appellant and there is no indication that Dr. Marshall ever reviewed the physical requirements of the job description. He provided a list of work restrictions upon which the employing establishment stated it based its limited-duty position but Dr. Marshall did not review and approve the job description presented to appellant in May 1994. The Board notes that one of the job requirements was that appellant be able to write messages based upon incoming telephone calls. The job description contains no indication as to how frequently appellant, whose injury is bilateral carpal tunnel syndrome,

⁷ *Camillo R. DeArcangelis*, *supra* note 5; see 20 C.F.R. § 10.124(e).

⁸ See *Carl W. Putzier*, 37 ECAB 691, 700 (1986); *Herbert R. Oldham*, 35 ECAB 339, 346 (1983).

⁹ See *Maggie Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(c)(6) (December 1993).

might be required to write messages and there is no opinion from Dr. Marshall as to whether appellant could perform this particular task considering the nature of her employment injury.

A functional capacities evaluation dated July 13, 1994 and performed for Dr. Maurer indicated that appellant could not perform the limited-duty offer from the employing establishment. One reason given in the report for appellant's inability to perform the offered position was that appellant could not write messages regarding telephone calls continuously or frequently, only intermittently. In notes dated August 17, 1994, he indicated that appellant could return to work for no more than three hours a day with the work restrictions listed in the functional capacities evaluation report.

As it appears that Dr. Marshall did not review the description of the job offered to appellant and as there is other medical evidence indicating that the position was not suitable for appellant, the Office improperly determined that the position constituted suitable work.

Considering all the evidence, the Board finds that the Office improperly determined that appellant rejected an offer of suitable employment.

The June 14, 1996 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, D.C.
February 16, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member