

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT STEELE and U.S. POSTAL SERVICE,
POST OFFICE, Grand Rapids, Minn.

*Docket No. 97-441; Submitted on the Record;
Issued January 4, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation under 5 U.S.C. § 8106(c) based on his refusal to accept suitable employment as offered by the employing establishment.

The Board has duly reviewed the case on appeal and finds that the Office abused its discretion in terminating appellant's compensation benefits.

The facts in this case indicate that on December 1, 1988 appellant, then a 48-year-old part-time distribution clerk, sustained an employment-related ruptured L2-3 disc. He stopped work on December 3, 1988, returned on December 12, 1988, stopped again on January 14, 1989 and has not returned. He received appropriate compensation and was placed on the periodic rolls, effective November 21, 1989. Following further development by the Office, appellant's treating Board-certified internist, Dr. Marc A. Fowler, provided a July 31, 1995 report and work capacity evaluation, in which he advised that appellant could work eight hours per day with restrictions. Also submitted as a functional capacity evaluation. Based on these reports, on March 5, 1996 the employing establishment offered appellant a limited-duty part-time distribution clerk position. He was to begin work on March 18, 1996. By letter dated March 6, 1996, the Office informed appellant that the offered position was suitable. On March 7, 1996 appellant rejected the job offer. By letter dated April 16, 1996, the Office advised appellant that his reasons for refusing the offered position were not acceptable. In a letter dated April 23, 1996, appellant's wife informed the Office that appellant was hospitalized and, therefore, could not work. By decision dated May 7, 1996, the Office suspended appellant's wage-loss compensation, effective May 26, 1996, on the grounds that he declined an offer of suitable work. Appellant requested reconsideration and submitted additional medical evidence. By decision dated August 20, 1996, the Office modified the prior decision but only to reflect that his compensation had been terminated pursuant to section 8106(c), finding that the evidence submitted with his reconsideration request was insufficient to modify the prior conclusion. The instant appeal follows.

Section 8106(c)(2) of the Federal Employees' Compensation Act¹ provides in pertinent part, "A partially disabled employee who ... refuses or neglects to work after suitable work is offered ... is not entitled to compensation."² To prevail under this provision, the Office must show that the work offered was suitable and must inform the employee of the consequences of refusal to accept such employment. An employee who refuses or neglects to work after suitable work has been offered has the burden of showing that such refusal to work was justified.³

In the present case, the Office established that the offered position of part-time distribution clerk was suitable through the reports of appellant's attending physician, Dr. Fowler, who diagnosed lumbar disc disease and nonemployment-related cervical disc disease and depression. He advised that appellant could work within restrictions provided in an attached work capacity evaluation. As the job offer made to appellant on March 5, 1996 complied with the restrictions furnished in the work capacity evaluation, the Board finds that the medical evidence of record establishes that, at the time the job offer was made, appellant was capable of performing the modified position.⁴

In order to properly terminate appellant's compensation under 5 U.S.C. § 8106, the Office must provide appellant notice of its finding that an offered position is suitable and give appellant an opportunity to accept or provide reasons for declining the position.⁵ By letter dated March 6, 1996, the Office advised appellant that a partially disabled employee who refused suitable work was not entitled to compensation, that the offered position had been found suitable and allotted him 30 days to either accept or provide reasons for refusing the position. On March 7, 1996 appellant rejected the job offer, stating, *inter alia*, that he did not get along with the postmaster and was physically unable to work. By letter dated April 16, 1996, the Office advised appellant that the reason given for not accepting the job offer was unacceptable. He was given an additional 15 days, in which to respond and in an April 23, 1996 letter, appellant's wife advised that appellant could not work because he was hospitalized. The Office then issued a May 26, 1996 decision, in which appellant's compensation was suspended effective that day on the grounds that appellant failed to show sufficient cause for his failure to accept suitable work. Appellant further advised, with his request for reconsideration dated August 6, 1996, that he had been hospitalized for 32 days, returning home on May 24, 1996 and submitted medical reports that were telefaxed to the Office on July 24, 1996, in which Dr. Jack D. Hornby, a Board-certified psychiatrist, advised that appellant had been an inpatient in the Montana Deaconess Medical Center for the period March 30 to April 7, 1996. Diagnoses included bipolar disorder, manic type, alcohol abuse and polysubstance abuse by history. Dr. Hornby advised that appellant wished to continue care near his home in Minnesota and he was discharged on

¹ 5 U.S.C. §§ 8101-8193.

² 5 U.S.C. § 8106(c)(2).

³ See *Michael I. Schaffer*, 46 ECAB 845 (1995).

⁴ See *John E. Lemker*, 45 ECAB 258 (1993).

⁵ See *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

medication to the care of his brother with the recommendation that he needed further inpatient care.

The Federal (FECA) Procedure Manual indicates that if medical reports document a condition, which has arisen since the compensable injury and this condition disables an employee from the offered job, the job will be considered unsuitable, even if the subsequently-acquired condition is not employment related.⁶ After the Office suspended appellant's compensation effective May 26, 1995, appellant submitted additional medical evidence from Dr. Hornby that indicated that he needed inpatient care for a psychiatric condition. The Board, however, notes that the August 20, 1996 decision, in which appellant's compensation was terminated does not indicate that this evidence was considered by the Office prior to making its decision to terminate benefits. The Board, therefore, must set aside the August 20, 1996 decision, and remand the case to the Office to fully consider the evidence, which was properly submitted by appellant prior to the issuance of this decision.⁷

The decisions of the Office of Workers' Compensation Programs dated August 20 and May 7, 1996 are hereby reversed.⁸

Dated, Washington, D.C.
January 4, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(4) (December 1993).

⁷ See *William A. Couch*, 41 ECAB 548 (1990).

⁸ The Board notes that the Office issued a decision dated January 24, 1997, after an appeal was filed with the Board. The Board and the Office may not have concurrent jurisdiction over the same issue in the same case. *Douglas E. Billings*, 41 ECAB 880 (1990). As the January 24, 1997 decision was a denial of a request for reconsideration of the prior decision over which the Board has jurisdiction, the decision addressed the same issues that would be addressed by the Board on appeal. The January 24, 1997 Office decision is, therefore, null and void.

A. Peter Kanjorski
Alternate Member