U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MIGDALIA TIRADO and U.S. POSTAL SERVICE,
POST OFFICE, Miami, Fla.

Docket No. 96-2303; Submitted on the Record;
Issued March 25, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation benefits on the grounds that she refused an offer of suitable work; and (2) whether appellant abandoned her request for a hearing.

On July 31, 1992 appellant, then a 39-year-old window clerk, sustained a lumbar strain and herniated nucleus pulposus in the performance of duty when she lifted a sack of mail at work. She was placed on the periodic compensation rolls to receive compensation benefits for temporary total disability.

In a report dated September 14, 1992, Dr. Andrew G. Frank, a psychiatrist, diagnosed a herniated lumbar disc with sciatic involvement and indicated that appellant had been totally disabled commencing on July 31, 1992.

In a report dated June 18, 1993, Dr. Frank diagnosed status post lumbar discectomy and indicated that appellant was able to work eight hours per day with certain restrictions.

In a report dated August 6, 1993, Dr. Frank stated that, in light of appellant's complaints of severe pain, he recommended a second neurosurgical opinion. He stated that appellant was also experiencing psychiatric problems but he did not know whether this condition was related to her employment. Dr. Frank stated that at the present time it appeared that she was prevented from performing even her light-duty position due to her pain and secondary psychological impairment.

In a letter dated August 18, 1993, Dr. Frank stated that he had reviewed the light-duty job description and felt that appellant was not physically or emotionally capable of meeting the demands of the job and was therefore totally disabled. He stated that he had recommended a neurosurgical and psychiatric evaluation.

In a report dated December 7, 1993, Dr. Irving E. Fixel, a Board-certified orthopedic surgeon and Office referral physician, provided a history of appellant's condition, findings on examination, and the results of an x-ray and stated that she was partially disabled.

In a work restriction evaluation dated September 7, 1993, Dr. Fixel indicated that appellant was able to work eight hours per day with certain restrictions which included no lifting over ten pounds, standing limited to one hour per day, walking limited to two hours per day and sitting limited to four hours per day.

By letter dated December 13, 1993, the Office referred appellant, together with a statement of accepted facts and copies of medical records, to Dr. Neil H. Edison, a Board-certified psychiatrist, for an examination and evaluation as to whether appellant had sustained any emotional condition causally related to her July 31, 1992 employment-related low back strain.

In a report dated January 3, 1994, Dr. Edison provided a history of appellant's condition and the results of a psychiatric evaluation and stated that appellant had a neuropsychiatric disorder, chemical dependency, that was presently in remission and that this condition preexisted her July 31, 1992 employment injury. He stated that appellant's nonwork-related psychiatric condition did not disable her from work.

In a report dated June 13, 1994, Dr. Fixel indicated that appellant could work four hours per day for one or two months with no lifting over fifteen pounds and that she would then be able to return to full-time work.

By letter dated January 12, 1995, the Office advised appellant that due to a conflict in medical opinions between Dr. Frank and Dr. Fixel, regarding appellant's work restrictions, appellant was referred to Dr. Bernard Tarr, a Board-certified orthopedic surgeon and impartial medical specialist, for an examination and evaluation of any work-related disability.

In a report dated February 2, 1995, Dr. Tarr provided a history of appellant's condition and findings on examination and diagnosed chronic depression, status post laminectomy at L4-5, and stated:

> "[Appellant] does not display any objective findings that would preclude her from working [as] a distribution window [clerk] in the [employing establishment]. Normal reasonable precautions for a person of her physical stature should be observed, *i.e.*, bending and lifting more than 20 to 25 pounds would probably be contraindicated. An 8-hour workday with the usual lunch break and other rest periods would seemingly not be overwhelming for [appellant], although the subjective nature of her problem may supersede my conclusions."

By letter dated July 7, 1995, the employing establishment offered appellant a position as a modified distribution window clerk effective August 8, 1995 with duties of selling stamps and money orders, completing records, responding to customer inquiries, and other duties as assigned within her work restrictions as provided by Dr. Tarr which included restricted bending and no lifting over 20 pounds. The employing establishment advised appellant that the position

was currently available and was subject to revision based on any changes in appellant's physical restrictions. The job description was signed by Dr. Tarr who indicated that he had reviewed the job description and found that appellant was able to perform those duties. Appellant was asked to return her decision regarding the job offer within 10 days.

On July 20, 1995 appellant refused the job offer on the grounds that the position required eight hours of standing. She also stated her opinion that the standing, sitting and walking should be intermittent.

By letter dated July 28, 1995, the Office advised appellant that it had found the modified distribution window clerk position offered by the employing establishment to be suitable to appellant's work capabilities, was currently available and that appellant had 30 days within which to either accept the position or provide an explanation of her reasons for refusing it. Appellant was advised that if she refused or neglected to work after suitable work was offered her compensation benefits would be terminated. The Board notes that the copy of this letter contains several handwritten notes and address corrections.

By decision dated September 8, 1995, the Office terminated appellant's compensation benefits on the grounds that she had refused an offer of suitable employment.

By letter dated September 28, 1995, appellant requested an oral hearing before an Office hearing representative.

By letter dated December 21, 1995, the Office sent to appellant's address of record a notice advising appellant that a hearing would be held on January 24, 1996 and the location of the hearing was provided to her.

By decision dated February 9, 1996, the Office determined that appellant had abandoned her request for a hearing because she had failed to appear for the hearing and had not requested cancellation at least three calendar days prior to the hearing and did not show good cause for her failure to appear within ten days after the time set for the hearing.

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

Section 8106(c)(2) of the Federal Employees' Compensation Act provides in pertinent part, "[a] partially disabled employee who ... refuses or neglects to work after suitable work is offered ... is not entitled to compensation."[1] However, to justify such termination, the Office must show that the work offered was suitable.[2] An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.[3]

[1] 5 U.S.C. § 8106(c)(2).

[2] *David P. Camacho*, 40 ECAB 267, 275 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341, 345 (1981).

[3] 20 C.F.R. § 10.124; *See Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

The Board finds that the Office denied appellant a reasonable opportunity to comply with 5 U.S.C. § 8106(c). When the Office informed appellant in its July 28, 1995 notification that it had determined the position offered to be suitable, it informed her of a preliminary determination. By inviting her to write and give reasons for not accepting, the Office acknowledged that its determination was not yet final, and that a reasonable explanation would justify her refusal and result in the continuation of her compensation for disability.

If a claimant chooses to respond within 30 days and gives reasons for not accepting the offered position, the Office must consider these reasons before it can make a final determination on the issue of suitability. Only after it has made a final determination on the issue of suitability can the Office afford the claimant an opportunity to accept or refuse an offer of suitable work. And only after it has finalized its decision on suitability can the Office notify the claimant that refusal to accept shall result in the termination of compensation, as the language of 5 U.S.C. § 8106(c) clearly mandates.[4]

In this case, the Office did not afford appellant an opportunity to accept the position offered after making a final determination that the position was suitable. The Office therefore denied appellant a reasonable opportunity to accept an offer of "suitable" work. Without such an opportunity, appellant cannot be held to have refused an offer of suitable work within the meaning of 5 U.S.C. § 8106(c). On July 20, 1995 appellant provided her reasons in support of her refusal to accept the offered position. On September 8, 1995 the Office issued a decision in which it determined that appellant had refused an offer of suitable work. In issuing this decision, the Office implicitly determined that the reasons submitted by appellant in support of her refusal to accept the offered position were unacceptable, and in doing so it finalized its preliminary decision on suitability. At the same instant, however, the Office terminated appellant's compensation for disability, thereby denying her an opportunity to accept the position after determining it to be a suitable one.

In view of the foregoing, the Board finds that the Office has not met its burden of justifying termination of appellant's compensation for disability.

In light of the Board's finding in regard to the first issue, there is no need to address the second issue in this case.

The September 29, 1995 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, D.C.
March 25, 1999

Michael J. Walsh

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

Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member