U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LETHIA M. ROLLINS and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Tampa, Fla.

Docket No. 97-1759; Submitted on the Record;
Issued March 17, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

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

The Board has carefully reviewed the evidence and finds that the Office met its burden of proof in terminating appellant's compensation.

Once the Office accepts a claim it has the burden of proving that the employee's disability has ceased or lessened before it may terminate or modify compensation benefits.[1] Section 8106(c)(2) of the Federal Employees' Compensation Act[2] provides that 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.[3] The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.[4]

The implementing regulation[5] 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 a showing before entitlement to compensation is terminated.[6] To

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[1] *Karen L. Mayewski*, 45 ECAB 219, 221 (1993); *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

[2] 5 U.S.C. §§ 8101-8193; 5 U.S.C. § 8106(c)(2).

[3] *Camillo R. DeArcangelis*, 42 ECAB 941, 943 (1991).

[4] *Stephen R. Lubin*, 43 ECAB 564, 573 (1992).

[5] 20 C.F.R. § 10.124(c).

[6] *John E. Lemker*, 45 ECAB 258, 263 (1993).

justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.[7]

Office procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.[8] Unacceptable reasons include relocation for personal desire or financial gain, lack of promotion potential, or job security.[9]

In this case, appellant's notice of traumatic injury, filed on July 19, 1991, was accepted for right shoulder strain and impingement. Appellant returned to limited duty on July 22, 1991, underwent an arthroscopy on November 8, 1991 and reinjured her right shoulder in an automobile accident on December 30, 1991. She returned to work on April 30, 1992 for four hours a day but underwent an open subacrominal decompression on January 8, 1993. Appellant worked four hours a day from June 19 until July 7, 1993 when she claimed a recurrence of disability.

Appellant then returned to limited, part-time duty on January 15, 1994 and received compensation for four hours a day. She also received a schedule award for 14 percent permanent impairment of her right shoulder, which ran from May 29, 1994 to March 30, 1995, when she elected to receive retirement disability benefits. Appellant claimed wage-loss compensation from February 3 to May 28, 1994 for recurrence of disability, but this claim was denied on June 24, 1994.

On August 24, 1994 the employing establishment offered appellant a limited-duty position based on her medical restrictions. Appellant's attorney responded that her treating physician had not approved the offered position. On March 27, 1995 the Office informed appellant that the position had been found to be suitable, based on the second opinion evaluation of Dr. Richard F. Lyster, a Board-certified orthopedic surgeon, and that she had 30 days to accept the position or explain her reasons for refusing it.

On July 12, 1995 the Office terminated appellant's compensation based on the grounds that she had refused an offer of suitable work, noting that the job was still available and that she had not responded to the March 27, 1995 letter. Appellant requested an oral hearing, and the hearing representative reversed the Office's decision on February 22, 1996 on the grounds that the position offered to appellant, a permanent employee when injured, had been temporary.

On remand, the Office inquired whether the offered position was temporary and, based on the employing establishment's response, again terminated appellant's compensation on

[7] *Maggie L. Moore*, 42 ECAB 484, 487 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[8] *C.W. Hopkins*, 47 ECAB 725 (1996); *see Patsy R. Tatum*, 44 ECAB 490, 495 (1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5 (May 1996).

[9] *Arthur C. Reck*, 47 ECAB 339 (1996).

July 29, 1996. Appellant requested reconsideration, which the Office denied on April 9, 1997 on the grounds that her request was insufficient to warrant review of its prior decision.

The Board finds that the Office has properly exercised its authority granted under the Act and the implementing federal regulations in terminating appellant's compensation. Initially, the medical evidence establishes that the requirements of the offered position were within appellant's physical limitations. The second opinion physician, Dr. Lyster, reviewed the August 24, 1994 job offer and stated that appellant was capable of performing the duties of the modified distribution clerk position. This position was the same one that appellant's treating physician. Dr. Michael J. Smith, a Board-certified orthopedic surgeon, had approved on June 17, 1993, and appellant agreed to return to this position on January 15, 1994. Therefore, appellant was medically capable of doing the modified job.[10]

Second, the Board finds that appellant was properly informed by the Office that the job was available and provided her with the opportunity either to accept the position or explain her refusal within 30 days. Appellant did not respond to the Office's March 27, 1995 letter, and therefore, the Office properly issued a termination decision.[11]

Appellant argued on reconsideration that the hearing representative's decision was correct and that the offered position did not conform to the Office's regulations. The hearing representative found that the offered position was temporary, but, as the record indicates, his finding was based on erroneous information. He had called the employing establishment for clarification because the August 24, 1994 letter itself stated that the position was "temporary." He was informed by Mr. Dale Harris, a human resources specialist at the employing establishment, that the position was temporary and that appellant was a permanent employee.

On remand, however, the Office determined that the hearing representative was wrongly advised. In a letter dated March 22, 1996, Mr. Harris explained that although the August 24, 1994 letter used the word, "temporary," the job offered to appellant was not temporary. He stated that the term was used by the employing establishment to distinguish a limited-duty job offer from a rehabilitation job offer and added that, at the request of the Office, the employing establishment had discontinued use of "temporary" because of the confusion it had caused. Therefore, the Board finds that appellant was not offered a temporary job.[12]

[10] *See Edward P. Carroll*, 44 ECAB 331, 341 (1992) (finding that appellant's assertion of inability to work is not reasonable grounds for refusing suitable work absent supporting medical evidence).

[11] *See Rosie E. Garner*, 48 ECAB ___ (Docket No. 95-74, issued December 6, 1996) (finding that if an employee submits reasons for refusing an offer of suitable work, the Office must inform appellant if it finds that the reasons are inadequate or unjustified and afford appellant one final opportunity to accept the offered position).

[12] *Cf. Leonard W. Larson*, 48 ECAB ___ (Docket No. 95-1102, issued May 12, 1997) (finding that the Office erred in terminating compensation on the grounds that appellant had refused an offer of suitable work because the offered position was temporary and therefore the offer did not conform with the Office's procedural requirements).

The April 9, 1997 and July 29, 1996 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
March 17, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member