

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NATHANIEL DAVIS and U.S. POSTAL SERVICE,
POST OFFICE, New York, N.Y.

*Docket Nos. 97-1565 & 97-2368; Submitted on the Record;
Issued May 13, 1999*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective January 7, 1995 on the grounds that he refused an offer of suitable work; and (2) whether the Office properly denied appellant's claim for a schedule award.

On October 18, 1993 appellant, then a 49-year-old letter carrier, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that on that date, he sustained numerous injuries when he was struck by a bicyclist while performing his federal employment duties. On December 8, 1993, following development of the medical evidence, the Office accepted appellant's claim for contusions to the left elbow, wrist, knee and shoulder, sprain of the left ankle, torn left medial meniscus and internal derangement of the left knee. Arthroscopy, partial medial menisectomy and a chondroplasty of the patella were performed on April 12, 1994. Arthroscopy, debridement of the glenoid labrum and a subacromial decompression with acromioplasty of the left shoulder were performed on August 16, 1994. Appellant stopped work on the date of the injury and began receiving appropriate compensation benefits for temporary total disability.

Appellant's treating physician, Dr. Hank Ross, a Board-certified orthopedic surgeon, submitted periodic reports documenting appellant's progress. In a report dated October 3, 1994, Dr. Ross indicated that appellant was improving and, although he remained unemployable, he expressed a desire to enroll in a vocational rehabilitation program to obtain a lighter-duty job.

In a letter dated November 1, 1994, the Office asked Dr. Ross whether appellant was employable and asked that he complete a work restriction evaluation (Form OWCP-5) outlining appellant's physical restrictions.

In response, Dr. Ross stated that appellant was seen on November 2, 1994 and that, while he remained unemployable, he was told to return to the office in one month's time, at which time he would be evaluated for light duty.

In reports dated November 10, 21 and 30, 1994, January 4 and 25 and April 11, 1995, Dr. Ross noted that appellant remained unable to return to his employment. He also stated that appellant had complaints of dizziness and needed to see a neurologist.

In a report dated December 13, 1994, Dr. Milford Blackwell, a Board-certified neurologist to whom appellant had been referred by Dr. Ross, examined appellant and stated that appellant was suffering from the aftermath of a brain concussion or post-cerebral concussion syndrome. He stated that based on appellant's history, symptoms and his clinical findings, the October 18, 1993 employment incident was the cause of appellant's neurological condition.

On June 2, 1995 the Office referred appellant to Dr. Leon Sultan, a Board-certified orthopedic surgeon, for a second opinion evaluation. The Office provided Dr. Sultan with a statement of accepted facts, copies of the medical record and a list of questions to be answered.

In a report dated June 29, 1995, Dr. Sultan reviewed the evidence of record and listed his findings on examination. He stated that appellant did demonstrate some marginal findings involving his left shoulder and knee secondary to his surgical procedures, but explained that these findings were not severe enough to prevent appellant from returning to work as a letter carrier, or at least returning to a modified position that would accommodate his subjective complaints involving his left shoulder and knee. Dr. Sultan concluded that appellant was clinically stable and required no further treatment or therapy. In an accompanying Form OWCP-5 dated June 29, 1995, he stated that appellant had already reached maximum medical improvement and that he could work eight hours a day provided he limited kneeling on his left knee and repeated reaching with his left arm to 15 minutes per hour.

On August 2, 1995 the Office forwarded a copy of Dr. Sultan's report to Dr. Ross for comment. The Office asked Dr. Ross to provide his objective findings if he disagreed with Dr. Sultan's assessment.

On August 31, 1995 the Office forwarded Dr. Sultan's report to the employing establishment and asked whether they could formulate a job offer for appellant.

On a disability slip dated August 18, 1995, Dr. Ross stated that appellant was unable to work and would be reevaluated in two months. In a Form OWCP-5 completed on August 31, 1995, however, he indicated that appellant could work for four hours a day and was restricted from kneeling, bending, lifting or reaching. Dr. Ross also noted that appellant was being treated by a neurologist for a concussion.

In a subsequent report dated October 18, 1995, Dr. Ross noted that appellant still suffered from weakness, pain and swelling in his shoulder and knee and lacked 10 degrees of internal shoulder rotation and five degrees of external shoulder rotation. In addition, he stated that appellant had patella femoral crepitus with soreness and degenerative changes of the knee and shoulder tendon as a result of his surgeries. Dr. Ross concluded: "I do not feel that he can return

to his job, as a letter carrier, for it required heavy lifting and prolonged periods of standing and walking. I do feel, however, that he is capable of work that would require less physical trauma.”

By letter dated October 31, 1995, the employing establishment offered appellant the position of modified letter carrier. The basic functions of the position were listed as casing and delivering mail, including express mail, eight hours a day, as adjusted to correspond to appellant’s physical limitations. The employing establishment noted that the physical requirements of the position were based on Dr. Sultan’s June 29, 1995 report which restricted appellant from kneeling on the left knee or repeatedly reaching with the left arm.

By letter dated November 6, 1996, the Office advised appellant that the job offer had been reviewed and compared with the medical evidence of record concerning his ability to work, and that the position was deemed suitable. Appellant was further advised of the provision of 5 U.S.C. § 8106(c) and given 30 days from the date of the Office’s letter to either accept the position or provide a written explanation of his reasons for refusing the offer.

On November 6, 1995 appellant refused the job offer for the reason that his physicians, Drs. Ross and Blackwell, did not believe he could perform the limited-duty position as described therein, and further stated that the job offer did not provide enough detail.

By letter dated December 7, 1995, the Office advised appellant that his reasons had been considered and determined to be insufficient. Appellant was informed that if he refused the offer of employment, or failed to report to work when scheduled, his compensation benefits would be terminated within 15 days.

In a letter received December 12, 1995, appellant’s counsel submitted a disability certificate from Dr. Ross dated December 4 1995, in which the physician stated: “This patient has been unemployed for so long he should not return 40 hours a week initially -- he may resume 20 hours a week light duty only.” Appellant’s counsel asserted that as appellant’s long-standing treating physician, and based on his credentials, Dr. Ross’ opinion should be given greater weight. Appellant’s counsel additionally asserted that the job offer presented by the employing establishment was legally deficient in that it did not specifically delineate the actual physical duties of the job.

On December 21, 1995 appellant accepted the position of modified letter carrier as delineated in the employing establishment’s offer of October 31, 1995.

By decision dated December 26, 1995, the Office terminated appellant’s monetary compensation effective January 7, 1996, on the grounds that appellant refused an offer of suitable employment.

Subsequent to the Office’s decision, on January 5, 1996, the Office received a letter from Lisa Lau, human resources associate for the employing establishment, who informed the Office that “[appellant] accepted the job offer, however, only to work four hours per day as per his treating physician’s opinion.” In a memorandum to file dated January 5, 1995, the Office noted that it had informed the employing establishment that the decision of December 26, 1995 remained valid as the job offer that was found suitable by the Office was for 8 hours a day and

although appellant signed the job offer stating that he accepted the job, he did not actually accept this job offer. Therefore, his compensation remained terminated for his refusal to accept a suitable job offer.

By letter dated January 10, 1996, appellant requested an oral hearing.

At the hearing, held on September 26, 1996, appellant testified that he had accepted the job offer within 15 days of the Office's December 7, 1995 letter explaining that his reasons for refusal had been found insufficient. Appellant stated that, upon his return to work, he reported to the employing establishment medical unit where he was examined by a physician. The employing establishment physician completed a Form 3956 indicating that appellant was medically cleared for limited duty involving no kneeling on the left knee or repeated reaching with the left arm, for eight hours a day. The physician indicated, however, that the position would be performed "4 h[ou]rs day -- per pt's PMD." Appellant testified that he had subsequently begun working six hours a day. He further testified that the job he was performing was different from the job of modified letter carrier offered in the employing establishment's October 31, 1995 letter, and was actually a clerical position. Appellant explained that upon his return to work, the station manager reviewed appellant's physical restrictions and chose a position for him.

By decision dated January 8, 1997, the Office hearing representative affirmed the December 26, 1995 decision terminating appellant's compensation on the grounds that appellant had refused to accept suitable employment.

On March 28, 1997 appellant filed a claim for a schedule award.

In a decision dated April 23, 1997, the Office denied appellant's request for a schedule award pursuant to 5 U.S.C. § 8106(c)(2), which provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for him is not entitled to compensation.

The Board finds that the Office failed to meet its burden of proof in terminating appellant's compensation benefits.

It is well established that once the Office accepts a claim and pays compensation for disability, it has the burden of justifying termination or modification of benefits. Under such circumstances it must establish either that its original determination was erroneous or that the employment-related disability has ceased.¹

The Office terminated appellant's compensation under 5 U.S.C. § 8106(c)(2) on the grounds that he had refused to accept suitable work offered to him by the employing establishment. However, to justify such termination, the Office must also show that the work offered was suitable.²

¹ *Lawrence D. Price*, 47 ECAB 120 (1995).

² *Arthur C. Reck*, 47 ECAB 339 (1996).

In the present case, the Office accepted appellant's claim for contusions to the left elbow, wrist, knee and shoulder; sprain of the left ankle; torn left medial meniscus and internal derangement of the left knee; as well as for arthroscopic treatment of appellant's knee and shoulder conditions. By decisions dated April 23 and January 8, 1997, the Office terminated appellant's compensation benefits based on the opinion of Dr. Sultan, an Office second opinion physician, that the light-duty position offered to appellant was suitable.

The Board finds that there is a conflict in the medical evidence between the Office referral physician, Dr. Sultan, and appellant's physician, Dr. Ross, regarding the nature and extent of appellant's capacity for employment.³

In reports dated August 31 and December 4, 1995, Dr. Ross stated that appellant was still suffering residual effects of his accepted knee and shoulder injuries but could return to work four hours a day, or 20 hours a week, provided he was restricted from excessive kneeling, bending, lifting or reaching. In contrast, Dr. Sultan stated in his June 29, 1995 report that appellant could perform modified duty, with kneeling and reaching restrictions, for eight hours a day.

The Board finds the opinions of Drs. Ross and Sultan to be of equal weight and in conflict. The Board notes that because the Office relied on the reports of Dr. Sultan to terminate appellant's compensation benefits effective January 7, 1996 without having resolved the existing conflict, the Office failed to meet its burden of proof in terminating appellant's compensation benefits.⁴

In addition, the Board notes that when the employing establishment offered the modified letter carrier position to appellant in a letter dated October 31, 1995, it merely noted that the position would be in accordance with appellant's work restrictions and then listed those restrictions, but it did not provide a description of the actual duties and requirements of the position besides noting that it involved casing and delivering mail and would be within

³ Section 8123(a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." 5 U.S.C. § 8123(a). When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence. *Gertrude T. Zakrajsek (Frank S. Zakrajsek)*, 47 ECAB 770 (1996).

⁴ See *Gail D. Painton*, 41 ECAB 492, 498 (1990); *Craig M. Crenshaw, Jr.*, 40 ECAB 919, 922-23 (1989).

appellant's physical limitations.⁵ The duties and physical requirements of the duties should be described by the employing establishment.

The Office should also verify that the position is still available and offered to appellant.

Finally, as the Office failed to meet its burden of proof in terminating appellant's compensation benefits, the Office should proceed to develop appellant's claim for a schedule award.

The April 23 and January 8, 1997 decisions of the Office of Workers' Compensation Programs are reversed.

Dated, Washington, D.C.
May 13, 1999

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁵ According to Office procedure, a job offer must be in writing and contain a description of the duties to be performed and the specific physical requirements of the position; *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity*, Chapter 2.814.4(a) (December 1993).