

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RONNIE W. SUTER and U.S. POSTAL SERVICE,
MAIN POST OFFICE, McAlester, OK

*Docket No. 99-358; Submitted on the Record;
Issued October 21, 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 met its burden of proof in terminating appellant's compensation benefits effective February 2, 1997 on the grounds that appellant refused an offer of suitable work.

On January 30, 1991 appellant, then a 40-year-old clerk, sustained a lumbar strain and a herniated nucleus pulposus at L4-5 and L5-S1 in the performance of duty.

Effective December 14, 1991, the Office placed appellant on the periodic compensation rolls to receive compensation benefits for temporary total disability.

In a report dated July 23, 1996, Dr. Sami R. Framjee, a Board-certified orthopedic surgeon, provided a history of appellant's condition, a summary of the medical reports of record, and findings on examination and stated that he had permanent partial disability related to his January 30, 1991 employment injury. Dr. Framjee stated that appellant could not perform his regular job but could return to work in a light-duty capacity. He stated that appellant could perform a job in which he did not have to lift more than 20 pounds initially and indicated that he would need to be able to walk, sit and stand intermittently.

By letter dated November 6, 1996, an employing establishment compensation specialist asked appellant's attending physician, Charles A. Borne, Jr., a Board-certified orthopedic surgeon, to review the job requirements for a permanent limited-duty position as a modified distribution clerk. The job duties included timekeeping, filing of delivery receipts and related forms, miscellaneous data entry, filing of customer claims, and answering inquiries in person and by telephone. The employing establishment noted that any additional assignments would adhere to appellant's medical restrictions and that he would be allowed to sit or stand as needed and that none of his assignments would include lifting over 20 pounds. The employing establishment noted that additional assignments could include sorting mail, assisting in the forwarding of mail and ordering supplies. On November 14, 1996 Dr. Borne noted on his copy of the Office's

November 5, 1996 letter, "According to the above description of job duties it is my opinion that [appellant] is able to perform these activities."

On November 22, 1996 appellant rejected the offer for the modified distribution clerk position.

By letter dated November 29, 1996, the Office advised appellant that it had found the modified distribution clerk position to be suitable to appellant's work capabilities and noted that the position was currently available to him. The Office stated that appellant had 30 days to either accept the position or provide an explanation of his reasons for refusing it. The Office noted that any claimant who refused an offer of suitable employment was not entitled to compensation benefits.

By letter dated November 22, 1996, appellant, through his representative, stated that he was not physically capable of performing the job duties of the modified distribution clerk position offered to him. He stated that his current attending physician, Richard Hubbard, a neurosurgeon, had not released him to return to work. Dr. Hubbard noted that Dr. Borne had performed surgery on appellant in 1993 but had not seen him since and he therefore did not understand how Dr. Borne could release him to return to work. He also noted that the Veterans Administration had determined that appellant was 100 percent disabled. Appellant asserted that he was not able to perform a job that involved lifting, standing and sitting for long periods of time or that involved a high level of stress.

By letter dated December 30, 1996, the Office advised appellant that it had considered appellant's reasons for refusing the offered position and found them to be unacceptable. The Office stated that appellant had 15 additional days to accept the position.

By letter dated December 27, 1996, appellant again stated that he was not able to perform the modified distribution clerk position. He submitted a rating decision from the Department of Veterans Affairs in which this agency stated that appellant had a 90 percent service-related impairment which, although not totally disabling, prevented appellant from following a substantially gainful occupation.

By decision dated January 14, 1997, the Office terminated appellant's compensation benefits effective February 2, 1997 on the grounds that appellant had refused an offer of suitable work.

By letter dated February 12, 1997, appellant requested an oral hearing before an Office hearing representative.

On October 20, 1997 a hearing was held before an Office hearing representative at which time appellant testified.

Subsequently, the Office received additional evidence from appellant. In a report dated June 13, 1994, Dr. Richard R. Hubbard, a Board-certified neurosurgeon, stated that appellant needed to have an orthopedic surgeon determine whether further surgery was appropriate.

In a report dated July 29, 1996, Dr. Hubbard provided findings on examination and recommended further testing to include a myelogram, computerized tomography (CT) scan and an electromyogram. He stated that appellant would not be a suitable candidate for return to the work force without further workup and possible surgical intervention.

In a letter dated November 12, 1997, Dr. G. Paul Kula, a Board-certified psychiatrist and neurologist, stated that he had reviewed the job description for the position offered to appellant and had reviewed appellant's disabilities as outlined by the Social Security Administration and the Department of Veterans Affairs. He stated:

“[Appellant's] physical disabilities are far beyond any ability to return to meaningful physical work as described in the job description he gave me and his chronic, unresolved depression makes him particularly ill-suited to address the public and disgruntled patrons by [tele]phone or in person. Therefore, by matching the descriptions of the disabilities versus the job offering, I would see this as being inappropriate.”

By decision dated January 22, 1998, the Office hearing representative affirmed the Office's January 14, 1997 decision.

By letter dated May 5, 1998, appellant requested reconsideration of the Office's January 22, 1998 decision and submitted additional evidence.

In a report dated March 25, 1998, Dr. William G. Wiggs, a Board-certified psychiatrist and neurologist, stated that he had examined appellant for lower back pain. Dr. Wiggs noted that a magnetic resonance imaging (MRI) scan performed on March 19, 1998 showed degenerative disc disease and that an electromyogram and nerve conduction studies revealed lumbosacral radiculopathies at L5 and S1. He stated, based on these findings and the previous records and history of the type of work that appellant had performed in the past, he found appellant totally permanently disabled. Dr. Wiggs stated that appellant needed to refrain from any strenuous activities such as lifting, bending and stooping.

By decision dated September 16, 1998, the Office denied modification of its January 22, 1998 decision.

The Board finds that the Office met its burden of proof in terminating appellant's compensation benefits effective February 2, 1997 on the grounds that appellant 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

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).

after suitable work has been offered to him has the burden of showing that such refusal to work was justified.³

The evidence of record shows that appellant is capable of performing the modified distribution clerk position offered by the employing establishment and determined to be suitable by the Office on November 29, 1996. The modified distribution clerk position involves primarily clerical duties involving filing, timekeeping and answering inquiries on the telephone and in person.

In determining that appellant is physically capable of performing the file clerk position, the Office properly relied on the opinion of Dr. Framjee, a Board-certified orthopedic surgeon who, in a report dated July 23, 1996, stated that appellant could perform a job in which he did not have to lift more than 20 pounds and indicated that he would need to be able to walk, sit and stand intermittently. The record shows that the modified distribution clerk position conforms to these physical restrictions. The Board finds that the Office has established that the modified distribution clerk position offered by the employing establishment is suitable.

In its November 29, 1996 letter, the Office properly complied with its procedural requirements by advising appellant of the suitability of the position offered, that the job remained open, and that his failure to accept the offer, without justification, would result in termination of his compensation. In a letter dated November 22, 1996, appellant provided his reasons for refusing the job offer. By letter dated December 30, 1996, the Office reviewed his response and appropriately advised him that his reasons were unacceptable and allowed him an additional 15 days to return to work.

As noted above, once the Office has established that a particular position is suitable, 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. The Board has carefully reviewed the evidence and argument submitted by appellant in support of his refusal of the modified distribution clerk position and finds that his reasons are not sufficient to justify his refusal of the position.

Appellant asserted that he was not capable of performing the offered position and provided medical reports which he felt supported his assertion.

In a report dated June 13, 1994, Dr. Hubbard, a Board-certified neurosurgeon, stated that appellant needed to have an orthopedic surgeon determine whether further surgery was appropriate. This report does not address the issue of whether the position offered by the employing establishment was suitable for appellant's physical capabilities and therefore it does not support appellant's assertion that he was not able to perform the position.

In a report dated July 29, 1996, Dr. Hubbard provided findings on examination and recommended further testing. He stated that appellant would not be a suitable candidate for return to the work force without further workup and possible surgical intervention. However,

³ See *Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

Dr. Hubbard provided insufficient medical rationale in support of his opinion. Furthermore, it is not clear whether he was opining that appellant was not able to perform his regular job or the modified position offered to him. His report does not mention the modified position. Due to these deficiencies, this report does not support appellant's assertion that he was not physically capable of performing the offered position.

In a letter dated November 12, 1997, Dr. Kula, a Board-certified psychiatrist and neurologist, stated that he had reviewed the job description for the position offered to appellant and had reviewed appellant's disabilities as outlined by the Social Security Administration and the Department of Veterans Affairs. He opined that appellant was not physically capable of performing the job and also indicated that his depression would make it difficult for him to deal with disgruntled patrons. However, he provided no physical findings on examination in support of his opinion. Furthermore, his opinion that appellant could not perform the job because his depression would render him incapable of dealing with disgruntled patrons was not supported by medical rationale. Due to these deficiencies, this report does not support appellant's belief that he was not capable of performing the offered position.

In a report dated March 25, 1998, Dr. Wiggs stated that he had examined appellant and noted that an MRI scan showed degenerative disc disease and that an electromyogram and nerve conduction studies revealed lumbosacral radiculopathies. He stated, based on these findings and the previous records and history of the type of work that appellant had performed in the past, that he found appellant totally permanently disabled. Dr. Wiggs stated that appellant needed to refrain from any strenuous activities such as lifting, bending and stooping. However, his opinion was that appellant was not capable of performing his regular job, not the modified distribution clerk position offered by the employing establishment. Dr. Wiggs stated that appellant could not perform any strenuous activity but the description of the offered position does not indicate any strenuous activity. Therefore, this report does not support appellant's contention that he could not perform the offered position.

Appellant also asserted that a rating decision from the Department of Veterans Affairs supported his contention that he was not able to perform the offered position. This rating decision states that appellant had a 90 percent service-related impairment which, although not totally disabling, prevented appellant from following a substantially gainful occupation. However, entitlement to benefits under one federal agency's rules and regulations is not determinative of a claimant's entitlement to compensation under the Act.⁴

For these reasons, the Office properly terminated appellant's compensation effective February 2, 1997 on the grounds that he refused an offer of suitable work.⁵

⁴ See *Daniel Deparini*, 44 ECAB 657, 659-60 (1993).

⁵ As noted above, the Office complied with its procedural requirements prior to terminating appellant's compensation, including providing appellant with an opportunity to accept the modified distribution clerk position after informing him that his reasons for initially refusing the position were not valid; see generally *Maggie L. Moore*, 42 ECAB 484 (1991); *reaff'd on recon.*, 43 ECAB 818 (1992).

The September 16 and January 22, 1998 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
October 21, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member