

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA. MUSICK and U.S. POSTAL SERVICE,
POST OFFICE, Blanchard, OK

*Docket No. 98-19; Submitted on the Record;
Issued September 15, 1999*

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective August 28, 1997 for refusing suitable work.

The Office accepted that appellant's August 23, 1994 employment injury, resulted in a lumbar strain and a herniated nucleus pulposus and authorized back surgery, which appellant underwent on July 18, 1995. Appellant received continuation of pay or compensation for temporary total disability until she returned to light-duty work on March 26, 1996. Appellant again stopped work on April 6, 1996 and the Office accepted that she sustained a recurrence of disability and resumed payment of compensation for temporary total disability. Appellant's application for disability retirement was approved effective August 16, 1996.

On June 27, 1997 the employing establishment offered appellant a light-duty position as a modified part-time flexible clerk, beginning at four hours per day and increasing to six hours per day after one week. By letter dated July 7, 1997, the Office advised appellant that it had found the employing establishment's offer suitable, that she had 30 days to accept the offer or provide reasons for refusing it, and that section 8106(c) of the Federal Employees' Compensation Act provides that a partially disabled employee who refuses suitable work is not entitled to compensation. On July 9, 1997 the employing establishment reiterated its offer, adding that it would be responsible for appellant's relocation expenses. The Office reissued its July 7, 1997 letter on July 10, 1997, adding that, since appellant had been separated from employment with the employing establishment and had moved more than 50 miles away, relocation expenses were authorized. By response received by the employing establishment on July 25, 1997 appellant declined the employing establishment's offer of light duty, stating, "Due to a deterioration in my condition I am unable to stand or sit for more than a few minutes. My doctor has me back in therapy to try to increase my range of motion [and] tolerance too."

By decision dated August 28, 1997, the Office terminated appellant's compensation effective that date on the basis that she refused an offer of suitable employment. Appellant continued to be entitled to medical benefits under the Act.

Under section 8106(c)(2) of the Act, the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.¹ To justify termination of compensation, the Office must establish that the work offered was suitable.²

The Board finds that the Office properly terminated appellant's compensation effective August 28, 1997 for refusing suitable work.

The physical requirements of the position of modified part-time flexible clerk offered to appellant by the employing establishment were occasional lifting up to 15 pounds from the floor to waist, occasional lifting up to 17.5 pounds from waist to eye level, carrying of 20 pounds two-handed, pushing up to 18 pounds, occasional standing while working with arms overhead, occasional bending over and limited repetitive squatting and trunk rotation while sitting. The offer indicated appellant could alternate standing and sitting every 45 minutes. These limitations correspond directly to those set forth by appellant's then-attending physician, Dr. D. Brent Tipton, in a March 20, 1997 report.

As ability to physically perform the duties of an offered position is primarily a medical question, appellant's reason for declining the offer ... that she could not physically tolerate it ... is not acceptable.³ Appellant submitted several reports from her new attending physician who began treating her on July 17, 1997 but none of these reports indicated that appellant could not perform the duties of the offered light-duty position.

Raised for the first time on appeal, appellant's other reason for refusing the employing establishment's offer -- that she had moved two and one-half hours away from the site of the employing establishment before the offer was made -- also is not acceptable.⁴ Appellant has not contended that her return to the site of the employing establishment was medically contraindicated and her preference to live in the area, in which she now resides is not an acceptable reason for refusing an offer of employment.⁵

¹ 5 U.S.C. § 8106(c)(2) provides in pertinent part: "A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered to, procured by, or secured for him; is not entitled to compensation."

² *David P. Camacho*, 40 ECAB 267 (1988).

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

⁴ *Carl N. Curtis*, 45 ECAB 374 (1994); *Edward P. Carroll*, 44 ECAB 331 (1992).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(b) (July 1996) states that, for claimants no longer on the employing establishment's rolls, having moved and a medical condition contraindicates a return to the area of residence at the time of injury is an acceptable reason for refusing an offered job. Chapter 2.814.5(c) states that an unacceptable reason for refusing an offered job is the claimant's preference for the area in which he or she currently resides.

The decision of the Office of Workers' Compensation Programs dated August 28, 1997 is affirmed.

Dated, Washington, D.C.
September 15, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member