

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LOUISE IANAZZI and U.S. POSTAL SERVICE,
POST OFFICE, Brooklyn, NY

*Docket No. 98-428; Submitted on the Record;
Issued September 8, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation under 5 U.S.C. § 8106(c) based on her refusal to accept suitable employment as offered by the employing establishment.

On November 12, 1994 appellant, then a 35-year-old window clerk, sustained an employment-related concussion, shoulder, cervical and lumbosacral sprains and contusions of the chest wall, left shoulder and left knee. She did not return to work and was placed on the periodic roll. The Office found that a conflict in the medical opinion evidence existed, based upon the opinions of appellant's attending Board-certified general surgeon, Dr. Tito Musacchio, who continued to advise that she could not work and Dr. Sanford R. Wert, a Board-certified orthopedic surgeon, who provided a second opinion evaluation for the Office and advised that appellant was capable of performing the limited-duty job specified in the position description provided to him. The Office referred appellant to Dr. Robert H. Copulsky, an orthopedic surgeon, who provided a report dated August 15, 1995 and a work capacity evaluation dated March 29, 1996 in which he advised that appellant could work eight hours per day with restrictions to her physical activity. By letter dated May 2, 1996, the employing establishment offered appellant a limited-duty clerk position within the restrictions provided by Dr. Copulsky. On May 13, 1996 appellant refused the job offer.

By decision dated July 19, 1996, the Office terminated appellant's wage-loss compensation on the grounds that she refused an offer of suitable work, finding the weight of the medical evidence rested with the impartial evaluation of Dr. Copulsky. On September 17, 1996 appellant returned to limited duty, four hours daily. On October 24, 1996 she filed a recurrence claim, stating that she had to stop work on October 17, 1996 due to severe pain. On June 12, 1997 appellant, through counsel, requested reconsideration and submitted additional medical evidence. Again relying on the opinion of Dr. Copulsky, by decision dated September 4, 1997, the Office denied modification of its prior decision. In a second decision dated September 4,

1997, the Office denied that appellant sustained a recurrence of disability on October 17, 1996.¹ The instant appeal follows.

The Board finds that the Office improperly terminated appellant's compensation on the grounds that she refused to accept suitable employment.

Section 8106(c)(2) of the Federal Employees' Compensation Act² states: "a partially disabled employee who: (1) refused to seek suitable work; or (2) refuses or neglects to work after suitable work is offered is not entitled to compensation." An employee who refuses or neglects to work after suitable work has been offered to her has the burden of showing that such refusal to work was justified.

In the present case, the Office found that a conflict in the medical evidence existed between appellant's attending physician, Dr. Musacchio, who opined that appellant was totally disabled and Dr. Wert, who provided a second opinion for the Office and opined that appellant could perform limited duty. Accordingly, the Office referred appellant, along with a statement of accepted facts and medical records, to Dr. Copulsky, an orthopedic surgeon, as an impartial medical specialist to resolve a conflict in the medical evidence. On the basis of Dr. Copulsky's opinion, the Office determined that a full-time light-duty clerk position was suitable for appellant, and further found that appellant's refusal of the position was not justified. Office procedures require that an impartial medical specialist be a Board-certified physician unless the physician has special qualifications for performing the examination as documented by the Office medical adviser.³ The Board notes, however, that it cannot be ascertained that Dr. Copulsky is a Board-certified specialist, nor is there indication in the record that Dr. Copulsky has special qualifications for performing appellant's evaluation. His opinion, therefore, cannot be accorded the special weight accorded to an impartial specialist. Thus, as an unresolved conflict of opinion remains regarding appellant's ability to perform the duties of the offered position, the Office has not established that the position offered to appellant was suitable. The Office, therefore, had no basis for its termination of appellant's compensation on the grounds that she refused suitable employment offered by the employing establishment.

¹ The Board notes that appellant filed a pleading with her appeal to the Board stating that she had requested an oral hearing before the Branch of Hearings and Review of the Office regarding the September 4, 1997 decision denying that she sustained a recurrence of disability and was, therefore, not appealing that decision to the Board.

² 5 U.S.C. §§ 8101-8193.

³ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b)(1) (March 1994); see *Charles M. David*, 48 ECAB ____ (Docket No. 95-1239, issued June 12, 1997).

The decision of the Office of Workers' Compensation Programs dated September 4, 1997 is hereby reversed.

Dated, Washington, D.C.
September 8, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member