

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MICHELLE M. BIERSTEDT and DEPARTMENT OF THE INTERIOR,  
BUREAU OF INDIAN AFFAIRS, MENOMINEE TRIBAL ENTERPRISES, Neopit, WI

*Docket No. 98-2478; Submitted on the Record;  
Issued August 9, 2000*

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DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits on the grounds that she refused an offer of suitable work.

The Board has duly reviewed the case on appeal and finds that the Office met its burden of proof to terminate appellant's compensation benefits.

On November 14, 1988 appellant, a forester, filed a claim alleging that she injured her right wrist in the performance of duty. The Office accepted appellant's claim for sprained right wrist. The Office entered appellant on the periodic rolls on May 23, 1989. The employing establishment terminated appellant on June 30, 1989. Appellant returned to work in the private sector as a conservation technician on April 6, 1992. By decision dated April 29, 1993, the Office reduced appellant's compensation benefits based on her capacity to earn wages as a conservation technician. Appellant underwent surgery on her right wrist on August 17, 1993 to repair a tear in her dorsal lunotriquetral ligament. The Office granted appellant a schedule award for 17 percent permanent impairment of her right upper extremity on August 20, 1996. On May 2, 1997 the employing establishment provided appellant with a job offer as a modified project forester. The Office informed appellant that the position was suitable, informed her of the penalty provisions of the Federal Employees' Compensation Act and allowed 30 days for a response. Appellant responded on May 29, 1997 and refused the position. By letter dated June 10, 1997, the Office informed appellant that her reasons for refusing the position were not justified and allowed an additional 15 days for appellant to accept the position. By decision dated July 8, 1997, the Office terminated appellant's compensation benefits effective that date as she had refused a suitable position. Appellant requested reconsideration on February 27, 1998. By decision dated May 11, 1998, the Office denied modification of its July 8, 1997 decision.<sup>1</sup>

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<sup>1</sup> Following the Office's May 11, 1998 decision, appellant submitted additional new evidence. As the Office did

It is well settled that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>2</sup> As the Office in this case terminated appellant's compensation under 5 U.S.C. § 8106(c), the Office must establish that appellant refused an offer of suitable work. Section 8106(c) of the Act<sup>3</sup> provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee is not entitled to compensation. Section 10.124(c) of the applicable regulations<sup>4</sup> provides that an employee who refuses or neglects to work after suitable work has been offered or secure 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 showing before a determination is made with respect to termination of entitlement to compensation. To justify termination of compensation, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.<sup>5</sup>

In this case, appellant's attending physician, Dr. Michael B. Wood, a Board-certified orthopedic surgeon, completed a report on August 9, 1995 and stated that appellant should avoid repetitive wrist range of motion for more than one hour, should avoid lifting more than 15 pounds with her right upper extremity and more than 35 pounds with both arms. He indicated on July 22, 1994 that appellant could work eight hours a day.

The Office referred appellant for a second opinion evaluation with Dr. Robert A. Wengler, a Board-certified orthopedic surgeon, who found that appellant could lift 5 pounds 12 times an hour with her right arm and that she could work 8 hours a day.

In reports dated August 5 and 6, 1996, Dr. Richard A. Berger, a Board-certified orthopedic surgeon, stated that appellant could use her right hand in a nonrepetitive setting when speed and coordination were not a factor, with no climbing or crawling. He indicated that appellant could lift and push and pull up to 6 pounds with her right hand and up to 10 pounds bilaterally. On April 21, 1997 Dr. Berger stated that he stood by his previous restrictions.

The light-duty position offered by the employing establishment required walking in wooded areas with no climbing or crawling, carrying up to four pounds of field equipment, no pushing or pulling in excess of four pounds and no repetitive motions. The inside portion of the position entailed lifting a handset weighing less than one pound and pushing buttons as well as distributing mail weighing less than four pounds. Appellant would work inside from October

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not consider this evidence in reaching a final decision, the Board may not review it for the first time on appeal. 20 C.F.R. § 501.2(c).

<sup>2</sup> *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

<sup>3</sup> 5 U.S.C. § 8106(c)(2).

<sup>4</sup> 20 C.F.R. § 10.124(c).

<sup>5</sup> *Arthur C. Reck*, 47 ECAB 339 341-42 (1995).

through March. The Office properly found the position offered by the employing establishment was well within appellant's work restrictions and, therefore, constituted suitable work.

Appellant refused the position as the position was outside her commuting area and away from her medical provider. She also stated that she had a lapse in her forestry training and skills and that she did not believe that her arm had the physical endurance necessary to work eight hours a day. The Office informed appellant that the employing establishment was willing to pay relocation expenses. Furthermore, appellant failed to submit any medical evidence in support of the contention that she was unable to perform the duties of the offered position. Therefore, appellant's reasons for refusing the position were not acceptable and the Office properly terminated her compensation based on her refusal to accept a suitable work position.

Following the Office's July 8, 1997 decision, appellant requested reconsideration on February 27, 1998 and alleged that her work-related condition had worsened prior to the Office's July 8, 1997 decision. Appellant stated that on October 23, 1997 Dr. Berger medically restricted the use of her right arm and that he performed a second reconstruction of her right wrist to replace a deteriorated ligament. Appellant stated, "The deterioration was active during the time the job offer was made" and that her requests for further medical evaluation were ignored.

In support of her request for reconsideration, appellant submitted additional medical evidence from Dr. Berger. On October 23, 1997 he stated that appellant was doing well until October 11, 1997. At the point she heard a loud pop in her wrist while performing housework. Appellant complained of constant pain since that time. Dr. Berger surgically corrected her lunotriquetral dissociation on January 19, 1998.

Appellant did not submit any evidence supporting that she was unable to perform the duties of the offered position at the time of the Office's July 8, 1997 decision. The medical evidence submitted indicates that appellant sustained an additional injury. The Office's procedure manual specifically states that a suitable work termination should not be modified even if the claimant's medical condition later deteriorates and he or she claims a recurrence of total disability.<sup>6</sup> Therefore, the Office properly denied modification of its July 8, 1997 decision on May 11, 1998.

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<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(d)(1) (July 1997).

The May 11, 1998 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.  
August 9, 2000

Michael J. Walsh  
Chairman

David S. Gerson  
Member

A. Peter Kanjorski  
Alternate Member