

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BARBARA CAPPIELLO and U.S. POSTAL SERVICE,
POST OFFICE, Long Beach, CA

*Docket No. 98-1579; Submitted on the Record;
Issued February 7, 2000*

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 benefits pursuant to section 8106(c)(2) of the Federal Employees' Compensation Act on the grounds that she refused and offer of suitable work.

On August 12, 1992 appellant, then a 29-year-old letter carrier, filed a notice of traumatic injury, alleging that she pulled something on the left side of her neck and back on August 11, 1992. The Office accepted appellant's claim for cervical, thoracic, lumbosacral and left shoulder strain. On March 12, 1993 appellant's treating physician, Dr. Tomas Saucedo, released appellant to return to work full time without restriction. Thereafter, appellant came under the care of Dr. John F. Tholen, a licensed psychologist, who indicated that appellant was temporarily totally disabled from a psychological condition beginning December 28, 1992. Appellant also underwent psychological treatment with Dr. George J. Karamigios, a Board-certified psychologist, who released appellant to return to work on April 1, 1994. On August 16, 1994 appellant accepted a limited-duty position with the employing establishment; however, she did not return to work. Appellant continued to received appropriate compensation for temporary total disability. On February 17, 1995 the Office accepted that appellant sustained major depression as a consequence of her accepted back strain injuries. On January 4, 1996 appellant's treating physician for asthma, Dr. Jonathan Chien, released appellant to return to work effective January 3, 1996.

On March 19, 1996 the employing establishment offered appellant a position as a modified letter carrier, which was approved by Dr. Saucedo on March 27, 1996. Through a representative, appellant refused the offered position. After appellant failed to accepted the offered position within the 30 and 15 days time limitations set forth in letters from the Office dated April 1 and June 19, 1996, the Office terminated appellant's compensation by decision dated July 11, 1996. Appellant disagreed with this decision and requested an oral hearing, In a decision dated and finalized June 17, 1997, an Office hearing representative affirmed the decision of the Office dated July 11, 1996. The Office hearing representative found that the

physical limitations provided by Dr. Saucedo, her treating physician for her orthopedic condition in his January 8, 1996 report were properly relied on by the Office in determining that appellant was capable of working in the offered limited-duty position. She also found that a report by Dr. Winston C. San Agustin, an orthopedist who also treated appellant without prior Office approval, was of limited probative value as it was based on an incomplete medical report. The Office hearing representative also found that as Dr. Karamigios was not a specialist with respect to appellant's orthopedic condition, his opinion was not probative concerning this issue. Finally, the Office hearing representative concluded that since appellant's claimed aggravation of major depression after March 27, 1996 was related to the processing of her compensation claim and the Office's request that she accept the offered position, her reaction was self-generated, was not compensable under the Act and did not negate the finding that the offered work was suitable.

The Board has given careful consideration to the issue involved, the contentions of the parties on appeal and the entire case record. The Board finds that the June 17, 1997 decision of the hearing representative of the Office finalized on that date, is in accordance with the facts and the law in this case and hereby adopts the findings and conclusions of the hearing representative.¹

On March 6, 1997 appellant's, representative requested that the Office reconsider appellant's claim and submitted medical evidence he believed supported appellant's contention that the work was not suitable. In a report dated February 10, 1998, Dr. Robert C. Ahearn, a Board-certified orthopedic surgeon, challenged Dr. Saucedo's March 1993 conclusion that appellant could return to work without restrictions. Dr. Ahearn reported that appellant was capable of medium type work, *i.e.*, third degree, under the Department of Labor's five degrees of work capabilities and indicated that the modified carrier position was second degree work. He concluded that it was unreasonable to expect a person with a chronic thoracolumbar pain pattern of five years plus to work within the first two categories.

The Office denied modification of the prior decision after merit review on March 17, 1998.

The Board finds that the Office properly terminated appellant's compensation based on refusal of an offer of suitable work.

Section 8106(c)(2) of the Act provides in pertinent part, "A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation."² However, to justify such termination, the Office must show that the work offered is suitable.³ An employee who refuses or neglects to work after suitable work has been offered to him or her has the burden of showing that such refusal of work was justified.⁴

¹ See *Robert S. Winchester*, 45 ECAB 135 (1993).

² 5 U.S.C. § 8106(c)(2).

³ *David P. Comacho*, 40 ECAB 267 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341 (1981).

⁴ 20 C.F.R. § 10.124; see *Catherine G. Hammond*, 41 ECAB 375 (1990).

In the present case, the initial issue to be resolved is whether the position offered was suitable within the meaning of the Act and regulations. The regulations governing the Act provide several steps that must be followed prior to the determination that the position offered is suitable. In accordance with the procedural manual and regulations, the Office properly referred the offer of work to Dr. Saucedo, the only authorized treating physician of record for appellant's orthopedic condition. In a report dated January 8, 1996, he indicated that appellant could return to work with a restriction on heavy lifting. On March 27, 1996 he approved the offered modified letter carrier position, which included a limitation of no heavy lifting, *i.e.*, 50 to 70 pounds. As discussed in the aforementioned decision by the Office hearing representative and noted above, the Office properly relied on this report and finding from Dr. Saucedo to conclude that the offered position was suitable. Although appellant has submitted additional medical evidence in an attempt to establish that the offered position was not suitable, the report by Dr. Ahearn is not sufficient to refute the opinion of Dr. Saucedo. Specifically, while Dr. Ahearn references review of Dr. Saucedo's March 13, 1993 report and implies that he reviewed other medical reports, Dr. Ahearn does not address Dr. Saucedo's January 8, 1996 report, which was the basis for the Office's suitability determination. His report is also devoid of any substantial medical or factual history of injury and Dr. Ahearn specifically states that he will not address appellant's disability or future medical care. Therefore, this report of limited probative value,⁵ cannot overcome the well-documented and rationalized report of Dr. Saucedo. The Office properly determined that the offered position was suitable and permissibly terminated appellant's compensation based on her refusal of this position.

The decisions of the Office of Workers' Compensation Programs dated March 17, 1998 and June 17, 1997 are hereby affirmed.

Dated, Washington, D.C.
February 7, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

⁵ *James A. Wyrich*, 31 ECAB 1805 (1980).