

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NENA M. PALMER and U.S. POSTAL SERVICE,
POST OFFICE, Huntsville, AL

*Docket No. 97-2769; Submitted on the Record;
Issued January 18, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective July 21, 1996 on the grounds that she refused an offer of suitable work; and (2) whether the refusal of the Office to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

The Board finds that the Office improperly terminated appellant's compensation effective July 21, 1996 on the grounds that she refused an offer of suitable work.

On February 16, 1989 appellant, then a 33-year-old letter carrier, sustained an employment-related back strain and herniated nucleus pulposus at L4-5. On January 4, 1990 appellant underwent a discography at L4-5 and L5-S1 with percutaneous discectomy at L5-S1 which was authorized by the Office. She stopped work and received compensation for total disability.¹ On April 1, 1996 the employing establishment offered appellant a position as a modified distribution clerk.² The position involves performing clerical duties and sorting mail; it requires intermittent sitting and standing for up to three hours per day, intermittent walking for up to one hour per day, intermittent lifting for up to one hour per day, intermittently reaching above the shoulders and engaging in simple grasping, fine hand manipulation and light pushing/pulling.³ Appellant refused the offer indicating that her physician had not released her to work.

¹ The Office had terminated appellant's compensation effective July 26, 1992, but this termination was reversed by decision dated and finalized April 8, 1993 on the grounds that there was insufficient medical evidence to justify the termination.

² The full title of the position is modified part-time flexible distribution clerk. The position provides for working on a part-time basis at first and then increasing work hours up to full-time work.

³ The position does not require bending, squatting, climbing, kneeling or pushing and allows for working four

By letter June 10, 1996, the Office advised appellant of its determination that the position of modified part-time flexible distribution clerk was suitable. By decision dated July 25, 1996, the Office terminated appellant's compensation effective July 21, 1996 on the grounds that she refused an offer of suitable work. By decisions dated September 16, 1996 and February 5, 1997, the Office denied modification of its July 25, 1996 decision and, by decision dated June 19, 1997, the Office denied appellant's request for merit review.

Section 8106(c)(2) of the Federal Employees' Compensation 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."⁴ However, to justify such termination, the Office must show that the work offered was suitable.⁵ 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.⁶

The evidence of record does not show that appellant was capable of performing the position of modified distribution clerk offered by the employing establishment in April 1996 and determined to be suitable by the Office in June 1996. In determining that appellant was physically capable of performing the modified distribution clerk position at the time it was offered in April 1996, the Office appears to have relied on the opinion of Dr. Regina P. Gilliland, an attending physician Board-certified in physical medicine and rehabilitation. In a form report dated March 17, 1995, he detailed appellant's work restrictions.⁷ Although the work restrictions contained in the March 17, 1995 report are similar to those contained in the description of the modified distribution clerk position, the record does not contain any medical evidence from around the time the position was offered in April 1996 which shows that appellant was capable of performing the position at that time. Moreover, the record contains other medical evidence which equivocates the doctor's opinion of whether appellant was able to perform the modified distribution clerk position. In a report dated August 25, 1995, Dr. Gilliland indicated that appellant had experienced increased problems with her back, hips, extremities and neck.⁸

The Board notes that, therefore, the Office did not establish that appellant was physically capable of performing the modified distribution clerk position offered by the employing establishment in April 1996. Consequently, the Office did not establish that the offered position

hours per day for the first two weeks, six hours per day for the next two weeks and eight hours per day thereafter.

⁴ 5 U.S.C. § 8106(c)(2).

⁵ *David P. Camacho*, 40 ECAB 267, 275 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341, 345 (1981).

⁶ 20 C.F.R. § 10.124; see *Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

⁷ Dr. Gilliland checked a box indicating that appellant would need additional vocational rehabilitation services such as testing, counseling, training or placement to return to work.

⁸ It should also be noted that upon reconsideration appellant submitted an undated report in which Dr. Gilliland indicated that her March 17, 1995 report was not intended to serve as a release to work. She also noted that when she last saw appellant on August 25, 1995 she was not able to return to work.

was suitable. For these reasons, the Office improperly terminated appellant's compensation effective July 21, 1996 on the grounds that she refused an offer of suitable work.⁹

The decisions of the Office of Workers' Compensation Programs dated February 5, 1997 and September 16, 1996 are reversed.

Dated, Washington, D.C.
January 18, 2000

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

⁹ Given the Board's disposition of the first issue in the present case, it is not necessary for it to consider the second issue, whether the refusal of the Office to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.