

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHIRLEY A. CHRISTENSEN and DEPARTMENT OF THE ARMY,
ARMY DEPOT, Tooele, UT

*Docket No. 98-135; Submitted on the Record;
Issued January 7, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation on the grounds that she refused an offer of suitable work.

On March 12, 1986 appellant, a heavy mobile equipment repairer, sustained an injury in the performance of duty while lifting drums weighing 50 to 60 pounds. The Office accepted her claim for lumbosacral strain and herniated nucleus pulposus at L5 and approved surgeries on May 9 and October 21, 1986 and on June 14, 1988. Appellant did not return to work after May 8, 1986. She received compensation for temporary total disability and schedule awards for permanent impairment to her lower extremities.

On February 5, 1997 the Office advised appellant's attending physician, Dr. Leslie J. Harris, a Board-certified orthopedic surgeon, that the employing establishment was interested in offering appellant limited duty if she was medically capable of performing the physical requirements of the position. The Office provided medical history documentation, a statement of accepted facts and a position description describing the major duties and physical demands of the position of clerk.

In a report dated April 14, 1997, Dr. Harris related appellant's history of injury and reviewed at length the medical records provided by the Office. After describing his findings on physical examination and diagnostic testing, he reported the following diagnoses: L4-5 annular tear, date of injury March 12, 1986; degenerative disc disease at L5-S1, preexisting; status post L4-5 disc excision on May 9, 1986; status post repeat L4-5 decompression and L4-5/L5-S1 fusions on October 24, 1986; status post hardware removal on February 14, 1989; status post total knee replacement, unrelated to March 12, 1986 work injury; and cervical sprain, not industrially related. Dr. Harris reported that appellant was unable to perform her previous work as a heavy mobile equipment repairer secondary to her work injury and subsequent back surgeries. He reviewed the job description of clerk, however, and reported that appellant was

currently able to accomplish that work. He recommended that appellant begin working 4 hours a day and increase to full-time work over a period of 30 to 60 days.

On May 21, 1997 Dr. Harris noted that appellant disagreed with his opinion. She felt that she was unable to do any work whatsoever, including sedentary work. Dr. Harris attempted to explain his reasoning, but appellant requested another opinion, which Dr. Harris stated was a reasonable request.

On June 17, 1997 the Office advised appellant that the position of clerk was suitable to her work capabilities and was currently available. The Office advised her that she had 30 days to accept the position or provide a sufficient explanation for refusing it. The Office notified appellant of the penalty provisions of 5 U.S.C. § 8106(c)(2).

On June 18, 1997 appellant declined the position. She indicated that she was not medically able to do the job. She also indicated that she wanted to be evaluated and tested by another orthopedic surgeon of her choice.

On July 21, 1997 appellant submitted a more detailed response. She again stated that she disagreed with the opinion of Dr. Harris because he never gave appellant a full physical examination and merely used the medical file to reach his conclusions. Appellant asserted that she was totally disabled from gainful employment and had been for over 11 years. She noted that the offered position required long periods of sitting, climbing stairs up to 2 levels and carrying items between 10 and 30 pounds. She stated that her legs were of unequal length, contrary to the opinion of Dr. Harris, and that the offered position would only exacerbate her disabling medical condition.

On July 21, 1997 the Office advised appellant that her reasons for refusing the position of clerk were insufficient to warrant modification of its finding that the position was within her medical capabilities. The Office found the position to be valid, suitable and currently available. The Office advised appellant that if she did not accept the position within 15 days her compensation would be terminated.

In a report dated July 25, 1997, Dr. Harris stated that appellant had supplied copies of various medical reports and correspondence regarding her work-related injury of March 12, 1980. She requested that he review the information and reconsider his opinions regarding the sequelae of her injury and current work capabilities. Dr. Harris reported: "I have reviewed this material and find that it does not in any way change my conclusions based upon review of records and my own interview and examination." Dr. Harris remained of the opinion that appellant was unable to do her previous work as a heavy mobile equipment operator and was limited to sedentary work. He felt that appellant was able to work as a clerk full time, 8 hours a day, 40 hours a week. He indicated his support of appellant's wishes to change treating physicians and obtain a second opinion.

In a decision dated August 7, 1997, the Office terminated appellant's compensation benefits on the grounds that she refused an offer of suitable work.

The Board finds that the Office properly terminated appellant's compensation.

Section 8106(c)(2) of the Federal Employees' Compensation Act states that a partially disabled employee who refuses to seek suitable work, or refuses or neglects to work after suitable work is offered to, procured by, or secured for her is not entitled to compensation.¹ The Office has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects suitable work when it is offered. Before compensation can be terminated, however, the Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work, and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.² In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused or neglected by appellant was suitable.³

The Office met its burden in the present case. The Office obtained a probative report from appellant's attending physician, Dr. Harris, showing that, while appellant remained disabled for her date-of-injury position as a heavy mobile equipment repairer, she was capable of performing sedentary work. The Office provided Dr. Harris with a statement of accepted facts and a position description describing the duties and physical requirements of the offered position. Dr. Harris reviewed appellant's medical records, conducted his own examination of appellant and found that she was medically capable of performing the physical requirements of the position of clerk.

The Office advised appellant of the position's suitability and availability and notified her of the penalty provisions of 5 U.S.C. § 8106(c)(2). The Office afforded her 30 days to accept or refuse the offer. When appellant declined the offer and presented her reasons, the Office considered those reasons, advised appellant that it found her reasons to be insufficient, and afforded her a second opportunity to accept the offer. After receiving a supplemental report from Dr. Harris reasserting his opinion that appellant was medically capable of performing the position of clerk, the Office terminated appellant's compensation pursuant to 5 U.S.C. § 8106(c)(2).

The medical evidence establishes the suitability of the offered position. Appellant's argument that she is totally disabled for all work and cannot perform the duties of the offered position is not supported by the record. The Office afforded appellant due process and complied with the procedural safeguards established in *Maggie L. Moore*.⁴ As appellant refused an offer of suitable work, she is not entitled to compensation.

The August 7, 1997 decision of the Office of Workers' Compensation Programs is affirmed.

¹ 5 U.S.C. § 8106(c)(2).

² *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

³ *Glen L. Sinclair*, 36 ECAB 664 (1985).

⁴ 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

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

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member