

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DEBORAH J. LAKATOS and U.S. POSTAL SERVICE,
MAPLE VALLEY STATION, Akron, OH

*Docket No. 98-1977; Submitted on the Record;
Issued July 14, 2000*

DECISION and ORDER

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

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

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

On May 25, 1989 appellant, then a 35-year-old letter carrier, sustained an employment-related lumbosacral strain. She stopped work on August 18, 1989, received appropriate compensation and was placed on the periodic rolls effective January 14, 1990. She has not returned to work. The accepted condition was later expanded to include herniated disc at L4-5, for which she underwent authorized laminectomy on March 30, 1993. The Office continued to develop the claim and on August 23, 1994 referred appellant to Dr. Timothy J. Nice for a second opinion evaluation.¹ Finding that a conflict in the medical opinion existed between the opinions of Dr. Nice and appellant's treating physicians, Drs. Richard A. Josof and William B. Kerek, regarding whether appellant could return to work, on October 7, 1996, the Office referred her to Dr. Richard S. Kaufman to resolve the conflict.² On March 20, 1997 the employing establishment offered appellant a modified general PTF clerk position which she refused on March 24, 1997. By letter dated April 1, 1997, the Office advised appellant that the position offered was suitable. In a letter dated April 28, 1997, appellant responded that she was physically unable to work and submitted additional medical evidence.

¹ Dr. Nice examined appellant in September 1994 and February 1996.

² Both Drs. Nice and Kaufman are Board-certified orthopedic surgeons and were provided with the medical record, a statement of accepted facts and a set of questions. Dr. Josof is an osteopathic physician who practices orthopedic surgeon and Dr. Kerek is a Board-certified internist.

By decision dated July 30, 1997, the Office terminated appellant wage-loss compensation, effective that day, on the grounds that she refused an offer of suitable work. The Office credited the opinion of Dr. Kaufman in finding the position suitable. On August 12, 1997 appellant, through counsel, requested a hearing that was held on February 24, 1998. In a decision dated May 7, 1998, an Office hearing representative affirmed the prior decision.

Section 8106(c)(2) of the Federal Employees' Compensation Act³ provides in pertinent part, "A partially disabled employee who ... refuses or neglects to work after suitable work is offered ... is not entitled to compensation."⁴ To prevail under this provision, the Office must show that the work offered was suitable and must inform the employee of the consequences of refusal to accept such employment. An employee who refuses or neglects to work after suitable work has been offered has the burden of showing that such refusal to work was justified.⁵ The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.⁶

The implementing regulations⁷ provides that an employee who refuses or neglects to work after suitable work has been offered or secured 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 a showing before entitlement to compensation is terminated.⁸ To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of her refusal to accept such employment.⁹

The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by medical evidence.¹⁰ In assessing medical evidence, the number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for and the thoroughness of physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.¹¹

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8106(c)(2).

⁵ See *Michael I. Schaffer*, 46 ECAB 845 (1995).

⁶ See *Stephen R. Lubin*, 43 ECAB 564 (1992).

⁷ 20 C.F.R. § 10.124(c).

⁸ See *John E. Lemker*, 45 ECAB 258 (1993).

⁹ *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

¹⁰ See *Marilyn D. Polk*, 44 ECAB 673 (1993).

¹¹ See *Connie Johns*, 44 ECAB 560 (1993).

In the present case, the record reflects that the modified general PTF clerk position offered to appellant on March 20, 1997 was reviewed by Dr. Kaufman, a Board-certified orthopedic surgeon, who provided an impartial medical evaluation. In an October 22, 1996 report, he set forth appellant's history, complaints and findings of physical examination. Dr. Kaufman advised that she could work in a sedentary position and "would probably profit" from treatment in a pain management clinic, noting that there was some exaggeration of symptoms and overreaction to them. He also submitted a work capacity evaluation dated January 28, 1997, in which he advised that appellant should not bend or lift more than five pounds. In a report dated February 5, 1997, Dr. Kaufman advised that, after review of the position description of modified general PTF clerk, appellant could perform the job duties.

In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.¹² Dr. Kaufman provided such an opinion. The medical evidence of record thus establishes that, at the time the job offer was made, appellant was capable of performing the modified position.¹³

In order to properly terminate appellant's compensation under 5 U.S.C. § 8106, the Office must provide appellant notice of its finding that an offered position is suitable and give appellant an opportunity to accept or provide reasons for declining the position.¹⁴ The record in this case indicates that the Office properly followed the procedural requirements. By letter dated April 1, 1997, the Office advised appellant that a partially disabled employee who refused suitable work was not entitled to compensation, that the offered position had been found suitable and allotted her 30 days to either accept or provide reasons for refusing the position.

In a letter dated April 28, 1997, appellant stated that her current physical condition prevented her from employment and submitted an April 28, 1997 report from Dr. Josof, her treating osteopathic orthopedic surgeon. He, however, merely reiterated his previous conclusions that had established the conflict in medical opinion. Appellant also submitted¹⁵ an April 16, 1997 report from Dr. Daniel M. Dorfman who is a Board-certified physiatrist. He advised that appellant would benefit from an antidepressant and needed to undergo pain management therapy and could then return to work. There is no indication, however, that Dr. Dorfman reviewed the offered position description. His opinion is, therefore, of diminished probative value and is insufficient to establish a new conflict in medical opinion. By letter dated May 27, 1997, the Office advised appellant that the reason given for not accepting the job offer was unacceptable. She was given an additional 15 days in which to respond. Appellant did not respond. There is, thus, no evidence of a procedural defect in this case as the Office provided

¹² See *Kathryn Haggerty*, 45 ECAB 383 (1994); *Edward E. Wright*, 43 ECAB 702 (1992).

¹³ See *John E. Lemker*, *supra* note 8.

¹⁴ See *Maggie L. Moore*, *supra* note 9.

¹⁵ She also submitted an April 23, 1997 report from Dr. Jeffrey S. Tharp, an osteopathic physician, who did not discuss whether she could return to work.

appellant with proper notice. She was offered a suitable position by the employing establishment and such offer was refused. Thus, under 5 U.S.C. § 8106 her compensation was properly terminated on July 30, 1997.

At the hearing appellant's counsel argued that she had a significant psychiatric overlay which should have been developed by the Office. The record, however, contains no psychiatric diagnosis and appellant testified that she had never received psychiatric treatment and, while she was prescribed antidepressant medication, she did not take it. Appellant also submitted a June 2, 1997 report from Dr. Josof who again reiterated his prior conclusions. Appellant, therefore, failed to demonstrate that the termination of compensation on July 30, 1997 for refusal of suitable work was not justified.

The decision of the Office of Workers' Compensation Programs dated May 7, 1998 is hereby affirmed.

Dated, Washington, D.C.
July 14, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member