

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BERNICE C. HEBSON and U.S. POSTAL SERVICE,
SOMERTON POST OFFICE, Philadelphia, PA

*Docket No. 98-2322; Submitted on the Record;
Issued July 24, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation for refusal to accept suitable employment; (2) whether the Office properly denied appellant's request for a hearing before an Office hearing representative; and (3) whether the Office properly denied appellant's request for reconsideration.

On April 5, 1982 appellant, then a 50-year-old letter carrier, was reaching into the back of her postal vehicle for mail when she developed neck and back pain. In an August 26, 1982 report, Dr. Bernice S. Silver, a general practitioner, indicated that she had been treating appellant since April 29, 1982. She noted that x-rays showed degenerative disc disease and arthritis of the cervical and lumbar regions of the spine. Dr. Silver diagnosed cervical and lumbar strain and spondylosis. The Office accepted appellant's claim for cervical and lumbar strain and spondylosis. She received continuation of pay for the periods April 14 through 23, 1982 and April 29 through May 19, 1982. The Office began payment of temporary total disability compensation effective May 20, 1982.

In a December 12, 1994 letter, the employing establishment offered appellant a position as a full-time letter carrier with restrictions of occasional kneeling and twisting, standing for 30 minutes each hour, lifting up to 30 pounds occasionally and 15 pounds frequently. The Office also offered to pay relocation expenses from Florida, where appellant had moved with her husband, back to the area of the employing establishment. Appellant, in response, indicated that she still had severe neck and back pain and could not perform some of the physical duties of the position. In a January 11, 1995 letter, the Office indicated that it had found the position to be suitable for appellant and warned her that failure to accept the offered position could lead to the termination of her compensation. Appellant submitted evidence to show her husband had lung cancer at an advanced stage. The Office was subsequently informed that appellant's husband had died. In a March 24, 1995 letter, the Office informed appellant that it had found her reasons for declining the position to be unjustified. The Office gave appellant 15 days to accept the position or have her compensation terminated. In an April 11, 1995 decision, the Office

terminated appellant's compensation effective April 30, 1995 on the grounds that she had not reported for suitable work that had been offered to her. Appellant requested reconsideration and submitted additional medical evidence. In a July 25, 1995 merit decision, the Office vacated its April 11, 1995 decision and reinstated appellant's compensation.

In a July 5, 1996 letter, the employing establishment offered appellant another position. The employing establishment indicated that the job would entail verifying mail and spot checking certain classes of mail. It stated that appellant could sit while verifying mail and noted that the position required no heavy lifting. The employing establishment indicated that appellant would also perform occasional route casing which would require intermittent standing and sitting and would occasionally answer the telephone, handling complaints and inquiries. The employing establishment stated that all duties would be in strict accordance with her permanent medical restrictions of no lifting over 15 pounds, occasional kneeling and twisting, ability to stand 30 minutes of each hour, sitting up to 1 hour at a time, lifting up to 30 pounds 4 times a day and working 8 hours a day. The Office sought the approval of appellant's physician and repeated the offer in a February 14, 1997 letter. In response, appellant indicated that she did not want to refuse the position but thought her condition was worse. She noted that she was 65 years old and was helping her daughter, who had multiple sclerosis and her three grandchildren.

In a May 30, 1997 letter, the Office informed appellant that it found the offered position to be suitable for her. She was given 30 days to accept the position or provide an explanation for her refusing the position. The Office indicated that appellant's reasons for the position would be considered prior to determining whether her reasons for refusing the job were justified. The Office stated that all reasonable and necessary expenses for relocation were authorized. The Office warned appellant that if she refused the position and her refusal was found to be unjustified her compensation would be terminated. She also submitted a form report indicating that she was totally disabled. In a July 14, 1997 letter, the Office informed appellant that her reasons for refusing the position were unacceptable. The Office gave appellant 15 days to accept the position or have her compensation terminated. In a September 11, 1997 decision, the Office terminated appellant's compensation, effective September 14, 1997, for refusal to accept suitable employment.

In a letter received by the Office on November 5, 1997, appellant requested a hearing before an Office hearing representative. In a November 21, 1997 decision, the Office denied appellant's request for a hearing as untimely and further found that the issues in the case could be equally well addressed by submitting new evidence and requesting reconsideration. In an April 23, 1998 letter, appellant requested reconsideration. In a June 9, 1998 decision, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was immaterial and therefore insufficient to warrant review of the prior decision.

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

Section 8106(c) of the Federal Employees' Compensation Act states: "A partially disabled employee who: (1) refuses to seek suitable work; or (2) refuses or neglects to work after suitable work is offered to, procured by or secured for him; is not entitled to

compensation.”¹ An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.²

The Office vacated its previous termination decision on the basis of an April 27, 1995 work capacity assessment which indicated that appellant could sit for 60 minutes at a time, but could not stand more than 22 minutes at a time, walk more than a ¼ mile at a time, or climb more than 2 flights of stairs at a time. The employing establishment cited the same study in support of its second job offer. The Office also asked appellant’s treating physician, Dr. Markus Kornberg, a Board-certified orthopedic surgeon, whether appellant could perform the duties of the position. In a December 4, 1996 report, Dr. Kornberg stated that the job description provided to him was in keeping with appellant’s permanent limitations and restrictions and the work capacity assessment. He concluded that appellant was capable of performing the duties of the offered position.

Dr. Kornberg, however, has given contradictory reports on appellant’s ability to work. In an August 16, 1994 report, he had indicated that appellant could work with restrictions and gave restrictions that the employing establishment used in developing the first position offered to appellant. In an April 4, 1995 report, Dr. Kornberg noted that appellant had not had a work status assessment since 1992 and therefore referred her for the work capacity assessment. In an April 23, 1996 form, he indicated that appellant was unable to work or return to any job. In the December 4, 1996 report, Dr. Kornberg concluded that appellant could perform the offered position. However, in an April 8, 1997 report, he stated appellant had persistent and limiting symptoms and indicated on a form that she was unable to work or return to any job. As Dr. Kornberg has given inconsistent reports on whether appellant could return to work, his reports, taken together, are of diminished probative value. His December 4, 1996 report, therefore, is insufficient to support the conclusion that the position offered to appellant was suitable. The Office has not met its burden of establishing that appellant was offered suitable employment. For this reason, issues two and three as listed above are moot.

¹ 5 U.S.C. § 8106(c).

² 20 C.F.R. § 10.124.

The decisions of the Office of Workers' Compensation Programs dated June 9, 1998
November 21 and September 11, 1997 are hereby reversed.

Dated, Washington, D.C.
July 24, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member