

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of JANE M. NOWAK and U.S. POSTAL SERVICE,  
POST OFFICE, Green Bay, WI

*Docket No. 98-1481; Submitted on the Record;  
Issued November 17, 2000*

---

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
VALERIE D. EVANS-HARRELL

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits on the grounds that she refused an offer of suitable work.

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

Appellant, an automation clerk, filed an occupational disease claim on July 11, 1995 alleging that she developed tendinitis in her right shoulder due to repetitive lifting in the performance of duty. The Office accepted appellant's claim for right rotator cuff tendinitis on April 17, 1995. Appellant returned to light-duty work on November 10, 1995. Appellant filed a traumatic injury claim on November 28, 1995 alleging that on November 13, 1995 she injured her shoulder and sustained a neck strain lifting a full tray of mail. The Office accepted her claim for right shoulder strain and authorized an arthroscopy. Appellant filed a recurrence of disability on January 10, 1996 alleging that on December 30, 1995 she sustained a recurrence of disability due to her November 13, 1995 employment injury. Appellant described her condition as painful shoulders, chest and neck. On June 14, 1996 the Office accepted appellant's claim for recurrence of disability on December 30, 1995 and authorized wage-loss compensation from January 1 to May 25, 1996. The employing establishment offered appellant a light-duty position, a mail processor (modified), on November 25, 1996. By letter dated December 5, 1996, the Office notified appellant that the position was suitable and allowed her 30 days to accept. Appellant rejected the position alleging that she injured her left shoulder on November 13, 1995. In a letter dated January 6, 1997, the Office informed appellant that her reason for refusal was not acceptable and allowed her 15 days to accept the position. In a letter dated January 17, 1997, appellant stated that she accepted the position. By decision dated January 24, 1997, the Office terminated appellant's compensation benefits finding that appellant had accepted the position but had not contacted the employing establishment as directed in order to return to work, therefore, she refused suitable work after it was secured for her. By decision

dated January 5, 1998, the hearing representative<sup>1</sup> affirmed the Office's January 24, 1997 decision.<sup>2</sup>

It is well settled that, once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>3</sup> As the Office in this case terminated appellant's compensation under 5 U.S.C. § 8106(c), the Office must establish that appellant refused an offer of suitable work. Section 8106(c) of the Act<sup>4</sup> provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee is not entitled to compensation. Section 10.124(c) of the applicable regulations<sup>5</sup> 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 showing before a determination is made with respect to termination of entitlement to compensation. To justify termination of compensation, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.<sup>6</sup>

In this case, the Office referred appellant for a second opinion evaluation with Dr. James G. Gmeiner, a Board-certified orthopedic surgeon. On November 29, 1995 Dr. Gmeiner completed a report and work restriction evaluation indicating that appellant could work 8 hours a day with limitations consisting of lifting 40 pounds from floor to the waist, 20 pounds from waist to shoulder and 10 pounds overhead on an occasional basis. Following this report, appellant sustained an accepted recurrence of disability on December 30, 1995.

As appellant sustained a recurrence of disability after Dr. Gmeiner's examination, it was inappropriate for the Office and the employing establishment to utilize these restrictions in formulating a suitable work position. Appellant's attending physician, Dr. Richard D. Horak, a Board-certified orthopedic surgeon, completed a work restriction evaluation on January 10, 1996 and indicated that appellant could work 8 hours a day medium work with no overhead work, and no pushing or pulling over 40 pounds.

The light-duty position offered by the employing establishment and found suitable by the Office required appellant to lift 10 pounds from the shoulder and above on occasion. This

---

<sup>1</sup> The hearing representative found that appellant had met her burden of proof in establishing a left shoulder injury due to her November 13, 1995 employment injury. The Office is responsible for medical expenses and any disability resulting from this condition.

<sup>2</sup> Following the January 5, 1998 decision, appellant submitted additional new evidence. As the Office did not consider this evidence in reaching a final decision, the Board will not consider it for the first time on appeal. 20 C.F.R. § 501.2(c).

<sup>3</sup> *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

<sup>4</sup> 5 U.S.C. § 8106(c)(2).

<sup>5</sup> 20 C.F.R. § 10.124(c).

<sup>6</sup> *Arthur C. Reck*, 47 ECAB 339, 341-42 (1995).

requirement is not in compliance with appellant's medical restrictions and the Office improperly found that the offered position constituted suitable work.

The January 5, 1998 decision of the Office of Workers' Compensation Programs is hereby reversed regarding the termination of appellant's compensation benefits.

Dated, Washington, DC  
November 17, 2000

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Valerie D. Evans-Harrell  
Alternate Member