

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELIAS M. CAMPOS and U.S. POSTAL SERVICE,
POST OFFICE, San Antonio, TX

*Docket No. 98-1455; Submitted on the Record;
Issued October 24, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
VALERIE D. EVANS-HARRELL

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation for refusal to accept suitable work.

On February 8, 1996 appellant, then a 48-year-old mailhandler, filed a notice of occupational disease and claim for compensation (Form CA-2), alleging that he suffered from carpal tunnel syndrome as a result of repetitive lifting performed during the course of his employment. Appellant stopped working on November 26, 1996.

On May 16, 1996 the Office accepted appellant's claim for bilateral carpal tunnel syndrome and authorized surgical releases. Dr. Terry L. Westfield, a Board-certified plastic surgeon, performed a right carpal tunnel release on appellant on September 10, 1996 and a left release on January 21, 1997.

Dr. Richard Hernandez, appellant's Board-certified family practitioner, referred appellant to Dr. David M. Hirsch, an osteopath. In a medical report dated July 29, 1997, Dr. Hirsch determined that appellant suffered from moderately severe carpal tunnel syndrome bilaterally. He noted that there were no signs of acute or chronic motor radiculopathy of the bilateral upper extremities by electrodiagnostic testing in a C5 through T1 myotomal distribution.

By letter dated September 3, 1997, the Office referred appellant to Dr. Rafael Parra, a Board-certified neurosurgeon, for a second opinion. In a medical report dated September 23, 1997, Dr. Parra opined that appellant had residual carpal tunnel syndrome in both upper extremities that was related to his job and the carpal tunnel syndrome had been minimally affected by his operations. He believed that appellant was unable to perform his work as a mailhandler and that some steroids and physical therapy may be needed. Dr. Parra also believed that appellant had reached maximum medical improvement for his condition in relation to his decompression.

In a work capacity evaluation for musculoskeletal conditions, Form OWCP-5c, dated September 8, 1997, Dr. Westfield stated that appellant should avoid repetitive motion -- lifting over 5 pounds and gripping, that appellant needed a 15 minute break for every hour of repetitive motion, that there should be no prolonged gripping and that appellant could not perform repetitive motions of the wrist. Dr. Westfield stated that appellant could work eight hours per day within these limitations, but that he was retired for other reasons.

On October 1, 1997 the Office issued a notice of proposed termination of compensation. The Office noted that appellant applied for disability retirement following two strokes which were not part of the accepted work-related condition. The Office concluded that appellant had been released to his regular, date-of-injury job, and was no longer entitled to receive wage-loss compensation. The Office noted that although appellant still required limited duty as a result of nonwork-related conditions, this did not entitle him to continue receiving disability compensation. The Office allotted appellant 30 days to submit additional evidence. Appellant noted his disagreement with this determination.

On October 1, 1997 Dr. Hernandez also completed a work capacity evaluation. He determined that appellant should limit kneeling due to a different condition, but did not provide any restrictions regarding appellant's carpal tunnel syndrome. Dr. Hernandez noted that appellant could perform repetitive motions of the wrist and elbow, and that there were no limitations due to his employment-related condition.

In another work capacity evaluation dated October 1, 1997, Dr. Westfield qualified his earlier opinion by noting that appellant was limited to working light duty four hours a day three days a week. He stated:

“Difficult to address work status for retired patient -- if pain becomes worse while working we would remove. Can [no]t determine any of this because patient is retired on disability. Patient could still become worse while working within only one week.”

Dr. Westfield reiterated this opinion in a form dated October 23, 1997, wherein he noted that appellant was retired due to history of strokes caused by post-traumatic stress flare-up. He stated:

“Difficult to address work status because patient is retired. Can [no]t determine if returning to work would cause pain.”

On October 17, 1997 the employing establishment notified appellant that the medical reports indicated that he was capable of performing sedentary duties. The listed job was working in processing and distribution in the General Mail Facility. Duties were to rotate to avoid repetitious use of hands and be self-paced. Appellant's duties would include working flip-flop table, answering telephones, rewrapping damaged mail and monitor work if needed. Additional sedentary clerical duties would alternate with these duties, on an as needed basis. This job would be within restrictions of no lifting over 5 pounds, no repetitive gripping and 15 minute breaks would be provided each hour from repetitive duties. Appellant would work Monday,

Thursday and Friday from 1900 hours to 2300 hours. Appellant was advised that if he did not accept this offer, his entitlement to compensation may be jeopardized.

A conference between the Office, the rehabilitation nurse and appellant was held on November 17, 1997. At the conference, appellant noted that he was retired from the employing establishment due to other medical conditions, not carpal tunnel syndrome and that he understood that once the compensation benefits ended, he would revert back to retirement benefits. Appellant stated that he did not feel that he was able to return to work because he was still under the care of a psychiatrist, suffered from memory loss and takes medication for mini strokes.

In a letter dated November 17, 1997, appellant, through his wife acting as his representative, stated that he agreed to discontinue compensation benefits as of December 6, 1997 and effective December 7, 1997, would continue with his disability retirement.

In a decision dated January 14, 1998, the Office ordered that entitlement to compensation for wage loss as well as compensation for permanent partial impairment to a schedule member be terminated because appellant refused the suitable job offer as a clerk without justified reasons. The Office noted that medical benefits would continue.

The Board finds that the Office has not met its burden of proof in terminating appellant's compensation benefits.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. This includes cases in which the Office terminates compensation under 5 U.S.C. § 8106(c) for refusal to accept suitable work.¹

Under section 8106(c)(2) of the Federal Employees Compensation Act, the Office may terminate compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee. To justify termination, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.² Furthermore, section 8106(c) will be narrowly construed as it serves as a penalty provision that may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.³ Section 10.124(c) of the Office's regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured 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.⁴

¹ *Henry W. Sheperd*, 48 ECAB 382, 384 (1997); *Shirley B. Livingston*, 24 ECAB 855 (1991).

² *Karen L. Mayewski*, 45 ECAB 219 (1993).

³ *See Robert Dickerson*, 46 ECAB 1002 (1995).

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

In the present case, the Office has not met its burden of proof to terminate compensation. 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 the medical evidence.⁵ In the case at hand, the medical evidence on the issue of whether the offered position was suitable is equivocal. The proffered job required appellant to work 3 days a week for 4 hours a day doing light work, which would not include any lifting over 5 pounds, repetitive gripping and would allow appellant a 15 minute break each hour from repetitive duties. These restrictions appear to be within the restrictions as set forth by Dr. Westfield in his work capacity evaluation of September 8, 1997. However, he qualified these restrictions in his later reports, wherein he noted that it was difficult to address appellant's work status as appellant was retired on disability and that appellant could still become worse with only one week of working. The second opinion physician, Dr. Parra, did not set forth specific restrictions which can be utilized to determine the suitability of the offered job, rather, he merely stated that appellant was unable to perform his work as a mailhandler and that some steroids or physical therapy may be needed. Similarly, Dr. Hirsch did not set forth appellant's work restrictions.

Furthermore, there is evidence in the record that appellant is disabled as a result of other medical conditions, including a history of mini strokes, memory loss and post-traumatic stress. The Office procedure manual provides that an acceptable reason for refusal of a suitable job offer includes subsequent medical conditions which prevent appellant from continuing to perform his job, even if the subsequently acquired condition is not work related.⁶ Therefore, the Office did not meet its burden of proof to establish that appellant refused suitable work.

⁵ *H. Adrian Osborne*, 48 ECAB 556, 560 (1997).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.10 (December 1995); *see also Edward J. Stabell*, 49 ECAB ____ (Docket No. 96-1249, issued June 15, 1998).

The decision of the Office of Workers' Compensation Programs dated January 14, 1998 is reversed.⁷

Dated, Washington, DC
October 24, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Valerie D. Evans-Harrell
Alternate Member

⁷ Appellant submitted additional medical evidence after the issuance of the Office's January 14, 1998 decision. The Board, however, may not review evidence for the first time on appeal that was not before the Office at the time it issued its final decision; *see* 20 C.F.R. § 501.2(c). This decision does not preclude appellant from submitting her evidence along with a request for reconsideration to the Office.