

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANTHONY HUGHES and U.S. POSTAL SERVICE,
POST OFFICE, Morristown, TN

*Docket No. 00-588; Submitted on the Record;
Issued June 21, 2001*

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective September 12, 1998 on the grounds that he refused an offer of suitable work.

On October 6, 1997 appellant, then a 46-year-old clerk, filed a notice of occupational disease and claim for compensation alleging that he sustained a back condition in the performance of duty. The Office accepted the claim for a herniated disc at L5-S1. Appellant last worked on September 16, 1997.

Appellant has been under the care of Dr. Archer W. Bishop, a Board-certified orthopedic surgeon, for treatment of his back condition. In a treatment note dated February 13, 1998, Dr. Bishop diagnosed that appellant sustained a ruptured disc due to factors of his employment, and that his back condition required surgery.

In a March 30, 1998 treatment note, Dr. Bishop indicated that appellant was not willing to proceed with surgery. He noted physical findings on examination and opined that appellant had reached maximum medical improvement with a five percent permanent physical impairment of his ruptured disc. Dr. Bishop reported that appellant should avoid repetitive bending, stooping and heavy lifting of more than 30 pounds.

Based on Dr. Bishop's work restrictions, the employing establishment sent appellant a letter on March 21, 1998 offering him a light-duty position.¹ Appellant accepted the job offer on March 31, 1998 and returned to work. The record indicates that appellant worked less than three hours on that day before going home with complaints of back pain. The next day he returned and worked less than two hours before going home.

¹ In a description of duties it was noted that appellant would "perform duties, within restrictions, as directed by the supervisor." It was noted that his duties included casing letter and flat-sized mail with limitations of no lifting of more than 30 pounds and no repetitive bending or stooping.

In an April 7, 1998 treatment note, Dr. Bishop related a conversation with appellant as follows:

“Patient returns to the office today. He states he does not feel he can do his job. In fact, he has applied for [s]ocial [s]ecurity [d]isability. What he really wanted me to do today was to somehow note that he was unable to do any type of employment. I told him that from an orthopedic standpoint he has had a ruptured disc and that the restrictions previously given him are appropriate for that abnormality. The patient has decided not to proceed with surgery and states he is really not planning on going back to work.”

In a treatment noted dated May 1, 1998, Dr. Bishop further reported:

“He has been trying to do his job but his job is quite difficult. He states, in fact, he has to bend 38 times every 10 minutes which is more than 200 times per hour and even though the job says he is not suppose (sic) to be repetitive bending, it seems that he is.

“I discussed with him I felt that much bending would be considered excessive and does not appear to fit the guidelines. He states he has been frustrated in his ability to change that. In fact, he is now going to consider whether or not to have surgery. He still has back and left leg pain, numbness on the lateral border of the left foot and signs of S1 nerve root compression. He states he would like to have a second opinion before considering proceeding and he will make arrangements.”

In a May 5, 1998 letter, the Office notified appellant that the light-duty job of a modified distribution clerk was deemed suitable work. The Office advised appellant that he had 30 days to return to work or to provide acceptable reasons for refusing the job or else he risked termination of his compensation.

Appellant subsequently responded on May 22, 1998. He alleged that the light-duty job was not within his physical restrictions because he had been required to bend approximately “38 times in 10 minutes.” Appellant further alleged that the job required him to lift over 30 pounds.

On May 29, 1998 the Office faxed a copy of the job requirements for a modified distribution clerk along with a picture of appellant’s assigned work area. Dr. Bishop was asked whether appellant was physically capable of working in the position as described.

Dr. Bishop replied on the same date, stating as follows: “It certainly appears that [appellant] could do the job as pictured at the ‘manual letter case.’ He certainly could do those activities as recommended within the previous restrictions, it certainly appears to fit the restrictions.”

In a June 12, 1998 letter, the Office advised appellant that the reasons he provided for abandoning a suitable job were not acceptable and that he had 15 days to accept the position and return to work or his compensation would be terminated.

On July 6, 1998 appellant filed a Form CA-8 claim for continuing compensation, alleging that he experienced increased back pain and leg numbness since he had been forced to return to work.

Appellant also filed for disability retirement with the Office of Personnel Management (OPM). On an OPM standard Form 3112B dated July 5, 1986, appellant's supervisor checkmarked a box indicating that no efforts had been made to accommodate appellant in his current position, that appellant had not been reassigned to a new position nor had he been reassigned to light duty. The remainder of the form was completed by Patsy M. Hurst, a Human Resource Specialist and stated, "As long as the employee has back problems and is restricted from repeated standing, lifting, bending, stooping, etc. reassignment to another position is not an option." She also stated: "All positions for which the employee would qualify required repeated standing, walking, stooping, bending and lifting."

In a decision dated August 26, 1998, the Office terminated appellant's compensation effective September 12, 1998 on the grounds that he refused an offer of suitable work.

Appellant subsequently requested a review of the written record.² He submitted a supervisor's statement dated July 28 and August 12, 1998. Appellant also submitted additional medical evidence discussed below.

In an April 6, 1998 report, Dr. Sunil T. Ramaprasad indicated that appellant had been a patient since February 10, 1997 for treatment of angina and coronary artery disease. He related that appellant complained of severe back pain.

In a May 4, 1998 treatment note, Dr. Ramaprasad reported that appellant was under a lot of stress which appellant is "attributing to the fact that he had been forced to go back to work and at work he has a tremendous amount of stress because he has a lot of pain in the back."

In a May 22, 1998 report, Dr. Marty P. Gagliardi noted appellant's symptoms of back pain and that a magnetic resonance imaging (MRI) scan performed in February 1998 demonstrated a herniated disc at L5-S1 with degenerative disc disease. He reported physical findings and recommended that appellant proceed with back surgery to alleviate his symptoms.

In a July 21, 1998 report, Dr. Mark P. Hermeling noted appellant's history of injury and complaints of continuing back pain. He stated:

"This patient's case is a classical picture of a herniated disc with nerve root impingement at the L5-S1 space. Unfortunately, the patient has had bad advice from nonprofessional people and has been unfortunately turned off by whatever surgeons he has seen up to this date for one reason or another. The patient was advised that his disability at this time is complete, that he is unable to do any type of standing or sitting work, and that in all probability, the symptoms will get worse, possibly even evolving into GI or GU symptoms should a cauda equina syndrome develop as a result of more massive disc protrusion."

² Appellant changed his request to one for a review of the written record.

Dr. Hermeling opined that appellant was totally disabled for any employment. He recommended that appellant consider having a decompression laminectomy with discectomy.

In a March 1, 1999 decision, an Office hearing representative affirmed the Office's August 26, 1998 decision.

Appellant subsequently filed two requests for reconsideration on March 18 and July 1, 1999. Those requests were denied by the Office in decisions dated May 28 and August 17, 1999.

The Board finds that the Office erred in terminating appellant's compensation benefits effective September 12, 1998 on the grounds that he refused an offer of suitable work.³

Once the Office accepts a claim, it has the burden of proving that the employee's disability has ceased or lessened before it may terminate or modify compensation benefits.⁴ Section 8106(c)(2) of the Federal Employees' Compensation Act⁵ provides that the Office may terminate compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.⁶ The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.⁷

The implementing regulation 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 his refusal to accept such employment.⁹

On March 21, 1998 the employing establishment offered appellant a position as a modified automation clerk based on the work restrictions provided by appellant's treating physician. It was noted that appellant's limited-duty job would not require him to perform repetitive bending nor would he be required to lift more than 30 pounds. After returning to work for only two days, appellant alleged that he could not perform the job. He stopped work and filed a claim for continuing disability. The Office subsequently issued a notice of suitability and requested specific information as to why appellant was refusing to work. Appellant responded that he was unable to bend "38 times in 10 minutes" in performing the job of a modified

³ Although appellant submitted additional evidence on appeal, the Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. 20 C.F.R. § 501.2(c).

⁴ *Karen L. Mayewski*, 45 ECAB 219 (1993); *Bettye F. Wade*, 37 ECAB 556 (1986).

⁵ 5 U.S.C. § 8106(c)(2); *see also* 20 C.F.R. § 10.516 (1999).

⁶ *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

⁷ *Stephen R. Lubin*, 43 ECAB 564 (1992).

⁸ 20 C.F.R. § 10.516 (1999).

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

automation clerk. Despite appellant's argument, the Office terminated his compensation for failure to accept suitable work effective September 12, 1998.

The Board, however, finds that the Office did not carry its burden of proof in terminating appellant's compensation since the Office failed to address the statements made by appellant's supervisor and the human resource specialist on the OPM standard Form 3112d. It would appear from the OPM standard Form 3112d that the employing establishment concedes that the modified job is not within appellant's work restrictions and that it is unable to accommodate appellant in a light-duty or alternative position. If the employing establishment concedes that the position of a modified distribution clerk is not within appellant's work restrictions then the position cannot be deemed suitable work. Consequently, the Office improperly terminated appellant's compensation on the grounds that he refused an offer of suitable work.

The decisions of the Office of Workers' Compensation Programs dated August 17, May 28 and March 1, 1999 are hereby reversed.

Dated, Washington, DC
June 21, 2001

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member