

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARY C. SMITH and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Beckley, WV

*Docket No. 00-1099; Submitted on the Record;
Issued May 1, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation on the basis that she refused an offer of suitable employment.

On August 10, 1993 appellant, then a 61-year-old registered nurse, filed a claim for an injury to her left hip and low back sustained on August 9, 1993 by moving a patient. The Office accepted that appellant sustained a lumbar strain. She received continuation of pay from August 24, 1993, when she stopped work until October 7, 1993. Thereafter the Office paid compensation for temporary total disability until appellant returned to limited duty for four hours per day on January 24, 1994. Appellant again stopped work on April 6, 1994 and the Office resumed payment of compensation for temporary total disability until she returned to limited duty on May 16, 1994 for four hours per day.

On June 9, 1994 appellant accepted a transfer from her position as a registered nurse in the operating room to one as a data collector with the employing establishment's quality management service. She began working full time in this position on June 12, 1994.

On July 24, 1995 appellant filed a claim for a recurrence of disability related to her August 9, 1993 employment injury. The Office accepted appellant's claim for a recurrence of disability and paid her compensation during intermittent absences from work from June 12 to July 7, 1995 and compensation for temporary total disability beginning July 24, 1995.

On February 7, 1996 the employing establishment offered appellant a position as a data collector/clinical nurse reviewer in the quality management service. The employing establishment's offer noted that this was the same position appellant held on the date of her recurrence of disability on July 24, 1995. By letter dated February 13, 1996, the Office advised appellant that it had found the offered position to be suitable. The Office also advised appellant that a partially disabled employee who refuses an offer of suitable employment is not entitled to compensation and allotted appellant 30 days to either accept the job or provide an explanation of the reasons for refusing it.

By decision dated April 11, 1996, the Office terminated appellant's compensation (except for medical benefits) effective February 12, 1996 on the basis that she refused an offer of suitable employment. By letter dated June 13, 1996, appellant requested reconsideration. By decision dated September 12, 1996, the Office refused to modify its prior decision. By letter dated March 11, 1997, appellant requested reconsideration. By decision dated June 25, 1997, the Office refused to modify its prior decision. By letter dated June 18, 1998, appellant requested reconsideration. By decision dated September 23, 1998, the Office refused to modify its prior decision. By an undated letter, appellant again requested reconsideration. By decision dated October 12, 1999, the Office found that appellant's request for reconsideration was not timely filed and did not demonstrate clear evidence of error. By undated letter received by the Office on November 4, 1999, appellant contended that her prior request for reconsideration was submitted within one year of the Office's September 23, 1998 decision and again requested that the Office reconsider its decisions. By decision dated January 27, 2000, the Office found that appellant's prior request was timely, but refused to modify its prior decisions.

The Board finds that it was proper for the Office to terminate appellant's compensation on the basis that she refused an offer of suitable work.

Under section 8106(c)(2) of the Federal Employees' Compensation Act, the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.¹ To justify termination of compensation, the Office must establish that the work offered was suitable.²

The medical evidence establishes that the position of data collector offered by the employing establishment on February 7, 1996 was suitable. Dr. Fathy, a Board-certified orthopedic surgeon to whom the Office referred appellant for a second opinion, reviewed a job analysis that described in detail the physical requirements of the position and concluded that appellant "should be able to perform as an RN [registered nurse] data collector." Appellant's attending physician, Dr. Richard C. Wisman, a Board-certified family practitioner, submitted brief notes indicating appellant was disabled for work at all times up to and after February 1996. These notes provide no explanation why Dr. Wisman considered appellant totally disabled. In a report dated November 27, 1995, Dr. Wisman stated: "It should be noted that in Dr. Zahir's report, he felt that she would not be able to do any type of prolonged standing, walking or any significant heavy lifting, squatting, pushing or pulling, which in fact probably disables her from the type of work that she performs at the [employing establishment]." Actually, these limitations, which are contained in a March 11, 1994 report from Dr. Syed A Zahir, a Board-certified orthopedic surgeon to whom the Office referred appellant, would not preclude appellant from performing the duties of the position of data collector, as described in the employing establishment's offer.

Appellant contends that the description of the position in the employing establishment's offer is incorrect in the amount of walking required. To further investigate this contention, the

¹ 5 U.S.C. § 8106(c)(2) provides in pertinent part: "A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered to, procured by or secured for him; is not entitled to compensation."

² *David P. Camacho*, 40 ECAB 267 (1988).

Office called the employing establishment on September 22, 1998 and spoke to a personnel management specialist, who stated that she and another employee “actually measured the distance from the office door where the claimant would work to the record room and/or file room which is where the claimant would go to obtain most of the files she worked on.” This evidence is more probative than appellant’s unsupported contention that much more walking is required.

The Office also complied with the procedural requirements by advising appellant of the suitability of the position and of the penalty for refusing an offer of suitable work. In its February 13, 1996 letter, the Office allotted appellant 30 days to accept the position or provide reasons for not doing so. Appellant called the Office on March 13, 1996 but did not provide any reasons for not accepting the offered position. In the absence of any reasons for not accepting the offer, it was proper for the Office to terminate appellant’s compensation on the basis that she refused suitable work.³ However, it was improper for the Office to make this termination retroactive to February 12, 1996. Due process and elementary fairness require that the Office observe certain procedures before terminating compensation under section 8106(c)(2) of the Act.⁴ As the Office’s February 13, 1996 letter gave appellant 30 days to accept the position without penalty, she cannot be deemed to have refused the offer before the expiration of these 30 days. Therefore, the Office’s termination of appellant’s compensation effective February 12, 1996 was improper.

The decision of the Office of Workers’ Compensation Programs dated January 27, 2000 is affirmed with regard to the finding that appellant refused an offer of suitable work. The case is remanded to the Office for use of a proper date of termination of compensation for this refusal.

Dated, Washington, DC
May 1, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

³ See *Cheryl D. Hedblum*, 47 ECAB 215 (1995); *Edwin P. Carroll*, 44 ECAB 331 (1992).

⁴ *Eileen R. Kates*, 46 ECAB 573 (1995); *Charlene R. Herrera*, 44 ECAB 361 (1993).