

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JANICE S. HODGES and U.S. POSTAL SERVICE,  
SOUTH JERSEY PROCESSING & DISTRIBUTION CENTER,  
Bellmawr, NJ

*Docket No. 00-2793; Submitted on the Record;  
Issued May 24, 2001*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation on November 20, 1998.

On October 1, 1997 appellant, a 60-year-old supervisor of distribution operations, filed a notice of traumatic injury alleging that she developed an emotional condition on that date. The Office accepted appellant's claim for post-traumatic stress disorder on December 1, 1997. Appellant filed a notice of recurrence of disability on November 17, 1997 and the Office also accepted this claim.

The employing establishment offered appellant a limited-duty position and the Office found this position suitable work and allowed appellant 30 days to accept it. Appellant declined to accept this position on October 30, 1998 "because of my nervous condition." The Office informed appellant that her reason for refusing the position was not acceptable and allowed 15 days for her to accept the position. Appellant declined the position on November 11, 1998. By decision dated November 20, 1998, the Office terminated appellant's compensation, finding that she failed to accept an offer of suitable work.

Appellant requested an oral hearing. By decision dated November 4, 1999, the hearing representative affirmed the Office's November 20, 1998 decision. She requested reconsideration on February 10, 2000 and by decision dated April 27, 2000 the Office denied modification of its prior decisions. Appellant requested reconsideration on June 13, 2000 and by decision dated June 26, 2000, the Office again denied modification of its prior decisions.

The Board finds that the Office failed to meet its burden of proof in terminating appellant's compensation benefits.

It is well settled that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>1</sup> Section 8106(c) of the Act<sup>2</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>3</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>4</sup>

In this case, the Office referred appellant for a second-opinion evaluation with Dr. Solomon Miskin, a Board-certified psychiatrist. In his May 7, 1998 report, Dr. Miskin found that appellant could return to full duty at a different duty station.

The employing establishment initially offered appellant a position at the Wilmington Processing & Distribution Plant working from 10:00 a.m. until 6:30 p.m. Appellant declined this position on August 27, 1998. She submitted a map indicating that her commute from her home in Cherry Hill, New Jersey, to New Castle, Delaware, was 43.4 miles and would require a commuting time of approximately an hour. Appellant also submitted a June 13, 1997 report from Dr. Arunan Sivalingam who diagnosed diabetic retinopathy. He stated: "I do feel that she probably has a problem with night-vision and driving during the night time. I recommend that she drive only during daytime."

On October 14, 1998 the employing establishment offered appellant a second position at the Wilmington Processing & Distribution Plant working from 7:00 a.m. until 3:30 p.m. The Office found this position suitable and allowed appellant 30 days to accept it. Appellant declined this position due to her "nervous condition." The Office informed appellant that her reason for refusing was not acceptable and allowed her 15 days to accept the position. Appellant declined the position and the Office terminated her compensation benefits for refusing an offer of suitable work.

On November 20, 1998 Dr. Sivalingam noted that he examined appellant on October 29, 1998 and stated that she had significant complaints of difficulty driving at nighttime. He noted that appellant had undergone laser treatment due to diabetic retinopathy. Dr. Sivalingam stated: "I definitely feel that her problem with night vision is due to the macular ischemia and that it is reasonable that she confine her driving to daylight hours only." He completed a similar report on June 2, 1999.

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<sup>1</sup> *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

<sup>2</sup> 5 U.S.C. § 8106(c)(2).

<sup>3</sup> 20 C.F.R. § 10.124(c).

<sup>4</sup> *Arthur C. Reck*, 47 ECAB 339, 341-42 (1995).

The Office's procedures provide that, in determining whether the position offered is suitable, the Office must consider preexisting as well as work-related conditions.<sup>5</sup> In this case, the medical evidence established that appellant could return to full-duty work at a different work site from that of her date-of-injury position. The employing establishment offered appellant such a position; however, appellant submitted medical evidence that she was unable to drive to the new location due to her preexisting diabetic retinopathy which prevented her from driving in the dark.

Appellant has submitted medical documentation of a nonwork-related disabling condition, diabetic retinopathy. Under the Office's procedures, the inability to travel to work because of residuals of the employment injury is an acceptable reason for rejecting an offer of suitable work if supported by the medical evidence.<sup>6</sup> While appellant's eye condition is not a residual of the employment injury, her need to avoid driving in the dark was not considered by the Office. Because she could not return to the work site where her injury occurred, the greater commuting time necessitated by the accepted employment injury requires that the Office consider appellant's preexisting condition in assessing whether the offered position was suitable, given that the hours of employment were from 7:00 a.m. until 3:30 p.m.

The Board finds that in this case the Office should have considered appellant's nonwork-related condition and its effect on appellant's ability to commute to the new duty station. The Office did not develop this aspect of the case by requesting further clarification from Dr. Sivalingam as to whether appellant could complete the commute prior to 7:00 a.m. The Office, therefore, did not have an appropriate basis on which to terminate appellant's compensation for refusal to accept suitable work.<sup>7</sup>

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<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.3 (June 1996).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(5) (July 1996). *Donna M. Stroud*, 51 ECAB \_\_\_\_ (Docket No. 98-476, January 5, 2000).

<sup>7</sup> The record reveals that, prior to the injury, appellant's regular work hours were from 7 a.m. to 3:30 p.m.

The June 26 and April 12, 2000 and November 4, 1999 decisions of the Office of Workers' Compensation Programs are hereby reversed.

Dated, Washington, DC  
May 24, 2001

David S. Gerson  
Member

Willie T.C. Thomas  
Member

Priscilla Anne Schwab  
Alternate Member