

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLES W. KIMBALL, JR. and U.S. POSTAL SERVICE,
GENERAL MAIL FACILITY, Boston, MA

*Docket No. 00-703; Submitted on the Record;
Issued October 5, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

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

On October 25, 1991 appellant, then a 42-year-old mailhandler, filed a claim stating that he had experienced severe spasms and pain in his shoulders since August 1991. He stated that he had severe tendinitis of both shoulders with a possible rotator cuff tear in the right shoulder. In a January 2, 1992 report, Dr. Charles Lowery, an osteopath, stated that appellant complained of severe pain in his shoulders beginning August 15, 1991 when he was dumping mail from mail sacks on to a belt. Dr. Lowery indicated that he had first examined appellant on August 20, 1991. He reported that a magnetic resonance imaging (MRI) scan of the right shoulder showed a possible rotator cuff tear with impingement while an MRI scan of the left shoulder showed impingement. Dr. Lowery related appellant's condition to the August 15, 1991 incident.

In a July 28, 1992 report, Dr. Frederic Huffnagle, a Board-certified orthopedic surgeon, stated that an arthroscopy of the right shoulder showed a rotator cuff tear with impingement and a glenoid labrum tear with Perthes lesion.

The Office accepted appellant's claim for bilateral rotator cuff strain. Appellant received temporary total disability compensation for the period July 28 through November 14, 1992 and intermittent temporary total disability for the period November 15, 1992 through January 11, 1993. He received compensation based on actual earnings for the period January 12 through April 2, 1993. Appellant returned to full-time work thereafter.

Appellant stopped working on September 20, 1994 and underwent surgery for a left shoulder arthroscopy with labrum shaving, open acromioclavicular joint excision, acromioplasty and coracoacromial ligament release. The Office began payment of temporary total disability compensation. Appellant returned to part-time work on February 27, 1995 and received payment of compensation for the hours he did not work.

In a May 12, 1995 note, Dr. Lowery reported that an MRI scan of the left shoulder showed a glenoid labrum tear. Appellant underwent surgery on July 12, 1995 for a partial synovectomy and stabilization for the glenoid labrum tear. The Office paid temporary total disability compensation for the period beginning May 27, 1995.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Philip I. Salib, a Board-certified orthopedic surgeon, for an examination and second opinion. In a January 17, 1996 report, Dr. Salib reported that appellant's shoulders presented no atrophy or swelling. He noted appellant's range of motion in the shoulders to be complete and painless. Dr. Salib found no localized tenderness or crepitus. He found no localization of pain or tenderness to palpation over the back from the level of the shoulder blades down to the pelvis. Dr. Salib concluded that appellant had successful operations on both shoulders with no residual limitation of motion or pain. He indicated that appellant had unrelated neck and back conditions as well as bilateral carpal tunnel syndrome. Dr. Salib related only the shoulder problem to appellant's work, stating that the neck, low back and wrist conditions appeared long after appellant stopped work. He commented that, based only on the shoulder conditions, appellant was able to return to his normal duties without restrictions.

In a February 2, 1996 report, Dr. Lowery stated that an electromyogram and nerve conduction studies showed that appellant had some chronic changes due to compression of the brachial plexus and some denervation of the C5 paraspinal areas on the left consistent with disc disease. He noted that appellant complained of left shoulder pain, left arm pain and weakness of the left trapezius with pain, as well as cervical pain. Dr. Lowery diagnosed cervical and trapezius disc disease with neuropathy, left first rib pain, left rotator cuff pain and post left rotator cuff surgical pain. He related appellant's condition to his employment. Dr. Lowery concluded that appellant remained disabled from doing heavy-duty work and was awaiting light-duty work from the employing establishment.

In a February 23, 1996 letter, the employing establishment offered appellant a "temporary limited[-]duty position" as a temporary modified mailhandler, starting at four hours a day. The employing establishment indicated that the job would involve traying letter mail while standing at a conveyor belt. It stated that appellant would be able to stand, walk and sit intermittently for four hours a day and would be able to lift up to 10 pounds and pull or push frequently. It noted that appellant's nonscheduled days would be Thursday and Friday.

In response, appellant refused the offered position. He stated that he did not wish to jeopardize his health and a possible return to full duty at some point. Appellant indicated that he suffered from excruciating physical pain on a daily basis that seemed chronic and had not resolved. He commented that he was unable to sleep more than three hours a night. Appellant complained that the nonscheduled days were unacceptable. He contended that those days should be Saturday and Sunday, the same as he last bid prior to his employment injury.

In a March 15, 1996 letter, the Office informed appellant that it had reviewed the job offered to him and found it to be suitable to his work capabilities. The Office noted appellant's refusal because he did not like the work schedule and believed that the job was contrary to his work capabilities. The Office found his reasons for not accepting the position to be unacceptable. The Office gave appellant 30 days to accept the offered position or provide

sufficient reason for refusing, after which a final decision would be made. The Office noted that the position was currently available to appellant and indicated that, upon acceptance, appellant would be paid the difference between the pay of the offered position and current pay of the position he held when injured. The Office warned appellant that, if he did not respond within 30 days in writing, it would assume that he had refused the job offer without reasonable cause and would commence termination of his compensation.

In a May 15, 1996 decision, the Office terminated appellant's compensation for refusal of offered employment.¹

In a May 13, 1997 letter, appellant's attorney requested reconsideration, contending that appellant did not receive the Office's March 15, 1996 letter informing him that it found the job offered to him to be suitable. He also contended that the Office did not provide appellant appropriate notice as required by Board decisions. In an August 6, 1997 merit decision, the Office denied appellant's request for modification.²

In a July 24, 1998 letter, appellant's attorney again requested reconsideration. In an October 23, 1998 merit decision, the Office again denied appellant's request for reconsideration.

The Board finds that the Office improperly terminated appellant's compensation for refusal to accept suitable employment.

Section 8106(c)(2) of the Federal Employees' Compensation Act states: "a partially disabled employee who: (1) refused to seek suitable work; or (2) refuses or neglects to work after suitable work is offered is not entitled to compensation."³ An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.⁴

The employing establishment stated that the position offered to appellant was a temporary limited-duty position. The Office's procedure manual, provides that the employing establishment, in making an offer of suitable work, cannot offer a temporary position to an employee who had a permanent position at the time of the employment injury.⁵ As appellant was in a permanent position at the time of the employment injury, the employing establishment improperly offered him a temporary position. The offered position therefore was unsuitable for appellant. The Office erred in finding that the temporary position was appropriate for appellant and therefore improperly terminated appellant's compensation for refusing to accept the position.

¹ The Office also sent appellant a letter that proposed to terminate his compensation on the grounds that he was no longer disabled due to the employment injury. The Office, however, did not issue a final decision pursuant to the letter.

² Appellant returned to work, four hours a day, on November 12, 1997.

³ 5 U.S.C. § 8106(c)(2).

⁴ 20 C.F.R. § 10.124.

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chap. 2.814.4(b)(3) (December 1993).

The decision of the Office of Workers' Compensation Programs dated October 23, 1998 is hereby reversed.

Dated, Washington, DC
October 5, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member