

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of GARY C. WAGGONER and U.S. POSTAL SERVICE,  
POST OFFICE, Nashville, TN

*Docket No. 00-2471; Submitted on the Record;  
Issued April 19, 2002*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective January 4, 1998 on the grounds that he refused an offer of suitable work.

The Board finds that the Office improperly terminated appellant's compensation effective January 4, 1998 on the grounds that he refused an offer of suitable work.

Section 8106(c)(2) of the Federal Employees' Compensation Act provides in pertinent part, "A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation."<sup>1</sup> However, to justify such termination, the Office must show that the work offered was suitable.<sup>2</sup> 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.<sup>3</sup>

On December 19, 1988 appellant, then a 41-year-old craft clerk, sustained injury to his low back and neck due to the duties of his job, which included engaging in heavy lifting and repetitive motion. The Office accepted that appellant sustained a permanent aggravation of degenerative lumbar disc disease and degenerative cervical disc disease.<sup>4</sup> On June 14, 1999 appellant underwent a laminectomy with foraminotomy at L5-S1 which was authorized by the Office.

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<sup>1</sup> 5 U.S.C. § 8106(c)(2).

<sup>2</sup> *David P. Camacho*, 40 ECAB 267, 275 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341, 345 (1981).

<sup>3</sup> 20 C.F.R. § 10.124; *see Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

<sup>4</sup> The Office had previously accepted that appellant sustained a low back strain on December 20, 1983 when he arose from a chair.

By decision dated December 23, 1997, the Office terminated appellant's compensation effective January 4, 1998 on the grounds that he refused an offer of suitable work. By decisions dated February 20 and July 10, 1998, July 23, 1999 and May 3, 2000, the Office affirmed its December 23, 1997 decision.<sup>5</sup>

The Board finds that the Office did not establish that the modified clerk position was suitable. The evidence of record does not show that appellant was capable of physically performing the modified clerk position offered by the employing establishment on October 9, 1997 and determined to be suitable by the Office in a letter dated November 19, 1997. The position involves repairing damaged mail and placing it into trays. It requires intermittent lifting of up to 10 pounds; intermittent sitting for up to 4 hours per day; intermittent standing for up to 4 hours per day; intermittent walking for up to 4 hours per day; and occasional bending and stooping.<sup>6</sup>

In a report dated July 28, 1997, Dr. John C. McInnis, a Board-certified orthopedic surgeon to whom the Office referred appellant, indicated that appellant could not perform the heavy lifting and carrying required by his craft clerk position.<sup>7</sup> He stated that "[I]t is possible this man may be able to work with restrictions" of engaging in occasional bending and stopping; walking for 2 to 4 hours per day; and standing for 2 to 4 hours per day (with the ability to alternate between standing and sitting).<sup>8</sup> Dr. McInnis diagnosed degenerative disc disease at L5-S1 with possible S1 nerve root impingement and a bone tumor of the left femoral head. He indicated that additional nerve block testing was necessary in order to determine whether appellant should have surgery on his back.

The modified clerk position requires occasional lifting of up to 10 pounds, but Dr. McInnis did not provide any assessment of appellant's ability to lift. He couched his evaluation of appellant's physical limitations in equivocal terms by noting that it was "possible" that appellant could work within the delineated physical restrictions. In addition, Dr. McInnis indicated that further evaluation should be carried out in order to determine whether appellant required back surgery. Moreover, there is other evidence of record which suggests that appellant was unable to physically perform the modified clerk position in late 1997. In an affidavit dated December 8, 1998, Dr. David H. McCord, an attending Board-certified orthopedic surgeon, indicated that he had reviewed the description of the modified clerk position and had determined that appellant was not able to perform the duties of the position after October 9, 1997, the date it was offered to him. Dr. McCord noted that appellant's degenerative low back condition with radiculopathy severely limited his ability to lift, bend, stoop, walk and stand.<sup>9</sup> Therefore, it the

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<sup>5</sup> By decision dated September 18, 1998, the Office denied appellant's request for merit review.

<sup>6</sup> The description of the position indicated that frequent stretch breaks were encouraged. Appellant declined the position on October 14, 1997 citing his physical inability to perform its duties.

<sup>7</sup> The craft clerk position required appellant to lift up to 70 pounds and to carry up to 44 pounds.

<sup>8</sup> Dr. McInnis stated, "I must admit some of these restrictions are based on subjective complaints of pain."

<sup>9</sup> The record contains reports from January 1998, which indicate that Dr. McCord was considering whether to perform back surgery on appellant at that time.

medical evidence does not establish that appellant was able to perform the required duties of the modified clerk position.

For these reasons, the Office did not show that the modified clerk position was suitable and improperly terminated appellant's compensation effective January 4, 1998 on the grounds that he refused an offer of suitable work.

The May 3, 2000 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC  
April 19, 2002

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member