

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DIANE J. JOHNSON and U.S. POSTAL SERVICE,
POST OFFICE, Fort Lauderdale, FL

*Docket No. 00-2227; Submitted on the Record;
Issued August 20, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective February 8, 1999, on the grounds that she refused an offer of suitable work; and (2) whether the Office abused its discretion by refusing to reopen appellant's claim for reconsideration.

On September 8, 1989 appellant, a 27-year-old clerk, injured her right leg, lower back and right shoulder when her chair flipped backward and she fell from her chair. She filed a claim for benefits on the date of injury, which the Office accepted on March 14, 1990 for right shoulder strain, lumbar strain, cervical strain and right knee strain. Appellant missed work intermittently and was paid compensation by the Office for appropriate periods. She returned to light duty on February 18, 1991 in a modified distribution clerk position, for four hours per day.

On February 28, 1997 appellant accepted a position as a modified distribution clerk for six hours per day.

In a work capacity evaluation dated July 17, 1998, Dr. David G. Lehrman, a Board-certified orthopedic surgeon, indicated that appellant could work an 8-hour day, with restrictions on climbing, kneeling, twisting, standing and lifting more than 10 to 20 pounds. Dr. Lehrman also indicated that appellant should alternate sitting and standing.

By decision dated July 24, 1998, the Office reduced appellant's wage-loss compensation based on her acceptance of the six-hour per day position as a modified clerk, in which capacity she had worked since March 14, 1997, based on the approval of her treating physician.

In a work capacity evaluation dated September 10, 1998, Dr. Manuel Sivina, a Board-certified surgeon, indicated that appellant could work an 8-hour day, with restrictions on lifting more than 10 pounds, squatting, climbing, kneeling, twisting and standing for more than 1 hour per day, and on sitting and walking for more than 5 to 6 hours per day.

In a September 16, 1998 investigative memorandum, which included a report based on several days of surveillance of appellant's daily activities, the employing establishment indicated that appellant could engage in a range of activities exceeding the restrictions outlined in her work capacity evaluation.

By letter dated October 6, 1998, the employing establishment offered appellant a job as a modified distribution clerk for eight hours a day, based on the recent reports from Drs. Lehrman and Sivina. This job entailed the same duties appellant was working in her current job as a modified distribution clerk for six hours per day. The effective date of the job offer was October 10, 1998.¹

By letter dated October 16, 1998, the Office advised appellant that the full-time modification distribution clerk position was suitable and, pursuant to section 8106(c)(2), she had 30 days to either accept the job or provide a reasonable, acceptable explanation for refusing the offer.² The Office advised appellant that it would terminate her compensation if she refused to accept the suitable full-time position. Appellant did not respond.

By letter dated January 7, 1999, the Office advised appellant that she had 15 days in which to accept the position or it would terminate her compensation. Appellant did not respond within 15 days.

By decision dated February 8, 1999, the Office terminated appellant's compensation benefits on the grounds that she refused an offer of suitable work. The Office noted that appellant had not submitted any additional evidence to contest the suitability of the full-time modified position offered on October 6, 1998.

By letter dated February 12, 1999, appellant requested reconsideration of the February 8, 1999 Office decision. She asserted that she never refused the offer to work an eight-hour day, that she never received notice of a start date and that she did not receive the Office's January 7, 1999 letter giving her 15 days notice. In a March 17, 1999 telephone call, appellant alleged that she was already working eight hours per day in the modified distribution clerk position.

By decision dated May 25, 1999, the Office denied appellant's request for reconsideration, finding that she failed to submit evidence sufficient to warrant modification of the February 8, 1999 decision. The Office stated that although appellant had not explicitly refused to accept the job offer, the evidence of record indicated that she had never actually begun working on the job that was offered to her and was available to her. The Office noted that the employing establishment provided a starting date of October 10, 1998 and that following her termination, appellant had only worked eight hours a day on a few intermittent dates.

Appellant requested reconsideration of the May 25, 1999 Office decision. She asserted that she never refused the offer to work an eight-hour day and that she did not received any notice of a start date.

¹ The job description for both the February 28, 1997 and October 6, 1998 offers stated:

² 5 U.S.C. § 8106(c)(2).

By decision dated July 1, 1999, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its prior decision.

By letter dated July 28, 1999, appellant requested reconsideration. She reiterated her previous contentions that she never refused the offer to work an 8-hour day, that she never received notice of a start date and that she did not receive the Office's January 7, 1999 letter giving her 15 days notice. In support of this request, appellant submitted a June 9, 1999 report from Dr. Sivina, who stated:

“[Appellant] was in my office on June 8, 1999.... My recommendation is that she should return to work on day shift due to the severity of her leg edema secondary to her previous operations.”

By decision dated August 24, 1999, the Office denied appellant's request for reconsideration, finding that she failed to submit evidence sufficient to warrant modification of the February 8, 1999 termination decision.

By letter dated September 27, 1999, appellant requested reconsideration. Her representative indicated that the October 6, 1998 job offer was not valid pursuant to its own workers' compensation guidelines. He stated that although the medical evidence indicated that appellant had a permanent impairment, the offer was for a temporary position and therefore she should have been reclassified into the rehabilitation program and offered a permanent assignment. By letter dated December 6, 1999, the Office sent a copy of Mr. Cervalli's letter to the employing establishment, which, by letter dated December 29, 1999, stipulated that the October 6, 1998 job offer was for a permanent job assignment.

By decision dated January 10, 2000, the Office denied appellant's request for reconsideration, finding that she failed to submit evidence sufficient to warrant modification of the February 8, 1999 termination decision.

By letter dated May 1, 2000, appellant requested reconsideration. In support of this request, she submitted a copy of the employing establishment's March 17, 2000 rehabilitation job offer for a modified general clerk job, entailing the same duties as the October 6, 1998 job offer; *i.e.*, an eight-hour workday, which she accepted on March 22, 2000.

By decision dated June 7, 2000, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its prior decision.

The Board finds that the Office properly terminated appellant's compensation benefits effective February 8, 1999, on the grounds that she refused an offer of suitable work.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. Under section 8106(c)(2) of the Act³ the Office may

³ 5 U.S.C. §§ 8101-8193.

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.⁴ Section 10.124(c) of the Office's regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured 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 a determination is made with respect to termination of entitlement to compensation.⁵ To justify termination, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.⁶ This burden of proof is applicable if the Office terminates compensation under 5 U.S.C. § 8106(c) for refusal to accept suitable work. The Office met its burden in the present case.

The initial question in this case is whether the Office properly determined that the position was suitable. The determination of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by the medical evidence.⁷ In the instant case, the employing establishment located a job as a modified distribution clerk for eight hours per day which entailed duties identical to those required by appellant's current six-hour per day job, based on restrictions outlined by her treating physicians, Drs. Lehrman and Sivina, both of whom indicated that appellant could work an eight-hour day. The Office found that the weight of the medical evidence rested with the opinions of Drs. Lehrman and Sivina, and that therefore appellant was capable of performing the modified job offered by the employing establishment on October 6, 1998. The Board finds that the weight of the medical evidence, which was unrefuted, establishes that the position was within appellant's physical limitations. Dr. Lehrman indicated in his July 17, 1998 work capacity evaluation that appellant could work an 8-hour day with restrictions on climbing, kneeling, twisting, standing and lifting more than 10 to 20 pounds and should alternate sitting and standing. Dr. Sivina stated in his September 10, 1998 work capacity evaluation that appellant could work an 8-hour day with restrictions on lifting more than 10 pounds, squatting, climbing, kneeling, twisting and standing for more than 1 hour per day, and on sitting and walking for more than 5 to 6 hours per day. The Office properly found that the modified distribution clerk job offered by the employing establishment was within these restrictions. This suitability determination was proper, as the opinions of Drs. Lehrman and Sivina represented the weight of medical opinion at the time of the Office's termination decision.⁸

Although appellant claimed that she never explicitly refused the employing establishment's October 6, 1998 offer of the modified job and that she never received the employing establishment's October 6, 1998 offer of the modified job, the Office's October 16, 1998 letter giving her 30 days notice that her compensation would be terminated if she did not

⁴ *Patrick A. Santucci*, 40 ECAB 151 (1988); *Donald M. Parker*, 39 ECAB 289 (1987).

⁵ 20 C.F.R. § 10.124(c); *see also Catherine G. Hammond*, 41 ECAB 375 (1990).

⁶ *See John E. Lemker*, 45 ECAB 258 (1993).

⁷ *Robert Dickinson*, 46 ECAB 1002 (1995).

⁸ *Barbara R. Bryant*, 47 ECAB 715 (1996).

accept the October 6, 1998 offer, or the Office's January 7, 1999 letter giving her 15 days notice prior to termination, these contentions are not sufficient to render the Office's termination decision improper. The fact that appellant claimed that she never refused is inconsequential in light of the fact that she did not show up to do the job on the prescribed date. Further, the October 6, 1998 job offer and the Office's October 16, 1998 and January 7, 1999 letters and the January 7, 1999 letter were all mailed to the same address provided by appellant. Pursuant to the mailbox rule, therefore, it can be presumed that appellant was given notice of the job offer and the two letters proposing termination.⁹ Finally, appellant alleged in a March 17, 1999 telephone call that she was already working eight hours per day, every day, in the modified distribution clerk position. However, by letter dated May 20, 1999, the employing establishment noted that its attendance records indicated that appellant only worked an eight-hour shift for seven work days during the period from February through April 1999; this contradicted her claim that she was working the eight-hour job full time. Thus, there was insufficient support for appellant's claim that she, in effect, did not refuse to accept the job offer. Accordingly, the refusal of the job offer therefore cannot be deemed reasonable or justified, and the Office properly terminated appellant's compensation. Therefore, as the Office met its burden of proof to establish that appellant refused a suitable position, the Office met its burden of proof in this case to terminate appellant's compensation benefits pursuant to 5 U.S.C. § 8106.

Following the Office's termination of compensation, the burden of proof in this case shifted to appellant, who thereafter submitted Dr. Sivina's June 9, 1999 report. This report, however, did not contain countervailing, probative medical evidence that appellant was physically unable to perform the modified distribution job for eight hours. Causal relationship must be established by rationalized medical opinion evidence. The medical evidence appellant submitted following the Office's February 8, 1999 termination decision was not sufficient to meet this burden. The employing establishment relied partly on Dr. Sivina's July 9, 1998 work restrictions in making the October 6, 1998 modified distribution clerk offer, and his June 9, 1999 report, a summary statement that appellant "should return to work on day shift" do not negate his prior findings and conclusions; nor do they establish that appellant's medical condition precludes her from performing the duties of the modified distribution clerk job. Finally, although appellant's representative claimed in his September 27, 1999 reconsideration request that the October 6, 1998 job offer was not valid because it only offered a temporary position, thus, contradicting the medical evidence indicating appellant had a permanent impairment, the employing establishment rebutted this contention in its December 29, 1998 letter, which confirmed that the October 6, 1998 job offer was for a permanent job assignment. Thus, neither Dr. Sivina's report nor the letter from appellant's union representative satisfied appellant's burden of proof to submit evidence sufficient to warrant modification of the Office's February 8,

⁹ The Board has found that, in the absence of evidence to the contrary, a letter properly addressed and mailed in the due course of business is presumed to have arrived at the mailing address in due course. This is known as the "mailbox rule." A review of the record indicates that the employing establishment and the Office mailed all correspondence to the 322 NW 59 Terr, Miami, FL 33127, the address provided by appellant throughout 1998 and 1999. Since the mailing address proffered by appellant was used by the Office throughout 1998 and 1999 without correction by appellant, the Board finds that the address used was proper. There is no evidence that the letter was returned as undeliverable. Consequently, the October 6, 1998 job offer and the October 16, 1998 and January 7, 1999 Office letters are entitled to the presumption of receipt. See *Dorothy Yonts*, 48 ECAB 549 (1997).

1999 termination decision. Accordingly, the Board affirms the Office's January 10, 2000 and August 24, 1999 decisions, affirming the February 8, 1999 termination decision.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for further review on the merits of her claim under 5 U.S.C. § 8128(a).

Under 20 C.F.R. § 10.607, a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law; by advancing a relevant legal argument not previously considered by the Office; or by submitting relevant and pertinent evidence not previously considered by the Office.¹⁰ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.¹¹

In this case, appellant has not shown that the Office erroneously applied or interpreted a specific point of law; she has not advanced a relevant legal argument not previously considered by the Office; and she has not submitted relevant and pertinent evidence not previously considered by the Office. The evidence appellant submitted was either previously considered and rejected by the Office in prior decisions, or is not pertinent to the issue on appeal. Additionally, the letter from appellant's union representative failed to show that the Office erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by the Office. Therefore, the Office acted within its discretion in refusing to reopen appellant's claim for a review on the merits. The Board therefore affirms the Office's June 7, 2000 nonmerit decision.

The decisions of the Office of Workers' Compensation Programs dated June 7 and January 10, 2000 and August 24, 1999 are hereby affirmed.

Dated, Washington, DC
August 20, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

¹⁰ 20 C.F.R. § 10.607(b)(1). *See generally* 5 U.S.C. § 8128(a).

¹¹ *Howard A. Williams*, 45 ECAB 853 (1994).