

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PEGGY M. JOHNSON and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Loma Linda, CA

*Docket No. 02-2013; Submitted on the Record;
Issued December 17, 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 effective February 24, 2002 on the grounds that she neglected to work after suitable work was offered to her; and (2) whether the Office properly denied appellant's request for a hearing under section 8124 of the Federal Employees' Compensation Act.

On February 17, 1991 appellant, then a 32-year-old nursing assistant, sustained cervical and left arm strains when she lifted a patient into a wheelchair. Appellant stopped work on February 17, 1991 and received compensation for periods of disability.¹ On June 20, 2001 the employing establishment offered appellant a position as a medical clerk. The position was essentially in nature and involved the performance of various clerical duties including managing administrative records and making medical appointments. The position required working 6 hours per day, lifting up to 20 pounds and engaging in limited standing and bending. It also required walking, reaching above the shoulders and engaging in repetitive motion for no more than an hour per day. By letter dated December 26, 2001, the Office advised appellant of its determination that the medical clerk position was suitable. The Office also informed appellant of the consequences of refusing the position or neglecting to work in the position. Appellant did not specifically refuse the offered position, but she neglected to work after the starting date of the position. By decision dated February 20, 2002, the Office terminated appellant's compensation effective February 24, 2002 on the grounds that she neglected to work after suitable work was offered to her. By decision dated May 2, 2002, the Office denied appellant's request for a hearing under section 8124 of the Act.

¹ Appellant began participating in a vocational rehabilitation program in December 1999, but her participation did not lead to a job placement.

The Board finds that the Office improperly terminated appellant's compensation effective February 24, 2002 on the grounds that she neglected to work after suitable work was offered to her.

Section 8106(c)(2) of the 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."² However, to justify such termination, the Office must show that the work offered was suitable.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 Board finds that the evidence of record does not show that appellant was capable of performing the medical clerk position offered by the employing establishment in June 2001 and determined to be suitable by the Office in December 2001. In reaching its suitability determination, the Office relied upon the opinion of Dr. Suanne White-Spunner, a Board-certified orthopedic surgeon who served as an Office referral physician. In a report dated July 16, 1999, Dr. White-Spunner reported the findings of an examination performed on July 15, 1999. She indicated that appellant continued to have some residuals of her employment injury, cervical and left arm strains, but noted that she could perform some type of work. In a form report dated August 20, 1999, Dr. White-Spunner indicated that appellant could work for 6 hours per day, lift up to 20 pounds, and engage in sitting, walking, standing and reaching for various periods per day.⁵

The record does not, however, contain any medical evidence from around the time that the medical clerk position was offered to appellant and the time that the Office determined the medical clerk position was suitable. By the time of the Office's suitability determination, the work restrictions opinion of Dr. White-Spunner was approximately two and a half years old.⁶ Therefore, it cannot be said that the Office presented medical evidence which showed appellant was physically capable of performing the medical clerk position around the time it was offered. The Office did not meet its burden of proof to show that the offered position was suitable.

For these reasons, the Office improperly terminated appellant compensation effective February 24, 2002 on the grounds that she refused an offer of suitable work.⁷

² 5 U.S.C. § 8106(c)(2).

³ *David P. Camacho*, 40 ECAB 267, 275 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341, 345 (1981).

⁴ 20 C.F.R. § 10.124; *See Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

⁵ In a report dated November 5, 1999, Dr. Thomas Dempsey, an attending orthopedic surgeon, indicated that he did not agree with Dr. White-Spunner's work restrictions. However, he did not provide any work restrictions of his own.

⁶ *See Keith Hanselman*, 42 ECAB 680 (1991).

⁷ Given the Board's disposition of the merit issue of the present case, it is not necessary for the Board to consider whether the Office properly denied appellant's hearing request.

The February 20, 2002 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, DC
December 17, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member