

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DANIEL C. PORTER and U.S. POSTAL SERVICE,
POST OFFICE, Charlotte, NC

*Docket No. 01-931; Submitted on the Record;
Issued June 4, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation on the grounds that he refused an offer of suitable work.

Appellant, then a 53-year-old clerk, filed an October 1, 1996 claim for carpal metacarpal arthritis which he attributed to factors of his federal employment. The Office accepted his claim for aggravation of metacarpal arthritis-bilateral thumbs and aggravation of left lateral epicondylitis. Appellant returned to work intermittently.

The employing establishment offered appellant a modified light-duty position on January 12, 1999 conforming with the restrictions imposed by his attending physician.¹ A copy of the job offer was submitted for review by Dr. Thomas Parent, appellant's attending Board-certified orthopedist, who noted that appellant could perform the job, stating that the "job analysis sounds ok."

By letter dated May 12, 1999, the Office informed appellant that it had reviewed the position description and found the job offer suitable with his physical limitations. He was advised that he had 30 days to accept the position or offer his reasons for refusing. Appellant was apprised of the penalty provisions of the Federal Employees' Compensation Act if he did not return to suitable work.

¹ In a letter dated December 11, 1997, the employing establishment offered appellant a permanent position as a modified distribution clerk. The employing establishment noted that the job restrictions matched those provided by Dr. Parent. Appellant refused the position, contending that the job duties did not conform with Dr. Parent's restrictions. Thereafter, Dr. Parent completed a Form CA-17 noting that appellant was unable to perform letter throwing and sorting duties. In a decision dated August 21, 1998, the Office determined that the December 11, 1997 offered job was not suitable because the duties included sorting and throwing mail, which was contrary to Dr. Parent's restrictions.

In a letter dated May 28, 1999, appellant responded to the Office's letter and declined the January 12, 1999 job offer. He indicated that the job offer did not consider his bilateral thumb condition or his left elbow injury. Appellant noted that the continuous repetitious motion of the job duties would result in further loss of the joint function.

By letter dated June 22, 1999, the Office informed appellant that the refusal of the offered position was found to be unjustified, based on the opinion of his treating physician, Dr. Parent and provided 15 days for him to accept the job.

In a letter dated July 1, 1999, appellant noted that he had been performing duties of nixie mail for the past several years and these activities had not aggravated his condition. He further noted that Dr. Parent, in his report of March 29, 1999, indicated that appellant's work duties were adjusted appropriately for his capabilities. Appellant noted that he had not been performing distribution duties as provided for in the job offer and as a result his condition had stabilized. Dr. Parent's treatment note of March 29, 1999 noted that appellant experienced pain in the elbow and thumbs; however, his condition stabilized.

By decision dated August 9, 1999, the Office terminated appellant's compensation, finding that he refused an offer of suitable work.

In a letter dated August 27, 1999, appellant requested a review of the written record and submitted a narrative statement dated December 4, 1999 with duplicative documents previously submitted and part of the record.²

In a decision dated January 14, 2000, an Office hearing representative affirmed the denial of appellant's claim.

By letter dated February 14, 2000, appellant requested reconsideration and submitted additional evidence including several witness statements; a questionnaire from Dr. Parent dated February 1, 2000; and a treatment note from him dated March 17, 2000. He noted that one of appellant's medical restrictions was no repetitive thumb motion and indicated that he would not release appellant to perform manual mail distribution if the duties involved repetitive thumb motion. Dr. Parent's treatment note of March 17, 2000 indicated that he continued treating appellant for chronic left elbow lateral epicondylitis. He noted full range of motion with no evidence of instability.

In a decision dated June 9, 2000, the Office denied appellant's reconsideration request on the grounds that the evidence submitted was insufficient to warrant modification of its prior decision.

In a letter dated June 13, 2000, appellant requested reconsideration and submitted various records, which were duplicative of those previously submitted and considered by the Office.

² On September 10, 1999 appellant requested an oral hearing before an Office hearing representative. The Office determined that appellant's request was untimely and proceeded with a review of the written record.

In a decision dated July 13, 2000, the Office denied appellant's request for review on the grounds that the evidence submitted in support of the request was repetitious and cumulative in nature and insufficient to warrant review of its prior decision.

By letter dated December 14, 2000, appellant through his attorney requested reconsideration of the Office's decision and submitted several documents, most of which were duplicative and a new report from Dr. Parent dated November 14, 2000 and an affidavit dated November 10, 2000. The report from Dr. Parent diagnosed appellant with arthritis of the base of the thumb. He noted that appellant's thumb condition would not improve without surgery. Dr. Parent further noted that appellant would not benefit from a job which required repetitive use of his thumbs and it was reasonable that appellant would decline such a job. He concluded that appellant has an osteoarthritic condition, which, with excessive use or strain on his thumbs, would aggravate his condition. Appellant's affidavit indicated that the January 12, 1999 job offer did not clearly represent the physical requirements of the job.

In a merit decision dated January 10, 2001, the Office denied appellant's reconsideration request on the grounds that the evidence submitted was insufficient to warrant modification of its prior decision.

It is well settled that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.³ In this case, the Office terminated appellant's compensation under 5 U.S.C. § 8106(c) on the basis that he refused an offer of suitable work. Section 8106(c) 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.⁴

The Office's implementing federal regulations provide that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of establishing that such refusal or failure to return 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 of compensation, the Office must show that the work offered was suitable and inform the employee of the consequences of refusal to accept such employment.⁶

The Office established that the offered position of January 12, 1999 was suitable. Dr. Parent provided physical limitations pertaining to his aggravation of metacarpal arthritis and aggravation of left lateral epicondylitis condition. The duty status report of May 26, 1998 noted that appellant was subjected to the same restrictions as the duty status report of December 16, 1997 which indicated no lifting, carrying, pushing, pulling or rolling over 20 pounds; no operation of equipment; and avoidance of activities such as letter throwing, sorting and repetitive

³ *Mohamed Yunis*, 42 ECAB 325 (1991).

⁴ 5 U.S.C. § 8106(c).

⁵ 20 C.F.R. § 10.124(c).

⁶ *Arthur C. Reck*, 47 ECAB 339 (1995).

thumb use. Dr. Parent was presented with a job description and narrative summary for the offered position. He noted restrictions on lifting of 10 pounds; carrying five pounds; no pushing, pulling, squatting, climbing or crawling; occasional bending; and no reaching above 15 inches. Dr. Parent stated that appellant could return to work for eight hours a day.

The Board finds that the Office complied with its procedural requirements in advising appellant that the position was found suitable and providing him with the opportunity to accept the position or provide his reasons for refusing.⁷ The record reflects that appellant did respond to the Office's notice in letters dated May 28 and July 1, 1999, where he indicated that the job offer did not consider his bilateral thumb condition or his left elbow injury. Appellant noted that the continuous repetitious motion of the job duties would result in further loss of joint function. He noted that he had been performing duties of nixie mail for the past several years and these activities had not aggravated his condition. Appellant noted that he had not been performing distribution duties as provided for in the job offer and his condition had stabilized. He also submitted a report from Dr. Parent dated March 29, 1999 indicating that appellant's condition stabilized but he still experienced pain in the elbow and thumbs. However, this evidence was insufficient to show that the offered position was not medically suitable. Dr. Parent's treatment note merely noted appellant's symptoms but did not address the suitability of the offered position. Therefore, appellant failed to submit any evidence or argument to show that the offered position was not medically suitable.⁸

The issue 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.⁹ In this case, the medical evidence provided from Dr. Parent, appellant's attending physician, establishes the suitability of the offered position. The Office met its burden of proof to terminate appellant's compensation based on his refusal of suitable work. Thereafter, the burden shifted to appellant to establish that the refusal of the job offer was justified.¹⁰

Following the Office's August 9, 1999 decision, appellant submitted various documents including reports from Dr. Parent dated February 1, March 17 and November 14, 2000. He noted that one of appellant's medical restrictions was no repetitive thumb motion and indicated that he would not release him to perform manual mail distribution if the duties involved repetitive thumb motion. Dr. Parent's treatment note of March 17, 2000 noted continued treatment for chronic left elbow lateral epicondylitis. He noted a full range of motion with no evidence of instability. Dr. Parent's report dated November 14, 2000 diagnosed appellant with arthritis of the base of the thumb and noted that appellant would not benefit from a job which required repetitive use of his thumbs. These reports of his are insufficient to establish that the position offered appellant was unsuitable as the physician offered no diagnosis or explanation of how or why appellant's osteoarthritic condition prevented him from performing the job duties of

⁷ See *Bruce Sanborn*, 49 ECAB 176 (1997).

⁸ See *Stephen R. Lubin*, 43 ECAB 564 (1992).

⁹ See *Maurissa Mack*, 50 ECAB ____ (Docket No. 97-821, issued August 2, 1999); *Robert Dickerson*, 46 ECAB 1002 (1995).

¹⁰ See *Deborah Hancock*, 49 ECAB 606 (1998); *Henry P. Gilmore*, 46 ECAB 709 (1995).

the selected position at the time it was offered. This evidence does not establish that Dr. Parent changed his opinion as to the suitability of the modified position offered to appellant prior to his rejection and the Office's termination of benefits. His opinion, however, while generally supporting continuing metacarpal arthritis of bilateral thumbs and left lateral epicondylitis residuals, does not explain how appellant's condition and residuals prevented his return to work in the modified position on January 12, 1999 when the Office notified him of the offered position and its finding that it was suitable, nor did Dr. Parent retract his prior reports indicating his approval of the offered position. Rather, he merely noted that appellant had an osteoarthritic condition which, with excessive use or strain on his thumbs, would aggravate his condition. These reports of Dr. Parent are not sufficient to establish that appellant remained totally disabled due to physical limitations on lifting at the time the job was offered or at any time prior to the termination of benefits.¹¹

The January 10, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
June 4, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

¹¹ See *Gayle Harris*, 52 ECAB ____ (Docket No. 99-1172, issued March 19, 2001).