

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VON D. LYONS and U.S. POSTAL SERVICE,
POST OFFICE, Houston, TX

*Docket No. 00-1448; Submitted on the Record;
Issued May 3, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective June 14, 1999, on the grounds that she refused an offer of suitable work.

On June 4, 1996 appellant, a 38-year-old mail processor, injured her left shoulder when a coworker inadvertently walked into her. She filed a claim for benefits on the date of injury, which the Office accepted on November 19, 1996 for sprain of the left shoulder and left arm. The Office subsequently authorized an arthroscopic subacromial decompression of the left shoulder, which appellant underwent on January 20, 1997. She missed work for intermittent periods, for which the Office paid appropriate compensation. On October 11, 1998 appellant stopped working and received compensation on the periodic rolls.

By letter dated November 23, 1998, the Office referred appellant to Dr. Robert J. Kolimas, Board-certified in psychiatry and neurology, for a second-opinion examination in order to determine whether she was capable of performing modified employment.

In a report dated January 8, 1999, Dr. Kolimas stated that appellant was not able to return to her regular job duties as a mail processor, which involved heavy-duty work, but could return to an eight-hour, sedentary job. He indicated that this job could involve work, which required sitting or standing and would allow for frequent changes in body position. Appellant would also need to avoid work involving repetitive head rotation, as well as reaching overhead, which required her to use her left shoulder. Dr. Kolimas advised that appellant could only occasionally lift objects no greater than 10 pounds, but not overhead and could occasionally push or pull objects not greater than 20 pounds. He also stated that appellant should work in a reduced noise environment.

In a report dated January 28, 1999, Dr. Kenneth M. Alo, a specialist in anesthesiology and appellant's treating physician, agreed that appellant was capable of returning to work in a light-duty, noise-restricted environment within the restrictions suggested by Dr. Kolimas.

On March 10, 1999 the employing establishment offered appellant a limited-duty job as a modified distribution clerk, performing sedentary work based on the restrictions outlined by Dr. Kolimas. The position required no reaching above the shoulder, with an environment devoid of excessive noise.¹

In a report dated March 11, 1999, Dr. Alo indicated that appellant would be capable of performing the limited-duty job, once she underwent surgery for a C2 dorsal ganglionotomy. Appellant underwent this procedure on March 22 and 29, 1999. On April 6, 1999 Dr. Alo released appellant to begin working at the modified distribution clerk job.

The employing establishment reinstated the modified job offer on April 14, 1999, which appellant accepted on April 21, 1999. However, she stopped working on April 23, 1999 alleging that she was unable to perform the requirements of the position.

By letter dated April 23, 1999, the Office advised appellant that a suitable position was available and that pursuant to section 8106(c)(2), she had 30 days to either accept the job or provide a reasonable, acceptable explanation for refusing the job offer. The Office stated that if appellant refused the job or failed to report to work within 30 days without reasonable cause, it would terminate her compensation pursuant to 5 U.S.C. § 8106(c)(2).² There was no response.

The Office subsequently advised appellant that she had 15 days in which to accept the position, or it would terminate her compensation.

By letter dated April 27, 1999, appellant advised the Office that she did not want to return to work with the employing establishment due to fear that she would reinjure herself.

By letter dated May 26, 1999, the Office advised appellant that her reason for refusing the job offer was not acceptable and that she had 15 days in which to accept the modified position.

In a report dated May 27, 1999, Dr. Alo stated that appellant "has been unable to work since April 23, 1999."

By decision dated June 14, 1999, the Office found that appellant was not entitled to compensation benefits on the grounds that she had refused to accept a suitable job offer.

¹ The job description indicated that appellant would sit in a chair and place letter mail into a modified letter case, which had been lowered in order to prevent her from reaching above her shoulders. The job description also stated that Dr. Alo had found that the noise level readings for appellant's work station were acceptable.

² 5 U.S.C. § 8106(c)(2).

By letter dated July 25, 1999, appellant requested an oral hearing, which was held on November 16, 1999.

By decision dated January 18, 2000, an Office hearing representative affirmed the June 14, 1999 termination.

The Board finds that the Office properly terminated appellant's compensation benefits effective June 14, 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 Federal Employees' Compensation Act³ the Office may 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 10.517(a) 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 did not meet its burden in the present case.

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 identified a light-duty, sedentary job as a modified distribution clerk, based on the restrictions outlined by Dr. Kolimas. Dr. Alo, appellant's treating physician, indicated that he approved the position as within appellant's restrictions once she underwent a surgical procedure. In an April 6, 1999 report, he stated that appellant would be able to perform the duties of the modified position. Appellant returned to work on April 21, 1999, however, she quit working after only two days claiming she was unable to perform the duties of this position. Appellant has not submitted sufficient medical evidence to support her assertion that the position is beyond her physical limitations. Appellant's fear of future injury if she were to return to work at the modified

³ 5 U.S.C. §§ 8101-8193.

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

⁵ 20 C.F.R. § 10.517(a); *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).

position, as stated in her April 27, 1999 letter, is not sufficient cause to establish that the position is unsuitable.⁸ Dr. Alo's May 27, 1999 report is merely a conclusory statement indicating appellant has been unable to work since April 23, 1999 but does not explain or discuss the reasons underlying appellant's refusal to accept the modified job offer. This report does not constitute probative, rationalized medical evidence establishing that she is unable to perform the job. The Office found that the weight of the medical evidence rested with Dr. Kolimas' opinion, which indicated that appellant was capable of performing the modified job and returning to work on light duty. The Board finds that Dr. Kolimas' opinion represents the weight of the medical opinion at the time of the Office's termination decision.⁹ Thus, there was insufficient support for appellant's stated reasons in declining 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 requested an oral hearing but failed to submit any additional medical evidence in support of her request. Thus, appellant failed to submit countervailing, probative medical evidence that she continued to have residual disability from her accepted June 14, 1999 injury, or that she was physically unable to perform the modified, light-duty job. Appellant, therefore, did not satisfy her burden of proof to submit medical evidence sufficient to warrant modification of the Office's June 14, 1999 termination decision. Accordingly, the Board affirms the Office's January 18, 2000 decision, affirming the June 14, 1999 termination decision.

⁸ Disability compensation is payable only for an employment injury which causes disability for work; fear of a recurrence of disability if the employee returns to work is not a basis for compensation. *James B. Christensen*, 47 ECAB 775 (1996); *William A. Kandel*, 43 ECAB 1011 (1991).

⁹ *Barbara R. Bryant*, 47 ECAB 715 (1996).

The decision of the Office of Workers' Compensation Programs dated January 18, 2000 is affirmed.

Dated, Washington, DC
May 3, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

Michael E. Groom
Alternate Member