

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JUNE E. BRIAND and U.S. POSTAL SERVICE,
POST OFFICE, San Angelo, TX

*Docket No. 02-1489; Submitted on the Record;
Issued November 8, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective April 21, 2001 on the basis that she refused an offer of suitable work.

The Office accepted that appellant sustained a right shoulder strain in an April 27, 1987 employment injury, and a sacroiliac strain, a lumbosacral strain and a herniated disc at L4-5 in a November 14, 1987 employment injury. The Office also accepted that appellant sustained tendinitis and an overuse syndrome of the wrists and bilateral carpal tunnel syndrome in the performance of her duties as a distribution clerk.

Appellant last worked at the employing establishment on January 8, 1993 and the Office paid her compensation for temporary total disability.

On February 14, 2001 the employing establishment offered appellant, who had moved to Colorado in 1997, a position as a limited-duty distribution clerk at the employing establishment.

By letter dated February 16, 2001, the Office advised appellant that it had found that this position was suitable and allotted appellant 30 days to accept the offer or provide reasons for not doing so.

By letter dated March 7, 2001, appellant contended that a functional capacity evaluation done on January 31, 2001 showed that she could not work, and that she still had depression and a chronic pain disorder.

By letter dated March 22, 2001, the Office advised appellant that it found her reasons for not accepting the employing establishment's offer unacceptable. The Office allotted appellant 15 days to accept the offer or have her compensation terminated.

By decision dated April 18, 2001, the Office terminated appellant's compensation effective April 21, 2001 on the basis that she refused an offer of suitable work.

Appellant requested a hearing, which was held on November 14, 2001. At this hearing appellant submitted additional medical evidence.

By decision dated January 31, 2002, an Office hearing representative found that the Office properly terminated appellant's compensation on the basis that she refused suitable work.

The Board finds that the Office improperly terminated appellant's compensation.

Under section 8106(c)(2) of the Federal Employees' Compensation Act, 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.¹ To justify termination of compensation, the Office must establish that the work offered was suitable.²

The Office based its determination that the limited-duty position offered by the employing establishment on February 14, 2001 was suitable on a July 9, 1999 report from Dr. Jeffrey Hrutkay, a Board-certified orthopedic surgeon, to whom the Office referred appellant for a second opinion evaluation. While the employing establishment's offer conformed to the work tolerance limitations set forth on July 6, 1999 by Dr. Hrutkay whose report was over 19 months old at the time of the employing establishment's offer. The Office cannot modify or terminate an employee's compensation without a detailed current description of the employee's condition and ability to perform work.³

In addition, one of appellant's attending physicians, Dr. Donald C. Ferlic, a Board-certified orthopedic surgeon, indicated in a March 25, 1999 report, three and one-half months before Dr. Hrutkay's evaluation, that appellant could only lift five pounds due to her carpal tunnel syndrome. This limitation would preclude the performance of the offered position, which required lifting up to 20 pounds.

The Office also did not consider appellant's nonemployment-related conditions in determining whether she could perform the duties of the position offered by the employing establishment. All impairments, whether work related or not, must be considered in assessing the suitability of an offered position.⁴ Major depression preventing appellant from functioning was diagnosed by Dr. W. Truett Smith, a psychologist, on January 3, 1995. There is no indication this condition has resolved or abated. Although not a specialist in the appropriate field of medicine, Dr. Wiley J. Jenkins, a Board-certified orthopedic surgeon, concluded in

¹ 5 U.S.C. § 8106(c)(2) provides in pertinent part: "A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered to, procured by, or secured for [her]; is not entitled to compensation."

² *David P. Camacho*, 40 ECAB 267 (1988).

³ See *Keith Hanselman*, 42 ECAB 680 (1991); *Anthony Pestana*, 39 ECAB 980 (1988); *Ellen G. Trimmer*, 32 ECAB 1878 (1981). These cases involved determinations of loss of wage-earning capacity.

⁴ *Edward J. Stabell*, 49 ECAB 566 (1998); *Robert Dickerson*, 46 ECAB 1002 (1995).

November 7 and 28, 2001 reports that appellant was totally disabled primarily by her psychological problems. Dr. Hrutkay noted that appellant was tearful on several occasions during his examination.

The Office did not base its determination of suitability on a medical report relatively contemporaneous with the employing establishment's offer of limited duty, and did not consider all the conditions, employment related and not, that may affect appellant's ability to perform the offered position. For these reason, the Office did not establish that the offered position was suitable, and did not meet its burden of proof to terminate appellant's compensation.

The January 31, 2002 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, DC
November 8, 2002

Michael J. Walsh
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member