U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

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In the Matter of GARY G. STAMPO and U.S. POSTAL SERVICE,
POST OFFICE, Verona, PA

*Docket No. 02-2222; Submitted on the Record;*
*Issued April 7, 2003*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation on the grounds that he abandoned suitable work.

On January 21, 1992 appellant, then a 43-year-old letter carrier, sustained a traumatic injury to his left knee while in the performance of duty. The Office accepted appellant's claim for left knee strain and aggravation of torn medial meniscus. Additionally, the Office authorized left knee arthroscopy, which appellant underwent on December 2, 1992. For more than seven years following his 1992 injury, appellant received wage-loss compensation for total disability.

On August 19, 1999 the employing establishment offered appellant a full-time position as a modified distribution clerk beginning August 30, 1999. Appellant accepted the position on August 23, 1999 and reported for work on August 30, 1999. However, appellant stopped work after less than one hour because the position allegedly required too much standing and the stool provided appellant was too high for proper seating.

Appellant's orthopedist, Dr. Vincent J. Ripepi, reviewed the job offer on September 22, 1999 and indicated that appellant could perform the duties on a part-time basis, progressing to full-time work on November 1, 1999.[1]

By letter dated September 29, 1999, the Office informed appellant that it found the modified distribution clerk position suitable for his work capabilities and that it was currently available. Moreover, the Office noted that, while appellant accepted the position, he subsequently abandoned the position after working only 30 minutes. The Office allowed appellant 30 days to either return to work or provide an explanation for abandoning the position.

[1] The modified distribution clerk position required 40 hours of work over a 6-day workweek. Thus, appellant was required to work 6 hours and 40 minuets per day. Although Dr. Ripepi indicated that appellant should begin work on a part-time basis, he did not specify the number of hours appellant was capable of working per day.

Additionally, the Office advised appellant of the consequences under 5 U.S.C. § 8106(c)(2) of refusing an offer of suitable work.

On October 1, 1999 appellant filed a claim alleging that he sustained a recurrence of disability on May 31, 1999 with a subsequent work stoppage on August 30, 1999. Additionally, on October 4, 1999 appellant responded to the Office's September 29, 1999 suitability determination. He stated that the offered position in McKeesport, PA was not suitable as it was outside his geographical area and would require at least a four-hour one way commute. Appellant explained that the commute required two bus transfers and several miles of walking. He also submitted an October 11, 1999 letter from Dr. Andrew D. Kranik, who indicated that the lengthy commute was unacceptable given appellant's left knee condition.

On October 29, 1999 the Office informed appellant that his reason for refusing to return to work was unacceptable. Appellant was afforded an additional 15 days to return to work and advised that the Office would not consider any further reasons for refusal.

Appellant obtained temporary accommodations at the McKeesport Young Men's Christian Association and reported to work on November 9, 1999. He completed his scheduled shift and returned to work the following day. After working approximately three and one-half hours on November 10, 1999, appellant stopped work.

On November 29, 1999 appellant filed a claim alleging that he suffered a recurrence of disability on November 10, 1999 causally related to his January 21, 1992 employment injury. Appellant stated that when he returned to work he felt more pain in his left knee and noted some swelling. He explained that the stool he was sitting on while working caused his leg to hang down, which resulted in a strong shooting pain and stiffness after only a couple of hours.

By decision dated January 21, 2000, the Office denied appellant's claim for recurrences of disability on August 30 and November 10, 1999. The Office hearing representative affirmed the decision on August 24, 2000. Additionally, in a decision dated March 12, 2002, the Board affirmed the Office hearing representative's August 24, 2000 decision.[2]

In a separate decision also dated January 21, 2000, the Office terminated appellant's compensation. Appellant requested a review of the written record and in a decision dated August 19, 2002, the Office hearing representative affirmed the January 21, 2000 decision terminating compensation.

The Board finds that the Office improperly terminated appellant's compensation on the grounds that he abandoned suitable work.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.[3] Under section 8106(c)(2) of the Federal Employees' Compensation Act,[4] the Office may terminate the compensation of an employee who refuses or

[2] Docket No. 00-2769 (issued March 12, 2002).

[3] *Frank J. Mela, Jr.*, 41 ECAB 115 (1989); *Mary E. Jones*, 40 ECAB 1125 (1989).

[4] 5 U.S.C. § 8106(c)(2).

neglects to work after suitable work is offered to, procured by, or secured for the employee.[5] To justify termination of compensation, the Office must show that the work offered was suitable,[6] and must inform appellant of the consequences of refusal to accept such employment.[7] An employee who refuses or neglects to work after suitable work has been offered or secured for him has the burden of showing that such refusal or failure to work was reasonable or justified.[8] Additionally, the employee shall be provided the opportunity to make such a showing before entitlement to compensation is terminated.[9]

The Office failed to provide appellant proper notice prior to terminating compensation pursuant to 5 U.S.C. § 8106(c)(2). In the instant case, the Office advised appellant on September 29, 1999 that the offered position of modified distribution clerk was deemed suitable for his work capabilities. Additionally, the Office informed appellant of the consequences under 5 U.S.C. § 8106(c)(2) of refusing an offer of suitable work. Appellant questioned the suitability of the offered position and the Office advised him on October 29, 1999 that his stated reason for refusing to return to work was unacceptable. The Office afforded appellant an additional 15 days to return to work and advised him that any further reasons for refusal would not be considered.

As previously noted, appellant returned to work on November 9, 1999 and after working approximately one and one-half days, he stopped work and later filed a claim for recurrence of disability. The Office denied the November 10, 1999 recurrence claim on January 21, 2000, which the Board subsequently affirmed by decision dated March 12, 2002. However, after denying appellant's claimed recurrence of November 10, 1999, the Office did not afford appellant the opportunity to return to work as a modified distribution clerk prior to terminating compensation. Although the record indicates that the position remained available as of January 21, 2000, appellant was not permitted to return to work. The rehabilitation counselor's January 28, 2000 report indicates that, upon learning of the denial of his claimed recurrence, appellant inquired on January 26, 2000 whether he was able to return to work at the McKeesport Post Office. After further discussions with the employing establishment, the Office rehabilitation specialists and the claims examiner, the rehabilitation counselor reported that a determination had been made that appellant could not return to work because he had previously refused the job and his claimed recurrence had been denied.

The notices provided by the Office on September 29 and October 29, 1999 are insufficient to terminate appellant's compensation following the denial of his November 10, 1999 claimed recurrence of disability. Appellant resumed work after the October 29, 1999 notice from the Office. And notwithstanding the fact that the Office advised that it would not consider any further reasons for refusal, the October 29, 1999 notice does not preclude appellant from filing a claim for recurrence of disability following his return to duty on November 9, 1999.

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

[6] *Arthur C. Reck*, 47 ECAB 339 (1996).

[7] *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1972).

[8] 20 C.F.R. § 10.517 (1999).

[9] *John E. Lemker*, 45 ECAB 258, 263 (1993).

Appellant's November 10, 1999 work stoppage does not constitute a refusal of suitable work. Appellant accepted the position, returned to work and thereafter, stopped work on November 10, 1999 based on a claimed recurrence of disability. The Office properly adjudicated appellant's November 10, 1999 recurrence claim, but failed to provide the appropriate notice to appellant prior to terminating compensation.[10] While the Office followed proper procedures in offering the suitable work position to appellant,[11] it did not complete the procedures necessary to establish that appellant abandoned suitable work.[12] The Office's procedure manual specifically provides that if the abandonment of the job is not deemed justified, the Office must so advise the claimant "and allow him or her 15 additional days to return to work."[13] After denial of the November 10, 1999 claimed recurrence, the Office should have provided appellant a final opportunity to accept or refuse the position prior to terminating compensation.[14] The Office denied appellant's November 10, 1999 claimed recurrence of disability on January 21, 2000. And that same day, without additional prior notice, the Office terminated compensation under 5 U.S.C. § 8106(c)(2). Accordingly, the Office improperly terminated appellant's compensation.

The August 19, 2002 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC
April 7, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[10] *William M. Bailey*, 51 ECAB 197, 200 (1999).

[11] *See* 20 C.F.R. § 10.516 (1999).

[12] *Mary G. Allen*, 49 ECAB 103, 106 (1998).

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.10(e)(1) (July 1996).

[14] *Id.*