

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of MARJORIE J. KOVAL and U.S. POSTAL SERVICE,  
POST OFFICE, Buffalo, NY

*Docket No. 01-1796; Submitted on the Record;  
Issued February 20, 2003*

---

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation on the grounds that she refused suitable work pursuant to 5 U.S.C. § 8106(c).

On November 27, 1991 appellant, then a 52-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that her back pain was due to lifting a five-pound parcel out of a hamper. The Office accepted appellant's claim for acute lumbar strain with radiculopathy and authorized lumbar discectomy surgery and anterior spinal reconstruction. Appellant stopped working on November 27, 1991 returned to four hours per day on July 6, 1992 and eight hours on August 1, 1992.<sup>1</sup> The Office accepted appellant's recurrence of disability on December 13, 1992 and appellant was placed on the periodic automatic rolls for temporary total disability.

In an August 14, 1998 report, Dr. Mark B. Kabins, an attending Board-certified orthopedic surgeon, indicated that appellant was capable of performing sedentary work 30 hours per week or up to 6 hours per day. Restrictions included no lifting more than 10 pounds, no bending, squatting, twisting or kneeling, no sitting or walking for more than 30 minutes at a time and no standing in one location for more than 20 minutes.

On October 23, 1998 the employing establishment offered appellant the position of modified distribution clerk working six hours, that the duties of the position complied with restrictions set by Dr. Kabins and that the position was located in Bullhead City, Arizona. The specific duties included greeting customers, answering simple questions, assisting the completion of forms by customers, answering the telephone, input information into the computer, ordering and inventorying supplies for the station and occasionally performing light secretarial work. The physical requirements included lifting of 5 to 10 pounds intermittently, 4 hours of intermittent

---

<sup>1</sup> Appellant was approved for disability retirement by the Office of Personnel Management and was separated from the employing establishment effective February 22, 1994.

sitting, 2 to 4 hours of intermittent walking and standing, 1 to 2 hours of intermittent stooping, bending, pulling/pushing and twisting and 4 to 6 hours of intermittent simple grasping and fine manipulations and intermittent ½ to 1 hour of reaching above the shoulder. Appellant was advised she had 10 days to accept or reject the offer.

In a November 24, 1998 letter, appellant noted that she accepted the offered position in Bullhead City, Arizona, which had a start date of November 2, 1998. Appellant noted that on October 30, 1998 she was told not to report to work as she needed reinstatement and a physical.

In an October 13, 1999 disability certificate, Dr. Kabins concluded that appellant was capable of performing sedentary work 6 hours per day with restrictions of no sitting for more than 30 minutes, no lifting over 10 pounds and no standing more than 20 minutes.

Dr. Kabins, in an October 15, 1999 progress note, indicated that appellant was “medically stable, stationary and permanent with impairment.” He concluded that she could perform sedentary work up to six hours per day with restrictions.

In a February 11, 2000 report, Dr. Kabins opined that appellant could perform sedentary work up to six hours per day with restrictions on sitting, walking, standing and lifting. He also included physical restrictions of no bending, kneeling, twisting or squatting in determining appellant’s work capability.

On March 13, 2000 the employing establishment offered appellant the position of modified general clerk located in Olean, NY working five hours per day, six days per week. Duties of the position “may consist of” filing, answering the telephone, delivery confirmation scanning analysis, computer input and other administrative duties. The employing establishment indicated that the duties of the position complied with the physical restrictions set by Dr. Kabins. It noted that the duties of the position required normal grasping, no lifting of objects over 10 pounds, writing, standing, sitting, walking and that the “the work is self paced.” Appellant was advised that she was to return to work by April 22, 2000 and that relocation expenses would be paid. She accepted the position on April 4, 2000 but subsequently declined the position.

In an April 4, 2000 report of call, the Office noted that Jan Anderson, a periodic rolls team member from the employing establishment, stated he held up the offer from New York state while attempting find appellant a position in Arizona for several months during late 1999 early 2000. However, no openings were available in the Arizona area.

On April 6, 2000 the Office advised appellant that the position of modified general clerk had been found suitable to her capabilities and was currently available. Appellant was advised that she should accept the position or provide an explanation for refusing the position within 30 days. The Office informed appellant that, if she failed to accept the position and failed to demonstrate that the failure was justified, her compensation would be terminated.

By letters dated April 24 and May 1, 2000, appellant noted that she currently resided in Arizona and financially it was better to find her a position in Arizona. Appellant noted that she had previously considered relocating and was told she could not because she was in the Arizona district. Appellant stated that she inquired why employment in Laughlin and Fort Mohave, Nevada had not been considered and that the Office informed her she could not be placed in a

nonresident state. Appellant also noted that she had previously accepted an October 23, 1998 job offer and that two days before her start date the employing establishment told her not to report to work.

By letter dated June 23, 2000, the Office advised appellant that her reasons for refusing the position were unacceptable and informed her that she had an additional 15 days to accept the job position. The Office informed appellant that if she refused the position her benefits would be terminated pursuant to 5 U.S.C. § 8106(c).

By decision dated November 22, 2000, the Office terminated appellant's wage-loss compensation effective December 3, 2000 on the basis that she refused an offer of suitable work.

Appellant requested an oral hearing, which was held on April 26, 2001.

By decision dated May 29, 2001 and finalized on May 30, 2001, the hearing representative affirmed the Office's November 22, 2000 decision, terminating appellant's compensation because of her failure to accept suitable work.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. This includes cases in which the Office terminates compensation under 5 U.S.C. § 8106(c) for refusal to accept suitable work.<sup>2</sup> Section 8106(c) of the Federal Employees' Compensation Act states: "a partially disabled employee who: (1) refuses to seek suitable work; or (2) refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal of work was justified."<sup>3</sup> The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed as it may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.<sup>4</sup>

To justify termination of compensation, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.<sup>5</sup> Further, 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 compensation is terminated.

The Board finds that the Office improperly terminated benefits on the basis that appellant refused suitable employment.

---

<sup>2</sup> *Henry W. Sheperd, III*, 48 ECAB 382, 384 (1997); *Shirley B. Livingston*, 24 ECAB 855 (1991).

<sup>3</sup> 5 U.S.C. § 10.124; *see also Vivian J. Walker*, 51 ECAB 448 (2000).

<sup>4</sup> *See H. Adrian Osborne*, 48 ECAB 556 (1997); *Robert Dickerson*, 46 ECAB 1002 (1995).

<sup>5</sup> *Linda Blue*, 50 ECAB 227 (1999).

In the instant case, the Office has failed to comply with the regulations governing the Act and the Office's procedure manual which provide that several steps must be followed prior to a determination that the position offered is suitable.

The Office's procedure manual states that to be valid, an offer of light duty must be in writing and must include the following information: (1) a description of the duties to be performed; (2) the specific physical requirements of the position and any special demands of the workload or unusual working conditions; (3) the organizational and geographical location of the job; (4) the date on which the job will first be available; and (5) the date by which a response to the job offer is required.<sup>6</sup>

The employing establishment did not adequately describe the duties of the job it offered appellant beyond noting that the duties of the position "may consist of" filing, answering the telephone, delivery confirmation, scanning analysis, computer input and other administrative duties. It indicated that it was offering her the position of modified general clerk and that such position would accommodate the physical restrictions set forth by Dr. Kabins in his reports. This general offer of a light-duty position specially fitted to appellant's physical limitations does not provide the objective criteria necessary to make a reasoned determination as to whether it constituted suitable work. The position description indicated that other administrative duties would be assigned without addressing what those duties were or what they would entail. The March 13, 2000 job offer statement that the position complied with the physical restrictions set by Dr. Kabins is not sufficiently specific to establish that the offer was suitable.<sup>7</sup> It is well established under Board precedent that in order for the Office to meet its burden of showing that the work offered was suitable both the job duties and the physical requirements of the job need to be fully described.<sup>8</sup> Furthermore, while the position noted that appellant would not be required to lift over 10 pounds, it failed to address the other restrictions regarding the amount of sitting and standing required beyond a general statement that the physical restriction of the offered position complied with her restrictions as set by her treating physician. In his October 13, 1999 report, Dr. Kabins opined that appellant should not sit for more than 30 minutes at a time or stand for more than 20 minutes at a time, there is no indication from the position description what appellant's sitting and standing requirements will be or that they complied with her restrictions.

Consequently, the Board finds that the Office failed to show that the offered position of modified general clerk was suitable and, therefore, failed to meet its burden of justifying termination of compensation. Because the position offered is not found to be suitable, appellant's compensation cannot be terminated under 5 U.S.C. § 8106(c) on the grounds that she refused suitable work.

---

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4 (December 1993).

<sup>7</sup> *Charlene R. Herrera*, 44 ECAB 261 (1993).

<sup>8</sup> *Hattie H. Chambliss*, 34 ECAB 453 (1982); *Robert Bledsoe*, 34 ECAB 144 (1982); *Liller Mark*, 33 ECAB 1656 (1982); *Bertha L. Buckner*, 31 ECAB 1434 (1980).

The decision of the Office of Workers' Compensation Programs dated May 29, 2001 and finalized on May 30, 2001 is hereby reversed

Dated, Washington, DC  
February 20, 2003

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member