

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT OGGINS and U.S. POSTAL SERVICE,
POST OFFICE, Forrest Hills, NY

*Docket No. 02-1070; Submitted on the Record;
Issued February 6, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation for refusing an offer of suitable work effective September 30, 2001; (2) whether appellant is entitled to a schedule award; and (3) whether the Office abused its discretion in denying appellant's request for reconsideration.

On July 20, 1994 appellant, then a 49-year-old letter carrier, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that his employment duties caused pain and numbness in his hands, fingers and arms.

On May 17, 1995 appellant's claim was accepted for bilateral carpal tunnel syndrome. He received compensation for temporary total disability.

In a June 3, 1999 letter, appellant was referred to Dr. Leonard Edelstein, a Board-certified orthopedist, to resolve a conflict in the medical evidence between appellant's treating physician, Dr. Victor Cheheban, an orthopedist, and Dr. Ross, an orthopedist and second opinion referral.

In a November 23, 1999 report, Dr. Edelstein found that appellant continued to have residual disability but he could work 8 hours per day, 5 days a week with restrictions that included 4 hours per day of repetitive wrist motion, 3 hours of pushing up to 30 pounds, 2 hours of pulling up to 20 pounds, 2 hours of lifting up to 15 pounds and 1 hour of climbing.

On February 11, 2000 the employing establishment made appellant a job offer as a modified mail carrier based on Dr. Edelstein's medical restrictions.

In a February 15, 2000 letter, appellant refused the job indicating that he had residual carpal tunnel syndrome and could not do the job.

On December 19, 2000 the Office informed appellant that the employing establishment had made an offer of employment that the Office considered suitable. He was also informed of

the consequences of refusing an offer of suitable employment, including termination of his entitlement to wage-loss compensation.

Appellant did not respond.

In a January 13, 2001 notice, appellant elected to receive benefits from the Office of Personnel Management (OPM).

In a January 19, 2001 letter, the Office informed appellant that he was found to have refused an offer of suitable work and he had 15 days to report to work or be subject to the consequences; namely denial of further compensation though, he remained eligible for medical benefits. The Office further notified appellant that his entitlement to compensation would be terminated despite his election to receive benefits from OPM.

On January 20, 2001 appellant requested a schedule award.

In a March 21, 2001 letter, the Office notified appellant what further information was necessary to develop his claim for a schedule award; specifically an assessment of his permanent impairment.

In an April 3, 2001 decision, the Office found that appellant refused an offer of suitable work and his entitlement to disability compensation was terminated.

In an April 17, 2001 report, Dr. Cheheban indicated that appellant was still totally disabled due to his accepted work condition and was a candidate for surgical intervention. Dr. Cheheban did not discuss appellant's permanent impairment.

In a January 14, 2002 decision, the Office denied appellant's request for a schedule award finding his entitlement to compensation had been terminated due to his refusal of an offer of suitable work.

In a January 21, 2002 letter, appellant requested reconsideration. He stated that he ignored the letters related to suitable work because he had elected to receive benefits from OPM; and, because he had elected to retire, he believed there would be no job available.

In a February 27, 2002 decision, the Office denied appellant's reconsideration.

The Board finds that the Office properly terminated appellant's compensation on the grounds that he refused an offer of suitable work.

Section 8106(c)(2) of the Federal Employees' Compensation Act provides in pertinent part, "a partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation."¹ However, to justify such termination, the Office must show that the work offered was suitable.² An employee who refuses or neglects to work

¹ 5 U.S.C. § 8106(c)(2).

² *David P. Camacho*, 40 ECAB 267, 275 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341, 345 (1981).

after suitable work has been offered to him has the burden of showing that such refusal to work was justified.³

The evidence of record shows that appellant is capable of performing the modified carrier position offered by the employing establishment and determined to be suitable by the Office in its January 19, 2001 letter to appellant. The position involves restrictions consistent with Dr. Edelstein's November 23, 1999 report, including working 8 hours per day, 5 days a week with no more than 4 hours per day of repetitive wrist motion, 3 hours of pushing up to 30 pounds, 2 hours of pulling up to 20 pounds, 2 hours of lifting up to 15 pounds and 1 hour of climbing.

In determining whether appellant was physically capable of performing the modified mail carrier position, the Office properly relied on the opinion of Dr. Edelstein as an independent medical examiner.

The Board notes that, therefore, the Office has established that the modified mail carrier position offered by the employing establishment is suitable. As noted above, once the Office has established that a particular position is suitable, an employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified. The Board has carefully reviewed the evidence and argument submitted by appellant in support of his refusal of the modified mail carrier and notes that it is insufficient to justify his refusal of the position.

For these reasons, the Office properly terminated appellant's compensation effective November 30, 2000 on the grounds that he refused an offer of suitable work.⁴

The Board also finds that appellant is not entitled to a schedule award.

Appellant was made aware in several letters from the Office that the penalty for refusing an offer of suitable work is the termination of compensation, including a schedule award. As appellant was found to have refused an offer of suitable work he forfeited his right to a schedule award.⁵

The Board further finds the Office did not abuse its discretion in denying appellant's request for reconsideration.

To require the Office to reopen a case for a merit review under section 8128(a) of the Act,⁶ the Office's regulations provide that a claimant must: (1) show that the Office erroneously

³ 20 C.F.R. § 10.517; *See Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

⁴ The Board notes that the Office complied with its procedural requirements prior to terminating appellant's compensation, including providing appellant with an opportunity to accept the position after informing him that his reasons for initially refusing the position were not valid. *See generally Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

⁵ 20 C.F.R. § 10.517(b).

⁶ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.⁷ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁸ When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.⁹

The Board has consistently held that electing to receive disability retirement is not a justifiable reason to refuse an offer of suitable work. In *Roy E. Bankston*,¹⁰ the Board affirmed the Office's termination of compensation where the employee chose to receive retirement benefits rather than accept the suitable work offered by the employing establishment. In *Stephen R. Lubin*,¹¹ the Board noted that the employee's election to receive retirement benefits was not a valid reason for refusing an offer of suitable work.¹²

Appellant indicated that he ignored the letters related to the job offer because he had elected OPM benefits; and as such there would be no job available. These arguments are not persuasive. The Office did not abuse its discretion in denying appellant's reconsideration request.

⁷ 20 C.F.R. §§ 10.606(b)(2).

⁸ 20 C.F.R. § 10.607(a).

⁹ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

¹⁰ 38 ECAB 380 (1987).

¹¹ 43 ECAB 564 (1992).

¹² See also *Carole A. Ketterer*, Docket No. 97-1694 (issued June 4, 1999) (indicating that "disability retirement is not generally a valid justification for refusing an offer of suitable work").

The decisions of the Office of Workers' Compensation Programs dated February 27 and January 14, 2002 and April 3, 2001 are hereby affirmed.

Dated, Washington, DC
February 6, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member