

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DEBRA L. GENTRY and U.S. POSTAL SERVICE,  
POST OFFICE, Dallas, TX

*Docket No. 02-1347; Submitted on the Record;  
Issued February 24, 2003*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation for refusing an offer of suitable work.

On September 19, 2000 appellant, then a 45-year-old mailhandler, was injured in the performance of duty when a mail container weighing over 300 pounds fell on her right foot and ankle. The Office accepted the claim for a right foot contusion and right ankle sprain. Authorization was also given for a course of physical therapy. Appellant worked limited duty from September 19 until October 4, 2000. Thereafter, she was placed on the periodic rolls for total disability compensation.

The record indicates that appellant first received conservative treatment for her right foot contusion beginning September 19, 2000 with Dr. Kim Israel, who prescribed a course of daily physical therapy. When appellant's right ankle pain did not subside, Dr. Israel placed appellant on total disability and referred her to Dr. Charles Cook, a Board-certified orthopedic foot specialist. Appellant began a work hardening program in December 2000.

A magnetic resonance image (MRI) of appellant's right ankle was obtained on January 8, 2001 and revealed a type 1 tear of the tibialis posterior tendon.

In a report dated January 23, 2001, Dr. Cook noted that appellant's chief complaint was right ankle pain. He reviewed the MRI findings and diagnosed an injury to the posterior tibia tendon along with tendinopathy. Dr. Cook fitted appellant with a brace to immobilize the right ankle and foot, and opined that she could return to limited duty. He suggested, however, that appellant consider surgery.

In an OWCP-5 work restriction form dated January 23, 2001, Dr. Cook listed no walking, standing, operating a motor vehicle, or climbing. He also noted that appellant had to wear her brace on the right foot at all times due to her torn tendon.

On January 30, 2001 the employing establishment offered appellant a limited-duty position identified as "Modified Casual." Appellant was assigned to prepare accident kits, make labels, perform filing tasks, and prepare training materials. The physical requirements of the position were listed as follows: "Will sit at a table or desk. Requires use of hands and arms. Standing and walking only to work site and for breaks."

On January 31, 2001 the Office advised appellant that the position of "Modified Casual" constituted suitable work. Appellant was given 30 days to accept the job or provide reasons for refusing the position or else she risked termination of compensation.

In a February 5, 2001 letter, appellant refused the job offer, noting that she was wearing a leg cast and would be unable to perform some of the filing requirements of the offered position as that would necessitate walking or standing in violation of her work restrictions. She also alleged that the hours were unreasonable to her and her family.

In a February 21, 2001 letter, the Office advised appellant that her reasons for refusing the job offer were found to be unacceptable. She was given an additional 15 days to accept the position or risk termination of her compensation.

In a decision dated April 1, 2001, the Office terminated appellant's compensation on the grounds that she refused an offer of suitable work.

In a December 3, 2001 letter, appellant requested reconsideration and submitted new evidence. Her reconsideration request included a March 20, 2001 report from Dr. Cook indicating that she could continue with limited duty.

In a report dated May 8, 2001, Dr. Cook indicated that appellant was unable to work as she wished to have surgery to correct her foot condition.

In an August 30, 2001 report, Dr. Ronald H. Blum opined that foot surgery was warranted and due to the accepted work injury.

Appellant also submitted the following evidence: a request to change treating doctors; copies of daily rehabilitation notes; an operative report dated September 24, 2001; x-rays of the right foot taken for purposes of surgery; and medical reports from Dr. Cook dated September 2001 through January 25, 2002 pertaining to appellant's recovery from her right posterior tibia reconstruction.

In a report dated December 13, 2001, Dr. Cook noted that appellant was 10 weeks post surgery and that x-rays "showed good fusion of the naviculocuneiform and healing of the calcaneal osteotomy, right side." He opined that it was time for appellant to undergo a course of physical therapy.

In a decision dated March 1, 2002, the Office denied modification of its prior decision.

The Board finds that the Office properly terminated appellant's compensation because she refused an offer of suitable work.<sup>1</sup>

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.<sup>2</sup> Section 8106(c)(2) of the Federal Employees' Compensation Act provides that the Office may terminate the compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee. The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.

The implementing regulation provides that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee 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 entitlement to compensation is terminated.<sup>3</sup> To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his or her refusal to accept such employment.<sup>4</sup>

The issue 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 medical evidence.<sup>5</sup> In assessing medical evidence, the number of physicians supporting one position over another is not controlling; the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for, and the thoroughness of, physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.<sup>6</sup>

In this case, the Office accepted that appellant sustained a right foot contusion, right ankle sprain and a torn tibia tendon as a result of having a heavy box fall on her foot at work. Appellant's treating physician approved appellant for limited duty with no standing or walking effective January 23, 2001. The employing establishment thereafter offered appellant a limited-duty job consistent with the work restrictions set forth by Dr. Cook.

The Board concludes that the Office properly considered the job offer to be suitable work. Although appellant argues that the job would require her to stand to perform filing duties, the employing establishment specifically stated that the only standing and walking to be required

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<sup>1</sup> The record before the Board does not contain record numbers 322 through 333.

<sup>2</sup> *Roberto Rodriquez*, 50 ECAB 124 (1998).

<sup>3</sup> *John E. Lemker*, 45 ECAB 258 (1993).

<sup>4</sup> *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 8181 (1992).

<sup>5</sup> *Maurissa Mack*, 50 ECAB 498 (1999); *Marilyn D. Polk*, 44 ECAB 673 (1993).

<sup>6</sup> *Maurissa Mack*, *supra* note 5; *Connie Johns*, 44 ECAB 560 (1993).

of appellant is when she enters and leaves her work site. There is no medical evidence of record to contradict the Office's finding of suitable work.

When appellant refused to accept the job offer, the Office correctly followed its procedures and considered appellant's reasons for refusing the job. Appellant alleged that the job offer was inconsistent with her work restrictions but she submitted no medical evidence to corroborate her concerns. The Office properly notified appellant that her reasons for refusing the job offer were found to be unacceptable and that she had 15 days to accept the position. When appellant failed to indicate within the designated time frame that she would accept the job offer, the Office then properly terminated her compensation.

The Board finds that appellant's evidence on reconsideration has no bearing on the suitability of the limited-duty job offer. In his March 2001 report, Dr. Cook specifically confirmed that appellant was capable of performing limited-duty work. The physician did not offer an opinion that appellant's job offer was inconsistent with her work restrictions or otherwise challenge the Office's suitability decision. Although Dr. Cook later reported that appellant was disabled from work following foot surgery, his subsequent opinions do not discount appellant's capacity to perform the suitable job offer as of the date the Office issued its termination decision. Accordingly, the Board concludes that the Office properly terminated appellant's compensation effective April 1, 2001.

The decision of the Office of Workers' Compensation Programs dated March 1, 2002 is hereby affirmed.

Dated, Washington, DC  
February 24, 2003

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member