

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRED H. ROGAN and U.S. POSTAL SERVICE,
POST OFFICE, Nashville, TN

*Docket No. 01-1270; Submitted on the Record;
Issued January 7, 2003*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation under 5 U.S.C. § 8106(c)(2) for refusing suitable work; and (2) whether the Office properly denied appellant's January 18, 2001 request for reconsideration.

On April 23, 1992 appellant, then a 50-year-old custodian, injured his back when he picked up a gurney of trash. The Office accepted his claim for a lumbar strain and paid compensation for temporary total disability.

On October 2, 1997 the employing establishment offered appellant the position of modified mailhandler. Appellant's attending orthopedist, Dr. William H. Ledbetter, reviewed this position and reported on October 6, 1997 that appellant could perform the duties as described. He refused the position that same day on the grounds that he was unable to work.

On November 5, 1997 the employing establishment offered appellant the position of modified distribution clerk with identical physical restrictions. He rejected the position on November 19, 1997: "I put in for my retirement. I am unable to work due to my back. I have to lay in bed about five hours a day due to the pain."

On December 2, 1997 the Office informed appellant that the position was suitable to his work capabilities and was currently available. The Office advised him that he had 30 days to accept the position or provide an explanation for refusing it. The Office notified appellant of the provisions of 5 U.S.C. § 8106(c)(2).

Appellant responded as follows:

"I received your letter dated December 2, 1997 about a PTF [part-time flexible] [d]istribution [c]lerk, modified at the employing establishment. I am still not able to work. I went to the doctor today. My leg and foot is swell real big. I go to

take a MRI [magnetic resonance imaging scan] on the December 19, 1997 also I have been falling down a lot.

“If you or the [employing establishment] will take responsibility if I hurt myself again I will come back to work. I wish you would write to my doctor and get my medical information (he also is the [employing establishment] doctor). If you need any more information please let me know.”

On January 9, 1998 the Office notified appellant that his reasons for refusing the job offered were unacceptable because he had submitted no new medical evidence to substantiate his claim that he was still not able to work. The Office notified appellant that he had 15 days to accept the offer without penalty; if he did not accept the offer within 15 days, the Office would terminate his compensation under 5 U.S.C. § 8106(c)(2).

On January 21, 1998 Dr. Ledbetter reported that a recent MRI scan showed a worsening of the bulging disc at L4-5. He recommended a conservative course and advised that appellant needed to remain off work until a follow-up appointment in about two and a half weeks. The Office received this evidence on January 28, 1998.

In a decision dated February 9, 1998, the Office terminated appellant’s compensation pursuant to 5 U.S.C. § 8106(c)(2) on the grounds that he refused a suitable job offer without justification. The Office noted that appellant had submitted no medical evidence to substantiate that he was unable to work the offered position.

On March 2, 1998 appellant requested reconsideration. He argued that he was still unable to work. Appellant described his symptoms and enclosed copies of medical reports, including Dr. Ledbetter’s January 21, 1998 report keeping him off work.

On May 2, 1998 appellant argued that he did not refuse the offered position; he accepted it but was not able to go back to work due to his back. He submitted treatment notes from Dr. Ledbetter.

On May 13, 1998 the Office reviewed the merits of appellant’s claim and denied modification of its prior decision. The Office noted that appellant had submitted no medical evidence clearly explaining the reason he was unable to perform the duties of the offered position on November 5, 1997.

On May 15, 1998 appellant requested reconsideration.

On May 18, 1998 Dr. Ledbetter noted the following: “In terms of work, I [have] been somewhat in the dark recently as to employment status. I had given restrictions to the [employing establishment] and it appeared that they had a job position for him but I [am] not sure what eventually entailed regarding this.”

In a decision dated June 16, 1998, the Office reviewed the merits of appellant’s claim and denied modification of its prior decision.

On July 21, 1998 the Office authorized a decompressive laminectomy with foraminotomy bilaterally at L4-5.

On October 16, 1998 appellant again requested reconsideration. He noted that he had surgery on his back in August of that year and was still having trouble with it.

In a decision dated May 6, 1999, the Office reviewed the merits of appellant's claim and denied modification of its prior decision. The Office found that appellant had submitted no evidence to support that he was incapable of performing the duties of the position of modified part-time flexible distribution clerk or that the Office's February 1998 decision was in error.

On April 5, 2000 appellant requested reconsideration. He submitted additional medical records from Dr. Ledbetter and an opinion from a neurosurgeon on proposed surgery.

In a decision dated August 29, 2000, the Office reviewed the merits of appellant's claim and denied modification of its prior decision. The Office noted it might not have previously considered Dr. Ledbetter's January 21, 1998 report stating that appellant needed to remain off work. The Office discounted the report; however, because Dr. Ledbetter's May 18, 1998 report implied that at some point after January 21, 1998 he had released appellant back to the restrictions that he had determined were appropriate in 1997. The Office found that, Dr. Ledbetter's January 21, 1998 report was insufficient to warrant modification of its decision, that appellant refused an offer of suitable work.

On January 18, 2001 appellant requested reconsideration. He indicated that he would submit additional and relevant evidence. Appellant argued that he did not refuse to go back to work.

In a decision dated March 2, 2001, the Office denied a merit review of appellant's claim. The Office found that appellant had presented no relevant or legal argument on which to base a review of his claim.

The Board finds that the Office failed to meet its burden of proof to terminate appellant's compensation pursuant to 5 U.S.C. § 8106(c)(2).

Section 8106(c)(2) of the Federal Employees' Compensation Act states that a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or secured for him is not entitled to compensation.¹ The Office has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects suitable work when it is offered. Before compensation can be terminated; however, the Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.² In other words, to justify termination of

¹ 5 U.S.C. § 8106(c)(2).

² *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused or neglected by appellant was suitable.³

Dr. Ledbetter's January 21, 1998 report supported continuing disability for work. Although Dr. Ledbetter approved the modified-duty position on October 6, 1997, he continued to treat appellant and reported that recent diagnostic testing showed a worsening of appellant's condition and that he needed to remain off work. The Office received this evidence on January 28, 1998, well before reaching a decision under 5 U.S.C. § 8106(c)(2). This medical evidence supports that appellant was totally disabled for work as of January 21, 1998 and was sufficient to justify appellant's failure to report to work within the 15-day period referred to in the Office's final notice of January 9, 1998.⁴

The Office addressed this matter in its August 29, 2000 merit review. The Office acknowledged that no further evidence addressing appellant's work status appeared in the record until May 18, 1998, when Dr. Ledbetter stated that he was somewhat in the dark as to appellant's employment status. He had given restrictions to the employing establishment and it appeared that they had a job position for appellant, but he was not sure what eventually became of it. The Office interpreted these comments as indicating a release sometime after January 21, 1998 to the restrictions previously determined to be appropriate.

The Office may not rely on evidence obtained in May 1998 to justify its decision to terminate benefits in February 1998. When it issued its February 9, 1998 decision, the most recent medical evidence supported that appellant remained disabled for work. There was no evidence to the contrary and the Office did not request Dr. Ledbetter to clarify his reports. The Board finds that the Office failed to meet its burden of proof to demonstrate that appellant could work after January 21, 1998 and was capable of performing the duties of the offered position.⁵ The Board will reverse the Office's decision terminating appellant's compensation.⁶

³ *Glen L. Sinclair*, 36 ECAB 664 (1985).

⁴ This 15-day period ended on January 24, 1998, a Saturday and a nonscheduled day under the November 5, 1997 offer of employment.

⁵ *See Galen E. Franklin*, 37 ECAB 478 (1986) (medical evidence showing condition had worsened).

⁶ The Board's decision on the issue of termination renders the issue of reconsideration moot.

The August 29, 2000 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, DC
January 7, 2003

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member