

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of HERBERT G. FLAVELL and U.S. POSTAL SERVICE,  
POST OFFICE, Kearny, NJ

*Docket No. 03-335; Submitted on the Record;  
Issued June 17, 2003*

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DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective November 4, 2001 on the grounds that he refused an offer of suitable work; and (2) whether the Office properly denied appellant's request for reconsideration.

On January 17, 1985 appellant, then a 51-year-old letter carrier, experienced left sided chest pain and arm discomfort. He immediately sought an evaluation by a cardiologist that was negative. Appellant returned to work one week later. On February 1, 1985 appellant experienced bilateral shoulder pain and left arm pain with occasional numbness. He remained off work for two weeks before he returned to light duty. On February 26, 1985 he stopped work again due to shoulder pain.

On February 27, 1985 appellant filed a notice of occupational disease Form (CA-2) alleging that he sustained a neck, shoulder and arm condition as a result of the performance of his federal duties. In a February 25, 1985 report Dr. Frederick Weisbrot, a neurologist, diagnosed appellant with cervical radiculitis, a soft tissue injury and muscle spasms caused by carrying his mailbag. In a December 6, 1985 decision, the Office accepted appellant's claim for cervical radiculitis. Appellant returned to light-duty work in June 1985 using a pushcart to transport his mail. On September 22, 1986 appellant passed out while working. He returned to work on November 11, 1986 with medical restrictions including no driving. He stopped work again in 1987 and received total temporary disability.

Appellant relocated from Kearny, New Jersey to Hallstead, Pennsylvania. In a December 4, 1992 letter, the employing establishment offered appellant a clerical position at his previous location in Kearny. In a January 8, 1993 letter, the Office found the position not suitable because it required appellant to commute more than 157 miles each way, a distance found to be excessive.

In an April 13, 1998 work capacity evaluation, Dr. Weisbrot indicated that appellant could not reach above his shoulders, do repetitive movements with his wrists or elbows, push, pull, lift, squat or kneel.

In a September 3, 1999 letter, the Office referred appellant to Dr. Abdol Samii, a neurologist, for a second opinion. In an October 12, 1999 report, Dr. Samii wrote that appellant presented with no pain in the trapezius muscles, mildly limited range of motion in his neck and limited abduction in both shoulders causing pain. He diagnosed appellant with chronic neck and shoulder pain, probably related to degenerative arthritis of the cervical spine with a mild degree of limited motion in his shoulder joints and mild degree of carpal tunnel syndrome. In an October 28, 1999 supplemental report, Dr. Samii after reviewing results of a magnetic resonance imaging scan and electromyogram found that appellant could return to work as a mail carrier after an intensive physical therapy program. Appellant was not referred for physical therapy and remained on total temporary disability.

In a March 19, 2001 letter, the Office referred appellant for another second opinion referral. In an April 18, 2001 report, Dr. V.D. Dhaduk, a Board-certified neurologist, wrote that appellant presented with pain in the right side of his neck as well as the right upper extremity and shoulder. Dr. Dhaduk indicated that appellant had tingling and numbness and has trouble holding objects in his right hand. He also found mild tenderness in the cervical region with minimal spasm of the paraspinal muscles on the right side and mild restriction of cervical spine movements. He diagnosed appellant with chronic mild cervical radiculopathy on the right side most likely due to degenerative disc disease in the cervical region. He opined that appellant could not return to his previous employment, but could return to work with no frequent repetitive movements with his right hand, no pushing or pulling or lifting over 25 pounds, no reaching more than 1-hour per day and no carrying over 15 pounds.

In an August 28, 2001 letter, the employing establishment offered appellant a modified city clerk carrier position in the Kearny office, four hours per day. Appellant's duties were to include casing mail for one hour and delivering the mail for three hours day. Appellant was to carry no more than 15 pounds, and lift, push and pull no more than 25 pounds. He would reach above his shoulder and twist for no more than one hour per day. The offer also included relocation expenses and the job would eventually increase to eight hours per day. In an August 30, 2001 letter, the Office found the job offer suitable and informed appellant that he had 30 days to accept the offer or explain a refusal.

In a September 4, 2001 letter, appellant refused the job explaining that he could not perform the position of letter carrier and a similar offer to work in Kearny, requiring a 157 mile commute each way, had been found by the Office to be excessive. In a September 13, 2001 letter, the Office informed appellant his reasons for refusing the job were unacceptable and gave him 15 days to accept the job.

In an October 15, 2001 report, Dr. Weisbrot wrote that appellant's symptoms continued unabated. Appellant complained of pain in the right side of the neck including the trapezius and deltoid areas. Dr. Weisbrot wrote that it was "not terribly feasible" that appellant could return to

his work in Kearny because he lives in upstate New York<sup>1</sup> and was bothered by pain in the right neck and shoulder during any exertion. He indicated that appellant's neurologic examinations remained unchanged. Dr. Weisbrot found some spasm and tenderness in the neck and shoulders, but essentially no change in appellant's condition.

In an October 23, 2001 decision, the Office terminated appellant's compensation finding that he had refused an offer of suitable work. In a November 3, 2001 letter, appellant requested a hearing before the Branch of Hearings and Review. He argued the job offer was unsuitable, just as the Office found it to be in 1993, because it would require him to travel 157 miles each way, spending 7 hours in the car in order to work 4 hours. He also argued that he, agreed with Dr. Dhaduk, who indicated that appellant could not perform as a letter carrier. Finally, he questioned why the Office could not find a similarly constructed position in 1 of the 50 post offices closer to his home, concluding the Office was more interested in getting him to retire than to return to work.

At the March 28, 2002 hearing, appellant argued that the job offer was not suitable because it was outside his medical restrictions in that it required carrying a 35-pound mailbag and/or pushing a 30-pound mail cart over various terrains and through adverse weather conditions. Appellant claimed that the requirement of casing mail, which he alleged required sorting a minimum of 18 mail pieces a minute, was a repetitive activity also outside Dr. Dhaduk's medical restrictions. He further argued that no physician had approved the job offer as being within his restrictions and that the employing establishment had made no effort to find a job closer to his home.

In an April 1, 2002 report, Dr. Weisbrot indicated that appellant returned with no change in his symptomatology and that he continued to have difficulty with his right arm, especially in the area of the trapezius and deltoid. He found that appellant's neurological examination remained unchanged. His motor and sensory functions were reported intact.

In an April 26, 2002 letter, the employing establishment wrote that the job was constructed in accordance with Dr. Dhaduk's restrictions, but acknowledged the job required reaching and repetitive movements of the dominant hand. The employing establishment noted that empty mailbags only weigh 2 pounds 3 ounce and that appellant was expected to self-monitor his bag weight so he did not exceed his medical restrictions. A mail cart weighed 30 pounds and 8 pounds of pressure were required to push a mail cart. Finally, the employing establishment offered that if needed, they would "conduct tests over various terrain with various amounts of mail in the cart."

In a May 6, 2002 letter, appellant reiterated arguments raised at the hearing and added that self-monitoring was not likely because management sets routes, mail loads and how routes were performed. He further noted that mail carts had 35-pound bags on both sides. Appellant pointed out that bad weather conditions in New Jersey often meant he would be pushing the bag through several inches of snow or rain.

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<sup>1</sup> Appellant was actually living in Hallstead, PA, not upstate New York.

In a May 16, 2002 letter, the employing establishment wrote that it tried to find a post office position closer to appellant's home, but was unsuccessful.

In a June 17, 2002 decision, the hearing representative affirmed the October 23, 2001 termination finding appellant refused an offer of suitable work. The hearing representative found that the job offer was suitable to appellant's medical restrictions; that the Office attempted to find appellant a position closer to his home and failed, but offered to pay relocation expenses; and that the Office followed the proper procedures in terminating appellant's compensation effective November 4, 2001.

In a September 3, 2002 letter, appellant requested reconsideration arguing that the job offer was inconsistent with the Office finding in 1993 that the same 157 mile commute each way was excessive. He argued that the job was not within his medical restrictions and that the employing establishment made no effort to find work closer to his home. Appellant also submitted a July 1, 2002 letter from Edward Morano, the postmaster at the Kearny post office who wrote that his office "has not sent or received any written correspondence regarding [appellant's] recent job offer at the Kearny, NJ post office to other postal facilities." In a July 24, 2002 letter Gail M. Muoz, the postmaster at the Hallstead post office wrote that she had no knowledge of any correspondence regarding any job offer in her office.

In an October 24, 2002 decision, the Office denied appellant's request for a merit review finding that appellant failed to raise a substantive legal question or submit new and relevant evidence.

The Board finds that the Office has not met its burden to terminate appellant's compensation for refusing 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."<sup>2</sup> However, to justify such termination, the Office must show that the work offered was suitable.<sup>3</sup> 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.<sup>4</sup>

In the present case, the Office has the burden of proof. The evidence of record does not establish that the job offered is consistent with appellant's medical restrictions and, therefore, a suitable job offer. In his April 18, 2001 report, Dr. Dhaduk, a Board-certified neurologist and second opinion referral physician, wrote that appellant could not return to his previous employment, but he could return to work that had no frequent repetitive movements with his right hand, no pushing, pulling or lifting over 25 pounds and no carrying over 15 pounds. In an April 26, 2002 letter, the employing establishment wrote that the job was constructed in accordance with Dr. Dhaduk's restrictions, but acknowledged the job required repetitive

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<sup>2</sup> 5 U.S.C. § 8106(c)(2).

<sup>3</sup> *David P. Camacho*, 40 ECAB 267, 275 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341, 345 (1981).

<sup>4</sup> 20 C.F.R. § 10.124; *see Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

movements of the dominant hand. The employing establishment letter also acknowledged that mail carts weighed 30 pounds *before* any mail was added to them; meaning with two bags on each cart, appellant could be asked to exceed his weight limitation of pushing or pulling 25 pounds, nor did the job offer make clear how appellant was to transport the 30-pound cart to delivery locations. (Emphasis added).

Additionally, there is no difference in duties between the job offered appellant and his previous job. The difference is in the amount of time and weight involved with performing the duties. Although Dr. Dhaduk was clear that appellant could not return to his job as letter carrier, he was not clear what aspect of his previous job appellant could not perform and if he could perform his previous job for four hours a day. Neither the Office, nor the employing establishment sought clarification by asking Dr. Dhaduk, or any other physician, to review the job description prior to making the offer to appellant.

The Board finds that the Office has not established that the modified city clerk position offered by the employing establishment is suitable. For these reasons, the Office improperly terminated appellant compensation effective November 4, 2001 on the grounds that he refused an offer of suitable work.

The decision of the Office of Workers' Compensation Programs dated June 17, 2002 is hereby reversed.<sup>5</sup>

Dated, Washington, DC  
June 17, 2003

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>5</sup> As the Board has reversed the Office merit decision, the October 24, 2002 reconsideration denial is moot.