

**United States Department of Labor
Employees' Compensation Appeals Board**

RICHARD BASSETT, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Nowata, OK, Employer**

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**Docket No. 04-150
Issued: February 18, 2004**

Appearances:
Vicki J. Kelly, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On October 15, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated July 16, 2003 finding that appellant refused an offer of suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation effective April 12, 2001 on the grounds that he refused an offer of suitable work.

FACTUAL HISTORY

On August 4, 2000 appellant, then a 55-year-old modified letter carrier, injured his left shoulder when he picked up a bag of mail. On September 6, 2000 he underwent arthroscopic surgery for a left torn rotator cuff. On October 13, 2000 the Office accepted appellant's claim

for a left shoulder sprain and sprain of the left rotator cuff. The surgery was also authorized by the Office.

In an October 16, 2000 report, Dr. Ronald Forristall, a Board-certified orthopedic surgeon, wrote that appellant was making slow but steady progress but was unable to work because he requires therapy and because it is unsafe for him to drive long distances. In a November 1, 2000 form report, Dr. Forristall wrote that appellant could return to work 4 hours a day with restrictions of no lifting more than 30 pounds, no pushing, pulling or climbing and intermittent sitting, standing and no reaching above his shoulder. He indicated that appellant could not drive more than 30 miles. In November 17, 2000 letter to appellant, the employing establishment offered a job as a modified distribution clerk within his medical restrictions including no driving required. In a November 17, 2000 letter, he responded that he must refuse the job as the commute to the job site exceeds his medical restrictions that prohibit appellant from driving more than 30 miles.

The job offered to appellant was located in Nowata, OK, appellant's original duty station. However, he never lived in Nowata, OK. At the time of his injury appellant lived in Afton, OK approximately 48 miles from Nowata, OK. Subsequent to his injury and prior to the job offer appellant relocated to Grove, OK due to his wife's terminal medical condition and his desire to be closer to her family. Grove, OK is approximately 60 miles from Nowata, OK.

In a January 31, 2001 letter, appellant, through his representative, argued that the job offer was not suitable citing to 20 C.F.R. § 10.500(b) which provides that when determining what is suitable work the Office must consider the employees current physical limitations, whether work is available within the employee's demonstrated commuting area, qualifications to perform such work and other relevant factors. In a February 28, 2001 letter, the employing establishment informed appellant that the job was still available. In a February 28, 2001 letter, the Office informed appellant that it found the job suitable and gave him his procedural rights. He did not respond and, in a March 28, 2001 letter, the Office notified him that he had 15 days to report to work. Appellant did not report to work and, in an April 12, 2001 decision, the Office terminated appellant's compensation for refusing an offer of suitable work.

Appellant requested a hearing and submitted a June 29, 2001 report from Dr. Forristall, who wrote that he still considered appellant totally disabled due to his inability to drive to Nowata from his home as well as to complete all of the tasks required of him on the job. In a November 2, 2001 report, Dr. Forristall wrote that appellant had returned to work but found the drive quite difficult. He added that high winds made it difficult for him to control his vehicle due to a combination of his bilateral shoulder injuries and bilateral carpal tunnel syndrome.¹

At the January 24, 2002 hearing, appellant argued that the job offered was not suitable due to his driving restrictions. He stated that the roads that he would have to travel were narrow, two lanes and unimproved with dips and pools that are difficult to navigate, especially with shoulder conditions that required he hold only the lower part of the steering wheel. Appellant

¹ Appellant's right shoulder injury occurred in 1997 and was work related. There is no indication from the record that his carpal tunnel condition was work related.

also argued that his move from Afton, OK to Grove, OK was irrelevant as the commute from either place exceeded his driving restrictions. Appellant further testified that at least one person within management thought he was a malingerer and when she left, the Office accommodated his driving restrictions by allowing him to work in Grove, OK.²

In an April 10, 2002 decision, the hearing representative affirmed the termination finding that the medical evidence supports that appellant could do the job, that the job itself required no driving and that his commute was not a justifiable reason for refusing the job. Appellant requested reconsideration and submitted additional medical reports including a November 8, 2002 report from Dr. Forristall who wrote that appellant's medical restrictions prevented him from performing the job offered. He explained that it requires nearly a year for the rotator cuff tendon to heal back to the bone and then rehabilitate and strengthen the muscle in order to endure long distant driving. Dr. Forristall added that he is familiar with the road between Grove, OK and Nowata, OK and it is a country road with hills, curves and significant semi trailer traffic. He stated that he was concerned that appellant could not control the vehicle, endangering himself and others.

In a July 16, 2003 decision, the Office denied modification finding that the medical evidence failed to address why appellant could not perform the specific job offered noting that the inability to travel to the job was not a valid reason for refusing the job.³

LEGAL PRECEDENT

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."⁴ However, to justify such termination, the Office must show that the work offered was suitable.⁵ 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.⁶ Office procedure provides that acceptable reasons for refusal of an offered job include withdrawal of the offer and medical evidence of inability to perform the position or, in certain cases, inability to travel to the job.⁷

² In May 2000 appellant was suspended for two weeks for violation of his medical restrictions related to his right shoulder condition. As he did return to work on September 1, 2001 he is seeking through his appeal lost wages for the period April 12 through September 1, 2001. Appellant returned to full-time work on December 30, 2001.

³ The record contains a September 11, 2003 schedule award decision, but appellant has not appealed this decision to the Board.

⁴ 5 U.S.C. § 8106(c)(2).

⁵ *David P. Camacho*, 40 ECAB 267, 275 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341, 345 (1981).

⁶ 20 C.F.R. § 10.124; *see Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5 (December 1993).

ANALYSIS

In the present case, the record demonstrates that the modified clerk position was developed by the employing establishment in conformance with work restrictions set forth by Dr. Forristall, appellant's attending physician. The employing establishment offered appellant the position by a February 28, 2001 letter. On February 28, 2001 the Office complied with the procedural requirements by advising appellant of the suitability of the position offered and the penalty for refusing the offered position under section 8106(c) of the Act. The Office told him that the job remained available and provided him with the opportunity to either accept the position or provide an explanation for his refusal.⁸

In response, appellant stated that he could not accept the position as the commute exceeded his medical restrictions and submitted medical evidence that supported his refusal. In a report dated November 1, 2000, Dr. Forristall indicated that appellant could not drive more than 30 miles.

The Board finds appellant's reason for refusing the job is justifiable and is supported by Office procedure which provides that, in certain cases, the inability to travel to the job is an acceptable reason for refusing a job offer. In rejecting his reason for refusing the job the Office cited to the case of *Ronald M. Jones* where the employee refused an offer of suitable work based, in part, on his inability to drive two hours to the job site.⁹ The Board found appellant's reason for refusing an offer of suitable work unacceptable because *Jones* voluntarily moved outside his driving restrictions. The Board stated, "[a]s appellant voluntarily chose to remain in [his new location], any difficulty he may have had in driving to [the job site] is not dispositive, as the commute would have been by his own choice and does not constitute a job duty imposed by the employing establishment."¹⁰

The present case is distinguishable from *Jones* in that the location of the modified job was outside appellant's commute at all times and, therefore, travel to the job was an additional job duty imposed by the employing establishment. While appellant did move from Afton, OK to Grove, OK, even if he had stayed in Afton, OK the offered job was outside his restrictions. The record shows that appellant's medical restrictions were to drive no more than 30 miles one way.¹¹ Afton, OK was 48 miles from the job site while Grove, OK was 60 miles. Since neither site was within his medical restrictions appellant did not voluntarily take himself out of the modified job and, therefore, the job offered was not suitable. The Office, therefore, improperly

⁸ See *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

⁹ *Ronald M. Jones*, 48 ECAB 600 (1997).

¹⁰ *Id.* at 603.

¹¹ Dr. Forristal continued to submit reports in which he discussed appellant's limited ability to drive. For example, in his November 8, 2002 report, Dr. Forristall explained that a torn rotator cuff tendon required a year to heal back to the bone and then rehabilitate and strengthen the muscle in order to endure long distant driving. Dr. Forristall also had personal knowledge of the physical requirements of the commute between Grove, OK and Nowata, OK and stated that it risked the safety of appellant and others on the road.

determined that appellant could not raise limitations on his driving ability as a reason for refusing the offered position.

CONCLUSION

For the above-described reasons, the Office improperly terminated appellant's compensation effective April 12, 2001 on the grounds that he refused an offer of suitable work.

ORDER

The decision of the Office of Workers' Compensation Programs dated July 16, 2003 is reversed.

Issued: February 18, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member