

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

JANET K. BOUSE, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Kansas City, MO, Employer**

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**Docket No. 05-1439
Issued: May 2, 2006**

Appearances:
Beth Regier Foerster, Esq., for the appellant
Jim C. Gordon, Jr., Esq., for the Director

Oral Argument March 9, 2006

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 27, 2005 appellant, through counsel, filed a timely appeal of a March 25, 2005 merit decision in which the Office of Workers' Compensation Programs terminated appellant's compensation for refusing 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 the case.

ISSUE

The issue on appeal is whether the Office met its burden of proof in terminating appellant's compensation effective June 29, 2001 on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

On December 16, 1994 appellant, then a 50-year-old rural mail carrier, filed a traumatic injury claim alleging that she sustained injuries to her left shoulder and hip while in the performance of duty. On February 28, 1995 the Office accepted the claim for rotator cuff tear in

her left shoulder. The Office also accepted appellant's occupational disease claim for carpal tunnel syndrome in her right hand and a rotator cuff tear in her right shoulder.

On September 30, 1999 appellant's treating physician, Dr. Larry Frevert, a Board-certified orthopedic surgeon, conducted an open rotator cuff repair with acromioplasty on the right. In an April 7, 2000 report, Dr. Frevert indicated that appellant had provided him with a "work proposal" from the employing establishment. He concurred with the proposal with the provision that appellant could not perform any type of casing, no lifting greater than 10 to 15 pounds, no overhead activity over 1 to 2 hours per day and no constant repetitive use of the left arm. Dr. Frevert advised that he would "let her go for the next six weeks and see how she does with that." He further noted that, if appellant was doing "fairly well at that time and tolerating those restrictions then we may very well make these permanent at this time."

In a May 18, 2000 disability certificate, Dr. Frevert provided permanent job restrictions which included no lifting greater than 10 to 15 pounds, no overhead activity over 1 to 2 hours per day, no casing of mail and no repetitive use of the left arm.

On October 17, 2000 the employing establishment provided a revised job offer to appellant as a modified part-time flexible (PTF) distribution clerk which utilized the restrictions provided by Dr. Frevert.

On October 23, 2000 appellant refused the revised job offer. She indicated that she had been approved for disability and that she could not "do the modified job."¹

On February 21, 2001 the Office found that the position offered by the employing establishment was suitable within the meaning of 5 U.S.C. § 8106(c). The Office advised appellant that it had confirmed with the employing establishment that the position remained available. The Office explained that the position of a modified PTF clerk at the employing establishment was suitable and in accordance with her medical conditions and that she had 30 days to accept the position. The Office noted that, if appellant failed to report to the offered position and failed to demonstrate that the failure was justified, her right to compensation would be terminated.

By letter dated March 6, 2001, appellant refused the offered position because her "doctor agreed she should [not] be working." She submitted additional evidence, which included a letter dated August 10, 2000 in which the employing establishment provided information to support her application for disability retirement. In an August 31, 2000 report, Dr. Frevert advised that appellant was released from care. He explained that she had various injuries and problems with her upper extremities and opined that he did "not feel that appellant has the capacity any longer to do her job because any type of repetitive activity, even light weight, causes her a fair amount of pain and discomfort." Dr. Frevert added that she was permanently disabled.

¹ Appellant was approved for disability retirement on October 5, 2000.

In an April 17, 2001 letter, the Office advised appellant that her reasons for refusing the offered position were insufficient. The Office afforded her 15 additional days in which to accept the position without penalty, noting that no further reasons for refusal would be considered.

In a memorandum of telephone call dated April 23, 2001, the Office noted that appellant requested an explanation regarding why she was not receiving her schedule award. She advised that she refused the modified position because she believed the reports from Dr. Frevert were “sufficient.”

By decision dated June 29, 2001, the Office terminated appellant’s entitlement to continuing compensation for refusal to accept suitable employment pursuant to 5 U.S.C. § 8106.

By letter dated July 16, 2001, appellant filed an application for review and oral argument. By order dated November 1, 2001, the Board dismissed her appeal as she advised that she did “not want the oral argument and the appeal” and had submitted her request to the wrong address.

Appellant requested reconsideration on October 5, 2001 and submitted additional medical evidence.² In a September 5, 2001 report, Dr. Frevert advised that she could not do “any type of data entry on a repetitive type basis” as appellant ran the risk of further inflaming and injuring her shoulders. He recommended that she remain off work.

By decision dated February 12, 2002, the Office denied modification of its June 29, 2001 decision.

By letter dated February 6, 2003, appellant, through counsel, requested reconsideration and submitted additional evidence and arguments. Her representative referred to the August 10, 2000 letter from the employing establishment which supported appellant’s application for disability retirement. Counsel also alleged that the modified job offer did not comply with appellant’s restrictions. She submitted additional medical evidence which included an August 6, 2002 medical report from Dr. Sergio Delgado, a Board-certified orthopedic surgeon. He reviewed the modified position description and opined that appellant “would have difficulty in performing most of the recommended work activities in her job offer based on the objective clinical findings and analysis of job tasks, restrictions assigned and concerns about further modification of these work activities once she returns to work.”

By decision dated April 24, 2003, the Office denied appellant’s request for reconsideration without a review of the merits on the grounds that her request neither raised substantial legal questions, nor included new and relevant evidence and, thus, it was insufficient to warrant review of its prior decision.

Appellant appealed to the Board on July 21, 2003. On January 5, 2005 the Office asked that the Board remand the matter, as the Director believed that the Office should have conducted

² Although appellant did not specifically request reconsideration, this was treated as a request for reconsideration.

a merit review of the claim. On February 11, 2005 the Board entered an order granting remand and canceling oral argument.³

In a decision dated March 25, 2005, the Office terminated appellant's wage-loss and schedule award benefits finding that she had failed to accept suitable work after work was offered to her. The Office found that appellant's reasons for refusing the job offer were not acceptable.

LEGAL PRECEDENT

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits. Under section 8106(c)(2) of the Federal Employees' Compensation Act⁴ the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.⁵ Section 10.517 of the Office's regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured 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 a determination is made with respect to termination of entitlement to compensation.⁶

Before compensation can be terminated, however, the Office has the burden of demonstrating that the employee can work; setting for 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.⁷ However, all of an employee's medical conditions whether work related or not, must be considered in assessing the suitability of the position.⁸

To justify termination, the Office must show that the work offered was suitable and must inform the employee of the consequences of refusal to accept such employment. This burden of proof is applicable if the Office terminates compensation under 5 U.S.C. § 8106(c) for refusal to accept suitable work.⁹

³ Docket No. 03-1935 (issued February 11, 2005).

⁴ 5 U.S.C. § 8101 *et seq.*

⁵ *Patrick A. Santucci*, 40 ECAB 151 (1988); *Donald M. Parker*, 39 ECAB 289 (1987).

⁶ 20 C.F.R. § 10.517; *see also Catherine G. Hammond*, 41 ECAB 375 (1990).

⁷ *Linda Hilton*, 52 ECAB 476, 481 (2001).

⁸ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(4) (December 1993).

⁹ *See John E. Lemker*, 45 ECAB 258 (1993).

ANALYSIS

The Office found that the modified position offered by the employing establishment was suitable within the meaning of 5 U.S.C. § 8106(c). However, the determination 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 the medical evidence.¹⁰

The employing establishment offered appellant a position as a modified distribution clerk on October 17, 2000 and utilized the physical restrictions provided by Dr. Frevert, her treating physician, on May 18, 2000. The Office determined that this position was medically suitable for appellant. The May 18, 2000 report of Dr. Frevert indicated that appellant could perform no lifting greater than 10 to 15 pounds, no overhead activity over 1 to 2 hours per day, no casing of mail and no repetitive use of the left arm. However, the Board notes that earlier he had noted in an April 7, 2000 report, that he would “let her go for the next six weeks and see how she does with that.” Dr. Frevert had indicated that, if appellant was doing “fairly well at that time and tolerating those restrictions then we may very well make these permanent at this time.” He subsequently explained in his August 31, 2000 report, that due to appellant’s various injuries and problems with her upper extremities, he no longer felt that she had the capacity to do her job “because any type of repetitive activity, even light weight, causes her a fair amount of pain and discomfort.” Dr. Frevert opined that appellant was permanently disabled.

The Board notes that the record does not contain any medical evidence which clearly establishes that appellant can perform the duties of the modified position offered in this case. As noted, Dr. Frevert advised that she could try the modified position to see how she would be able to perform. However, he subsequently explained that appellant could not do any repetitive activity. The Office did not attempt to clarify Dr. Frevert’s opinion on the modified position. It did not meet its burden to show that the work offered was medically suitable.¹¹ The medical reports prior to the job offer were tentative in that he wanted to see how she performed under the recommended restrictions. Appellant subsequently submitted a report from Dr. Frevert opining that she could not perform any repetitive activity which was part of the functions of the offered position. The Board, therefore, finds that the medical evidence of record does not establish that the offered position was medically suitable. Accordingly, the Board will reverse the Office’s March 25, 2005 decision terminating appellant’s compensation on the grounds that she refused an offer of suitable work.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant’s wage-loss compensation effective June 29, 2001 on the grounds that she refused an offer of suitable work.

¹⁰ *Robert Dickinson*, 46 ECAB 1002 (1995).

¹¹ *See supra* note 9.

ORDER

IT IS HEREBY ORDERED THAT the March 25, 2005 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 2, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board