

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VIVIAN J. WALKER and U.S. POSTAL SERVICE,
POST OFFICE, Cleveland, OH

*Docket No. 98-799; Submitted on the Record;
Issued April 4, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective November 26, 1997 on the grounds that she refused an offer of suitable work.

In the present case, the Office accepted appellant's occupational disease claim for bilateral carpal tunnel syndrome and authorized bilateral carpal tunnel surgery by letter dated September 16, 1996. She underwent right carpal tunnel release surgery on November 18, 1996. On January 31, 1997 appellant underwent left carpal tunnel release surgery. She was paid appropriate compensation for her temporary total disability commencing November 16, 1996.

On May 5 and 14, 1997 the Office referred appellant to Dr. Daniel Dorfman, Board-certified in physical medicine and rehabilitation, for a second opinion examination and an opinion on appellant's disability status. In a report dated May 20, 1997, he diagnosed bilateral carpal tunnel syndrome and opined that appellant had "findings suggestive of increased sympathetic dysfunction in the upper extremities as a direct result of the surgical repair of the carpal tunnel syndrome bilaterally." Dr. Dorfman concluded that appellant was unable to perform her usual employment as well as being unable to perform any tasks involving the use of her hands. He stated that she was precluded from "any repetitive use of the upper extremities and hands" due to increased sympathetic dysfunction in her upper extremities and that she would not reach maximum medical improvement for at least six months. Lastly, Dr. Dorfman recommended that appellant be referred to Dr. Thomas Chelimsky, a Board-certified neurologist, internist and clinical neurophysiologist, for aggressive treatment of her sympathetic nervous dysfunction.

On July 28, 1997 the employing establishment advised Dr. Herbert S. Bell, appellant's attending Board-certified neurological surgeon, that it had developed a limited-duty position within physical restrictions he had noted and requested his opinion as to whether appellant could

perform the proposed position. The proposed job involved no use of the hands or arms with the physical requirements noted as seated work, use of a foot pedal and speaking into a microphone.

On July 30, 1997 Dr. Bell rejected the employing establishment's limited-duty job offer for appellant. He stated that appellant was not to return to work at that time and that she would be reevaluated in October.

By letter dated August 8, 1997, the employing establishment advised the Office that Dr. Bell had found the job offer unsuitable and requested that the Office provide a determination on the suitability of the proposed job.

By letter dated September 12, 1997, the Office informed appellant that it had found the proposed modified clerk position suitable and informed her of the penalty provision of 5 U.S.C. § 8106(c). The Office allowed appellant 30 days to provide an explanation if she refused the offer.

In a letter dated October 8, 1997, appellant stated that she could not accept or refuse the job offer at that time without Dr. Bell's releasing her to work.

In a decision dated November 26, 1997, the Office terminated appellant's compensation effective November 26, 1997 on the grounds that she refused an offer of suitable work.

The Board finds that the Office improperly terminated appellant's compensation effective November 26, 1997 on the grounds that she refused an offer of suitable work.

Under the Federal Employees' Compensation Act,¹ once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of compensation.² In this case, the Office terminated appellant compensation under 5 U.S.C. § 8106(c) of the Act which provides in pertinent part, "A partially disabled employee who ... refuses or neglects to work after suitable work is offered ... is not entitled to compensation."³ However, to justify such termination, the Office must show that the work offered is suitable.⁴ An employee who refuses or neglects to work after suitable work has been offered to him or her has the burden of showing that such refusal of work was justified.⁵

In this case, the Office terminated appellant's compensation on November 26, 1997 on the grounds that she refused an offer of suitable work. The record contains no medical opinion indicating that appellant was capable of performing the offered position. Furthermore, the employing establishment requested Dr. Bell to advise whether appellant was capable of

¹ 5 U.S.C. §§ 8101-8193.

² *William A. Kandel*, 43 ECAB 1011 (1992).

³ 5 U.S.C. § 8106(c)(2).

⁴ *David P. Comacho*, 40 ECAB 267 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341 (1981).

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

performing the modified clerk position and he rejected the offered position, stating that appellant was not to return to work at that time. While Dr. Dorfman, in his May 20, 1997 report, indicated that appellant was capable of working eight hours per day provided she not use her hands, neither the Office nor the employing establishment requested his opinion on appellant's ability to perform the proposed limited-duty position. As the record contains no medical opinion verifying appellant's ability to perform the duties of the modified clerk position and appellant's treating physician specifically rejected the proposed job offer, the Office improperly determined that appellant refused an offer of suitable work. In fact, the Office did not present any medical evidence disclosing the basis of its determination. There is no physician or Office medical adviser involved in the claim who determined the position to be suitable. Therefore, the Office has failed to meet its burden of proof in terminating appellant's compensation for failure to accept suitable work.

The decision of the Office of Workers' Compensation Programs dated November 26, 1997 is hereby reversed.

Dated, Washington, D.C.
April 4, 2000

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member