

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of NICK C. BOOSALIS and U.S. POSTAL SERVICE,  
POST OFFICE, Minneapolis, MN

*Docket No. 98-923; Submitted on the Record;  
Issued December 14, 1999*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's right to compensation benefits on the grounds that he refused an offer of suitable work.

On February 10, 1977 appellant, a city carrier, sustained an injury while in the performance of his duties when he slipped on an icy driveway while delivering mail. He fell backward and hit the back of his head. The Office accepted his claim for the conditions of cerebral concussion, cervical thoracic strain, temporary depressive disorder (ended by February 1981) and psychogenic pain disorder. Appellant received compensation on the periodic rolls.

On August 17, 1994 Dr. Jack E. Hubbard, appellant's attending neurologist, reported that the tasks associated with a limited-duty sedentary position prepared by the employing establishment were within appellant's medical restrictions. On May 16, 1996 the Office found the position of part-time flexible general clerk to be suitable. Appellant refused the offer, citing the pressure of trying to cope with strangers and their complaints while he was depressed with a severe headache. He also cited his questionable dependability on days when he was dizzy and had a headache or when he was up all night with a bad neck ache and headache.

In a decision dated June 20, 1996, the Office terminated appellant's compensation benefits on the grounds that he refused an offer of suitable work. On December 31, 1996, however, an Office hearing representative vacated the June 20, 1996 decision on the grounds that the Office failed to develop the issue of appellant's accepted psychogenic pain disorder. The hearing representative remanded the case for a second opinion evaluation of appellant's psychological condition and a review of the suitability of the offered position.

The Office received a June 18, 1996 report from Dr. Ralph E. McKinney, a licensed psychologist and consultant to Dr. Hubbard. Dr. McKinney related appellant's chief complaint and history of present illness. He described his findings on mental status examination and

related appellant's social history. Dr. McKinney reported that appellant was not psychologically suited to return to work because of fear of being with people. "With therapy," he stated, "it may be possible that [appellant] can ease into a position such as that being offered at this time." Dr. McKinney reported his impression as follows:

"Based on the foregoing, the patient is seen as a [m]ajor [d]epressive [d]isorder, 296.23. Due to the [w]orkers' [c]ompensation injury of February 10, 1977, the patient experiences significant pain as noted above as well as fearfulness of being with people and a variety of symptoms of depression noted within. Because of the injuries, he has been unable to work since 1977, has lost significant self-worth, tends to isolate himself from others, has given up going to church, and feels worthless and out of control of his life to a large extent."

The Office referred appellant, together with copies of the medical record and a statement of accepted facts, to Dr. Thomas Gratzner, a Board-certified psychiatrist. In a report dated March 10, 1997, Dr. Gratzner related appellant's history of injury, medical and psychiatric treatment, social profile, current function and the results of a mental status examination. Dr. Gratzner reported a principal diagnosis of dysthymia, alcohol abuse and rule out somatoform pain disorder. He noted the basis of his diagnosis of dysthymia and explained that appellant was not suffering from major depressive disorder and had no organic personality disorder. Dr. Gratzner reported that the relationship between appellant's dysthymia and the February 10, 1997 injury was "unclear." He noted that the records suggested a worsening of appellant's dysphoric mood after the accident but that there were indications that his mood subsequently improved. Regardless, Dr. Gratzner reported that appellant's dysthymia did not prevent him from performing the duties of a part-time postal clerk, as he understood the job description. In order for appellant to make the transition, however, Dr. Gratzner recommended that appellant receive supportive therapy on a once a week basis for the first two months.

On April 8, 1997 the Office advised appellant that the position of general clerk was suitable and that he had 30 days either 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) and of the penalty for refusing an offer of suitable work.

Appellant telephoned the Office to advise that he did not believe he could do the job as it existed, that he could not be inside, that he could not be around people and that he could not communicate. The Office also received a note from the employing establishment indicating that appellant refused the offer because he just could not do it, that he could not have an inside job dealing with people and that he would not be dependable.

On May 19, 1997 the Office advised appellant that his reasons did not justify his refusal of the offer. The Office provided him an additional 15 days to accept the position and once again notified him of the provisions of 5 U.S.C. § 8106(c)(2) and of the penalty for refusing suitable work.

On May 27, 1997 appellant replied that since his injury, which was and continued to be very painful, he had not been able to work. "Not only have I gone down physically," he stated, "but mentally as well." He explained that he contacted the employing establishment and

expressed his desire to consider a position in which he could be by himself or deliver packages or messages and be outside. Appellant stated that the employing establishment had not responded.

In a decision dated June 13, 1997, the Office terminated appellant's compensation benefits on the grounds that he refused an offer of suitable work. The Office discussed the evidence in the case, noted that Dr. Hubbard had approved the offer as suitable to appellant's physical restrictions and found that the weight of the medical evidence failed to establish that appellant's psychological condition prevented him from performing the position offered.

The Board finds that the Office improperly terminated appellant's compensation benefits on the grounds that he refused an offer of suitable work. There is an unresolved conflict in medical opinion that precludes a finding of suitability.

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.<sup>1</sup> 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.<sup>2</sup> In other words, to justify termination of 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.<sup>3</sup>

Dr. McKinney, a licensed psychologist and consultant to appellant's attending physician, Dr. Hubbard, reported that appellant had a major depressive disorder and was not psychologically suited to return to work in the position offered because of fear of being with people. With therapy, he reported, it was possible that appellant could ease into such a position, but the accepted employment injury of February 10, 1977 had caused significant pain, a fearfulness of being with people and a variety of symptoms of depression. Dr. Gratzner, a psychiatrist and Office referral physician, disagreed with Dr. McKinney both on the diagnosis of appellant's condition and on appellant's ability to return to the offered position. Dr. McKinney diagnosed dysthymia and reported that he did not believe this condition would prevent appellant from performing the duties of the offered position.

With such a difference of opinion on the nature of appellant's psychological condition and on his ability to perform the duties of the position of general clerk, the medical record in this case fails to establish that the offered position is suitable. For this reason, the Board finds that the Office improperly invoked the penalty provisions of 5 U.S.C. § 8106(c)(2).

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<sup>1</sup> 5 U.S.C. § 8106(c)(2).

<sup>2</sup> *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

<sup>3</sup> *Glen L. Sinclair*, 36 ECAB 664 (1985).

The June 13, 1997 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, D.C.  
December 14, 1999

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member