U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LOIS K. MURAN and U.S. POSTAL SERVICE,
POST OFFICE, Austin, TX

Docket No. 99-1555; Submitted on the Record;
Issued December 1, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective February 9, 1999 on the grounds that she neglected to work after suitable work was offered to her.

The Board finds that the Office properly terminated appellant's compensation effective February 9, 1999 on the grounds that she neglected to work after suitable work was offered to her.

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."[1] However, to justify such termination, the Office must show that the work offered was suitable.[2] An employee who refuses or neglects to work after suitable work has been offered to her has the burden of showing that such refusal to work was justified.[3]

In the present case, the Office accepted that appellant sustained right shoulder and arm sprains and a right shoulder dislocation on February 24, 1990 and paid compensation for periods of disability.[4] By decision dated January 15, 1999, the Office terminated appellant's

[1] 5 U.S.C. § 8106(c)(2).

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

[3] 20 C.F.R. § 10.124; *see Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

[4] The Office authorized the performance of right shoulder arthroscopy and arthroplasty.

compensation effective February 9, 1999 on the grounds that she refused an offer of suitable work.[5]

The evidence of record shows that appellant is capable of performing the modified automated mark-up clerk position offered by the employing establishment and determined to be suitable by the Office in October 1995. The position involves the performance of various clerk duties for 4 hours per day; it restricts appellant from lifting more than 10 pounds and from walking, standing, reaching and twisting more than 2 hours per day. The record also shows that appellant is vocationally and educationally capable of performing the position.

In determining that appellant is physically capable of performing the modified automated mark-up clerk position, the Office properly relied on the opinion of Dr. John A. Genung, an attending Board-certified orthopedic surgeon. On August 25, 1998 Dr. Genung completed a report which contained work restrictions, which were in accordance with the work restrictions of the modified automated mark-up clerk position. On October 2, 1998 he reviewed the description of the modified automated mark-up clerk position and determined that appellant was able to perform the position.[6]

The Office has, therefore, established that the modified automated mark-up clerk position offered by the employing establishment is suitable. As noted above, once the Office has established that a particular position is suitable, an employee who refuses or neglects to work after suitable work has been offered to her has the burden of showing that such refusal to work was justified. The Board has carefully reviewed the evidence and argument submitted by appellant in support of her neglect to work in the modified automated mark-up clerk position and notes that it is not sufficient to justify such a neglect to work.[7] In several letters, appellant indicated that she was not arguing that she could not perform the duties of the offered position, but rather that she would not be able to perform the duties on a regular basis without suffering reinjury. The Board notes, however, that the possibility of future injury constitutes no basis for the payment of compensation.[8]

[5] The present appeal is the second appeal of this case before the Board. By decision and order dated November 7, 1997 (Docket No. 95-1896), the Board had reversed a prior termination of appellant's compensation for refusing an offer of suitable work. The Board had determined that the Office did not show that the medical evidence supported a finding of suitability.

[6] In a letter dated October 9, 1998, Dr. Genung indicated that appellant's work restrictions had remained virtually unchanged for the past four years, but he did not indicate that appellant could not perform the modified automated mark-up clerk position.

[7] The Office indicated that appellant refused the modified automated mark-up clerk position. Appellant did not explicitly refuse the position but she neglected to work in the position after it was offered. The position remained available to appellant at the time the Office issued its January 15, 1999 decision.

[8] *Gaeten F. Valenza*, 39 ECAB 1349, 1356 (1988).

For these reasons, the Office properly terminated appellant's compensation effective February 9, 1999 on the grounds that she neglected to work after suitable work was offered to her.[9]

The decision of the Office of Workers' Compensation Programs dated January 15, 1999 is affirmed.

Dated, Washington, D.C.
December 1, 1999

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

[9] The Board notes that the Office complied with its procedural requirements prior to terminating appellant's compensation, including providing appellant with an opportunity to accept the modified automated mark-up clerk position after informing her that her reasons for neglecting to work in the position were not valid. After the Office issued its October 15, 1998 suitability determination, appellant provided her reasons for neglecting to work in the offered position. By letter dated November 6, 1998, the Office advised appellant that her reasons were unacceptable and provided her with an additional 15 days to accept the position; *see generally Maggie L. Moore*, 42 ECAB 484 (1991); *reaff'd on recon.*, 43 ECAB 818 (1992).