

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROSANNE SCOZZAFAVA and U.S. POSTAL SERVICE,
POST OFFICE, Hollywood, FL

*Docket No. 99-60; Submitted on the Record;
Issued February 25, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT:

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation, effective September 14, 1997, on the grounds that she refused an offer of suitable work.

The Board has duly reviewed the case record in the present appeal and finds that the Office properly terminated appellant's compensation on the grounds that she refused an offer of suitable work.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.¹ Under section 8106(c)(2) of the Federal Employees' Compensation Act,² 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.³ An employee who refuses or neglects to work after suitable work has been offered or secured for her has the burden of showing that such refusal or failure to work was reasonable or justified.⁴ Additionally, the employee shall be provided the opportunity to make such a showing before entitlement to compensation is terminated.⁵ To justify termination of compensation, the Office

¹ *Frank J. Mela, Jr.*, 41 ECAB 115 (1989); *Mary E. Jones*, 40 ECAB 1125 (1989).

² 5 U.S.C. §§ 8101-8193.

³ *Patrick A. Santucci*, 40 ECAB 151 (1988); *Donald M. Parker*, 39 ECAB 289 (1987).

⁴ 20 C.F.R. § 10.124(c).

⁵ *John E. Lemker*, 45 ECAB 258, 263 (1993).

must show that the work offered was suitable⁶ and must inform appellant of the consequences of refusal to accept such employment.⁷

In the instant case, appellant, a former letter carrier, sustained two work-related injuries. She initially injured her right elbow on September 27, 1984 when she slipped on a wet tile porch and fell. The Office accepted the claim for a displaced fracture of the right proximal ulna and adhesive capsulitis of the right shoulder. Appellant received appropriate wage-loss compensation for her injury. Additionally, the Office granted appellant a schedule award for a 24 percent permanent impairment of her right upper extremity. On March 13, 1989 appellant returned to work in a part-time, limited-duty capacity as a modified general clerk. She worked four hours per day, five days a week and the Office compensated her for the balance of her regular eight-hour workday. On October 23, 1989 appellant sustained a second work-related injury to her neck, which the Office accepted for cervical strain. Appellant subsequently resumed work as a part-time, modified general clerk and she continued to work in this capacity until she resigned from the employing establishment on June 28, 1996. Appellant's stated reason for resigning was "[t]o join [her] husband in Georgia."

At the time of her resignation in June 1996 the record contained conflicting medical evidence regarding appellant's ability to work more than four hours per day. Her treating physician, Dr. Neil A. Beinhaker, a Board-certified orthopedic surgeon, indicated in a report dated May 11, 1993, that appellant had been released to work for four hours per day. Additionally, the Office had referred appellant for examination by Dr. Franklin A. Reyes, who, in a report dated May 25, 1995, noted his agreement with Dr. Beinhaker that appellant could not work more than four hours per day. However, in June 1996, Dr. Reyes approved a limited-duty job offer that required appellant to work six hours per day.

In order to resolve the conflict between the opinions of Drs. Beinhaker and Reyes, the Office referred appellant for an impartial medical examination with Dr. Jeffrey T. Haines, a Board-certified orthopedic surgeon. In a report dated November 18, 1996, Dr. Haines concluded that appellant had no impairment to her cervical spine as a result of the injury she sustained on October 23, 1989. With respect to appellant's September 27, 1984 injury to her right elbow and shoulder, Dr. Haines agreed that appellant had sustained a 24 percent permanent impairment of her right upper extremity. However, he stated that appellant's current subjective complaints were well out of proportion to the injuries she had sustained and that she was unwilling to fully flex and abduct her shoulder. Dr. Haines concluded that appellant was capable of performing clerical duties that involved sitting and walking for eight hours a day, standing for six hours per day, lifting for one to two hours per day, bending, squatting and twisting for four hours per day. The only specific restrictions imposed by Dr. Haines included overhead reaching with appellant's right upper extremity and lifting greater than 10 pounds.

On April 2, 1997 the employing establishment offered appellant a limited-duty position as a modified distribution clerk. The position involved full-time employment and was consistent

⁶ *Arthur C. Reck*, 47 ECAB 339 (1996).

⁷ *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1972).

with the limitations outlined by Dr. Haimes in his November 18, 1996 report.⁸ Appellant, however, declined the position on April 21, 1997. The Office informed appellant on May 16, 1997 that it found the modified distribution clerk position to be suitable for her work capabilities and that it was currently available. The Office also advised appellant that she had 30 days within which to either accept the position or provide an explanation for refusing the position.

By letter dated June 6, 1997, appellant advised the Office that she was declining the job offer because no effort was made to find a position for her in Georgia and because she was unable to obtain information regarding relocation expenses. Appellant also explained that the position description was unclear regarding the duties she was expected to perform. Additionally, appellant questioned the Office's reliance on Dr. Haimes' opinion and noted that her own physician, Dr. Beinhaker, indicated that she could not work eight hours per day.

The Office advised appellant on July 16, 1997 that the reasons she provided for declining the job offer were unacceptable and that she had an additional 15 days within which to accept the position. Appellant did not subsequently accept the offered position and, therefore, by decision dated September 9, 1997, the Office terminated appellant's compensation effective September 14, 1997 based upon her failure to accept suitable employment.

On September 17, 1997 appellant requested an oral hearing, which was conducted on March 27, 1998. Appellant also submitted additional medical evidence that included an August 24, 1986 diagnosis of "mild thoracic outlet syndrome" from Dr. Arthur Surloff as well as an April 20, 1998 report from Dr. Beinhaker in which he diagnosed cervical radiculopathy and capsulitis right shoulder. Based on his April 20, 1998 examination, Dr. Beinhaker concluded that appellant was "permanently disabled for gainful employment."

In a decision dated and finalized on June 10, 1998, the hearing representative affirmed the Office's September 9, 1997 decision terminating compensation.

With respect to the procedural requirements for termination under section 8106(c) of the Act, the Office, by letters dated May 16 and July 16, 1997, properly advised appellant of the availability of suitable work and the consequences of her refusal to accept such work. Inasmuch as appellant did not accept the offered position subsequent to the Office's July 16, 1997 notification, the Office accordingly terminated benefits thereafter. The Board, therefore, finds that the Office properly followed the procedural requirements for termination under section 8106(c).

The determination of whether appellant is capable of performing the offered position is a medical question that must be resolved by medical evidence.⁹ In the instant case, the Office determined that a conflict of medical opinion existed based on the reports of Drs. Beinhaker and

⁸ Dr. Haimes approved the modified distribution clerk position on March 21, 1997.

⁹ *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

Reyes and, therefore, the Office properly referred appellant to an impartial medical examiner.¹⁰ In cases where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹¹ The Board finds that the impartial medical examiner's report dated November 18, 1996 is sufficiently well rationalized and based upon a proper factual background. Dr. Haimes not only examined appellant, but also reviewed appellant's medical records. He also reported accurate medical and employment histories. Accordingly, the Office hearing representative properly accorded determinative weight to Dr. Haimes' findings.

Although appellant's treating physician, Dr. Beinhaker, issued an April 20, 1998 report indicating that appellant was "permanently disabled for gainful employment," he did not provide any explanation for his conclusion. The absence of such an explanation is particularly troublesome in light of Dr. Beinhaker's earlier report dated May 11, 1993 wherein he found appellant capable of working at least four hours per day. Moreover, it does not appear from the record that Dr. Beinhaker reviewed Dr. Haimes' November 18, 1996 findings. Consequently, Dr. Beinhaker's reports are of diminished probative value.¹²

With respect to appellant's diagnosis of "mild thoracic outlet syndrome," Dr. Surloff's August 24, 1986 report does not address whether appellant has any current work limitations as a result of this condition. Finally, Dr. Haimes specifically questioned whether appellant had thoracic outlet syndrome. He indicated that the fact that appellant has cervical ribs evident on x-ray examination does not mean that she has thoracic outlet syndrome or that it was casually related to her injuries. Accordingly, Dr. Surloff's opinion is of no probative value in determining whether appellant is capable of performing the duties of a modified distribution clerk.

Lastly, appellant's refusal to accept the offered position based on her desire to remain in Georgia does not constitute an acceptable basis for rejecting the offer. Appellant resigned her position with the employing establishment based on her stated desire to join her husband in Georgia. At the time of her resignation and subsequent relocation to Georgia, the Office had yet to terminate appellant's compensation. As such, the Office was under no obligation to offer suitable employment in the location where appellant currently resided.¹³

In conclusion, the Board finds that the Office met its burden of proof in terminating appellant's compensation because the evidence of record establishes that the Office complied

¹⁰ The Act provides that if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination. 5 U.S.C. § 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

¹¹ *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

¹² See *Thomas Bauer*, 46 ECAB 257 (1994) (finding that an attending physician's report which critiqued the impartial medical examiner's opinion was insufficiently comprehensive or rationalized to create a conflict with the specialist's conclusion).

¹³ 20 C.F.R. § 10.123(f); see *Arthur C. Reck*, 47 ECAB 339, 343-44 (1996).

with the required procedures and that the offered position was medically suitable. Accordingly, the Office properly terminated appellant's wage-loss compensation.¹⁴

The decision of the Office of Workers' Compensation Programs dated June 10, 1998 is, hereby, affirmed.

Dated, Washington, D.C.
February 25, 2000

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member

¹⁴ See *Michael I. Schaffer*, 46 ECAB 845 (1995) (finding the medical evidence sufficient to establish that appellant was physically capable of performing the duties of the offered modified position).