U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

In the Matter of RASILA R. THAKKAR and U.S. POSTAL SERVICE,
POST OFFICE, Paterson, NJ

*Docket No. 00-533; Submitted on the Record;*
*Issued December 6, 2001*

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation based on her refusal to accept suitable work; and (2) whether appellant met her burden of proof to establish that she sustained a recurrence of disability on October 7, 1998.

On May 20, 1992 appellant, then a 40-year-old letter sorting machine operator, sustained an employment-related left wrist strain, left elbow tendinitis and left shoulder impingement. On November 18, 1997 she sustained a right shoulder impingement, stopped work that day, and was placed on the periodic rolls.[1] Appellant underwent physical therapy three times weekly and occupational therapy twice weekly.

[1] Appellant's left upper extremity conditions were adjudicated by the Office under file number 02-648347 and her right upper extremity condition under file number 02-740695. The two claims were doubled on June 30, 1998. The record indicates that, following the May 20, 1992 employment injury, appellant did not stop work and was placed on limited duty. On October 30, 1995 she filed a recurrence claim. At about that time, her unit was relocated, and on December 4, 1995 she was offered a modified distribution clerk position at a new location, which she declined on December 15, 1995. Her treating physician, Dr. Gregory S. Gallick, a Board-certified orthopedic surgeon, approved the offered position and on January 11, 1996 she accepted the position. By letter dated February 20, 1996, the Office accepted that she sustained a recurrence of disability and she began physical therapy. Electromyographic studies completed on April 11, 1996 were normal. The Office referred her to Dr. Joseph T. Barmakian, a Board-certified orthopedic surgeon, for a second opinion evaluation. By report dated June 3, 1996, he advised that she had no employment-related restrictions. Finding that a conflict existed between the opinions of Drs. Gallick and Barmakian, by letter dated September 19, 1996, the Office referred appellant to Dr. Charles E. Granatir, a Board-certified orthopedic surgeon, for an independent medical evaluation. In a report dated October 3, 1996, Dr. Granatir advised that appellant had multiple myalgia complaints of both upper extremities, none of which were employment related. In a work capacity evaluation dated October 29, 1996, he advised that she could work eight hours per day with no restrictions. On December 30, 1996 the Office informed appellant that it proposed to terminate her medical benefits, based on the opinion of Dr. Granatir. By decision dated February 1, 1997, the termination of medical benefits was finalized. Dr. Granatir made a secondary finding that appellant's blood tests indicated that she had a metabolic abnormality. She was seen by Dr. March Ann R. Curiba, a Board-certified rheumatologist, who provided a report dated January 6, 1997 in which she advised that appellant had no specific connective tissue disease and diagnosed left lateral epicondylitis, muscular pain in hands, elevated sedimentation rate and Grave's disease.

The Office continued to develop the claim and on July 16, 1998 referred appellant for vocational rehabilitation. She continued to submit medical evidence from her treating Board-certified orthopedic surgeon, Dr. William C. Oppenheim. On September 22, 1998 the employing establishment offered appellant a position as lobby monitor, based on physical restrictions provided by Dr. Oppenheim.[2] By letter dated September 25, 1998, the Office advised appellant that the position offered was suitable. Appellant reported for work on October 5, 1998. On October 7, 1998 she refused to sign the job offer and was sent home. By decision dated November 5, 1998, the Office terminated appellant's wage-loss compensation, effective October 5, 1998, on the grounds that she refused an offer of suitable work.

On November 17, 1998 appellant requested reconsideration, arguing that she had not been provided with an ergonomic chair, that she spent too much time standing, that the position's duties were not specified in the job offer and that her duty location and rest day had been changed.

In a decision dated January 22, 1999, the Office denied appellant's request.

On February 12, 1999 appellant, through counsel, requested reconsideration. On February 19, 1999 she filed a recurrence claim, alleging that on October 7, 1998 she sustained a recurrence of disability due to the standing, walking and bending of her job duties. On March 29, 1999 the Office denied appellant's reconsideration request. On June 29, 1999 appellant's counsel again requested reconsideration and submitted additional medical evidence. By decision dated August 4, 1999, the Office denied modification of the prior decisions. The Office additionally found that she failed to establish a recurrence of disability. The instant appeal follows.

Initially, the Board finds that the Office met its burden to terminate appellant's compensation benefits.

Section 8106(c)(2) of the Federal Employees' Compensation Act[3] provides in pertinent part, "A partially disabled employee who ... refuses or neglects to work after suitable work is offered ... is not entitled to compensation."[4] To prevail under this provision, the Office must show that the work offered was suitable and must inform the employee of the consequences of refusal to accept such employment. An employee who refuses or neglects to work after suitable work has been offered has the burden of showing that such refusal to work was justified.[5] The

[2] The record indicates that the job offer was mailed to appellant's correct address by both certified and first class mail. The certified mail was "undeliverable." The job offer sent first class was not returned. It is, therefore, presumed that, under the "mailbox rule," appellant received the offer sent first class. In the absence of evidence to the contrary, a notice mailed to an individual in the ordinary course of business was received by that individual. This presumption arises when it appears from the record that the notice was properly addressed and duly mailed. The appearance of a properly addressed copy in the case record, together with the mailing custom or practice of the Office itself, will raise the presumption that the original was received by the addressee. *Clara T. Norga*, 46 ECAB 473 (1995).

[3] 5 U.S.C. §§ 8101-8193.

[4] 5 U.S.C. § 8106(c)(2).

[5] *See Michael I. Schaffer*, 46 ECAB 845 (1995).

Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.[6]

The implementing regulation[7] provides that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee 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 entitlement to compensation is terminated.[8] To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his or her refusal to accept such employment.[9]

The issue 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 medical evidence.[10] In assessing medical evidence, the number of physicians supporting one position or another is not controlling, the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for and the thoroughness of physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[11]

In the present case, the record reflects that the physical restrictions of the lobby monitor position offered to appellant on September 22, 1999 were in agreement with those provided by Dr. Oppenheim in a report dated June 18, 1998. He advised that appellant could not return to the date-of-injury position stating:

> "Based upon her recovery to date, I do believe that she could perform at a position which was not repetitive in nature like sorting. She would do markedly better in an office type environment where she did a little bit of this and a little bit of that. A head phone set would enable her to do some degree of phone work in addition. She can do a small amount of typing, writing, filing etc."

In a report dated August 4, 1998, Dr. Oppenheim continued to note findings on examination of both upper extremities. Regarding a return to work, he stated: "As long as the job is not repetitive I believe that she could do quite well."

The job description of the position offered to appellant on September 22, 1998 states:

> "Lobby Sweep/Monitor: Meeting and greeting customers, assisting them in their mailing needs and suggestive better services. Ensuring that there [are] sufficient

[6] *See Stephen R. Lubin*, 43 ECAB 564 (1992).

[7] 20 C.F.R. § 10.124(c).

[8] *See John E. Lemker*, 45 ECAB 258 (1993).

[9] *Maggie L. Moore*, 42 ECAB 484 (1991), *aff'd on recon.*, 43 ECAB 818 (1992).

[10] *See Marilyn D. Polk*, 44 ECAB 673 (1993).

[11] *See Connie Johns*, 44 ECAB 560 (1993).

labels and mailing materials available in the lobby. Listening to the customers problems and attempting to resolve them. Maintaining of the general order in the lobby. There will be some standing and walking, suggest use of flat shoes and dress should be appropriate business attire to greet the public.

"General Clerk/Light Duty/Administrative: Incidental customer service work; these duties are well within your physical restrictions."

Specific restrictions were no lifting over five pounds, no repetitive movement of the wrists or elbows, no pushing or pulling, no reaching above the shoulders.

The medical evidence of record thus establishes that, at the time the job offer was made, appellant was capable of performing the duties of the modified position.[12]

In order to properly terminate appellant's compensation under 5 U.S.C. § 8106, the Office must provide appellant notice of its finding that an offered position is suitable and give appellant an opportunity to accept or provide reasons for declining the position.[13] The record in this case indicates that the Office properly followed the procedural requirements. By letter dated September 25, 1998, the Office advised appellant of the penalty provisions of section 8106, that a partially disabled employee who refused suitable work was not entitled to compensation, that the offered position had been found suitable and allotted her 30 days to either accept or provide reasons for refusing the position. Appellant reported for work on October 5, 1998 and on October 7, 1998 refused to sign the job offer.

On February 19, 1999 she filed a recurrence claim.

In this case, the medical evidence provided from Dr. Oppenheim, appellant's attending physician, establishes the suitability of the offered position. The Office met its burden of proof to terminate appellant's compensation based on her refusal of suitable work. Thereafter, the burden shifted to appellant to establish that the refusal of the job offer was justified.[14]

On appeal appellant contends that since she reported for work on October 5, 1998 and was sent home because she would not sign the job offer, section 8106 does not apply. Appellant contends that she refused the job because "she wanted to be assured that some of her safety concerns were met," *i.e.*, she wanted to be placed behind safety glass, provided with an adjustable chair and with a more detailed statement regarding her duties. The Board finds this argument to be without merit. The job was properly found to be medically suitable and the duties of the position were reasonably described.[15]

In support of her reconsideration requests, appellant submitted reports from Dr. Oppenheim dated December 8, 1998 and March 23, 1999.[16] Dr. Oppenheim, however,

[12] *See John E. Lemker*, *supra* note 8.

[13] *See Maggie L. Moore*, *supra* note 9.

[14] *See Deborah Hancock*, 49 ECAB 606 (1998).

[15] *See Charmyn J. Jernigan*, 43 ECAB 207 (1991).

[16] Appellant also submitted medical reports that were duplicates of evidence of record.

merely indicated that appellant was not working, stating that "unfortunately the [employing establishment] was unwilling to provide her with a stool" and expressed his wish that the employing establishment "locate a nonrepetitive strain type position for her." These reports, therefore, do not indicate that appellant could not perform the lobby monitor position when offered.

Office procedures provide that termination of compensation under section 8106(c) of the Act should not be modified even if appellant's medical condition later deteriorates and he or she claims a recurrence of total disability.[17] The Board therefore finds that appellant's refusal of suitable employment in this case serves as a bar to the receipt of further compensation arising from the accepted employment injury.

The decisions of the Office of Workers' Compensation Programs dated August 4, March 29 and January 12, 1999 and November 5, 1998 are hereby affirmed.

Dated, Washington, DC
December 6, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

[17] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(d)(1).