

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONNA FREDA and DEPARTMENT OF THE ARMY,
CIVILIAN PERSONNEL ADVISORY CENTER, Ft. Monmouth, NJ

*Docket No. 00-461; Submitted on the Record;
Issued January 18, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether Office of Workers' Compensation Programs properly terminated appellant's compensation effective October 7, 1998 on the grounds that she refused an offer of suitable work.

On April 21, 1997 appellant, then a 44-year-old computer specialist, filed a traumatic injury claim (Form CA-1) alleging that she injured herself when she tripped while going up the stairs. The Office accepted the claim for lumbosacral sprain, sprain of the wrists and cervical strain and was placed on the automatic rolls for temporary total disability by letter dated October 4, 1997.

On February 4, 1998 the Office referred appellant to Dr. Gordon D. Donald, a Board-certified orthopedic surgeon, to resolve the conflict in the medical evidence between Dr. Frederick A. DePaola, appellant's attending Board-certified orthopedic surgeon and Dr. Irving D. Strouse, a second opinion Board-certified orthopedic surgeon, as to whether appellant had any continuing disability due to her accepted employment injury.

In a report dated February 18, 1998, Dr. Donald, based upon a review of the medical record, employment injury history and physical examination, diagnosed chronic cervical and lumbar strain with bilateral wrist sprains. Regarding whether appellant was totally disabled, he concluded that appellant was disabled from performing her usual employment working and typing on a computer. Dr. Donald, however, opined that appellant was capable of working four hours per day initially and gradually working up to eight hours within a year under physical restrictions. He provided restrictions limiting the amount of time appellant could sit, walk, lift, kneel and climb and that she have breaks of 10 to 15 minutes every 90 minutes.

By letter dated July 9, 1998, the employing establishment offered appellant a limited-duty job as a computer specialist based on the restrictions outlined by Dr. Donald. The employing establishment noted that the job was within the restrictions noted by Dr. Donald and

indicated that the position was sedentary and that she would provide troubleshooting assistance for e-mail concerns which included “answering and making [tele]phones calls, coordinating problems and request with team members and the customers and the DCI help desk. Providing guidance and support in the area of the cc:Mail/Lotus Notes Contract for maintenance and support for the command.”

By letter dated July 16, 1998, 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 facsimile dated July 20, 1998, appellant stated that she could not accept or refuse the job offer at that time until her attending physician and attorney had reviewed the job offer. On August 12, 1998 appellant declined the offered position.

In letters dated August 11 and 18, 1998, appellant’s counsel rejected the job offer and submitted a July 24, 1998 report from Dr. DePaola in support. In the July 24, 1998 report, Dr. DePaola concurred with Dr. Donald that appellant was medically disabled from performing her usual employment working on a computer. Dr. DePaola opined that appellant would be unable to return to work until her neurological and rheumatologic tests had been completed.

By letter dated August 21, 1998, the Office found Dr. DePaola’s July 24, 1998 report was insufficient to justify refusal of the offered position. The Office informed appellant that she had 15 days to accept the position and that no further reason for refusal of the offer would be considered.

In a decision dated October 6, 1998, the Office terminated appellant’s compensation effective October 7, 1998 on the grounds that she refused an offer of suitable work.

Appellant’s counsel requested an oral hearing which was held on March 24, 1999.

By decision dated July 14, 1999, the Office hearing representative affirmed the termination of benefits. In his decision, the hearing representative found the position suitable and noted that the employing establishment indicated that it would accommodate appellant’s restrictions and that she would not be required to work outside of those restrictions.

The Board has duly reviewed the case record and concludes that the Office did not meet its burden of proof to terminate appellant’s compensation benefits 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’s compensation under 5 U.S.C. § 8106(c) of the Act

¹ 5 U.S.C. §§ 8101-8193.

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

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

The initial question in this case is whether the Office properly determined that the position offered appellant was suitable. In this regard, the Office reviewed the employing establishment’s offer to appellant of a computer specialist, reviewed the report by Dr. Donald, the impartial medical specialist, which indicated that appellant could not type or work on a computer and provided restrictions on walking, lifting, sitting and standing. The employing establishment did not provide a copy of the position for review by either appellant’s treating physician or Dr. Donald. While the position description states that the position would comply with the restrictions set forth by Dr. Donald, it is unclear from the list of job duties that appellant would be restricted from work on the computer, particularly as the position is listed as a computer specialist and the duties appear to require work on the computer.

The Board finds that the Office did not meet its burden of proof to terminate appellant’s compensation benefits pursuant to 5 U.S.C. § 8106. A review of the medical evidence does not support that the offered position was within appellant’s physical limitations. Although Dr. Donald advised in his report that appellant was capable of working four hours per day initially with restrictions and no working on the computer, the employing establishment selected a position with duties comprised of performing work on the computer. Once appellant raised the issue of whether the position was within the restrictions set forth by Dr. Donald, including no computer or typing work, thereby conflicting with the restrictions imposed by Dr. Donald, the Office did not obtain any medical evidence indicating that the position involved alternate tasks which would prevent appellant from engaging in activities contrary to Dr. Donald’s restrictions. As it is the Office’s burden of proof to establish that appellant refused a suitable position, the Office did not meet its burden of proof in this case.⁶

Because the Office failed to make a valid offer of employment,⁷ The Board finds that the penalty provisions of section 8106(c)(2) was not properly invoked. The record, therefore, establishes that the Office did not meet its burden of proof in terminating wage-loss compensation under 5 U.S.C. § 8106(c). For these reasons, the Board finds that the Office improperly invoked the penalty provision of 5 U.S.C. § 8106(c).

³ 5 U.S.C. § 8106(c)(2).

⁴ *Vivian J. Walker*, 51 ECAB ____ (Docket No. 98-799, issued April 4, 2000); *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).

⁶ *Barbara R. Bryant*, 47 ECAB 715 (1996).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, 2.814.4(c) (July 1997).

The decision of the Office of Workers' Compensation Programs dated July 14, 1999 is hereby reversed.

Dated, Washington, DC
January 18, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member