

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HECTOR CRUZ and U.S. POSTAL SERVICE,
POST OFFICE, Brooklyn, NY

*Docket No. 99-1295; Submitted on the Record;
Issued March 22, 2001*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

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

The Office accepted that appellant sustained a lumbosacral sprain and deep vein thrombosis of the left leg as a result of his December 1, 1975 injury incurred by lifting a mail sack. The Office also accepted that appellant sustained a herniated disc from lifting heavy objects at work. The Office paid appropriate compensation for disability until appellant's return to work on March 18, 1986, but denied appellant's claim for a recurrence of disability from September 6, 1986 until appellant again returned to work on March 11, 1987.¹ The Office continued to pay appellant for intermittent absences from work and began payment of compensation for temporary total disability in November 1988.

On June 10, 1996 the employing establishment offered appellant a limited-duty position as a lobby monitor with the ability to walk at his comfort and limitations of no lifting over 10 pounds, and no repetitive bending, twisting or squatting. The duties were sitting or standing in a post office lobby assisting customers with questions on mail services, retrieving accountable mail for customers to expedite lobby lines, and directing customers to the appropriate window service areas. On June 14, 1996 appellant declined this offer, and submitted a report dated June 13, 1996 from his attending physician, Dr. Cesar N. Abiera, Jr., a Board-certified family practitioner, stating that appellant was "unable to work because of his medical condition."

By letter dated May 15, 1997, the Office advised appellant that it had determined that the position of lobby monitor was suitable, in that Dr. Michael J. Smigielski, a Board-certified orthopedic surgeon to whom the Office referred him for a second opinion evaluation, concluded that he was able to perform this position. The Office advised appellant that he had 30 days to

¹ The Office's decisions denying appellant's claim for a recurrence of disability from September 6, 1986 to March 11, 1987 were affirmed by the Board in a decision dated August 23, 1988.

accept the position or provide an explanation for refusing it, and also advised appellant that any claimant who refuses an offer of suitable employment is not entitled to compensation for wage loss. By letter dated June 2, 1997, appellant contended that he could not perform the offered position. After ascertaining that the offered position was still available, the Office, by letter dated July 16, 1997, advised appellant that his reasons for refusing the offer were unacceptable, and that he had 15 days to accept the offer or have his compensation terminated. By letter dated July 28, 1997, appellant asked why he could not be offered a position in Florida, where he had lived since 1990, rather than the one offered in Brooklyn, New York, where he resided at the time of the employment injury.

By decision dated September 3, 1997, the Office terminated appellant's compensation on the basis that he refused an offer of suitable employment. The Office found that the weight of the medical evidence established that appellant could perform the offered position, and that the fact that warmer weather was recommended was not a sufficient basis for refusing the offered position. Appellant requested a hearing before an Office hearing representative, which was held on June 2, 1998. By decision dated September 28, 1998, an Office hearing representative found that the Office properly terminated appellant's compensation for refusing an offer of suitable employment. Appellant requested reconsideration and submitted a report from a psychiatrist stating that he psychiatrically could not perform any gainful government employment. By decision dated January 26, 1999, the Office found that the additional evidence was irrelevant and not sufficient to warrant review of its prior decisions.

Under section 8106(c)(2) of the Federal Employees' Compensation Act, 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.² To justify termination of compensation, the Office must establish that the work offered was suitable.³

The Board finds that the Office properly terminated appellant's compensation for refusing suitable work.

At the time of the Office's September 3, 1997 decision terminating appellant's compensation for refusing suitable work, the weight of the medical evidence established that he was capable of performing the position of lobby monitor offered by the employing establishment. In a February 26, 1997 report, Dr. Smigielski, the Office's referral physician, stated, in reference to the position offered by the employing establishment: "On the basis of the patient's back injury and postphlebitis syndrome which are related to his work injury, I see no contradictions to the patient working at this position. ... From an orthopedic surgeon's standpoint I see no contraindications to the above job description on the basis of this patient's examination, objective radiological findings, objective EMG [electromyogram] and electrical study findings and review of the chart." Although appellant's attending physician, Dr. Abiera, concluded that appellant could not perform the offered position, this doctor did not provide rationale for this conclusion.

² 5 U.S.C. § 8106(c)(2) provides in pertinent part: "A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered to, procured by, or secured for him; is not entitled to compensation."

³ *David P. Camacho*, 40 ECAB 267 (1988).

Subsequent to the Office's September 3, 1997 decision terminating his compensation for refusing suitable work, appellant submitted a medical report that was sufficient to create a conflict of medical opinion with the opinion of Dr. Smigielski. In a report dated September 9, 1997, Dr. Harvey R. Grable, a Board-certified orthopedic surgeon, who treated appellant from August 23, 1984 to March 28, 1990 concluded, on the basis of his examination of appellant on September 9, 1997, that appellant "cannot work in any capacity in the [employing establishment] whether this [is] light duty or part[-]time duty." Dr. Grable explained that he had last examined appellant on March 28, 1990 and that appellant had continuous low back pain radiating to his right lower extremity as well as periodic swelling of both legs. Dr. Grable concluded, "It continues to be my impression that the patient has lumbar radiculitis from a 'hard disc' ... as well as bilateral chronic knee synovitis and vascular insufficiency from his thrombophlebitis." This examination revealed limited lumbar motion and muscle spasm, as did the examination by Dr. Smigielski. The report of Dr. Grable is no less rationalized than that of Dr. Smigielski. Dr. Grable found, based on his examination of appellant, that he could not work, while Dr. Smigielski, based on his examination with similar findings, found that he can. This is a conflict of medical opinion. However, as the Office met its burden of proof on September 3, 1997, it is not required to reinstate appellant's compensation because he subsequently submitted new evidence which was of such a nature as to require further development of the evidence by the Office.⁴

The decision of the Office of Workers' Compensation Programs dated September 28, 1998 is affirmed with respect to the Office's termination of appellant's compensation for refusing suitable work. The case is remanded to the Office for resolution of the subsequently created conflict of medical opinion.⁵

Dated, Washington, DC
March 22, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁴ Cheryl E. Hedblum, 47 ECAB 215 (1995).

⁵ Given its disposition of this case, the Board has not reviewed the Office's January 26, 1999 nonmerit decision.