U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLES WOFFORD and DEPARTMENT OF THE INTERIOR, OFFICE OF SURFACE MINING, Knoxville, Tenn.

Docket No. 96-1823; Submitted on the Record;
Issued June 22, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

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

In the present case, appellant filed a claim on August 6, 1985 alleging that he sustained a back condition causally related to his federal employment. The Office accepted that appellant sustained aggravation of spinal stenosis and disc lesion L4-5, and he began receiving compensation for temporary total disability. By letter dated June 20, 1995, the employing establishment offered appellant the position of physical science technician. The Office, by letter dated August 23, 1995, advised appellant that it found that job to be suitable, and he was given 30 days to accept the position or provide reasons for refusing the job. In a letter dated September 26, 1995, the Office stated that the reasons offered were unacceptable and he had 15 days to accept the position or his compensation would be terminated pursuant to 5 U.S.C. § 8106(c).

In a decision dated October 16, 1995, the Office terminated appellant's compensation on the grounds that he had refused an offer of suitable work. An Office hearing representative affirmed the termination by decision dated May 2, 1996.

The Board has reviewed the record and finds that the Office did not meet its burden of proof in terminating compensation under 5 U.S.C. § 8106(c).

Section 8106(c) 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." It is the Office's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.[1] To justify such a termination, the Office

[1] *Henry P. Gilmore*, 46 ECAB 709 (1995).

must show that the work offered was suitable.[2] An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.[3]

The initial question presented is whether the Office properly determined that the offered position was medically suitable. In this case, the medical evidence on which the Office relies is a second opinion physician, Dr. James B. Talmage, a specialist in occupational medicine, who provided a narrative report and a work capacity evaluation (Form OWCP-5c) dated April 21, 1994. By the time of the suitability decision in this case, the report of Dr. Talmage was well over one year old. This is not considered to be current medical evidence as to appellant's work restrictions.[4] The Board also notes that the employing establishment's description of the offered position stated that "85 percent of the duties and responsibilities of the position description is sedentary and requires no twisting as stated in Dr. Talmage's work restrictions." It is not entirely clear whether the remaining job duties would involve twisting. The Office did not send the job description to a physician for an opinion as to whether appellant could perform the stated duties.[5]

The Board further notes that appellant submitted to the hearing representative an October 12, 1995 report from Dr. Gilbert L. Hyde, an orthopedic surgeon, who provided work restrictions and indicated that appellant could not work eight hours per day. Therefore the most current medical evidence of record does not establish that the offered job was within appellant's work restrictions.

It is, as noted above, the Office's burden to establish that the offered position was medically suitable. The Board finds that the Office has not met its burden in this case.

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

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

[4] *See, e.g., Keith Hanselman*, 42 ECAB 680 (1991), where the Office, in a wage-earning capacity determination, was found to have improperly relied on a work restriction evaluation that was over a year old.

[5] *See Herbert R. Oldham,* 35 ECAB 339 (1983), where the Board found that the Office had failed to show the offered job was suitable, noting that the employing establishment failed to adequately describe the physical requirements of the position and the Office failed to secure an opinion from a physician as to whether claimant could perform the position.

The decision of the Office of Workers' Compensation Programs dated May 2, 1996 is reversed.

Dated, Washington, D.C.
June 22, 1998

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member