U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILTON T. BRYANT and DEPARTMENT OF THE ARMY, CORPS OF ENGINEERS, Mobile, Ala.

Docket No. 96-871; Submitted on the Record;
Issued May 11, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's disability compensation effective March 8, 1994 on the grounds that he refused an offer of suitable work; and (2) whether the Office properly determined that appellant received a $4,692.20 overpayment of compensation.

The Board has duly reviewed the case record in the present appeal and finds that the Office improperly terminated appellant's disability compensation effective March 8, 1994 on the grounds that he refused an offer of suitable work.

Section 8106(c)(2) of the Federal Employees' Compensation Act 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."[1] However, to justify such termination, the Office 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]

In the present case, the Office accepted that appellant sustained a right knee strain and a partial rupture of the quadriceps tendon of his right knee; the Office paid compensation for periods of disability.[4] On October 19, 1993 the employing establishment offered appellant a light-duty position, the position involved sedentary clerical duties, contained restrictions on lifting, bending and stooping, and allowed appellant to elevate his leg, sit or walk as desired. On November 3, 1993 appellant refused the employing establishment's job offer. By letter dated November 24, 1993, the Office advised appellant that the light-duty position offered by the

[1] 5 U.S.C. § 8106(c)(2).

[2] *David P. Camacho,* 40 ECAB 267, 275 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341, 345 (1981).

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

[4] Appellant had multiple surgeries performed on his right knee.

employing establishment was suitable and invited him to provide any reasons for refusing the position. Appellant explained that his right knee condition prevented him from performing the duties of the position and driving the 36 miles each way to and from work. By decision dated March 8, 1994, the Office terminated appellant's disability compensation effective March 8, 1994 on the grounds that he refused an offer of suitable work[5] and, by decisions dated August 26, 1994 and October 19, 1995, the Office denied modification of its March 8, 1994 decision.[6]

The Office based its determination that appellant was physically capable of performing the light-duty position offered by the employing establishment on the opinion of Dr. Bony F. Barrineau, an attending Board-certified orthopedic surgeon. Although Dr. Barrineau indicated that appellant could perform the actual duties of the light-duty position, a review of Dr. Barrineau's reports from late 1993 shows that he was uncertain whether appellant was physically capable of driving to and from work. In a note dated September 29, 1993, Dr. Barrineau stated, "[appellant] says he cannot drive the 36 miles from his home to the [work site]; says his knee hurts too bad to drive that distance. I am uncertain as what to do at this point. Certainly, according to the limitations [the employing establishment outlined, he could do them." In another note dated September 29, 1993, Dr. Barrineau noted, "[appellant] says it hurts him too bad to drive, and he is not able to work. The only thing I can think of that may get him back to work, where he can drive those 36 miles to work, is a work hardening program." In a report dated October 19, 1993, Dr. Barrineau indicated:

> "I have told [appellant] that he could go back to work with restrictions as outlined by his employer, and he says he cannot ride in the car for 36 miles to do this; says that he cannot sit still in the car for 36 miles, the knee hurts too bad. As far as restrictions, he cannot do any squatting, climbing, lifting or bending; but he can do sedentary type work."

The opinion of another physician of record casts further doubt regarding appellant's ability to drive to and from work at the time he was offered the light-duty position by the employing establishment. In a report dated November 2, 1993, Dr. Samuel R. Goldstein, an attending Board-certified orthopedic surgeon, described appellant's right knee condition and stated:

> "In regards to his return to work, there are several ways that this can be resolved, first he could undergo a physical capacities evaluation to see if indeed he had the strength or endurance to drive for 35 miles to go to work at a sedentary type occupation. Without a physical capacities evaluation, I am in no way capable of judging his abilities to perform these duties."

As previously noted, it is the Office's responsibility to show that a given position is suitable, but the Office has not shown that appellant was physically capable of driving to and from work at the time the light-duty position was offered to him by the employing

[5] The Office indicated that appellant was still entitled to compensation for medical treatment.

[6] In an August 22, 1994 decision, the Office determined that appellant would be placed back on the total disability rolls effective June 20, 1994, but the Office vacated this decision through its August 26, 1994 decision.

establishment.[7] The Board notes that, therefore, the Office has not established that the light-duty position offered by the employing establishment was suitable. For these reasons, the Office improperly terminated appellant's compensation effective March 8, 1994 on the grounds that he refused an offer of suitable work.

The Board further finds that the Office improperly determined that appellant received a $4,692.20 overpayment of compensation.

By decision dated January 26, 1995, the Office determined that appellant received a $4,692.20 overpayment when he received a $4,692.20 disability compensation check covering the period June 20 to August 26, 1994. The Office indicated that appellant was not entitled to this money because his disability compensation had been terminated effective March 8, 1994 due to his refusal of an offer of suitable work. Given the Board's finding that the Office improperly determined appellant refused an offer of suitable work, the Office has no basis on which to find that appellant is not entitled to receive the $4,692.20 disability compensation check covering the period June 20 to August 26, 1994.[8] For this reason, the Office improperly determined that appellant received a $4,692.20 overpayment.

The decisions of the Office of Workers' Compensation Programs dated October 19 and January 26, 1995 are reversed.

Dated, Washington, D.C.
May 11, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member

[7] The Federal Procedure Manual provides that the refusal of a position may be justified when the medical evidence shows the claimant is unable to travel to the job because of residuals of the employment injury. Chapter 2.814.5(a)(5) (July 1996).

[8] The Office had determined that the medical evidence showed appellant had employment-related total disability during this period.