U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN J. BOYLE and DEPARTMENT OF THE ARMY, TOBYHANNA ARMY DEPOT, Tobyhanna, Pa.

Docket No. 96-1377; Oral Argument Held June 2, 1998; Issued September 4, 1998

Appearances: *Paul Victor Jorgensen, Esq.*, for appellant; *Catherine P. Carter, Esq.*, for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS, BRADLEY T. KNOTT

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

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 he refused an offer of suitable work.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits. This burden of proof is applicable if the Office terminates compensation under 5 U.S.C. § 8106(c) for refusal to accept suitable work. The Office did not meet its burden in the present case.

Under section 8106(c)(2) of the Federal Employees' Compensation Act,[1] the Office may terminate the compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[2] Section 10.124(c) of Title 20 of the Code of Federal Regulations[3] provides that, "[a]n 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

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[1] 5 U.S.C. § 8106(c)(2).

[2] *Camillo R. De Arcangelis*, 42 ECAB 941 (1991).

[3] 20 C.F.R. § 10.124(c).

with the opportunity to make such showing before a determination is made with respect to termination of entitlement to compensation."[4] To justify termination, the Office must show that the work offered was suitable[5] and must inform appellant of the consequences of refusal to accept such employment.[6]

Initially, the Office must review the written job offer and preliminarily assess whether the offered job is suitable. In this regard, the Office reviewed the employing establishment's October 14, 1994 offer to appellant of permanent reassignment to the light-duty position of electronics mechanic and found it consistent with the physical limitations imposed by Dr. Michael Raklewicz, the independent medical examiner, who stated in a June 30, 1994, report that appellant could not do heavy work but could do light work, and "would require only some work hardening to get him back into condition to go back to work."

On November 10, 1994 the Office advised appellant that it had found the light-duty position of electronics mechanic to be suitable to his work capabilities. Appellant was further advised that he had 30 days to either accept the position or provide an explanation for refusing it. Additionally, the Office advised that, at the expiration of the 30 days, a final decision would be made and that if appellant did not accept the position, the Office would further determine whether his reasons for refusing the position were justified. Appellant was advised that if he failed to accept the offered position and his reasons for refusing were not justified, his compensation would be terminated.

Appellant neither responded to the Office's November 11, 1994 letter nor reported for duty.

In a decision dated December 12, 1994, the Office terminated compensation benefits finding that appellant had refused to accept suitable employment.

On January 3, 1995 appellant requested reconsideration of the Office's December 12, 1994 decision and submitted additional evidence in support of his request.

By letter dated February 15, 1995, the Office forwarded the additional medical evidence to Dr. Raklewicz for his review. In a supplemental report dated June 12, 1995, Dr. Raklewicz stated that he felt appellant could perform the position of electronics mechanic, which had been described to him as sedentary in nature, capable of being performed with one hand and being desk work, as appellant had motor function in both of his hands to allow this.

In a decision dated July 28, 1995, the Office found that the evidence submitted in support of appellant's request for reconsideration was insufficient to warrant modification of the prior decision.

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[4] *Camillo R. DeArcangelis, supra* note 2; *see* 20 C.F.R. § 10.124(e).

[5] *See Carl W. Putzier*, 37 ECAB 691 (1986); *Herbert R. Oldham*, 35 ECAB 339 (1983).

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

On August 18, 1995 appellant requested reconsideration of the Office's prior decision and submitted additional medical evidence in support of his request. While his request was pending before the Office, however, appellant filed an application for review with the Board, thereby negating the Office's jurisdiction over his claim.[7]

The Board finds that the Office did not properly determine that the position offered to appellant was suitable, and therefore did not meet its burden of proof to terminate appellant's compensation benefits pursuant to 5 U.S.C. § 8106. While Dr. Raklewicz, the independent medical examiner, did state in his June 30, 1994 report that appellant was capable of performing light work, he qualified his opinion by adding that appellant would require some work hardening to get him back into condition to go back to work. As appellant was not given the opportunity to participate in a work hardening program, in accordance with the independent medical examiner's recommendations, prior to being directed to report to work, the Office did not meet its burden of proof to establish that appellant refused a suitable position.

The decision of the Office of Workers' Compensation Programs dated July 28, 1995 is hereby reversed.[8]

Dated, Washington, D.C.
September 4, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

Bradley T. Knott
Alternate Member

[7] The Board notes that the record contains new medical evidence submitted with appellant's requests for reconsideration which was not considered by the Office in its July 25, 1995 decision. As this evidence has not been previously considered by the Office, the Board is precluded from reviewing this evidence in the present appeal. S*ee* 20 C.F.R. § 501.2(c).

[8] The Board notes that on May 12, 1998 the Office submitted a motion to remand to the Board, in which it conceded that several procedural errors had occurred and therefore requested that the Board find the case not in posture for a decision and remand this case for a hearing to be scheduled and for appellant to be given an opportunity to submit additional relevant evidence. In light of the Board's decision in this case, the Office's May 12, 1998 motion is moot.