

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRYAN L. YOUNG and DEPARTMENT OF AGRICULTURE,
ROGUE RIVER NATIONAL FOREST, Medford, OR

*Docket No. 99-1372; Submitted on the Record;
Issued July 19, 2000*

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 compensation on the grounds that he refused an offer of suitable work; and (2) whether the Office properly determined that appellant's request for reconsideration was insufficient to warrant merit review of the claim.

In the present case, the Office accepted that appellant, an automotive mechanic, sustained tenosynovitis of the right long finger and left ring finger. In a letter dated January 31, 1997, the employing establishment offered appellant a position as a safety technician. By letter dated February 14, 1997, the Office advised appellant that it considered the job suitable, that he had 30 days to accept the position or provide reasons for refusing and that a claimant who refuses an offer of suitable work is not entitled to further compensation under 5 U.S.C. § 8106(c)(2). Appellant responded by letter dated February 19, 1997 that he had declined the position because he was physically unable to perform the assigned duties. In a letter dated March 4, 1997, the Office stated that it considered the reasons offered as unacceptable and appellant had 15 days to accept the position before a final decision was issued.

In a decision dated March 21, 1997, the Office terminated appellant's compensation on the grounds that he had refused suitable work. By decision dated August 14, 1998 and Office hearing representative affirmed the termination. In a decision dated February 8, 1999, the Office determined that appellant's request for reconsideration was insufficient to warrant merit review of the claim.

The Board has reviewed the record and finds that the Office properly terminated appellant's compensation in this case.

5 U.S.C. § 8106(c) provides in pertinent part, "A partially disabled employee who ... 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 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 this case, the probative evidence of record indicates that the offered position was vocationally and medically suitable. The record contains a report dated November 20, 1996, from appellant's attending physician, Dr. Kenneth Pons, a surgeon, outlining appellant's work restrictions. The report indicates that appellant could work eight hours per day with limitations on the duration of certain postural and repetitive activities. The job description for the safety technician position indicated that its physical demands were limited to writing notes, keyboarding, occasional travel, occasional climbing steps, kneeling and bending, while conducting on site evaluations and getting in and out of protective clothing. Appellant asserted that he could not physically perform the position, but this is a medical issue that must be resolved by the medical evidence. Dr. Pons indicated in the November 20, 1996 report that appellant could work around moving machinery and occasionally drive automotive equipment and the report indicates that appellant could climb, kneel and bend occasionally. There is no indication that the offered position was outside any of the specific work restrictions specified by Dr. Pons. Accordingly, the Board finds that the offered position was medically suitable based on the evidence of record.

With respect to the procedural requirements of termination under section 8106(c), the Board has held that the Office must inform appellant of the consequences of refusal to accept suitable work and allow appellant an opportunity to provide reasons for refusing the offered position.⁴ If appellant presents reasons for refusing the offered position, the Office must inform the employee if it finds the reasons inadequate to justify the refusal of the offered position and afford appellant a final opportunity to accept the position.⁵

In this case, the Office followed its procedures in advising appellant of the consequences of refusing suitable work, then offering appellant an additional opportunity to accept the position after finding his reasons for refusing unacceptable. Accordingly, the Board finds the procedural requirements of section 8106(c) were met in this case.

Following the March 21, 1997 decision, appellant submitted additional evidence. In a report dated March 30, 1998, Dr. Pons stated that he had reviewed the safety technician position and he agreed with appellant "that he will not be able to perform this duty primarily because it would require more use of his hands than I think he can tolerate." It appears that Dr. Pons is referring to appellant's current ability to perform the position, whereas the issue is whether

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

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

⁵ *Id.*

appellant could perform the position at the time of the March 21, 1997 decision. Dr. Pons does not provide any additional evidence with regard to this issue.

The probative evidence of record indicates that the position of safety technician was suitable work that appellant refused without acceptable reason. Accordingly, the Board finds that the Office properly terminated compensation in this case.

The Board further finds that the Office properly denied appellant's request for reconsideration.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,⁶ the Office's regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law, or (2) advancing relevant legal argument not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office.⁷ Section 10.608(b) states that any application for review that does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.⁸

In this case, appellant submitted handwritten journal entries from October to December 1996 regarding his condition. These notes do not constitute medical evidence and are not relevant to the suitable work determination issues. Appellant has not met the requirements of section 10.606(b)(2) and the Office properly denied reopening the case for merit review.

⁶ 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application").

⁷ 20 C.F.R. § 10.606(b)(2).

⁸ 20 C.F.R. § 10.608(b); *see also* Norman W. Hanson, 45 ECAB 430 (1994).

The decisions of the Office of Workers' Compensation Programs dated February 8, 1999 and August 14, 1998 are affirmed.

Dated, Washington, D.C.
July 19, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member