

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN SCHULTZ and DEPARTMENT OF THE AIR FORCE,
AIR COMBAT COMMAND, TINKER AIR FORCE BASE, OK

*Docket No. 02-547; Submitted on the Record;
Issued July 19, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation properly terminated appellant's compensation based on his refusal of suitable work.

On November 12, 1997 appellant, then a 39-year-old computer program analyst filed a notice of traumatic injury and claim for compensation (Form CA-1) alleging that he injured his back when he reached over a computer to check the cables. He had a history of work-related and nonwork-related back problems since 1995. The work-related case was closed in March 1997 while he continued to receive benefits from the nonwork-related injury sustained while in the military. Appellant was off work from October 14 through November 7, 1997 and then stopped again on February 24, 1999 and has not returned.

In a July 8, 1999 letter, the Office accepted the claim for a lumbar strain and later expanded the claim to include a herniated disc at L4-5. Authorized surgery was performed on February 10, 2000.

On a June 7, 2000 Dr. Richard Fellrath, an orthopedist and appellant's treating physician, referred appellant to Dr. Brenton Tipton for supervision of a pain management and work hardening program. He added that appellant "continues to complain of bilateral lower extremity radicular pain and parathesias. However, his reflex and motor examination is normal. I am at a loss to explain this."

An August 2, 2000 discharge note from the pain management program states:

"[Appellant] has been involved in a variety of activities ... with program activities and guarded motivation to progress. His function remained primarily self limited by reported pain and secondarily limited by poor trunk stability. [Appellant] has made limited improvement regarding his musculoskeletal profile. Although his left lower extremity strength is limited due to reported low back pain onset, his motor control is intact and his muscle tone does not reveal atrophy. [Appellant]

demonstrated significant and at times, apparently exaggerated physical deviations, however[,] was able to maintain good control with activities despite these deviations....

“[Appellant] actively participated in individual and group cognitive -- behavioral psychological services.... He reports a limited ability to decrease pain and tension with biofeedback strategies. This is inconsistent with changes measured by biofeedback equipment. A significant increase in [appellant’s] finger temperature (87.5 to 94.5 degrees) has a high correlation to decreased tension and pain level. There have been limited improvements in mood with decreases in anxiety and levels of depression. These levels are not severe and based on current psychological functioning, he does not require referral for further psychological testing.”

An August 18, 2000 treatment note states that appellant completed a functional capacity evaluation that showed he can perform in the sedentary work classification. It also noted that appellant “chose not to participate in vocational testing, terminated his work hardening program early and his compliance with vocational activity is less than what is needed.”

Dr. Tipton opined that appellant could perform at the sedentary level for 8 hours with restrictions including frequent breaks and no lifting of more than 26 pounds. Dr. Fallrath agreed with this assessment and restrictions.

In an October 26, 2000 letter, amended in a November 14, 2000 letter, the Office offered appellant his computer program analyst’s position with accommodations consistent with Dr. Tipton’s restrictions. Appellant was also notified of his rights and penalties for refusing a suitable offer of work and given 30 days to respond.

Appellant accepted the position but stopped work on the first day, complaining of pain. He did not return.

In treatment notes dated November 11, 2000, Dr. Michael Wright wrote: “[Appellant] returns today for a reevaluation. His most recent (MRI) [magnetic resonance imaging scan] was in May 2000. [Appellant] reports significant increases in his low back and leg complaints since that time.” Dr. Wright further indicates that he is referring appellant for an MRI scan of his lumbar spine.

In a letter date stamped by the Office on December 11, 2000, appellant indicated his dissatisfaction with treatment from Dr. Tipton and requested a change of treating physician to Dr. Wright.

In a December 14, 2000 letter, the Office denied appellant’s request noting that Dr. Tipton was a referral from appellant’s treating physician, Dr. Fallrath, that Dr. Tipton was a specialist and providing appropriate treatment. The Office further noted that appellant could submit any medical reports he wished but appellant would have to pay the costs.

In another December 14, 2000 letter, the Office notified appellant that it found the job offer suitable and he had 15 days to either return to work or provide justification for why he could not.

In a January 10, 2001 letter, appellant stated that he had been referred to a new doctor by his last workers' compensation doctor and was to be off work indefinitely while he was seeking treatment for his physical and mental health problems. Included with the letter was "[c]ertificate to [r]eturn to [s]chool/[w]ork" form. The form contained the initials "DSS" and indicated that appellant was to remain off work "indef[inably]." (sic) Next to indefinably was "2 [weeks]" that was scratched out.

In a January 16, 2001 decision, the Office terminated appellant's compensation for refusing an offer of suitable work. The Office relied on the medical reports of appellant's treating physicians Drs. Tipton and Fallrath who agreed that appellant could perform the job offered.

In a January 29, 2001 letter, appellant requested a hearing. He also submitted a January 29, 2001 letter from Dr. R. Scott Stewart, who wrote:

I am writing at the request of [appellant]. I am sure you are aware [he] has chronic back pain from an injury that he sustained at work and has a pending [w]orkman's [c]ompensation claim. [Appellant's] pain and current symptoms, as well as his depression, preclude him from functioning in his current job capacity at the present time.... His chronic pain and the stress of the coordination of his care have resulted in a reactive depression [for][which [he] [is] being treated. It is my professional medical opinion that [appellant] should not return to work until his functional status is improved.

In an October 4, 2001 decision, the Office affirmed its decision to terminate appellant's compensation based on his refusal to accept an offer of suitable work. The hearing representative found that appellant's own physician had indicated that appellant could work eight hours in a sedentary position and the job offer was consistent with appellant's medical restrictions. She further found that appellant had accepted the position but failed to report to work and that appellant had been provided with the proper notices and penalties for refusing a suitable work offer. And that his reasons and medical reports from Drs. Wright and Stewart were insufficient. She found Drs. Wright's and Stewart's reports fail to provide an opinion regarding appellant's ability to do the offered job.

The Board finds the Office properly terminated appellant's compensation for refusing 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

¹ 5 U.S.C. § 8106(c)(2).

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

Appellant's own physicians Drs. Tipton and Fallrath indicated that appellant could perform sedentary work eight hours a day with restrictions. The employing establishment modified his position, as a computer analyst, to accommodate his restrictions. The medical evidence of record does support a finding that the offered position was suitable, given appellant's work restrictions. Appellant accepted the offer then refused to work after less than one day on the job. The medical evidence in support of his refusal was insufficient. Dr. Wright indicated that appellant was still experiencing pain and recommended him for an MRI scan. Dr. Stewart also indicated that appellant was in pain and added that he suffered from depression. Neither report addresses the critical issue which is whether appellant could perform the modified light-duty job that was offered to him. Neither report indicates that the physicians were aware of appellant's medical history, the medical restrictions provided by his previous doctors or the details of the offered job. Appellant, therefore, did not submit the necessary evidence to establish that his refusal of the position was medically justified.

Furthermore, the Board finds that the Office followed the correct procedural requirements in making a suitable work termination.

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).

The Office of Workers' Compensation Programs' decision dated October 4, 2001 is hereby affirmed.

Dated, Washington, DC
July 19, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member