

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LES RICH and DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, New York, NY

*Docket No. 01-1995; Oral Argument Held November 21, 2002;
Issued January 2, 2003*

Appearances: *Jeffrey P. Zeelander, Esq.*, for appellant; *Julia Mankata-Tamakloe, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation, effective July 29, 1999, on the grounds that he refused an offer of suitable work.

This case is before the Board for the second time. By decision dated September 1, 2000, the Board affirmed the Office's July 28, 1999 decision terminating appellant's compensation based upon his failure to accept suitable employment.¹

On August 2, 2001 appellant requested reconsideration. He argued that he had accepted the offered position and the employing establishment agreed to delay the start date until September 20, 1999. In a decision dated August 11, 2001, the Office denied modification of its decision dated July 28, 1999.

The Board finds that the Office properly terminated appellant's compensation for refusing an offer of suitable work.

The Board's September 1, 2000 decision details the factual history of the instant claim. A brief summary of the relevant facts is in order.

On July 2, 1984 appellant sustained an employment-related injury to his back, which the Office accepted for a herniated disc at L4-5. On October 6, 1985 he sustained a consequential injury to his right knee. The Office accepted appellant's 1985 injury for patella tendon laxity and authorized surgery in 1985, 1987 and 1992.

¹ Docket No. 00-1139 (September 1, 2000). The Board also affirmed the Office's November 8, 1999 decision denying appellant's request for an oral hearing. The September 1, 2000 decision is incorporated herein by reference.

On May 11, 1999 the employing establishment offered appellant a limited-duty position as a modified information research assistant available as of May 26, 1999. The Office informed appellant on May 14, 1999 that it found the offered position to be suitable for his work capabilities and that it was currently available. On June 14, 1999 appellant returned the May 11, 1999 job offer to the employing establishment with the following notation: "Please send me a calculation. I will sign under acceptance or declination after I get the calculation."

By letter dated June 17, 1999, the Office advised appellant that his request for "a 'calculation' prior to accepting or declining the job offer" was insufficient to change the determination previously made regarding the suitability of the offered position. The Office reminded appellant of the requirements under 5 U.S.C. § 8106(c) and stated "If you refuse this employment or fail to report to work when scheduled, your compensation benefits will be terminated within 15 days." He responded on June 28, 1999, advising that he was awaiting a response from the employing establishment concerning requested calculations of the amount of salary and benefits he would receive upon acceptance of the offered position. Appellant also requested that the position start date be postponed until September 20, 1999.

By decision dated July 28, 1999, the Office terminated appellant's compensation effective July 29, 1999 for refusing to work in a suitable job that had been secured for him. The Board affirmed the Office's July 28, 1999 decision.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.² Under section 8106(c)(2) of the Federal Employees' Compensation Act,³ the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.⁴ To justify termination of compensation, the Office must show that the work offered was suitable⁵ and must inform appellant of the consequences of refusal to accept such employment.⁶ An employee who refuses or neglects to work after suitable work has been offered or secured for him has the burden of showing that such refusal or failure to work was reasonable or justified.⁷ Additionally, the employee shall be provided the opportunity to make such a showing before entitlement to compensation is terminated.⁸ Office procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.⁹ The determination of whether appellant is capable of

² *Frank J. Mela, Jr.*, 41 ECAB 115 (1989); *Mary E. Jones*, 40 ECAB 1125 (1989).

³ 5 U.S.C. § 8106(c)(2).

⁴ *Patrick A. Santucci*, 40 ECAB 151 (1988); *Donald M. Parker*, 39 ECAB 289 (1987).

⁵ *Arthur C. Reck*, 47 ECAB 339 (1996).

⁶ *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1972).

⁷ 20 C.F.R. § 10.124(c).

⁸ *John E. Lemker*, 45 ECAB 258, 263 (1993).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5 (July 1997); *see C.W. Hopkins*, 47 ECAB 725, 727 n.5 (1996).

performing the offered position is a medical question that must be resolved by medical evidence.¹⁰

The Board previously determined that the offered position of modified information research assistant was medically suitable. The position was sedentary in nature and consistent with the physical restrictions imposed by appellant's treating physician, Dr. Cary Skolnick, a Board-certified orthopedic surgeon. Appellant did not submit any additional medical evidence on reconsideration relevant to the issue of medical suitability nor did he allege that the prior determination was in error. Accordingly, the Board finds that the offered position of modified information research assistant was medically suitable.¹¹

Regarding the issue of whether the Office afforded appellant his procedural rights under the Act, the Board previously concluded that the Office properly advised appellant of his rights. Specifically, the Board found that the Office's correspondence dated May 14 and June 17, 1999, properly advised appellant of the availability of suitable work and the consequences of his refusal to accept such work.

On appeal appellant contends that he verbally accepted the May 11, 1999 job offer prior to the expiration of the 15-day timeframe set forth in the Office's June 17, 1999 letter. He alleged that he accepted the job offer during a telephone conversation with Thomas Feeney, an employing establishment official.¹² During his conversation with Mr. Feeney appellant also reportedly requested that his start date be postponed until September 20, 1999. The exact date of this conversation is not apparent from the record.¹³

On February 2, 2000 the Office arranged a telephone conference with Mr. Feeney to ascertain what he discussed with appellant regarding the May 11, 1999 job offer. The February 2, 2000 memorandum of conference indicates that when appellant asked Mr. Feeney if the start date could be postponed until September 20, 1999, Mr. Feeney contacted the employing establishment's workers' compensation office for advice. Based on the advice he received, Mr. Feeney told appellant that while he did not have a problem with postponing the start date until September 20, 1999, appellant should contact the Department of Labor, as it was ultimately the Department's decision to make.

The conference memorandum does not indicate that appellant verbally accepted the job offer during his conversation with Mr. Feeney. Appellant's counsel argued that acceptance of

¹⁰ *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

¹¹ See *Michael I. Schaffer*, 46 ECAB 845 (1995) (finding the medical evidence sufficient to establish that appellant was physically capable of performing the duties of the offered modified position).

¹² Mr. Feeney is a staff assistant with the employing establishment's criminal investigation division. The May 11, 1999 job offer identified Mr. Feeney as the contact person if appellant had any questions regarding the offer.

¹³ At oral argument appellant's counsel referred to a memorandum allegedly prepared by Mr. Feeney, which purportedly indicated that the conversation occurred in early July 1999. The "Feeney" memorandum counsel alluded to is not part of the record on appeal. In an August 6, 1999 letter to the Office, appellant indicated that his conversation with Mr. Feeney preceded a June 28, 1999 letter to the Office requesting a postponement of the job start date.

the position was implicit in that appellant and Mr. Feeney would not have discussed a September 20, 1999 start date if appellant had not already accepted the position. This argument is not persuasive because appellant had expressed other preconditions to his acceptance, which had not been met prior to or during appellant's conversation with Mr. Feeney. Appellant stated that his June 28, 1999 letter to the Office was written in response to the advice he received from Mr. Feeney. This letter begins with the statement: "Before accepting the job offer ... I am currently awaiting a response from the [employing establishment], which will outline all pertinent salary calculations, benefits and information relevant to my acceptance." Appellant then added he would like to postpone the start date until September 20, 1999.¹⁴ Appellant's June 28, 1999 letter contradicts his allegation that he verbally accepted the job when he spoke by telephone with Mr. Feeney.

The record does not establish that appellant accepted the offered position prior to the expiration of the 15-day time period set forth in the Office's June 17, 1999 correspondence. The record establishes that Mr. Feeney did not alter the terms of the May 11, 1999 job offer by agreeing to a September 20, 1999 start date. While the employing establishment properly advised appellant that it was willing to accommodate his request for a later start date, the decision properly rested with the Office.

Appellant did not return to work within 15 days of the Office's June 17, 1999 notice and the Office terminated compensation effective July 29, 1999.¹⁵ He argued that the termination was improper because the Office's June 17, 1999 notice did not clearly indicate that he was required to report for duty within 15 days. According to appellant, the June 17, 1999 letter did not provide a start date, but merely advised that he had to accept the position within 15 days. There is no evidence that appellant timely accepted the May 11, 1999 job offer either verbally or in writing. Appellant's argument that he could accept the position within 15 days and later commence work at a more convenient date fails because it is premised on a timely acceptance, which has not been demonstrated.

The Office's June 17, 1999 notice provided in relevant part: "If you refuse this employment or fail to report to work when scheduled, your compensation benefits will be terminated within 15 days." Appellant is correct that a start date was not specifically set forth in the Office's June 17, 1999 notice. This information, however, had already been provided to appellant by the employing establishment on May 11, 1999. The job offer clearly indicated that the position was available effective May 26, 1999. Accordingly, appellant's scheduled return to work date was May 26, 1999, unless otherwise indicated. The Office's 30-day and 15-day notices issued May 14 and June 17, 1999, effectively extended appellant's start date beyond the initially scheduled date of May 26, 1999, as the job offer remained open for his acceptance.

¹⁴ Appellant requested that the position start date be postponed until September 20, 1999 because he had several doctors' appointments scheduled for July and August, as well as continued physical therapy three times per week. He also stated that he planned to observe the religious holidays in September and because "[he had] no leave available ... [he did] not wish to be on leave without pay" during the holiday season.

¹⁵ The Office verified that the position remained available as of July 27, 1999.

Appellant argued that because his date of return had not yet been scheduled, he did not “fail to report to work when scheduled.” He was scheduled to return to work no later than 15 days after the Office’s June 17, 1999 notice. As appellant did not report within that time period, the Office properly terminated compensation. If he did not believe he was expected to report to work prior to the expiration of the 15-day time period established on June 17, 1999, he presumably would not have requested postponement of the start date. Appellant’s contention that he was unaware he was expected to return to duty within 15 days is without merit.

In a letter dated June 27, 1999, the rehabilitation counselor retained by the Office advised the claims examiner that he had spoken with appellant regarding the June 17, 1999 letter and appellant understood that “he has 15 days to render a decision concerning his return to work.” The rehabilitation counselor further noted that appellant had been in contact with the employing establishment and appellant had “no objections towards returning to work provided that it is at (sic) [September 20, 1999].” Additionally, the Office’s rehabilitation counselor stated “I advised [appellant] that the [claims examiner’s] letter stipulates that he returns to work within the 15 days” otherwise the Office “will make plans to terminate compensation.”

The Board finds that any ambiguities purportedly raised by the Office’s June 17, 1999 notice were clearly addressed and resolved by an Office representative prior to the expiration of the 15-day time period. Appellant, however, did not heed the advice of the Office rehabilitation counselor, but instead wrote to the Office on June 28, 1999 essentially advising that he was not yet prepared to accept the offered position and return to work within the delineated 15-day time period. Once the Office advises a claimant that his reasons for not accepting an offered position are unacceptable and he is given an opportunity to accept the position or have compensation terminated, the claimant submits further reasons and supporting evidence at his own risk.¹⁶

The absence of a specified start date in the Office’s June 17, 1999 notice is not tantamount to a denial of appellant’s procedural rights. The clear mandate of *Maggie L. Moore* was that claimant’s receive notice of the intentions of the Office and be given a reasonable period of time to make the requisite decision to either accept or reject an offer of suitable employment.¹⁷ The Office’s June 17, 1999 notice advised appellant that his expressed desire for certain “calculations” prior to acceptance of the offer was insufficient to change the prior determination regarding the suitability of the offered position. The Office clearly advised appellant of the requirements and sanctions imposed under 5 U.S.C. § 8106(c). Lastly, the Office afforded appellant an additional 15-day opportunity to act so as to avoid termination of his compensation. A partially disabled employee who “refuses or neglects to work” after suitable work is offered, procured by or secured for him is not entitled to compensation.¹⁸ As appellant did not accept the position and return to work within 15 days of the June 17, 1999 notice, the Office properly terminated his compensation.

¹⁶ *Rosie E. Garner*, 48 ECAB 220, 225 (1996).

¹⁷ *Maggie L. Moore*, *supra* note 6.

¹⁸ 5 U.S.C. § 8106(c)(2).

The August 11, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
January 2, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member