

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HERMAN M. BATISTE and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Alexandria, VA

*Docket No. 00-427; Submitted on the Record;
Issued March 28, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective July 17, 1999 for refusing to perform suitable work.

On August 24, 1983 appellant, then a 34-year-old food service worker, filed a claim for an injury to his back sustained on August 15, 1983 by lifting a mop bucket. The Office accepted that appellant sustained a lumbosacral strain and that his partial laminectomy and disc decompression at L4-5 were a result of this injury. After a period of continuation of pay, the Office paid appellant compensation for temporary total disability until he returned to limited duty on December 13, 1993 as a housekeeping aid. By decision dated May 20, 1994, the Office terminated appellant's compensation on the basis that he had no loss of wage-earning capacity.

On August 2, 1995 appellant, who was still working as a limited-duty housekeeping aid, filed a claim for an injury to his back sustained that date by bending over to empty a trash can. He stopped work on August 9, 1995 and received continuation of pay from that date until September 19, 1995. Appellant returned to work on September 20, 1995. The Office subsequently authorized leave buy back for February 1 to 6, 1996 and for 17 hours during the period from April 3 to May 15, 1996. The Office accepted that the August 2, 1995 employment injury resulted in a lumbar sprain and a permanent aggravation of appellant's post laminectomy/fusion syndrome.

On April 5, 1996 appellant, on the recommendation of his attending physician, Dr. Vanda Davidson, reduced his work week from 40 to 30 hours. By decision dated December 26, 1996, the Office found that the position of housekeeping aid for 30 hours per week represented appellant's wage-earning capacity. The Office began payment of compensation for partial disability.

On December 22, 1998 appellant stopped work; on January 20, 1999 he filed a claim for a recurrence of disability beginning December 22, 1998. The Office accepted appellant's claim for a recurrence of disability and began payment of compensation for temporary total disability.

On May 28, 1999 the employing establishment offered appellant a position as a limited-duty housekeeping aid for three hours per day. By letter dated May 28, 1999, the Office advised appellant that it had found this offer was suitable; the Office allotted appellant 30 days to accept the offer or provide an explanation for refusing it. Appellant refused the offer, stating that his attending physician provided a May 28, 1999 note that he was not to return to work before another examination on June 17, 1999. By letter date June 28, 1999, the Office advised appellant that his reason for refusing the employing establishment's offer was unacceptable, and that he had 15 days to accept the offer. By decision dated July 13, 1999, the Office terminated appellant's compensation effective July 17, 1999 on the basis that he refused an offer of suitable employment. By letter dated August 3, 1999, appellant requested reconsideration and submitted additional medical evidence from Dr. Davidson. By decision dated September 23, 1999, the Office found that the additional evidence was not sufficient to warrant modification of its prior decisions.

Under section 8106(c)(2) of the Federal Employees' Compensation Act, 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.¹ To justify termination of compensation, the Office must establish that the work offered was suitable.²

The Board finds that the Office improperly terminated appellant's compensation for refusing suitable work.

In determining that the position offered by the employing establishment on May 28, 1999 was suitable, the Office relied on two reports from Dr. Davidson: an April 17, 1999 form report of appellant's work tolerance limitations and a May 3, 1999 narrative report. The employing establishment's description of the offered position states that the physical demands will not exceed the 20 minutes per hour of sitting, 10 minutes per hour of walking and 10 minutes per hour of standing. These limitations are consistent with Dr. Davidson's April 17, 1999 form report of appellant's work tolerance limitations. However, it is not clear how appellant could perform the one duty listed in the offer -- light damp dusting of water fountains and ice machines -- given that Dr. Davidson in his May 3, 1999 report limited appellant to no more than one hour of standing and walking each workday. Dr. Davidson stated in the May 3, 1999 report that appellant was "disabled from gainful employment."

Moreover, in response to the Office's notice that the position had been found to be suitable, appellant submitted a May 28, 1999 note from Dr. Davidson stating that appellant was not to return to work before he was reevaluated on June 17, 1999 and a June 17, 1999 report from Dr. Davidson stating: "His condition has definitely deteriorated in the low back area, and I do not think he is capable to return to gainful employment or will be in the future." As these reports, which were received before the Office's decision terminating appellant's compensation, from the same doctor on whom the Office relied to conclude that appellant could perform limited-duty contradict that doctor's earlier reports, the Office cannot rely on the earlier reports

¹ 5 U.S.C. § 8106(c)(2) provides in pertinent part: "A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered to, procured by or secured for him; is not entitled to compensation."

² *David P. Camacho*, 40 ECAB 267 (1988).

while disregarding the later ones. The later reports significantly decrease the probative value of the earlier reports, to the point that the medical evidence fails to establish that the offered position was suitable.³ In a July 28, 1999 report, submitted with appellant's request for reconsideration, Dr. Davidson stated that he had changed his mind since April about appellant's ability to work. In this report and in reports dated August 19 and July 2, 1999, Dr. Davidson explained why he believed appellant was not able to work. The Office has not established that the position offered was suitable, and it therefore improperly terminated appellant's compensation for refusing suitable work.

The decisions of the Office of Workers' Compensation Programs dated September 23 and July 13, 1999 are reversed.

Dated, Washington, DC
March 28, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member

³ *Patrick A. Santucci*, 40 ECAB 151 (1988); *Carol J. Bernard*, 37 ECAB 471 (1986); see *Darrell W. Garner*, 46 ECAB 318 (1994) (In a review of a nonmerit decision of the Office, the Board found that a later report from the same doctor on whom the Office relied in finding an offer of full-time employment to be suitable, stating that the employee could not perform the offered position full time "raises a substantial question of the correctness" of the Office's decision finding he refused suitable work.