

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BILLY H. BRYANT and DEPARTMENT OF THE ARMY,
Fort Polk, LA

*Docket No. 02-1014; Submitted on the Record;
Issued November 6, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective December 8, 1999, on the grounds that he refused an offer of suitable work; and (2) whether the Office properly refused to reopen appellant's claim for further review on the merits under 5 U.S.C. § 8128(a).

On October 24, 1988 appellant, a 42-year-old mobile equipment mechanic, injured his lower back while removing a spare tire from a truck. He filed a claim for benefits on October 25, 1988, which the Office accepted for a lumbar strain and a herniated disc at L4-5. Appellant returned to work for various periods, but sustained several recurrences and stopped working on June 21, 1990. The Office paid him compensation for temporary total disability for appropriate periods and placed him on the periodic rolls.

In a work restriction evaluation dated May 8, 1996, Dr. David H. Steiner, a Board-certified orthopedic surgeon and appellant's treating physician, opined that appellant could return to work on light duty for four hours per day. He indicated that appellant was restricted from lifting more than 20 pounds and should engage in intermittent sitting for no more than four hours per day, intermittent standing and walking for no more than two hours per day, and intermittent lifting and squatting for one hour per day. Dr. Steiner advised that appellant should avoid kneeling, climbing, bending and twisting entirely. Finally, he recommended that appellant could operate foot controls and operate motor vehicles; *i.e.*, drive a car, but only for short periods.

The Office referred appellant for a second opinion examination with Dr. David D. Teuscher, a Board-certified orthopedic surgeon, who, in a report dated April 27, 1997, outlined restrictions substantially similar to those recommended by Dr. Steiner and agreed that appellant was capable of working four hours per day. With regard to appellant's ability to drive a car, Dr. Teuscher limited him to driving for no longer than 30 minutes at a time. He also stated that repetitive entering and exiting a car could exacerbate his back condition.

In a report dated September 28, 1998, Dr. Steiner expressed his approval of Dr. Teuscher's work restriction evaluation and agreed that appellant could do sedentary work for four hours per day. He advised that the traveling distance to work was "a consideration" for appellant and stated that long rides would be inappropriate in light of the fact that he would have to drive to work twice a day.

The Office referred appellant to a vocational rehabilitation counselor, who was asked to locate a suitable job within the restrictions outlined by Drs. Steiner and Teuscher. In a letter dated March 31, 1999, the vocational rehabilitation counselor asked Dr. Steiner for his opinion regarding the position of emergency services dispatcher. Accompanying the letter was a copy of the job description.¹

By letter dated April 12, 1999, Dr. Steiner advised the vocational counselor that the job appeared satisfactory so long as it did not require appellant to drive or sit for extended periods. Dr. Steiner completed an updated work restriction evaluation on June 23, 1999 in which he explicitly restricted appellant from operating foot controls, engaging in repetitive movements or operating a car or motor vehicle for more than 30 minutes.

In a note dated August 6, 1999, the vocational counselor stated that Dr. Steiner had approved the 38-mile driving distance from appellant's home to the job site, despite the fact that he had previously indicated that appellant's daily driving commute should not exceed 30 miles. By letter dated August 31, 1999, the vocational counselor informed Dr. Steiner that she had advised the Office that the emergency dispatcher job was within appellant's work restrictions. She further informed Dr. Steiner that although she was aware of his 30-mile driving restriction, "[y]ou felt[,] however[,] that he should be able to make this drive from home to the job site and back home."

By letter October 19, 1999, the Office advised appellant that the emergency services dispatcher position was suitable and, pursuant to section 8106(c)(2), he had 30 days to either accept the job or provide a reasonable explanation for refusing the offer.

¹ The job description for the emergency services dispatcher required appellant to serve as the operator of the fire/emergency communication system and as the dispatcher of fire rescue equipment and emergency services at Fort Polk. This required appellant to: operate all fire department and emergency communications equipment including but, not limited to computer alarm systems, emergency work order telephones, emergency telephone systems; dispatch appropriate emergency repair crews and equipment; give responding crews needed information regarding the particular emergency; and operate intercommunications with local fire and similar emergency assistance elements. Appellant was also required to: operate equipment such as interior station intercommunications, public address systems and two-way tactical fire crash radio communications between fire alarm centers, control tower and operational elements such as hospital, military police and range control; operate a voice recorder interconnected to all central alarm center emergency voice communications; monitor, notify and interpret small program modules on the computer system that are a part of the fire department response and mission requirements; enter data into computer software when necessary to reflect changes or updates in the overall character of the installation database; maintain a daily log of organizational activities including information on personnel assignments, vehicle movements, vehicle mechanical status, response to fire incidents, emergencies, false alarms, alarms received, alarm transmission over automatic/manual and sprinkler systems, special exercise, names of visitors, injuries to personnel, etc.

By letter dated November 3, 1999, appellant's union representative advised the Office that appellant had discussed the job offer with Dr. Steiner, who indicated that the driving distance, entailed by the emergency services dispatcher position, could be a problem for appellant. Accompanying the letter was an October 13, 1999 report from Dr. Steiner, who stated:

“Significant discussion was had with [appellant] with regards to his abilities and to what he can ... and can [not] do. He seemed to have great difficulty in traveling more than 30 minutes at a time.... [Appellant] does indicate that driving to [the job site] takes about 50 minutes and he is very uncomfortable by the time he drives that distance, he is not really able to function. The assignment that had been discussed for him to do at Fort Polk does not seem to be a real problem as far as him being able to do that if he was not so uncomfortable when he got there. Therefore, the driving distance to this job seems to be a real problem.”

By letter to appellant dated November 22, 1999, the Office reiterated that the emergency services dispatcher position was suitable and, pursuant to section 8106(c)(2), he had 15 days to either accept the job or provide a reasonable explanation for refusing the offer.

In an inter-Office memorandum dated December 7, 1999, an Office claims examiner stated that the vocational counselor claimed that Dr. Steiner had approved the driving distance to the emergency services dispatcher jobsite. The vocational counselor also stated that she had personally clocked the distance, which totaled 30 minutes and had opined that the 38-mile drive could easily be completed within 30 minutes, given that 20 miles of the trip were covered by a four-lane highway and that traffic moved quickly.

By decision dated December 8, 1999, the Office terminated appellant's compensation benefits on the grounds that he refused an offer of suitable work.

By letter dated December 14, 1999, appellant's representative requested reconsideration.

By decision dated January 3, 2000, the Office denied reconsideration.

By letter dated February 10, 2000, appellant's representative requested reconsideration. Accompanying the request was a January 27, 2000 report from Dr. Steiner, who advised that appellant experienced difficulty riding in a car for longer than 30 minutes, which undermined his ability to drive from his home to the job site in which the offered job is located.

In an April 12, 2000 report, Dr. Steiner reiterated his previous findings and conclusions and advised that appellant was capable of performing limited duty so long as he was not required to travel significant distances.

By decision dated June 2, 2000, the Office denied reconsideration.

By letter dated September 7, 2000, appellant's representative requested reconsideration. Accompanying the request were June 14, August 10 and October 25, 2000 reports from Dr. Steiner, who essentially reiterated his previous findings and conclusions. In his August 10, 2000 report, Dr. Steiner specifically stated that the assigned job site exceeded appellant's

restrictions regarding his traveling distance and time and recommended in this report and in his October 25, 2000 report that appellant be allowed to engage in some light mechanical work at his home.

By decision dated March 7, 2001, the Office denied reconsideration.

By letter dated August 9, 2001, appellant's attorney requested reconsideration.

By decision dated October 18, 2001, the Office denied reconsideration.

By letter dated November 8, 2001, appellant's attorney requested reconsideration. Appellant submitted a March 27, 2001 report from Dr. Steiner, who essentially reiterated his previous findings and conclusions.

By decision dated December 6, 2001, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its prior decision.

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. Under section 8106(c)(2) of the Federal Employees' Compensation Act² 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.³ Section 10.517 of the Office's regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured has the burden of showing that such refusal or failure to work was reasonable or justified and shall be provided with the opportunity to make such a 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 and must inform appellant of the consequences of refusal to accept such employment.⁵ 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.

The initial question in this case is whether the Office properly determined that the position was suitable. The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by the medical evidence.⁶ A review of the medical evidence, in the present,

² 5 U.S.C. § 8101 *et. seq.*

³ *Patrick A. Santucci*, 40 ECAB 151 (1988); *Donald M. Parker*, 39 ECAB 289 (1987).

⁴ 20 C.F.R. § 10.517; *see also Catherine G. Hammond*, 41 ECAB 375 (1990).

⁵ *See John E. Lemker*, 45 ECAB 258 (1993).

⁶ *Robert Dickinson*, 46 ECAB 1002 (1995).

case indicates that there is not sufficient medical evidence to support a finding that the offered position was within appellant's physical limitations. Drs. Steiner and Teuscher concurred that appellant can work a sedentary job for four hours per day and Dr. Steiner indicated that appellant is capable of performing the emergency services dispatcher job as depicted by the job description. Both physicians, however, had included a 30-minute limit with regard to the amount of time appellant should spend driving to and from the worksite. Although the vocational counselor claimed that Dr. Steiner told her that he was approving the job notwithstanding the fact that the commute time exceeded 30 minutes, there is no evidence in the record that Dr. Steiner himself gave his approval. Dr. Steiner stated, in his October 13, 1999 report, that he had discussed extensively with appellant whether he would be able to perform a job which required driving longer than 30 minutes. Appellant indicated that the drive to Fort Polk, where the job was situated, took him approximately 50 minutes, at the conclusion of which he was in so much discomfort that he felt he would not be able to perform the job once he arrived. Dr. Steiner subsequently concluded that the proposed daily commute to the job site exceeded appellant's restrictions regarding his traveling distance and time. As appellant submitted medical evidence indicating that he had greater physical restrictions than those upon which the emergency services dispatcher job was based, the offered position was no longer suitable. As it is the Office's burden of proof to establish that appellant refused a suitable position, the Office did not meet its burden of proof in this case to terminate appellant's compensation benefits pursuant to 5 U.S.C. § 8106.⁷

⁷ *Barbara R. Bryant*, 47 ECAB 715 (1996).

The October 18 and March 7, 2001 decisions of the Office of Workers' Compensation Programs are hereby reversed.⁸

Dated, Washington, DC
November 6, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

⁸ As the Board has reversed the Office's termination decision, it need not address the second issue herein, whether the Office properly refused to reopen the case for merit review.