U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

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In the Matter of DONALD L. SMITH and DEPARTMENT OF THE ARMY, BLUE GRASS ARMY DEPOT, Lexington, KY

*Docket No. 03-1991; Submitted on the Record;*
*Issued November 5, 2003*

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DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective July 26, 2003, on the grounds that he refused an offer of suitable work.

On January 21, 1991 appellant, a 49-year-old guard supervisor, injured his lower back, when he slipped on a piece of electrical conduit and fell to the floor. He filed a claim for benefits on the date of injury which the Office accepted on March 21, 1991 for spinal cord contusion. Appellant returned to work on April 8, 1991 on light duty until May 13, 1991, when he went off work again due to his accepted back injury. He returned to work in September 1991 and worked intermittently until February 10, 1992, when he left work. Appellant has not returned to work since that date. He was paid compensation by the Office for appropriate periods. The Office placed appellant on the periodic rolls and paid him compensation for total disability.

In a work capacity evaluation dated July 8, 1998, Dr. Frank A. Burke, a Board-certified orthopedic surgeon, indicated that appellant was able to work, though not for an eight-hour day, with no lifting, pushing, pulling, squatting, kneeling, twisting or climbing, no walking for more than two hours a day and no more than one hour a day of sitting and standing. In a supplemental report dated August 7, 1998, Dr. Burke indicated that appellant could work three to four hours a day, with a maximum of four hours, within the above restrictions.

The Office referred appellant for a second opinion examination with Dr. Regina M. Raab, a specialist in neurosurgery. She stated in a report dated December 19, 2001, that while she doubted appellant could perform his former job as a security guard supervisor, she considered him employable in a more sedentary type activity in which he would be allowed to alternate standing and sitting, as long as there was no frequent lifting, bending, twisting, etc.

In a work capacity evaluation dated July 24, 2002, Dr. Raab stated that appellant should be able to work light duty with intermittent breaks and could gradually increase his work hours

as tolerated. She outlined the following restrictions: no reaching above the shoulder, no twisting, no operating a motor vehicle, no squatting, no kneeling and no climbing; no pushing or pulling exceeding 20 pounds; and no lifting exceeding 10 pounds. Dr. Raab recommended that appellant take breaks every 30 minutes of 5 minutes duration.

In a supplemental report dated July 30, 2002, Dr. Raab stated that appellant could perform light duty with minimal pushing, pulling and lifting, especially if he was allowed the opportunity to change positions and move around when he experienced low back discomfort. She advised that appellant's work injury temporarily aggravated his underlying degenerative disease of the spine, but doubted that his accepted spinal contusion would have altered the course of his underlying degenerative disc disease.

By letter dated May 19, 2003, the employing establishment offered appellant a job as a clerk based on the restrictions outlined by Dr. Raab.[1] Appellant was informed that he was expected to start work on May 27, 2003. In a signed, handwritten note, which was written on a form specifying the physical requirements of the offered clerk position, Dr. Raab stated that she believed appellant was physically able to perform the clerk position.[2] She reiterated that he should be allowed to take stretch breaks and rest his back as indicated.

By letter dated May 19, 2003, the Office advised appellant that a suitable position was available and that pursuant to section 8106(c)(2), he had 30 days to either accept the job or provide a written explanation for refusing the offer. The Office stated that if appellant refused the job or failed to report to work within 30 days, it would terminate his compensation pursuant to 5 U.S.C. § 8106(c)(2).[3]

In a June 22, 2003 statement, written on the offer form, received by the Office on June 27, 2003 appellant declined the clerk job. He asserted that he was unable to perform the combination of sitting, standing, etc., entailed by the position. He also claimed that the job required him to negotiate steps to and from the worksite in order to take the necessary breaks.

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[1] The job description for the clerk position entitled the following duties:

> "a. Keeps time and attendance records and ensures data is input[ed] into ATAAPS.
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> b. Receives, separates and distributes incoming mail to the office personnel.
>
> c. Assists in filing or retrieving information by subject. Copies documents as needed. Maintains the bulletin board, selecting and filing deleted material for future reference.
>
> d. Orders and maintains office supplies. Orders and maintains various forms, requisitioning publications and blank forms when required.
>
> e. Receives and refers visitors and office calls.
>
> f. Inputs basic data, utilizing a computer or completes simple forms utilizing a typewriter. A qualified typist is not required."

[2] Dr. Raab's note approving the clerk position was not dated.

[3] 5 U.S.C. § 8106(c)(2).

In a letter dated July 22, 2003, the employing establishment's workers' compensation administrator stated that the May 19, 2003 job offer did not require appellant to climb any steps. The employing establishment asserted that the duty station was located on the ground floor with bathroom facilities, a sitting area and noted that an eating area was available on the same floor.

By decision dated July 23, 2003, the Office terminated appellant's compensation benefits on the grounds that he refused an offer of suitable work. The Office stated that the information appellant submitted in response to its May 19, 2003 letter, was insufficient to support his failure to accept the offered position.

The Board finds that the Office properly terminated appellant's compensation benefits effective July 23, 2003, 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 Act[4] 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.[5] Section 10.124(c) 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.[6] 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.[7] 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 met its burden in the present case.

The initial question in this case is whether the Office properly determined that the position was suitable. The determination 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.[8] The Office found that the weight of the medical evidence rested with the opinion of Dr. Raab, who found that appellant was capable of performing the modified job offered by the employing establishment on May 19, 2003. The employing establishment located a job as a clerk within the restrictions outlined by Drs. Burke and Raab, both of whom indicated that appellant could work a four-hour day. Dr. Raab stated that appellant could perform light duty with minimal pushing, pulling and lifting, especially if allowed the opportunity to change positions, move around and take intermittent breaks every 30 minutes of 5 minutes duration, to alleviate low back discomfort. The Board finds that the weight

[4] 5 U.S.C. §§ 8101-8193.

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

[6] 20 C.F.R. § 10.124(c); *see also Catherine G. Hammond*, 41 ECAB 375 (1990).

[7] *See John E. Lemker*, 45 ECAB 258 (1993).

[8] *Robert Dickinson*, 46 ECAB 1002 (1995).

of the medical evidence, which was unrefuted, establishes that the position was within appellant's physical limitations. Dr. Raab outlined restrictions of no reaching above the shoulder, no twisting, no operating a motor vehicle, no squatting, kneeling or climbing, no pushing or pulling exceeding 20 pounds and no lifting exceeding 10 pounds. All of these restrictions were included on a form outlining the physical requirements of the offered clerk position, to which Dr. Raab signed her assent. In this handwritten note Dr. Raab explicitly stated that she believed appellant was physically able to perform the clerk position so long as he was allowed to take stretch breaks and rest as indicated. Therefore, the Office properly found that the clerk job, offered by the employing establishment was within these restrictions.

Although appellant claimed that the job required him to climb and descend steps, this contention, in the absence of supporting factual evidence, is insufficient to render the Office' termination decision improper. The employing establishment refuted appellant's assertion in its July 22, 2003 letter, asserting that the job site's duty station was located on the ground floor containing bathroom facilities, a sitting area and an eating area. Appellant has offered no corroboration to support his claim that the job was unsuitable because it required him to negotiate steps. Accordingly, the refusal of the job offer, therefore, cannot be deemed reasonable or justified and the Office properly terminated appellant's compensation. Therefore, as the Office met its burden of proof to establish that appellant refused a suitable position, the Office met its burden of proof in this case to terminate appellant's compensation benefits pursuant to 5 U.S.C. § 8106.

The decision of the Office of Workers' Compensation Programs dated July 23, 2003 is hereby affirmed.

Dated, Washington, DC
November 5, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member