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THOMAS M. CHARLES, Appellant)	
)	
and)	Docket No. 04-740
)	Issued: June 10, 2004
DEPARTMENT OF LABOR, MINE SAFETY)	
& HEALTH ADMINISTRATION, Pikeville, KY,)	
Employer)	
)	

Case Submitted on the Record

The issue is whether the Office properly terminated appellant's compensation effective November 13, 2002 on the basis that he refused an offer of suitable work.

FACTUAL HISTORY

On September 7, 2000 appellant, then a 49-year-old coal mine inspector, sustained an injury to his right knee in the performance of duty. The Office authorized surgery for a torn anterior cruciate ligament and torn medial meniscus, and this surgery was performed by Dr. Harry Derderian, a Board-certified orthopedic surgeon, on December 18, 2000. On February 20, 2001 appellant returned to limited duty at the employing establishment.

By letter dated May 30, 2002, the employing establishment offered appellant a position as a mine safety and health inspector in Albany, New York, with limitations against crawling and kneeling consistent with the March 22, 2002 work tolerance limitations of Dr. Gregory T. Snider, a Board-certified family practitioner to whom Dr. Derderian referred him for an evaluation. Appellant's representative contended that this position was not suitable because it required climbing of ladders and requested a medical evaluation. The Office referred appellant to Dr. Snider, who concluded in a July 1, 2002 report that appellant was unable to operate heavy equipment or work on a ladder at a height exceeding stepladder height. On July 5, 2002 appellant declined the offered position on the basis that he was unable to meet its physical requirements.

On July 8, 2002 the employing establishment informed appellant that it no longer had limited duty for him in his local district. Appellant filed a claim for compensation and the Office began payment of compensation for temporary total disability on July 9, 2002.

By letter dated July 22, 2002, the employing establishment offered appellant a position as a mine safety and health specialist in the metal/nonmetal office in Warrendale, Pennsylvania, and advised him that it would provide for relocation expenses. The physical demands of the position indicated that kneeling or crawling on the right knee, climbing ladders above stepladder height, or operating heavy equipment would not be required. By letter dated August 26, 2002, the Office advised appellant that it had found this position was suitable, that it would pay compensation based on the difference between the pay of the offered position and the pay of his position on the date of injury, that he had 30 days to accept the offer or provide reasons for refusing it, and that a claimant who refuses an offer of suitable employment was not entitled to further compensation for wage loss or a schedule award.

In a September 25, 2002 response, appellant stated that he was not refusing the job offer, but had some concerns that needed to be addressed: that he was not qualified to perform the job because all his experience was in coal mines and he had no computer training, that the offer was not based on a current medical examination, that he had developed a heart and a shoulder condition since his employment injury, that he could have and should have been accommodated in his local area, and that relocating would be a hardship on his family. On September 28, 2002 the employing establishment advised the Office that it had no jobs available in appellant's commuting area, and that appropriate training was always given to employees when transferred to new jobs.

By letter dated October 2, 2002, the Office advised appellant that his reasons for refusing the position were unacceptable, as there was no medical evidence showing he was physically unable to perform the position and a desire to remain in the area where he currently resided was

not a valid reason for refusal. The Office allotted appellant 15 days to accept the position, after which it would proceed to a final decision without further reasons being considered. Appellant responded on October 15, 2002, stating that he did not refuse the offer, which he characterized as not legitimate or appropriate.

By decision dated November 13, 2002, the Office terminated appellant's compensation effective that date on the basis that he refused an offer of suitable work. Following a hearing held on September 29, 2003 at appellant's request, an Office hearing representative affirmed the Office's December 22, 2003 decision.

LEGAL PRECEDENT

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 Section 10.516 of the Code of Federal Regulations³ provides that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee 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 showing before a determination is made with respect to termination of entitlement to compensation.⁴

ANALYSIS

The Office properly found that the position offered to appellant by the employing establishment on July 22, 2002 was suitable. In a report prepared three weeks before the employing establishment's offer, Dr. Snider stated that appellant could not operate heavy equipment or work on a ladder at a height exceeding stepladder height. These limitations, along with Dr. Snider's earlier prohibition against kneeling and crawling on the right knee, were specifically incorporated into the July 22, 2002 offer of employment. Although appellant contended that he had developed heart and shoulder problems that would prevent his performance of the offered position,⁵ he presented no medical evidence in support of this contention.⁶

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).

³ 20 C.F.R. § 10.516.

⁴ *See Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

⁵ All impairments, whether work related or not, must be considered in assessing the suitability of an offered position. *Edward J. Stabell*, 49 ECAB 566 (1998).

⁶ The issue of whether an employee has the physical ability to perform an offered position is primarily a medical question that must be resolved by the medical evidence. *Robert Dickerson*, 46 ECAB 1002 (1995).

As required, the Office advised appellant that it had found the offered position suitable and afforded him 30 days to accept the offer or provide reasons for not doing so.⁷ At this point the burden shifted to appellant to show that his refusal to accept the offered position was justified.⁸ Appellant presented reasons why he believed the offered position was not suitable, but the Office properly found they were unacceptable. Appellant stated that he had no experience in the metal/nonmetal area and no computer skills and would need training, and the employing establishment responded that training would be provided. Appellant's preference to remain in the area where he was residing is an unacceptable reason for refusing an offered position,⁹ where, as here, the employing establishment offered to pay relocation expenses.¹⁰ Appellant contended that he should have and could have been accommodated in his commuting area,¹¹ but he presented no corroboration of this contention, and the employing establishment stated that it had no jobs available for appellant in his commuting area.

As required, the Office then advised appellant that his reasons were unacceptable and afforded him 15 days to accept the offered position without penalty.¹² Appellant did not accept the offered position, and the Office therefore properly found that he refused an offer of suitable work.

CONCLUSION

The Office properly found the position offered by the employing establishment suitable and appellant's reasons for not accepting the offer unacceptable. The Office also complied with its requirements regarding notice and opportunity to be heard, and properly terminated appellant's compensation for refusing an offer of suitable work.

⁷ 20 C.F.R. § 10.516 states that the Office shall advise the employee it has found the offered work suitable and afford the employee 30 days to accept the job or present reasons to counter the Office's finding of suitability.

⁸ *Kathy E. Murray*, 55 ECAB ____ (Docket No. 03-1889, issued January 26, 2004).

⁹ *Fred L. Nelly*, 46 ECAB 142 (1994).

¹⁰ *See Arthur C. Reck*, 47 ECAB 339 (1996). (General concerns regarding relocation expenses are not a basis for refusing an offer of suitable work.)

¹¹ 20 C.F.R. § 10.508 states in part: "If possible, the employer should offer suitable reemployment in the location where the employee currently resides. If this is not practical, the employer may offer suitable reemployment at the employee's former duty station or other location."

¹² 20 C.F.R. § 10.516.

ORDER

IT IS HEREBY ORDERED THAT the December 22, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 10, 2004
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member