

FACTUAL HISTORY

On September 11, 1995 appellant, then a 41-year-old mechanic helper, filed an occupational disease claim for a respiratory condition. He attributed his condition to exposure to fumes. The Office accepted the claim for mild obstructive pulmonary disease and paid appropriate compensation. Appellant stopped work on February 2, 1998.

By letter dated March 17, 2003, the Office requested that Dr. Jose M. Ugarte, an attending Board-certified family practitioner, provide an opinion addressing appellant's current medical conditions, continuing employment-related residuals or disability and his ability to perform part-time or limited-duty work. Dr. Ugarte did not respond. On May 1, 2003 the Office requested that appellant submit a medical report from an attending physician which addressed his employment-related condition and disability. Appellant did not respond.

By letter dated May 5, 2003, the Office referred appellant, together with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. Douglas W. Jenkins, a Board-certified internist, for a second opinion medical examination.

In a May 28, 2003 medical report, Dr. Jenkins reviewed the history of appellant's employment injury, medical treatment, social and family background. He noted that appellant periodically experienced a combination of shortness of breath, perioral numbness and tingling of the hands and tenderness for which there had been no diagnosis to date. On physical examination, Dr. Jenkins reported that appellant's head, eyes, ears, nose and throat were unremarkable. He also reported burns along the right neck and right supraclavicular area consistent with his past history of nitric acid exposure. The lungs showed no rales or rhonchi. The cardiac examination showed no gallops, murmurs, rubs or evidence of right heart enlargement. The abdomen showed no organomegaly or masses. Peripherally there was no cyanosis, clubbing or edema. Dr. Jenkins performed a pulmonary function test which was normal. He reviewed x-rays and computerized axial tomography (CAT) scans which were also normal.

Dr. Jenkins stated that his examination showed no respiratory abnormalities or evidence of secondary effects of respiratory abnormalities. Appellant had mild intermittent asthma which was controlled on medications. Dr. Jenkins indicated that, by history, appellant maintained sensitivity to various odors, vapors and temperatures which the physician found medically unusual since five years had passed since his workplace exposure. As the current pulmonary function tests were normal and the previous pulmonary function tests showed a response to a bronchodilator in March 2001, he believed that appellant's condition had improved. Due to difficulties in assessing the history, Dr. Jenkins could not state unequivocally that the effects of the employment factors had ceased. He opined that appellant could not perform his regular duties as an electrical equipment repairer due to his symptomatic response to various dust, vapors and odors. Dr. Jenkins stated that he was a candidate for vocational rehabilitation as he had no deficits in reaching, manipulating, standing or sitting. While appellant had some symptoms with walking, he could reasonably travel to and from work. Dr. Jenkins concluded that appellant had a number of symptoms that he could not relate to the accepted occupational exposures. He did not know of any medical precedent that would relate the alleged respiratory exposures to the issues of gasping for air and frequent emesis.

In a work capacity evaluation (Form OWCP-5c) dated June 3, 2003, Dr. Jenkins stated that appellant could work eight hours per day with restrictions. He was precluded from working in an environment with extreme temperatures, airborne particles and gas/fumes. Dr. Jenkins did not indicate that appellant had any physical limitations.

By letters dated July 23 and September 25, 2003, the Office requested that Dr. Ugarte review Dr. Jenkins's May 28, 2003 report and provide whether he agreed with his findings.

On January 12, 2004 the employing establishment offered appellant the modified-duty position of materials expediter based on the restrictions set forth in Dr. Jenkins's May 28, 2003 report and June 3, 2003 OWCP-5c form.

By letter dated January 12, 2004, the Office advised appellant that the offered materials expediter position was suitable and available. Appellant had 30 days to either accept the position or provide an explanation of the reasons for refusing the position. It further advised him that he would be paid for any difference in salary between the offered position and his date-of-injury position and that he could accept the job without penalty. The Office informed appellant that his compensation could be terminated based on his refusal to accept a suitable position pursuant to 5 U.S.C. § 8106(c)(2).

On January 14, 2004 appellant rejected the job offer. He alleged that all of the buildings at the employing establishment were contaminated with dust, gas, chemicals and asbestos. Appellant noted that his respiratory condition was employment related and would last a lifetime.

In a January 14, 2004 report, Dr. Ugarte stated that appellant had emphysema and reactive airway disease. He opined that appellant was totally disabled due to these illnesses and unable to work in any occupation for the remainder of his life.

On February 12, 2004 the Office advised appellant that it was aware of his refusal to accept the offered position. It advised him that his reasons for refusing the offered position were not valid. Appellant was given 15 days to accept the position. He did not respond within the allotted time.

By decision dated February 27, 2004, the Office terminated appellant's wage-loss compensation because he refused an offer of suitable work.

On March 20, 2004 appellant requested an oral hearing before an Office hearing representative.

The Office received numerous medical records. In an October 20, 2004 report, Dr. Ugarte reiterated his prior diagnoses of reactive airway disease and emphysema. He opined that appellant had been totally disabled since 1998.

By decision dated February 15, 2005, an Office hearing representative reversed the February 27, 2004 decision. He found that the offered materials expediter position was not suitable as the requirements, location and environmental exposure of the position were unclear. The hearing representative directed the Office to reinstate appellant's compensation benefits effective February 27, 2004.

On April 11, 2005 the employing establishment again offered appellant the materials expediter position. The position description provided as follows:

“Performs various duties to expedite parts, supplies and materials involved with the overhaul, repair, modification and other related rework of aircraft, their structures, components, parts and equipment. Uses a keyboard, but a qualified keyboard operator not required.

“1. Receives incoming material at the work center. Unloads material. Opens containers as necessary to remove material for storage. Checks documents to assure the item(s) received correspond in identity, quantity, and work order number. Checks work documents to insure that routing is correct and that previous processing has been signed off as completed. Reports discrepancies or damaged items to a higher-grade expediter or supervisor. Places material in bins or assigned storage space or in shop working areas. Returns unneeded items to supply.

“2. Prepares material for movement to the next processing location and to supply or storage area. Assembles material into kits, packages, lots or units. Assures proper tags or documents are provided. Assures that documents for work completed have been signed and/or stamped. Places and secures material on proper handling device. Notifies transportation personnel to deliver material.

“3. Maintains a stock of daily used supplies and replacement parts. Orders materials as needed to maintain a fixed inventory level.”

The physical requirements of the offered position included handling weights up to 35 pounds without assistance and over 35 pounds with assistance from another worker or weight handling equipment. The work environment was indoors in a well-lighted and ventilated shop. No chemicals were to be used in the work area and an industrial hygiene inspection determined that the area was clean. There was no asbestos or asbestos-containing material in the work area so there was no danger of exposure. All work would be performed in the work area. The duties of the offered position did not require leaving the work area. A door was provided directly from the parking lot to the work area to eliminate the need to walk through any other work areas.

The industrial hygiene report found no chemicals in the work area of the offered position. There were only six readings of air samples in this area that were above one “ppm.”

By letter dated April 18, 2005, the Office advised appellant that the offered materials expediter position was suitable based on the restrictions set forth in Dr. Jenkins’s June 3, 2003 OWCP-5c form and that it was still available. It further advised him that he would be paid for any difference in salary between the offered position and his date-of-injury position and that he could accept the job without penalty. The Office informed appellant that he had 30 days to either accept the position or arrange for the submission of a medical report. It also informed him that his compensation could be terminated based on his refusal to accept a suitable position pursuant to section 8106(c).

In a July 11, 2001 report, Dr. William W. Burgin, Jr., an internist, stated that appellant had reactive airway disease. He opined that he was totally disabled and unable to return to work. In reports dated April 20 and May 16, 2005, Dr. Ugarte reiterated his opinion that appellant remained totally disabled.

In an undated letter received by the Office on May 19, 2005, appellant rejected the employing establishment's job offer due to his reactive airway disease and emphysema.

By letter dated May 19, 2005, the Office advised appellant that his reason for rejecting the offered position was not valid. Appellant was given 15 days to accept the position prior to termination of compensation. He did not respond.

In a decision dated June 22, 2005, the Office terminated appellant's compensation effective that date. It found that he refused an offer of suitable work.

The Office received the April 11, 2006 results of a CT scan performed by Dr. Vi Q. Truong, a radiologist, who found hyperaeration of both lungs without acute cardiopulmonary process seen, no evidence of mediastinal or axillary lymphadenopathy and a stable thorax during the interval.

By letter dated April 18, 2006, appellant requested reconsideration of the Office's June 22, 2005 decision.

In a May 18, 2006 decision, the Office denied modification of the June 22, 2005 decision. It found that appellant failed to submit sufficient evidence to establish that he was unable to perform the duties of the offered position.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.² Under section 8106(c)(2) of the Federal Employees' Compensation Act, the Office may terminate the compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.³ 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.⁴ Section 8106(c) will be narrowly construed as it serves as a penalty provision, which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.⁵

² *Linda D. Guerrero*, 54 ECAB 556 (2003).

³ 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

⁴ *Ronald M. Jones*, 52 ECAB 190 (2000).

⁵ *Joan F. Burke*, 54 ECAB 406 (2003).

Section 10.517 of the Act'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.⁶ Pursuant to section 10.516, the employee shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.⁷

ANALYSIS

The Office accepted that appellant sustained mild obstructive pulmonary disease as a result of exposure to fumes while working at the employing establishment. It subsequently terminated his compensation benefits effective June 22, 2005 finding that he refused an offer of suitable work based on the medical opinion of Dr. Jenkins, an Office referral physician. The initial question in this case is whether the Office properly determined that the offered position was medically suitable. The issue of whether an employee has the physical ability to perform a modified position is primarily a medical question that must be resolved by the medical evidence.⁸

In a May 28, 2003 report, Dr. Jenkins reviewed the history of appellant's employment injury, medical treatment, social and family background. He reported normal findings on physical examination and pulmonary function testing. Dr. Jenkins reviewed x-rays and CAT scans which were also normal. Dr. Jenkins stated that his examination showed no respiratory abnormalities or evidence of secondary effects of respiratory abnormalities. He diagnosed mild intermittent asthma which was controlled on medications. Dr. Jenkins indicated that by history, appellant maintained sensitivity to various odors, vapors and temperatures which he found medically unusual since five years had passed since his workplace exposure. He related that since the current pulmonary function tests were normal and the previous pulmonary function tests showed a response to a bronchodilator in March 2001, he believed there was evidence that appellant's condition had improved. Dr. Jenkins opined that he could not perform his regular duties as an electrical equipment repairer due to his symptomatic response to various dust, vapors and odors. However, Dr. Jenkins stated that he was a candidate for vocational rehabilitation as he had no deficits in reaching, manipulating, standing or sitting. He indicated that while appellant had some symptoms with walking, he could reasonably travel to and from work.

Dr. Jenkins's OWCP-5c form stated that appellant could work eight hours per day with restrictions. He was precluded from working in an environment with extreme temperatures, airborne particles and gas/fumes. Appellant did not have any physical limitations.

The Board finds that Dr. Jenkins's opinion is sufficiently well rationalized and based upon a proper factual background such that it is the weight of the evidence on the issue of the extent of appellant's disability and work restrictions. He found that appellant was no longer

⁶ 20 C.F.R. § 10.517(a); see *Ronald M. Jones*, *supra* note 4.

⁷ *Id.* at § 10.516.

⁸ See *Gayle Harris*, 52 ECAB 319 (2001).

totally disabled due to his employment-related mild obstructive pulmonary disease and that he could perform light-duty work with restrictions.

On April 11, 2005 the employing establishment offered appellant the position of materials expediter. This position conformed to Dr. Jenkins's work restrictions. It listed activities, including handling documents and materials. The physical demands included handling weights up to 35 pounds without assistance and over 35 pounds with assistance from another worker or weight handling equipment. Moreover, appellant's work area was in a clean, well-lighted and ventilated shop free from chemicals, asbestos and asbestos-containing material. All of his work would be performed in this area. A door was provided directly from the parking lot to appellant's work area to eliminate the need for him to walk through any other work areas.

The Board finds that the offered materials expeditor position was medically suitable. The weight of the medical evidence establishes that appellant was no longer totally disabled from work and has the physical capacity to perform the duties listed in the April 11, 2005 job offer.

The Office notified appellant of its finding that the materials expediter job offer was suitable and of the consequences for not accepting a suitable offer. He contended that the position was not suitable because he suffered from reactive airway disease and emphysema.

In accordance with established procedures, the Office found that appellant's reasons for refusing the position were not valid and provided him an additional 15 days to accept the position prior to termination of compensation.

Appellant submitted Dr. Burgin's July 11, 2001 report and Dr. Ugarte's April 20 and May 16, 2005 reports which found that appellant had reactive airway disease and emphysema and that he was permanently totally disabled. However, neither Dr. Burgin nor Dr. Ugarte discussed the offered position or provided a reasoned opinion on the issue presented. The Board finds that appellant has submitted no probative medical evidence providing support for his refusal of suitable work. Therefore, he has not established a reasonable basis for refusing the offered position.

In light of the foregoing, the Board finds that the job offered was medically and vocationally suitable and the Office followed its procedures prior to termination of compensation. Accordingly, the Board finds that the Office met its burden of proof to terminate compensation.

Following the June 22, 2005 decision, appellant submitted Dr. Truong's April 11, 2006 CT scan report which found hyperaeration of both lungs without acute cardiopulmonary process seen, no evidence of mediastinal or axillary lymphadenopathy and a stable thorax during the interval. However, he does not discuss the relevant issue in this case of whether appellant was capable of performing the materials expediter position at the time it was offered or provide a reasoned opinion on the issue presented.

The Board finds that appellant has submitted insufficient medical evidence to support his refusal of suitable work. Therefore, he has not established a reasonable basis for refusing the offered position. As the weight of the medical evidence at the time of the June 22, 2005 decision established that he could perform the duties of the offered position, appellant did not offer

sufficient justification for refusing the position. Therefore, the Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective June 22, 2005, as he refused an offer of suitable work.⁹

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation benefits effective June 22, 2005 on the grounds that he refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the May 18, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 13, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

⁹ *Karen L. Yaeger*, 54 ECAB 323 (2003).