

work. The Office accepted that he sustained a low back strain and a right shin laceration. Appellant began to perform limited-duty work in a series of jobs for the employing establishment. The Office later accepted that he sustained a herniated nucleus pulposus at L5-S1 on February 10, 1993 due to loading tires at work. On November 4, 1993 appellant underwent a discectomy at L5-S1 which was authorized by the Office. He last worked for the employing establishment in March 1995 but remained on its employment rolls.¹

On January 16, 1999 appellant underwent fusion surgery at L4-5 and L5-S1 with instrumentation. On September 27, 2001 he underwent fusion surgery at L3-4 with instrumentation.² The Office accepted that appellant sustained patellar tendinitis of his left knee as a consequence of his employment-related back condition. On May 19, 1995 he underwent a partial medial meniscectomy and chondroplasty of the left knee. On April 27, 2004 appellant underwent a repeat partial medial meniscectomy and chondroplasty of the left knee. All of his surgical procedures were authorized by the Office.

In mid 2004, appellant commenced treatment with Dr. Thomas S. Pattison, a Board-certified physical medicine and rehabilitation physician.³ In a December 17, 2005 form report, Dr. Pattison indicated that appellant could not perform his regular work but noted that he could perform limited-duty work for eight hours per day. He stated that appellant could walk, stand, push and pull up to 20 pounds and engage in repetitive wrist and elbow motion for eight hours per day, sit and reach for six hours per day, reach above his shoulders for four hours per day, lift up to 20 pounds, twist, squat and kneel for two hours per day and bend, stoop and climb for one hour per day. Dr. Pattison indicated that he could not drive a motor vehicle.

The Office provided Dr. Pattison with a description of a full-time clerk position and requested that he provide an opinion regarding whether appellant could perform it. The position included such duties as producing and organizing various documents, handling incoming mail and answering mail. Most of the required work was performed while sitting and the employee could sit, stand or move around as his needs dictated. The position required that the employee sit for up to six hours per day, intermittently walk and stand (not for prolonged periods), lift up to 20 pounds for up to two hours per day, intermittently push, pull and grasp up to 20 pounds (not for prolonged periods), reach above his shoulder for four hours per day, twist, squat and kneel for two hours per day and bend and climb for one hour per day. The position did not require the employee to drive a motor vehicle.

On February 10, 2006 Dr. Pattison stated that he had reviewed the description for the clerk position and found that appellant could perform the position with the restrictions provided in his December 17, 2005 form report. The record also contains a February 4, 2006 report in

¹ Appellant's rigger job was a temporary position. In 1996 he moved to Elk Grove, CA which is about 400 miles from Port Hueneme.

² For both fusion surgeries, appellant had additional instrumentation surgically implanted and then had instrumentation removed.

³ Appellant was referred to Dr. Pattison by his attending orthopedic surgeon.

which Dr. Pattison stated that it would appear that appellant could perform the clerk job offered by the employing establishment. Dr. Pattison stated:

“I note that he also has some disability considerations with respect to headaches. However, we are conducting a functional capacity evaluation.... Therefore, I would like to see those results before finalizing my impressions regarding this situation, as I have inherited this case.”

On March 6, 2006 Dr. Pattison stated that appellant’s February 20, 2006 functional capacity evaluation “does represent a conservative, but plausible aspect of his ability.”⁴ He indicated that appellant’s condition was permanent and stationary and that he was a “good candidate to find a light-duty job along the lines I talked about.” Dr. Pattison indicated that appellant had “some fear of public places and also has some chronic headaches” that might somewhat limit his ability to participate in the open job market, but noted that he thought these conditions were treatable without medicine and did not “present true functional limitations in a job setting.”

On March 27, 2006 the employing establishment offered appellant a clerk position for eight hours per day which was located at the Naval Base Ventura County, Port Hueneme, CA, his previous place of employment.⁵ The position had the same physical requirements as those found in the position description sent to Dr. Pattison. The employing establishment stated, “Although your temporary position expired on March 30, 1995 and you currently reside in Elk Grove, there are no suitable positions available in or around Elk Grove, California, for which I have the knowledge of or authority to place you within the Department of Navy.”

On April 7, 2006 Dr. Pattison stated that the results of appellant’s functional capacity evaluation “reinforced my earlier opinion based on serial clinical evaluations that he could return to some sort of productive work.” He noted that appellant referenced his left knee condition and stated that the “functional capacity evaluation essentially covered his knee issues and at this point, I do not see any reason to modify my earlier restrictions.” Dr. Pattison stated that the fact that the clerk position was mostly a sitting job lead him to believe that appellant “would be able to undertake it in terms of the knee issue.” He stated, “However, having opined the above, there may be some significant value in getting an independent medical evaluation to look at the situation comprehensively.”

On April 7, 2006 appellant refused the job offer indicating that he was awaiting a second opinion from another physician. On April 9, 2006 he requested that his authorized attending physician be changed from Dr. Pattison. Appellant stated, “I feel that I have not received adequate medical treatment and would like to be treated by a physician that is more knowledgeable with my type of injury.” He later claimed that Dr. Pattison had not kept him informed “as to what was going on medically with his case.”

⁴ A report of appellant’s February 20, 2006 functional capacity evaluation revealed that he was capable of performing work at a light to medium physical demand level for eight hours per day.

⁵ The clerk position was a temporary position not to exceed one year.

On April 20, 2008 the Office advised appellant of its determination that the clerk position offered by the employing establishment was suitable. The Office stated that the medical opinion of Dr. Pattison showed that he could perform the position. It indicated that the employing establishment had attempted to find a job for appellant near his former duty station in Hueneme, CA, but had determined that it was not possible to do so. The Office provided appellant with 30 days from the date of the letter to accept the position or provide good cause for not accepting it in order to avoid termination of his compensation under 5 U.S.C. § 8106(c)(2).⁶

In a decision dated April 27, 2006, the Office denied appellant's request for a change of physicians. The Office indicated that appellant was referred to Dr. Pattison by his attending orthopedic surgeon after it was felt that he no longer needed surgical intervention. It noted that Dr. Pattison's specialty of physical medicine and rehabilitation was appropriate for appellant's condition. The Office noted that appellant did not provide any notable explanation of why he felt Dr. Pattison's treatment was inadequate and indicated that a review of the record revealed that Dr. Pattison provided detailed medical reports containing recitations of medical history objective and subjective findings and treatment plans. It indicated that appellant had not provided any evidence that Dr. Pattison's treatment was not proper or adequate.

On May 8, 2006 the Office received an April 26, 2006 report of Dr. Stephen C. Weber, an attending Board-certified orthopedic surgeon, who diagnosed medial meniscus tear and articular cartilage injury. He noted that appellant's left knee examination was benign and indicated that his x-rays were normal. Dr. Weber stated that he reviewed appellant's restrictions and determined that they seemed appropriate for someone with mild arthritis and noted that, with respect to his knee function, he felt that his "modified duty is appropriate."⁷

In a letter dated May 12, 2006 and received by the Office on May 23, 2006, appellant indicated that he was requesting reconsideration of the Office's April 27, 2006 denial of his request for a change of physicians. He asserted that Dr. Pattison did not provide adequate explanation for the conclusions in his reports and that his reports often contained conflicting statements regarding the nature of his medical condition. Appellant also argued that Dr. Pattison did not adequately explain why he was physically capable of performing the clerk position offered by the employing establishment. He claimed that Dr. Pattison did not adequately address his left knee condition or provide an opinion on its effect on his ability to work. Appellant suggested that Dr. Pattison's opinion on his ability to work was equivocal because Dr. Pattison stated in his April 7, 2006 report that there might be some significant value in getting an independent medical evaluation to further address his medical condition.

In a May 24, 2006 decision, the Office terminated appellant's compensation effective May 24, 2006 on the grounds that he refused an offer of suitable work. It stated that the medical opinion of Dr. Pattison showed that appellant could perform the clerk position offered by the employing establishment. The Office specifically discussed the April 26, 2006 report of

⁶ The Office indicated that, although the offered clerk position was a temporary position, it was appropriate to offer such position as appellant's date-of-injury job was a temporary position.

⁷ Dr. Weber indicated that he would defer to Dr. Pattison regarding whether "modified duty is appropriate for his back."

Dr. Weber and indicated that it did not show that appellant could not perform the offered position. It stated, “As of this date, [appellant] has not provided written documentation explaining his refusal to accept the employing establishment’s suitable job. The documentation which has been submitted subsequent to the job suitability letter dated April 20, 2006 is not sufficient to justify his refusal to accept the employing establishment’s suitable job.”

On May 7, 2006 Dr. Pattison reported the findings of his examination of appellant on that date. He indicated that his medical condition was stable with regard to his back and discussed his problems with headaches.

Appellant requested a review of the written record by an Office hearing representative. In a November 13, 2006 decision, the Office hearing representative affirmed the Office’s April 27 and May 24, 2006 decisions regarding the termination of appellant’s compensation for refusing suitable work and the refusal of his request for a change of physicians. The hearing representative indicated that the Office properly followed its procedural requirements in terminating appellant’s compensation and stated, “When [appellant] did not respond to either the [employing establishment] or the Office, no further warning or notification to [him] was applicable and the Office took appropriate action to terminate the [appellant’s] entitlement to benefits under 5 U.S.C. § 8106(c)(2).”

LEGAL PRECEDENT -- ISSUE 1

Section 8106(c)(2) of the Federal Employees’ Compensation Act provides in pertinent part, “A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation.”⁸ However, to justify such termination, the Office must show that the work offered was suitable.⁹ An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.¹⁰

Certain explanations will justify a claimant’s refusal to accept an offer of employment. The Office’s procedure manual itself lists a number of reasons that are considered acceptable.¹¹ If a claimant refuses the employment offered and provides such a reason, the Office will consider his refusal justified and will continue his compensation for disability.¹²

If a claimant chooses to respond within 30 days and provide additional evidence in support of his refusal to accept an offered position, the Office must consider this evidence before it can make a final determination on the issue of suitability. Only after it has made a final

⁸ 5 U.S.C. § 8106(c)(2).

⁹ *David P. Camacho*, 40 ECAB 267, 275 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341, 345 (1981).

¹⁰ 20 C.F.R. § 10.124; *see Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

¹¹ Federal (FECA) Procedure Manual, Part -- 2 Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5 (July 1997).

¹² *Id.*

determination on the issue of suitability can the Office afford the claimant an opportunity to accept or refuse an offer of suitable work. Only after it has finalized its decision on suitability can the Office notify the claimant that refusal to accept shall result in the termination of compensation, as the language of 5 U.S.C. § 8106(c) clearly mandates.¹³

ANALYSIS -- ISSUE 1

The Board finds that the Office denied appellant a reasonable opportunity to comply with 5 U.S.C § 8106(c) before terminating his compensation effective May 24, 2006. When the Office informed appellant in its April 20, 2006 notification, that it had determined that the clerk position offered to be suitable, it informed him of a preliminary determination. By inviting appellant to write and give reasons for not accepting, the Office acknowledged that its determination was not yet final and that a reasonable explanation would justify his refusal and result in the continuation of his compensation for disability.

In this case, the Office did not afford appellant an opportunity to accept the position offered after making a final determination that the position was suitable. The Office, therefore, denied appellant a reasonable opportunity to accept an offer of “suitable” work. Without such an opportunity, appellant cannot be held to have refused an offer of suitable work within the meaning of 5 U.S.C. § 8106(c). Appellant submitted evidence in support of his refusal to accept the offered position within 30 days of April 20, 2006, the date that the Office advised him that he had 30 days to accept the offered position or provide justification for not accepting it.

On May 24, 2006 the Office issued a decision in which it determined that appellant had refused an offer of suitable work. It specifically discussed the April 26, 2006 report of appellant’s attending Board-certified orthopedic surgeon, Dr. Weber, which had been received by the Office on May 8, 2006. The Office determined that the report did not show that appellant could not perform the clerk position offered by the employing establishment. Moreover, it appears that the Office implicitly rejected argument that appellant made in support of his refusal to accept the offered position and which was received by the Office before it issued its May 24, 2006 decision.¹⁴ In a May 12, 2006 letter, received by the Office on May 23, 2006, appellant argued that Dr. Pattison, an attending Board-certified physical medicine and rehabilitation physician, did not adequately explain why he was physically capable of performing the clerk position offered by the employing establishment.¹⁵

¹³ See *Maggie L. Moore*, 42 ECAB 484 (1991); *reaff’d on recon.*, 43 ECAB 818 (1992).

¹⁴ It is not entirely clear whether the Office considered this argument, although it did suggest that it had considered all evidence and argument received prior to May 24, 2006. The Office stated, “As of this date, [appellant] has not provided written documentation explaining his refusal to accept the employing [establishment’s] suitable job. The documentation which has been submitted subsequent to the job suitability letter dated April 20, 2006 is not sufficient to justify his refusal to accept the employing [establishment’s] suitable job.”

¹⁵ Appellant claimed that Dr. Pattison did not adequately address his left knee condition or provide an opinion on its effect on his ability to work. He suggested that Dr. Pattison’s opinion on his ability to work was equivocal because Dr. Pattison stated in his April 7, 2006 report, that there might be some significant value in getting an independent medical evaluation to further address his medical condition.

In issuing its May 24, 2006 decision, the Office determined that evidence submitted by appellant in support of his refusal to accept the offered position was unacceptable and in doing so it finalized its preliminary decision on suitability. At the same instant, however, the Office terminated appellant's compensation for disability, thereby, denying him an opportunity to accept the position after determining it to be a suitable one. In view of the foregoing, the Board finds that the Office has not met its burden of justifying termination of appellant's compensation for disability effective May 24, 2006

LEGAL PRECEDENT -- ISSUE 2

Under section 8103(a) of the Act,¹⁶ an employee is permitted the initial selection of a physician. However, Congress did not restrict the Office's power to approve appropriate medical care after the initial choice of a physician. The Office has the general objective of ensuring that an employee recovers from his injury to the fullest extent possible in the shortest amount of time. The Office, therefore, has broad administrative discretion in choosing the means to achieve this goal within the limitation of allowing an employee the initial choice of a doctor. An employee who wishes to change physicians must submit a written request to the Office fully explaining the reasons for the request. The Office may approve the request in its discretion if sufficient justification is shown.¹⁷ The regulations indicate that requests that are often approved include those for "transfer of care from a general practitioner to a physician who specializes in treating conditions like the work-related one or the need for a new physician when an employee has moved."¹⁸

The only limitation on the Office's authority is that of reasonableness.¹⁹ Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.²⁰

ANALYSIS -- ISSUE 2

The Board finds that the Office did not abuse its discretion when it refused appellant's request for a change of physicians. In the Office's April 27, 2006 decision initially denying this request and its November 13, 2006 decision affirming this denial, the Office explained that appellant was referred to Dr. Pattison by his attending orthopedic surgeon after it was felt that he no longer needed surgical intervention and stated that, therefore, Dr. Pattison's specialty of physical medicine and rehabilitation was appropriate for appellant's condition. The Office noted that appellant did not provide any notable explanation of why he felt Dr. Pattison's treatment was

¹⁶ 5 U.S.C. § 8103(a).

¹⁷ See *Elizabeth Stanislav*, 49 ECAB 540 (1998); 20 C.F.R. § 10.316(a), (b).

¹⁸ 20 C.F.R. § 10.316(b).

¹⁹ *Daniel J. Perea*, 42 ECAB 214 (1990); *Pearlie M. Brown*, 40 ECAB 1090 (1989).

²⁰ *Rosa Lee Jones*, 36 ECAB 679 (1985).

inadequate and indicated that a review of the record revealed that Dr. Pattison provided detailed medical reports containing recitations of medical history objective and subjective findings and treatment plans.²¹ The Board finds that given these explanations the Office's decision to deny appellant's request for a change of physicians was not unreasonable. Appellant has failed to establish that the Office abused its discretion by refusing to authorize a change of physicians on the basis of inadequate treatment or improper care.

CONCLUSION

The Board finds that the Office improperly terminated appellant's compensation effective May 24, 2006 on the grounds that he refused an offer of suitable work. The Board further finds that the Office did not abuse its discretion when it refused appellant's request for a change of physicians.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' November 13, 2006 decision is reversed with respect to the termination of his compensation for refusing suitable work and is affirmed with respect to the refusal of his request for a change of physicians. The Office's May 24, 2006 decision is reversed and its April 27, 2006 decision is affirmed.

Issued: October 25, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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

²¹ The Board notes that appellant only generally explained why he felt that Dr. Pattison's treatment was inadequate. For example, he generally asserted that Dr. Pattison did not provide adequate explanation for the conclusions in his reports, that his reports often contained conflicting statements regarding the nature of his medical condition, and that he had not kept him informed "as to what was going on medically with his case."