

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES F. DILLARD and DEPARTMENT OF THE ARMY,
RED RIVER ARMY DEPOT, Texarkana, Tex.

*Docket No. 96-1546; Submitted on the Record;
Issued April 14, 1998*

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's monetary compensation for refusing suitable work.

Appellant sustained an injury in the performance of duty on December 3, 1990. The Office accepted his claim for the conditions of lumbar strain and herniated nucleus pulposus at the L3-4 level and authorized surgery. Appellant received compensation for temporary total disability on the periodic compensation rolls.

On April 13, 1994 the employing establishment submitted a job description for the position of materials handler, together with a work restriction evaluation form, to Dr. Warren D. Long, Jr., appellant's attending neurological surgeon.

In a report dated April 15, 1994, Dr. Long indicated that appellant could not squat, stoop, bend or kneel at all. He could walk only about two hours a day. He could sit for only about six. He could lift only about 10 pounds. Dr. Long reported that if the employing establishment could offer a position in a sedentary capacity consistent with being able to pick up 10 pounds and occasionally 20 "then I think they should go for it." He stated that appellant could certainly push and pull and work above his shoulders, and that his finger manipulations were unremarkable. "The problem," Dr. Long reported, "is that he cannot stand, sit or walk for any length of time without giving out."

Dr. Long completed a work restriction evaluation form on April 24, 1994. He indicated that appellant could sit and walk for two hours a day but could perform no lifting, bending, squatting, climbing, kneeling or twisting. Dr. Long appeared initially to indicate a lifting restriction of 0 to 10 pounds, but he scribbled over this indication.

On April 24, 1994 Dr. Long indicated on a separate form that it was his medical opinion that appellant could perform the duties as described in the job offer.¹

On September 7, 1995 the employing establishment offered appellant the position of materials handler. On December 7, 1995 the Office notified appellant that the position of materials handler was suitable to his work capabilities and was currently available. The Office stated that he had 30 days from the date of the letter either to accept the position or to provide an explanation in writing for refusing it. At the expiration of the 30 days, the Office stated, a final decision on the issue would be made. The Office notified appellant of the provisions of 5 U.S.C. § 8106(c)(2). "If you fail to accept the offered position," the Office advised, "and fail to demonstrate that the failure is justified, your compensation will be terminated."

In an undated letter received by the Office on January 17, 1996, appellant advised that he was responding in writing after talking to the claims examiner. He explained that he was unable to work: He could not bend, stoop or walk any distance. His legs go numb and he could not drive. Further, he stated, he could not lift, push or pull. Appellant enclosed an August 8, 1995 report from Dr. Long. "According to my condition and my doc[tor]," he stated, "I am total[ly] disable[d]."

On January 22, 1996 the Office found that appellant had not responded to the offer and had not reported for work. In a decision dated January 31, 1996, the Office terminated appellant's monetary compensation for refusing suitable work.

In the case of *Maggie L. Moore*, the Board held that when the Office makes a preliminary determination of suitability and extends the claimant a 30-day period either to accept or to give reasons for not accepting, the Office must consider any reasons given before it can make a final determination on the issue of suitability. Should the Office find the reasons unacceptable, it may finalize its preliminary determination of suitability, but it may not invoke the penalty provision of 5 U.S.C. § 8106(c) without first affording the claimant an opportunity to accept or refuse the offer of suitable work with notice of the penalty provision.² Federal Employees' Compensation Act Bulletin No. 92-19, issued July 31, 1992, adapted Office procedure to comply with the Board's ruling in *Moore*. The Bulletin provides that if the reasons given for refusal are considered unacceptable, the claimant will be informed of this by letter, given 15 days from the date of the letter to accept the job, and advised that the Office will not consider any further reasons for refusal. If the claimant does not accept the job within the 15-day period, compensation payments, including schedule award payments, will be terminated under 5 U.S.C. § 8106(c).

The Board finds that the Office prematurely invoked the penalty provision of 5 U.S.C. § 8106(c) because it failed to consider appellant's written response and the reasons given therein for not accepting the offered position. The Office received appellant's correspondence a full two weeks before issuing its final decision but failed to address the adequacy of appellant's reasons

¹ Dr. Long added a barely legible notation that appeared to place a 10-pound limit on picking up items constantly.

² 42 ECAB 484 (1991), *aff'd on reconsideration*, 43 ECAB 818 (1992).

or the medical evidence submitted in support thereof. Instead, the Office erroneously found that appellant did not respond to the job offer.

Because the Office failed to consider appellant's reasons prior to finalizing its preliminary determination of suitability, the Board finds that the Office failed to discharge its burden of proof to justify termination of appellant's compensation.³

The January 31, 1996 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, D.C.
April 14, 1998

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

³ See, e.g., *Harold S. McGough*, 36 ECAB 332 (1984) (once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits).