

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of GEORGE M. KELLEY and DEPARTMENT OF TRANSPORTATION,  
FEDERAL AVIATIONS ADMINISTRATION, Miami, Fla.

*Docket No. 96-2302; Submitted on the Record;  
Issued October 8, 1998*

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DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,  
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs had the authority to issue a decision dated July 30, 1996 reinstating appellant's compensation, during the pendency of his appeal of its April 24, 1996 decision in the same matter; and (2) whether the Office properly terminated appellant's compensation benefits effective December 10, 1995 on the grounds that he refused an offer of suitable work.

On October 28, 1993 appellant, then a 48-year-old logistics specialist, filed a traumatic injury claim, alleging that he sustained an injury while lifting boxes on October 27, 1993. Appellant stopped work on October 28, 1993. The Office accepted appellant's claim for lumbosacral strain and low back aggravation of degenerative disc disease and spondylolisthesis. Appellant received appropriate compensation for temporary total disability. On October 19, 1995 the employing establishment offered appellant a position as a modified logistics management specialist with restrictions on bending, prolonged standing, twisting, crawling or lifting over 10 pounds. By letter dated November 3, 1995, the Office informed appellant that it found this position suitable and informed him of the penalty provision set forth in 5 U.S.C. § 8106(c). The Office allowed appellant 30 days to provide an explanation if he refused the offer. In a decision dated December 14, 1995, the Office advised appellant that the evidence he submitted did not provide an acceptable reason for his refusal of the position and terminated his compensation effective December 10, 1995 on the grounds that he had violated section 8106 of the Federal Employees' Compensation Act by his refusal of suitable work. By decision dated April 24, 1996, an Office hearing representative affirmed the Office's December 14, 1995 decision in part, finding that the initial termination of compensation was proper, but remanding the case for compliance with Chapter 2.814 of the Federal Procedure Manual based on evidence submitted by appellant subsequent to the issuance of the Office's December 1995 decision. By letter date July 20, 1996, appellant filed an application for review with the Board of the Office's April 24, 1996 decision terminating his compensation benefits. In a decision dated July 30, 1996, the Office reinstated appellant's compensation effective December 10, 1995 on the

grounds that the medical evidence established that there was no wage-earning capacity and offered appellant an election of benefits.

The Board finds that the Office did not have the authority to issue its decision dated July 30, 1996.

In *George H. Thamer*,<sup>1</sup> the Board provided the following holding which governs the present case:

“When appellate procedure is invoked by an appeal, the decision appealed from should not be changed before the appellate body has a chance to render its decision. This is an elementary proposition long recognized. Any other course would nullify the purpose of an appellate function and create constant confusion in the cases – as exemplified by the present case.... An action which disturbs the status of the case as appealed from must necessarily be regarded as a nullity; otherwise, orderly appeal processes would break down.”<sup>2</sup>

Thus, as the Board and the Office cannot have simultaneous jurisdiction over the same issue in the same case, the decision of the Office dated July 30, 1996 regarding appellant’s entitlement to compensation in relation to his October 27, 1993 employment injury is null and void.<sup>3</sup>

The Board also finds that the Office improperly terminated appellant’s compensation benefits on the grounds that he refused an offer of suitable work.

Under the Act,<sup>4</sup> once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of compensation.<sup>5</sup> 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.”<sup>6</sup> However, to justify such termination, the Office must show that the work offered is suitable.<sup>7</sup> An employee who refuses or neglects to work after suitable work has been offered to him or her has the burden of showing that such refusal of work was justified.<sup>8</sup>

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<sup>1</sup> 2 ECAB 88 (1948).

<sup>2</sup> *Id.*

<sup>3</sup> *Douglas E. Billings*, 41 ECAB 880 (1990).

<sup>4</sup> 5 U.S.C. § 8101 *et seq.*

<sup>5</sup> *William Kandel*, 43 ECAB 1011 (1992).

<sup>6</sup> 5 U.S.C. § 8106(c)(2).

<sup>7</sup> *David P. Comacho*, 40 ECAB 267 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341 (1981).

<sup>8</sup> 20 C.F.R. § 10.124; *see Catherine G. Hammond*, 41 ECAB 375 (1990).

The regulations governing the Act provide several steps that must be followed prior to a determination that the position offered is suitable. Section 10.124(b) of the Office's regulation reads as follows:

“Where an employee has been advised by the employing agency in writing of the existence of specific alternative positions within the agency, the employee shall furnish the description and physical requirements of such alternative positions to the attending physician and inquire whether and when the employee will be able to perform such duties.”<sup>9</sup>

In this case, the Office terminated appellant's compensation benefits on the grounds that he refused an offer of suitable work, however, the Office did not follow the regulations in effect at the time of its December 14, 1995 decision in reaching this decision. The record did not contain any reports from any of appellant's treating physicians which indicated that he could perform the position offered. Although the employing establishment formulated the proffered position ostensibly based on a July 20, 1995 report by Dr. Barry J. Silverman, one of appellant's treating physicians and a Board-certified orthopedic surgeon, as noted by the Office hearing representative in his decision, this report which purportedly released appellant for work six hours a day with restrictions was not contained in the record. Thus, there was no report of record by appellant's treating physician at the time the limited-duty position was offered which supported the restrictions set forth therein. In addition, the Board notes that appellant was referred for a second opinion examination and report contemporaneous with the offer of limited-duty work for appellant and that the Office referral physician provided an opinion that would not support the Office's determination that the position offered was suitable. In a report dated October 25, 1995, Dr. Orestes G. Rosabal, a Board-certified orthopedic surgeon, and Office referral physician, diagnosed Grade I to II L5-S1 spondylolisthesis associated with chronic low back pain, chronic cervical pain by history and indicated that internal derangement of the right knee needed to be ruled out. He indicated that appellant's knee condition might need surgical intervention and placed a restriction on appellant's ability to walk to less than one hour per day, in addition to the other restrictions provided in the limited-duty job offer, until such time that the knee condition was further diagnosed. This restriction on walking would have rendered the offered position unsuitable.<sup>10</sup> Therefore, as there was no evidence in the record at the time the position was deemed suitable which supported the medical limitations provided in said offer, the Office did not meet its burden of proof in terminating appellant's compensation benefits effective December 10, 1995 for failure to accept suitable work.

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<sup>9</sup> 20 C.F.R. § 10.124(b).

<sup>10</sup> The Board further notes that documentation establishing appellant's knee condition, in and of itself, may have rendered the position unsuitable. The Federal Procedure Manual provides that “[i]f medical reports in file document a condition which has arisen since the compensable injury, and this condition disables the claimant from the offered job, the job will be considered unsuitable (even if the subsequently-acquired condition is not work related). Federal (FECA) Procedure Manual, Part 2 – Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(4) (December 1993).

The decision of the Office of Workers' Compensation Programs dated July 30, 1996 is set aside as null and void, and the decisions of the Office dated April 24, 1996 and December 14, 1995 are hereby reversed.

Dated, Washington, D.C.  
October 8, 1998

George E. Rivers  
Member

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member