

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JAMES M. ROBINSON and TENNESSEE VALLEY AUTHORITY,  
Chattanooga, TN

*Docket No. 98-136; Submitted on the Record;  
Issued August 9, 1999*

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DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits on the grounds that he refused an offer of suitable work.

The Board has duly reviewed the case on appeal and finds that the Office failed to meet its burden of proof to terminate appellant's compensation benefits.

Appellant filed a claim alleging on March 11, 1993 he sustained cervical and lumbar strains in the performance of duty.<sup>1</sup> The Office accepted this claim on May 24, 1993 and entered appellant on the periodic rolls. The employing establishment offered appellant a limited-duty position on February 25, 1994.<sup>2</sup> The Office informed appellant that it found this position suitable on March 3, 1994 and allowed him 30 days to accept the position or offer his reasons for refusal. Appellant refused the position on March 11, 1994 and alleged that his physician found he was unable to work. The Office responded on March 14, 1994, informed appellant that his reasons for refusal were unacceptable and allowed him an additional 15 days to accept the position. Appellant's attorney responded on March 18, 1994 and provided additional reasons. By decision dated April 14, 1994, the Office terminated appellant's compensation benefits finding that he refused an offer of suitable work. Appellant, through his attorney,<sup>3</sup> requested

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<sup>1</sup> The Office previously accepted that appellant sustained a lower back strain on September 4, 1990 and a lumbar strain due to a June 6, 1991 employment injury.

<sup>2</sup> The employing establishment offered a position located in Muscle Shoals, Alabama and required appellant to sit, walk and stand intermittently for 4 hours each, to lift up to 20 pounds for 1 hour and to bend, squat, climb, kneel and twist, intermittently for up to 2 hours each.

<sup>3</sup> Appellant, through his attorney, initially requested an oral hearing and then review by the Board. In response to appellant's request through counsel, the Board dismissed the appeal in an order dated January 24, 1995. Docket No. 94-2073.

reconsideration on April 4 and September 18, 1995, May 29, September 4 and November 20, 1996 and May 27, 1997. The Office reviewed appellant's claim on the merits on August 1, 1995, May 17, August 28 and November 14, 1996, February 27 and July 9, 1997.

It is well settled that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>4</sup> As the Office in this case terminated appellant's compensation under 5 U.S.C. § 8106(c), the Office must establish that appellant refused an offer of suitable work. Section 8106(c) of the Act<sup>5</sup> provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee is not entitled to compensation. Section 10.124(c) of the applicable regulations<sup>6</sup> provides that an employee who refuses or neglects to work after suitable work has been offered or secured 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. To justify termination of compensation, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.<sup>7</sup>

Dr. W. Cooper Beazley, a Board-certified orthopedic surgeon,<sup>8</sup> examined appellant on April 5, 1993 following his March 11, 1993 employment injury. He diagnosed a recurrent injury and aggravation of preexisting back problem and a neck injury. Dr. Beazley recommended that appellant try to medically retire. On April 7, 1993 Dr. Beazley diagnosed lumbar and cervical strains. In a note dated April 19, 1993, Dr. Beazley stated that if appellant could work in the Johnsonville Plant as a engineering aide, mechanical, he could try to return to work. He stated that the drive to the employing establishment was causing appellant more discomfort in regard to his neck and back. On May 19, 1993 Dr. Beazley recommended that appellant apply for disability retirement. He stated that appellant was having too much pain to continue working. He continued to support appellant's total disability for work.

In a report dated July 22, 1993, Dr. Beazley recommended a functional capacity evaluation. On August 10, 1993 the functional capacity evaluation was reported as invalid based on inconsistencies in testing, selectivity of pain reports and pain behaviors. The testing indicated that appellant could sit for 2 hours in 30-minute durations, stand for 2 hours in 30-minute durations and walk for 8 hours. He could not kneel and could bend, stoop, squat, crawl, climb stairs, crouch and balance occasionally, for up to 33 percent of an 8-hour workday. The report indicated that appellant's lifting capacity varied between 12.6 and 23.6 pounds depending on the position. Dr. Beazley noted the testing in a September 17, 1993 report and stated that the

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<sup>4</sup> *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

<sup>5</sup> 5 U.S.C. § 8106(c)(2).

<sup>6</sup> 20 C.F.R. § 10.124(c).

<sup>7</sup> *Arthur C. Reck*, 47 ECAB 339 (1995).

<sup>8</sup> Dr. Beazley was originally an Office second opinion physician. However, appellant continued to seek treatment from him.

therapist was unable to carry out the testing due to appellant's pain. He again recommended medically retiring appellant.

The Office referred appellant for a second opinion evaluation with Dr. Lawrence P. Laughlin, a Board-certified orthopedic surgeon, on December 17, 1993. In a report dated January 12, 1994, Dr. Laughlin noted appellant's history of injury, performed a physical examination and reviewed x-rays. Dr. Laughlin found good movement in the cervical spine, 90 percent normal with no paracervical muscle spasm. He found that appellant had 70 percent of normal movement in the back with no muscle spasm. Dr. Laughlin found that appellant's x-rays revealed degenerative disc disease L5-S1 and a myelogram with a defect at the S1 nerve root. He diagnosed degenerative disc disease, lumbar spine and neck strain. Dr. Laughlin stated:

“This is going to be a difficult gentleman to get back to work. He has really got degenerative disc changes in the low back, probably same in the neck that might restrict his lifting to 40 pounds, bending to 20 times per hour. I feel that the current condition probably is related to the injury of March 11[, 1993] and the fall aggravated a preexisting condition.”

In a letter dated February 7, 1994, the Office asked that Dr. Beazley review Dr. Laughlin's report and provide an opinion regarding appellant's work restrictions. On February 21, 1994 Dr. Beazley responded to the Office's request and stated that appellant could not return to work because of chronic problems consistent with disc bulging and arthritic conditions in his cervical and lumbar spines. He stated, “I feel that he should be medically retired, as I have stated in numerous other letters. I do n[o]t feel he can be returned to any type of reasonable work situation; even with severe restrictions, he seems to have pain on a continual basis.”

In a report dated April 5, 1994, received by the Office on April 14, 1994, Dr. Robert J. Barnett, a Board-certified orthopedic surgeon, noted appellant's history of injury and performed a physical examination. He noted limited range of motion in appellant's neck and back. Dr. Barnett stated that appellant could not lift, stand or sit for long periods of time. He found extreme limited motion and stated that appellant was unable to return to the labor market.

Section 8123(a) of the Federal Employees' Compensation Act<sup>9</sup> provides, “If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.”

In this case, there is a conflict of medical opinion evidence between appellant's physicians, Drs. Barnett and Beazley, who opined that appellant could not return to work due to his March 11, 1993 employment injury and Dr. Laughlin, the Office second opinion physician, who indicated that appellant could return to work eight hours a day with restrictions. Due to this unresolved conflict of medical opinion evidence, the Board finds that the medical evidence is not sufficient to establish that the offered position is within appellant's physical limitations.

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<sup>9</sup> 5 U.S.C. §§ 8101-8193, 8123(a).

As the Office failed to meet its burden of proof in establishing that the offered position was suitable based on the medical evidence of record, the Office failed to establish that appellant refused a suitable work position.

The decisions of the Office of Workers' Compensation Programs dated July 9 and February 27, 1997 and November 14, 1996 are hereby reversed.

Dated, Washington, D.C.  
August 9, 1999

Willie T.C. Thomas  
Alternate Member

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member