

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DALE M. JENSEN and DEPARTMENT OF THE NAVY,  
NAVAL AIR STATION, Miramar, Calif.

*Docket No. 97-895; Submitted on the Record;  
Issued February 2, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,  
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective June 22, 1996 on the grounds that he refused an offer of suitable work; and (2) whether the Office properly denied appellant's request for a hearing under section 8124 of the Federal Employees' Compensation Act.

The Board finds that the Office properly terminated appellant's compensation effective June 22, 1996 on the grounds that he refused an offer of suitable work.

Section 8106(c)(2) of the 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>1</sup> However, to justify such termination, the Office must show that the work offered was suitable.<sup>2</sup> 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.<sup>3</sup>

In the present case, the Office accepted that appellant sustained bilateral cataracts due to exposure to radiation at work and paid compensation for periods of disability. By decision dated June 10, 1996, the Office terminated appellant's compensation effective June 22, 1996 on the grounds that he refused an offer of suitable work in the form of an office aide position.

The evidence of record shows that appellant is capable of performing the office aide position offered by the employing establishment and determined to be suitable by the Office in January 1995. The office aide position is a sedentary position requiring the performance of various clerical duties including filing and answering telephones. There is no indication that the

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<sup>1</sup> 5 U.S.C. § 8106(c)(2).

<sup>2</sup> *David P. Camacho*, 40 ECAB 267, 275 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341, 345 (1981).

<sup>3</sup> 20 C.F.R. § 10.124; *see Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

position requires notable reading. The record contains medical evidence, which shows that appellant's vision condition does not prevent him from performing the office aide position. In a report dated August 24, 1994, Dr. Harry Holcomb, an attending ophthalmologist, noted that appellant's corrected vision in both eyes was 20/25 and indicated that he did not know of any work restrictions due to appellant's vision condition.<sup>4</sup> Moreover, the record reveals that appellant is vocationally and educationally capable of performing the office aide position.

The Board notes that, therefore, the Office has established that the office aide position offered by the employing establishment is suitable. As noted above, once the Office has established that a particular position is suitable, 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. The Board has carefully reviewed the evidence and argument submitted by appellant in support of his refusal of the office position and notes that it is not sufficient to justify his refusal of the office aide position.<sup>5</sup>

For these reasons, the Office properly terminated appellant's compensation effective June 22, 1996 on the grounds that he refused an offer of suitable work.<sup>6</sup>

The Board further finds that the Office properly denied appellant's request for a hearing under section 8124 of the Act.

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, provides in pertinent part: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."<sup>7</sup> As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.<sup>8</sup>

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary

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<sup>4</sup> Dr. Holcomb indicated that appellant presented with blurred vision on July 1, 1994, due to anterior uveitis, but that the condition was treated with medication such that it improved and stabilized August 1, 1994 and no longer required medication. In a report dated May 2, 1996, Dr. Holcomb indicated that appellant reported peripheral opacities in his eyes, but he did not indicate that this condition restricted his ability to work.

<sup>5</sup> Appellant alleged that the condition of his vision prevented him from performing the office aide position, but he did not clarify how his medical condition would prevent him from carrying out the duties of the position.

<sup>6</sup> The Board notes that the Office complied with its procedural requirements prior to terminating appellant's compensation, including providing appellant with an opportunity to accept the office aide position after informing him that his reasons for initially refusing the position were not valid; *see generally*, *Maggie L. Moore*, 42 ECAB 484 (1991); *reaff'd on recon.*, 43 ECAB 818 (1992).

<sup>7</sup> 5 U.S.C. § 8124(b)(1).

<sup>8</sup> *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

authority in deciding whether to grant a hearing.<sup>9</sup> Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act, which provided the right to a hearing,<sup>10</sup> when the request is made after the 30-day period for requesting a hearing<sup>11</sup> and when the request is for a second hearing on the same issue.<sup>12</sup>

In the present case, appellant's hearing request was made more than 30 days after the date of issuance of the Office's prior decision dated June 10, 1996 and, thus, appellant was not entitled to a hearing as a matter of right. Appellant requested a hearing before an Office representative in a letter dated September 19, 1996 and postmarked September 20, 1996. Hence, the Office was correct in stating in its November 8, 1996 decision that appellant was not entitled to a hearing as a matter of right because his hearing request was not made within 30 days of the Office's June 10, 1996 decision.

While the Office also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, the Office, in its November 8, 1996 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's hearing request on the basis that the case could be resolved by submitting additional evidence and requesting reconsideration. The Board has held that as the only limitation on the Office's authority is reasonableness, 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 deduction from established facts.<sup>13</sup> In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's hearing request which could be found to be an abuse of discretion.

For these reasons, the Office properly denied appellant's request for a hearing under section 8124 of the Act.

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<sup>9</sup> *Henry Moreno*, 39 ECAB 475, 482 (1988).

<sup>10</sup> *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

<sup>11</sup> *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

<sup>12</sup> *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

<sup>13</sup> *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

The decisions of the Office of Workers' Compensation Programs dated November 8 and June 10, 1996 are affirmed.

Dated, Washington, D.C.  
February 2, 1999

Michael J. Walsh  
Chairman

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member