

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DICK J. WARREN and DEPARTMENT OF THE AIR FORCE,
STRATEGIC AIR COMMAND, F.E. WARREN AIR FORCE BASE, Wyo.

*Docket No. 97-1052; Submitted on the Record;
Issued January 4, 1999*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues before the Board in this appeal are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation under 5 U.S.C. § 8106(c) based on his refusal to accept suitable employment as offered by the employing establishment; and (2) whether the termination of appellant's compensation under 5 U.S.C. § 8106(c) serves as a bar to further compensation under section 8107 arising from the accepted employment injury.

On September 1, 1992 appellant, then a 56-year-old motor vehicle operator, fell from a trailer and landed on his right shoulder during the performance of his work duties. The Office accepted the claim for a right shoulder strain, right shoulder arthroscopy and right rotator cuff tear and repair and appropriate benefits were authorized.

In an April 11, 1996 report, Dr. Robert G. Weiner, a Board-certified orthopedic surgeon and a second opinion physician, stated that appellant was able to work eight hours per day provided that he was doing desk work.

By letter dated October 10, 1996, the employing establishment offered appellant a position as a facility maintenance control clerk. Within the offer, appellant was requested to respond by October 25, 1996. On October 24, 1996 appellant declined the job offer on the basis that he "retired in March 1996."

In a November 7, 1996 letter, the Office advised appellant that the job offer was considered valid and that the position was suitable to his work capabilities. Appellant was advised that the job remained open for him to accept and that he had 30 days in which to accept the job offer or provide an explanation for his refusal accompanied by supporting medical evidence. Appellant was notified that if he rejected the job offer, he would not be entitled to further compensation benefits for wage loss or schedule award. Appellant was also informed that retirement was not an acceptable reason for refusing suitable employment.

In a December 10, 1996 memorandum, the Office asked the district medical adviser to review the March 9 and April 11, 1996 reports of Dr. Weiner and the reports from the last year and a half from appellant's attending physician, Dr. Richard Torkelson, a Board-certified orthopedic surgeon. In his March 9, 1996 report, Dr. Weiner stated that appellant's shoulder symptoms were primarily due to pain and, from a purely subjective standpoint, appellant was totally and permanently disabled from any type of meaningful work. Dr. Weiner noted that appellant claimed discomfort on any type of motion of the shoulder. "Therefore, according to appellant, even sitting at a desk trying to write would cause him discomfort." Dr. Weiner stated that unless appellant agreed to additional surgery, he felt that appellant has maximized his therapeutic benefits, no further treatment was indicated and would be no significant chance of appellant being rehabilitated to a functional level. Dr. Weiner further stated that he was somewhat pessimistic that appellant would ever return to meaningful work again. In his April 11, 1996 report, Dr. Weiner stated that he never stated appellant's arm was essentially useless. Basically, the only significant loss of function of the right upper extremity is in abduction. Dr. Weiner stated that he saw no reason why appellant could not work eight hours per day, provided that he was just doing desk work. Dr. Weiner stated that appellant's primary pathology would be discomfort, weakness and basic inability to abduct his shoulder. Therefore, any reasonable work that did not require shoulder abduction or significant shoulder flexion would be compatible with the objective findings in appellant. Dr. Torkelson, appellant's attending physician, stated that appellant was totally disabled because of chronic pain. However, Dr. Torkelson did not provide any objective findings to support his opinion. The district medical adviser stated that the offered position did not require more than activities of daily living and agreed with Dr. Weiner that appellant was capable of performing the offered position.

On December 6, 1996 appellant refused the offered job based on his contention that he was disabled from pain and on the fact that Dr. Torkelson had reported that he remained disabled from work.

In a December 11, 1996 letter, the Office advised appellant that his reason for refusing the job offer was not acceptable and provided appellant an additional 15 days to accept the position.

On December 21, 1996 the Office received an unsigned treatment note dated December 2, 1996, apparently from Dr. Torkelson, which stated that appellant was disabled "because of chronic pain." No objective findings or explanation was given for this opinion.

By decision dated December 31, 1996, the Office terminated appellant's compensation benefits under 5 U.S.C. § 8106(c) effective January 4, 1997 finding that he refused to accept a suitable job offer. The Office noted that appellant was not entitled to further compensation benefits with the exception of medical benefits for treatment of his accepted condition.

The Board finds that the Office properly exercised its authority under 5 U.S.C. § 8106(c) and implementing regulations to terminate appellant's compensation effective January 4, 1997 based on his refusal of suitable work. The Board also finds that, based on his refusal of suitable employment, the Federal Employees' Compensation Act and implementing federal regulations serve as a bar to the receipt of further compensation under section 8106 by appellant arising from the accepted employment injury.

Section 8106(c) of the Act provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for him is not entitled to compensation.¹ Further, the Office has promulgated federal regulations under this section of the Act concerning an employee's obligation to return to work or to seek work when available. Section 10.124(c) provides:

“Where an employee has been offered suitable employment (or reemployment) by the employing agency (*i.e.*, employment or reemployment which the Office has found to be within the employee's educational and vocational capabilities, within any limitations and restrictions which preexisted the injury, and within the limitations and restrictions which resulted from the injury), or where an employee has been offered suitable employment as a result of job placement efforts made by or on behalf of the Office, the employee is obligated to return to such employment. An employee who refuses or neglects to work after suitable work has been offered or secured for 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 as provided by 5 U.S.C. § 8106(c)(2) and paragraph (e) of this section.”²

The Office's implementing regulations further provide, at sub-section (e), as follows:

“A partially disabled employee who, without showing sufficient reason or justification, refuses to seek suitable work or refuses or neglects to work after suitable work has been offered to, procured by, or secured for the employee, is not entitled to further compensation for total disability, partial disability, or permanent impairment as provided by sections 8105, 8106, and 8107 of the Act. An employee shall be provided with the opportunity to make such showing of sufficient reason or justification before a determination is made with respect to termination of entitlement to compensation as provided by 5 U.S.C. § 8106(c).”³

In the present case, the Office has properly exercised its authority as granted under the Act and implementing federal regulations.⁴ The record on appeal demonstrates that following the acceptance of appellant's claim for right shoulder strain, right shoulder arthroscopy and right rotator cuff tear and repair causally related to his federal employment, the Office paid appropriate benefits and medical expenses. The employing establishment, incooperating the restrictions set forth by Dr. Weiner, identified the position of facility maintenance control clerk,

¹ 5 U.S.C. § 8106(c)(2).

² 20 C.F.R. § 10.124(c).

³ 20 C.F.R. § 10.124(e).

⁴ It is well established that once the Office accepts a claim, it has the burden of proof of justifying termination or modification of compensation benefits. This includes cases in which the Office terminates compensation entitlement under section 8106(c) for refusal to accept suitable employment; *see Shirley B. Livingston*, 42 ECAB 855 (1991).

which found appellant could work eight hours per day if he were just doing desk work. Appellant was properly notified by the Office that the selected position was found physically suitable and was advised that if he refused to accept the position his compensation benefits could be terminated. Appellant was provided with the opportunity to accept the position, but he declined the position stating that he had chronic pain and Dr. Torkelson had stated that he was disabled from work.

The Board finds that the Office properly determined that appellant rejected an offer of suitable employment and met its burden of proof in terminating appellant's compensation benefits effective January 4, 1996. The evidence of record establishes that appellant was provided with the opportunity to accept or reject the position, following notification of the Office's determination of suitability of the offered position and advising appellant of the penalty for refusing to accept such employment. Moreover, appellant has not demonstrated that the position was outside his physical limitations as recommended by the second opinion physician, Dr. Weiner, and confirmed by the district medical adviser. As the issue in this case is whether appellant is capable of performing the job offered for eight hours per day doing desk work, the question revolves around whether the offered position fits within appellant's restrictions. Although Dr. Torkelson, appellant's attending physician, stated that appellant is disabled "because of chronic pain," his opinion is of limited probative value as he did not provide any medical rationale or objective evidence to support his conclusion that appellant was disabled.⁵ Thus, appellant has not submitted sufficient medical evidence to establishing that he was not physically capable of performing the duties of the facility maintenance control clerk position offered in this case. The Office, therefore, met its burden of proof to terminate appellant's monetary benefits effective January 4, 1996.

With regard to the second issue, the Office properly found that section 8106(c) of the Act served as a bar to further compensation for disability arising from the accepted employment injury. In their formal decision issued to appellant on December 31, 1996, the Office cited 5 U.S.C. § 8106(c), which excludes appellant from further entitlement of monetary benefits including a schedule award. The Board notes that the Office, in a June 4, 1996 decision, awarded appellant compensation for a 19 percent right arm permanent disability for the period March 9, 1996 to April 27, 1997. Thus, based on his refusal of suitable work, the Act and its implementing regulations, appellant is barred from receiving further monetary benefits, including compensation granted under 5 U.S.C. § 8107 for a schedule award after December 31, 1996.⁶

⁵ *Lucrecia M. Nielsen*, 42 ECAB 583 (1991) (where the Board held that medical opinions must be supported by medical rationale to be of sufficient probative value).

⁶ 5 U.S.C. § 8106(c)(2); *see Stephen R. Lubin*, 43 ECAB 564 (1992) (finding that, based on claimant's refusal of suitable work, the Act and implementing regulations serve as a bar to the receipt of further monetary compensation, including compensation granted under 5 U.S.C. § 8107 for a schedule award); *see also* 20 C.F.R. § 10.124(e) (stating that an employee who refuses an offer of suitable work is not entitled to further compensation for total disability, partial disability, or permanent impairment but remains entitled to medical benefits).

The December 31, 1996 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
January 4, 1999

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member