

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHNNY B. WALKER and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Bay Pines, FL

*Docket No. 98-262; Submitted on the Record;
Issued January 3, 2000*

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs abused its discretion in terminating appellant's compensation under 5 U.S.C. § 8106(c) based on his refusal to accept suitable employment as offered by the employing establishment.

The Board has duly reviewed the case on appeal and finds that the Office did not meet its burden of proof in terminating appellant's wage-loss compensation.

On June 19, 1986 appellant, then a 49-year-old maintenance foreman, sustained employment-related chlorine gas inhalation. He stopped work in January 1988 and was placed on the periodic rolls. In a January 17, 1995 work capacity evaluation, Dr. Eli Freilich, appellant's treating Board-certified pulmonologist, provided restrictions to appellant's physical activity and advised that he could not work in an environment with airborne particles, gasses or fumes and could not work in stressful situations. In an attached report, Dr. Freilich stated that appellant had bronchospasm when exposed to various fumes and odors, advising:

“Any type of work situation in which he would be exposed to gasses or fumes, including that of common perfumes, can lead to bronchospasm and has done so in the past. Dusty environments have also led to bronchospasm. Stressful situations, high volume work, meeting deadlines, etcetera, can and [have] caused chest tightness and wheezing. He also begins to get very nervous in these situations and finds it very difficult to perform.”

Dr. Freilich concluded that, aside from the bronchospastic airway condition, appellant was in very good health and had no other significant medical problems.

By letter dated May 17, 1995, the employing establishment offered appellant a permanent position as a computer assistant. Job training, if needed, was to be provided, and the position

was within the restrictions provided by Dr. Freilich.¹ He was given 30 days to respond. By letter dated June 15, 1995, the job offer was extended an additional 30 days.

Appellant submitted a May 31, 1995 report from Dr. Freilich who advised that, since the 1986 injury, appellant had moved to a location that would require him to drive over 200 miles daily if he were to accept the offered job which would be a hardship as well as possibly precipitate his asthma from the stress of the drive. Dr. Freilich also noted that appellant would be exposed to a considerable amount of exhaust fumes. In a June 19, 1995 report, Dr. Freilich advised that appellant should not be exposed to perfumes, chemicals and dust or cigarette smoke as these seemed to exacerbate his condition.

On June 29, 1995 appellant refused the offered job, stating:

“I regretfully refuse the position for the following reasons: I believe the chemical odors would cause me breathing problems and my doctor agrees with me.”

He also indicated that he had visited the computer room at the employing establishment, finding that, while it was climate controlled, it was not chemical free. Appellant stated that after he had been there for 20 to 30 minutes he had to take medication to relieve a sinus headache. He particularly noted an odor of recycled cardboard and paper, dust particles, paper and carbon particles in the printer heads and frames, an odor of cleaning chemicals, perfume and deodorants in the computer room and bathroom which contained containers of cleaning products. Appellant stated that a strong odor of cleaning chemicals was present near the personnel office. He concluded by stating that he had relocated to a rural area in 1991 upon the advice of his physician and that a commute to the employing establishment would entail a drive of 110 miles each way in congested traffic with a five- to six-hour daily exposure to exhaust fumes.

In a June 30, 1995 report, Dr. Thomas Sutton, an employing establishment physician who is Board-certified in emergency medicine, advised that he had reviewed appellant's medical record and had spent a few minutes with appellant on June 1, 1995 at the employing establishment and noted that at that time appellant was breathing comfortably with a normal respiratory rate.

By letter dated July 29, 1995, the Office advised appellant that it found the offered job to be suitable. He was notified of the penalty provisions of section 8106 and given 30 days to respond. In a September 11, 1995 decision, the Office terminated appellant's wage-loss compensation, effective September 17, 1995 on the grounds that he had declined an offer of suitable work. The Office noted that appellant did not respond to the July 29, 1995 letter.

Following appellant's request, a hearing was held on October 22, 1996 at which time he testified regarding his lung condition, that he had moved to a rural area upon the recommendation of his physician and noted an allergic episode while eating out and several

¹ The job description indicates that the work was primarily sedentary with some walking and standing required as is typical of a normal office setting but not to an unusual degree. The work environment was a computer room setting with adequate environmental conditioning that maintained 50 percent humidity and 71 degrees Fahrenheit temperature.

occasions when he had trouble breathing while out shopping. He stated that he had recently been diagnosed with lymphoma, for which he had undergone radiation therapy. Appellant testified that, after he received the job offer, he visited the employing establishment, that, after 20 to 30 minutes in the computer room, he suffered a severe headache and that he noticed chemical smells in the computer room, hallways and bathroom. He stated that he rides a bicycle for one and one-half to two miles five times a week and concluded that the commute to work would be hazardous to his health.

Appellant submitted additional medical evidence at the hearing that included a November 23, 1988 report from Dr. Kathryn C. Corrigan, a Board-certified internist, who advised that appellant move to a rural area because of his reactive airway disease. Appellant also submitted undated² deposition testimony in which Dr. Freilich described appellant's history and treatment and testified that he was not certain whether a return to work by appellant would be dangerous to his health. He advised that environmental stimuli caused appellant to develop bronchospasm and that there was no way to tell if the chemicals, paper products, etc., at the employing establishment would affect appellant unless he were placed in the work environment, stating that appellant could be placed there for a period of time and perform breathing tests afterwards. Dr. Freilich advised that appellant seemed to be doing better in his rural home setting and that automobile pollution, which especially affects patients with reactive airway disease, bothered him. He also noted that, while appellant's lymphoma was not affecting his reactive airway disease, it obviously affected his health.

Appellant also submitted a November 11, 1996 report from Dr. George H. Coupe, an osteopathic physician, who advised that he had been appellant's family physician since 1965. Dr. Coupe noted the history of appellant's employment injury and lymphoma diagnosis and treatment and stated that appellant had become depressed and quite anxious, suffering from fatigue, lack of appetite and weight loss. He concluded that appellant was permanently disabled.

By decision dated January 16, 1997 and finalized January 17, 1997, an Office hearing representative affirmed the prior decision, finding that the medical evidence failed to demonstrate that appellant could not perform the duties of the offered job. The instant appeal follows.

Section 8106(c)(2) of the Federal Employees' Compensation Act³ provides in pertinent part, "A partially disabled employee who ... refuses or neglects to work after suitable work is offered ... is not entitled to compensation."⁴ To prevail under this provision, the Office must show that the work offered was suitable and must inform the employee of the consequences of

² The record indicates that appellant submitted videotapes at the hearing and the transcripts of the taped testimony. The videotapes are not contained in the case record before the Board. The transcripts also include undated deposition testimony from Dr. Gregory H. Heigh who practices preventive medicine, homeopathy and traditional Chinese medicine. The record indicates that Dr. Heigh is merely licensed to practice acupuncture in the state of Florida and is, thus, not a physician as defined by 5 U.S.C. § 8101(2).

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8106(c)(2).

refusal to accept such employment. An employee who refuses or neglects to work after suitable work has been offered has the burden of showing that such refusal to work was justified.⁵ Section 8106(c) will be narrowly construed as it serves as a penalty provision which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.⁶

The determination of whether an employee is physically capable of performing a modified position is a medical question that must be resolved by medical evidence.⁷ Office procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.⁸ Furthermore, if medical reports document a condition which has arisen since the compensable injury and the condition disables the employee, the job will be considered unsuitable.⁹ Lastly, if the employee is required to move to a certain area, isolated or otherwise, because of health conditions which were caused by the injury or which predated it, the issue of availability must be considered with respect to the new area of residence.¹⁰

In determining medical suitability, Office procedures require that, if the medical evidence is not "clear and unequivocal," the Office should seek medical advice from the attending physician or an Office medical adviser.¹¹ In this case, the Board finds that the January 17, 1995 reports of Dr. Freilich were not sufficient on which to base the physical requirements of the offered position as Dr. Freilich did not opine whether appellant could return to full-time work. The Office failed to request that Dr. Freilich clarify whether appellant could perform the duties as described in the job offer on a full-time basis. The Board, therefore, finds that the Office did

⁵ See *Michael I. Schaffer*, 46 ECAB 845 (1995).

⁶ See *Robert Dickerson*, 46 ECAB 1002 (1995).

⁷ *Id.*

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(5) (July 1996); see *Susan L. Dunnigan*, 49 ECAB ____ (Docket No. 96-2673, issued January 7, 1998).

⁹ *Id.* at Chapter 2.814.4(b)(4) (June 1996).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b) (June 1996); see *Edward J. Stabell*, 49 ECAB ____ (Docket No. 96-1249, issued June 15, 1998).

¹¹ See *Annette Quimby*, 49 ECAB ____ (Docket No. 97-317, issued January 30, 1998).

not meets its burden of proof to terminate appellant's compensation under section 8106(d) as the medical evidence does not establish that the selected position was suitable.¹²

The decision of the Office of Workers' Compensation Programs dated January 16, 1997 and finalized January 17, 1997 is hereby reversed.

Dated, Washington, D.C.
January 3, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

¹² The Board further notes that, in a November 23, 1988 report, Dr. Corrigan, a Board-certified internist, advised that appellant should move to a rural area because of his reactive airway disease caused by the chlorine exposure. Dr. Freilich advised that the long commute from appellant's home to the employing establishment would possibly precipitate his asthma from the stress of the drive. He also noted that appellant would be exposed to a considerable amount of exhaust fumes. Furthermore, Office procedures provide that if medical reports in the 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, and the evidence in this case indicates that appellant subsequently developed lymphoma which Dr. Freilich advised affected appellant's health.