

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of GERALD W. McCOLLUM and DEPARTMENT OF AGRICULTURE,  
FEDERAL CROP INSURANCE CORPORATION, Kansas City, MO

*Docket No. 98-294; Submitted on the Record;  
Issued January 11, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, BRADLEY T. KNOTT,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation on the grounds that he had refused an offer of suitable work.

In the present case, the Office accepted that appellant, an accountant, sustained injuries in the performance of duty on July 1, 1991 while walking down stairs.<sup>1</sup> The record indicates that appellant underwent back surgery in April 1992, returned to work in October 1992 and stopped working following heart surgery in January 1993. Appellant briefly returned to work from April 13 to 30, 1993 and did not return to work.

By letter dated October 6, 1995, the Office advised appellant that the position of operating accountant, offered to appellant by the employing establishment, was considered suitable. Appellant was notified that he had 30 days to either accept the position or provide written reasons for refusing the position, and a claimant who refuses an offer of suitable work is not entitled to further compensation for wage loss.

In a letter dated November 1, 1995, appellant indicated that he did not feel he was medically capable of returning to full-time work, and he enclosed reports from his attending physician, Dr. John G. Yost, Jr., an orthopedic surgeon.

In a letter dated November 7, 1995, the Office advised appellant that his reasons for not accepting the position were unacceptable, and he was advised that he had an additional 15 days to accept the position or his compensation for wage loss would be terminated.

In a decision dated December 8, 1995, the Office terminated appellant's compensation on the grounds that he had refused an offer of suitable work. By decision dated December 26, 1996, a hearing representative affirmed the termination of benefits.

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<sup>1</sup> The accepted conditions include low back sprain and L4-5 disc protrusion with radiculopathy.

The Board has reviewed the record and finds that the Office properly terminated appellant's compensation for wage loss in this case.

5 U.S.C. § 8106(c) 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." It is the Office's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.<sup>2</sup> To justify such a termination, the Office must show that the work offered was suitable.<sup>3</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>4</sup>

With respect to the procedural requirements of termination under section 8106(c), the Board has held that the Office must inform appellant of the consequences of refusal to accept suitable work, and allow appellant an opportunity to provide reasons for refusing the offered position.<sup>5</sup> If appellant presents reasons for refusing the offered position, the Office must inform the employee if it finds the reasons inadequate to justify the refusal of the offered position and afford appellant a final opportunity to accept the position.<sup>6</sup>

In the present case, the Office did comply with the procedural requirements of section 8106(c)(2). The October 6, 1995 letter provided notice and an opportunity to respond to the finding of suitability, and the November 7, 1995 letter notified appellant that his reasons for declining the job were unacceptable, providing appellant an additional period to accept the position prior to termination.

The determination of suitability in this case was based on the reports of Dr. Satish C. Bansal, a Board-certified orthopedic surgeon selected as an impartial medical specialist. The Office had found that a conflict existed between the attending physician, Dr. Yost, who had opined that appellant could not return to any work and Dr. Richard E. Whitehead, a second opinion orthopedic surgeon, who indicated in an August 22, 1994 report that appellant could work in a sedentary position.

In a report dated October 21, 1994, Dr. Bansal provided a history and results on examination. Dr. Bansal noted that appellant had multiple health problems, but indicated that appellant could work in a sedentary job with restrictions that included being able to get up and walk 5 to 10 minutes after an hour of sitting, an orthopedic chair to keep his left leg elevated, and no prolonged walking or standing. Dr. Bansal completed a work capacity evaluation, noting that appellant could work eight hours a day with restrictions, including limiting standing and walking to one-half hour at a time.

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<sup>2</sup> *Henry P. Gilmore*, 46 ECAB 709 (1995).

<sup>3</sup> *John E. Lemker*, 45 ECAB 258 (1993).

<sup>4</sup> *Catherine G. Hammond*, 41 ECAB 375, 385 (1990); 20 C.F.R. § 10.124(c).

<sup>5</sup> *Maggie L. Moore*, 42 ECAB 484 (1991); *reaff'd on recon.*, 43 ECAB 818 (1992).

<sup>6</sup> *Id.*

It is well established that when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.<sup>7</sup> The Board finds that the evidence from Dr. Bansal represents the weight of the evidence regarding appellant's physical limitations. Appellant did submit an August 25, 1995 report from Dr. Yost, who reiterated his opinion that appellant was not capable of returning to work. Dr. Yost indicated that appellant had progressive degenerative arthritis in the right knee, but he did not provide a reasoned opinion as to whether he believed appellant's condition had significantly deteriorated since October 1994. Appellant also submitted a report dated November 1, 1995 from a Dr. Koch, who indicated only that any job for appellant would require individual tailoring, without providing an opinion to whether appellant could perform the offered position. The Board accordingly finds that the weight of the evidence is represented by the opinion of Dr. Bansal.

By letter dated July 25, 1995, the employing establishment offered appellant the position of operating accountant, with the specific limitations as provided by Dr. Bansal. The position provided an orthopedic chair to keep the leg elevated, and provided the specific standing and walking restrictions noted by Dr. Bansal. The Board therefore finds that the position offered was within appellant's medical restrictions and was properly found to be medically suitable.

In refusing the offered position, appellant asserted that he was physically unable to perform the duties. As noted above, the weight of the medical evidence established that the position was within appellant's physical limitations.<sup>8</sup> Following the December 8, 1995 decision, appellant submitted medical evidence from Dr. Melvin D. Karges, an orthopedic surgeon, regarding appellant's continuing treatment. Dr. Karges opined in an August 8, 1996 report that appellant was "significantly restricted from gainful employment," but he does not discuss the offered position or appellant's condition at the time of the suitable work determination in this case. Accordingly, the Board finds that the Office properly terminated appellant's compensation under 5 U.S.C. § 8106(c)(2).

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<sup>7</sup> *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

<sup>8</sup> The Board notes that review of evidence is limited to evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c). The evidence submitted after the December 26, 1996 decision cannot be reviewed by the Board.

The decision of the Office of Workers' Compensation Programs dated December 26, 1996 is affirmed.

Dated, Washington, D.C.  
January 11, 2000

Michael J. Walsh  
Chairman

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member