

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of FLOYD A. McEACHERN and U.S. POSTAL SERVICE,  
POST OFFICE, Long Island City, NY

*Docket No. 01-38; Submitted on the Record;  
Issued February 1, 2001*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective April 23, 2000 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 April 23, 2000 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>

On June 26, 1973 appellant, then a 34-year-old mailhandler, sustained employment-related lumbosacral and groin strains. Appellant stopped work on June 26, 1973 and retired from the employing establishment in September 1974; he received compensation from the Office for periods of disability. On January 31, 2000 the employing establishment offered appellant a job as a modified mailhandler, but appellant effectively refused the position.<sup>4</sup> By decision dated April 18, 2000, the Office terminated appellant's compensation effective April 23, 2000 on 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).

<sup>4</sup> Appellant signed both the acceptance and declination portions of the offer form and he did not show up for work on the designated date.

grounds that he refused an offer of suitable work. By decision dated August 14, 2000, the Office denied appellant's request for a hearing.

The evidence of record shows that appellant is capable of performing the modified mailhandler position offered by the employing establishment on January 31, 2000 determined to be suitable by the Office on February 15, 2000. The full-time position required lifting up to 20 pounds and engaging in standing, twisting, pushing, pulling and lifting for 6 hours per day.<sup>5</sup>

The medical evidence of record reveals that appellant is physically capable of performing the modified mailhandler position. In a report dated August 18, 1999, Dr. William S. Bronk, a Board-certified orthopedic surgeon to whom the Office referred appellant, indicated that appellant could perform light-duty work. Dr. Bronk indicated that appellant's subjective low back complaints had continued without any objective findings.<sup>6</sup> In an accompanying form, Dr. Bronk indicated that appellant could work 8 hours per day with breaks, lift up to 20 pounds, and engage in standing, twisting, pushing, pulling and lifting for 6 hours per day.<sup>7</sup>

The Board notes that, therefore, the Office has established that the modified mailhandler 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.

Appellant alleged that he could not accept the offered position because his back pain, eyesight and diabetes prevented him from driving to and from work. He did not, however, provide any evidence in support of this assertion or otherwise justify his refusal of the position. Prior to terminating his compensation, the Office advised appellant that his reason for refusing the offered position was not justified and provided him with another opportunity to accept the position which continued to be available.<sup>8</sup>

For these reasons, the Office properly terminated appellant's compensation effective April 23, 2000 on the grounds that he refused an offer of suitable work.

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

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<sup>5</sup> The position allowed appellant to take breaks during the workday. The evidence of record reveals that appellant is vocationally capable of performing the position.

<sup>6</sup> He noted that videotape and photographs of appellant playing golf showed that he was functioning at a "reasonable level" despite his complaints.

<sup>7</sup> In a report dated March 2, 1999, Dr. Munir Jabbur, an attending Board-certified orthopedic surgeon, indicated that his evaluations of appellant revealed no objective findings to support his complaints and noted that appellant could return to his usual work at the employing establishment. Dr. Jabbur stated that videotape and photographs of appellant playing golf showed that he had no significant functional disability due to his back. It is unclear whether the videotape and photographs were provided to Dr. Jabbur in accordance with the relevant Office policies.

<sup>8</sup> The Board notes that the Office complied with its procedural requirements prior to terminating appellant's compensation. *See generally Maggie L. Moore*, 42 ECAB 484 (1991); *reaff'd on recon.*, 43 ECAB 818 (1992).

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>9</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>10</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 authority in deciding whether to grant a hearing.<sup>11</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>12</sup> when the request is made after the 30-day period for requesting a hearing,<sup>13</sup> and when the request is for a second hearing on the same issue.<sup>14</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 April 18, 2000 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 June 24, 2000.<sup>15</sup> Hence, the Office was correct in stating in its 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 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 August 14, 2000 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 issue in 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 or clearly unreasonable exercise of judgment.<sup>16</sup> In the present case, the evidence of record does not indicate that the Office committed any act in

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<sup>9</sup> 5 U.S.C. § 8124(b)(1).

<sup>10</sup> *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

<sup>11</sup> *Henry Moreno*, 39 ECAB 475, 482 (1988).

<sup>12</sup> *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

<sup>13</sup> *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

<sup>14</sup> *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

<sup>15</sup> Appellant indicated that he previously requested reconsideration by letter dated May 11, 2000. However, the record does not contain evidence that such a letter was sent.

<sup>16</sup> *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

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.

The decisions of the Office of Workers' Compensation Programs dated August 14 and April 18, 2000 are affirmed.

Dated, Washington, DC  
February 1, 2001

David S. Gerson  
Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member