

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of STANLEY BLUM and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Brooklyn, NY

*Docket No. 00-2430; Submitted on the Record;
Issued June 20, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

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

The Office accepted that appellant sustained a lumbosacral sprain in the performance of duty on November 14, 1995. On March 26, 1998 the employing establishment offered appellant a position as an information receptionist at three hours per day from 8:00 a.m. to 11:00 a.m. The position was to increase one hour per day after two weeks, and continue to increase one hour per day every two weeks until full time. The starting time remained at 8:00 a.m.

By decision dated June 9, 1998, the Office terminated appellant's compensation as of June 20, 1998 on the grounds that he had refused an offer of suitable work. In a decision dated August 17, 1999, an Office hearing representative affirmed the termination. By decision dated April 27, 2000, the Office denied modification.

The Board finds that the Office did not meet its burden of proof to terminate compensation.

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.¹ To justify such a termination, the Office must show that the work offered was suitable.² An employee who refuses or neglects to work

¹ *Henry P. Gilmore*, 46 ECAB 709 (1995).

² *John E. Lemker*, 45 ECAB 258 (1993).

after suitable work has been offered to him has the burden of showing that such refusal to work was justified.³

The Office determined that the position was medically suitable on the grounds that it was within the medical restrictions of Dr. Mitchell Goldstein, a Board-certified orthopedic surgeon selected as an impartial medical specialist. In a report dated October 17, 1997, Dr. Goldstein stated in pertinent part: “At this time, I feel he could return to a sedentary job. Due to the chronic nature of his condition and having that work [sic] since then, I would recommend starting with a 3-hour day and restrictions and modifications to allow him to change positions every 15 to 20 minutes and travel during nonrush hour times to minimize his time in the car.”

With respect to the travel to the job, the Office did request that Dr. Goldstein discuss whether appellant could take public transportation. In a report dated February 12, 1998, Dr. Goldstein responded that he would need to know how long a trip it would be, what type of transportation, and how many transfers appellant would make. The Office did not seek additional clarification from Dr. Goldstein.

The offered position is located in Brooklyn, New York, and begins at 8:00 a.m.⁴ The Board is unable to see how this comports with Dr. Goldstein’s “travel during nonrush hour times to minimize his time in the car.” In the April 27, 2000 decision, the Office notes that the ending time of the job is not a rush hour, at least initially, but Dr. Goldstein does not indicate that he was referring only to travel at the end of the workday. The Office did not provide Dr. Goldstein with a job description that included the scheduled work times, or secure a supplemental report from Dr. Goldstein that provided further details on the travel restrictions. The Board finds that the offered position did not provide for travel during nonrush hour times and therefore does not comply with the impartial specialist’s restrictions as stated in the October 17, 1997 report. It is the Office’s burden of proof to establish the suitability of the position, and they have not met their burden in this case.

³ *Catherine G. Hammond*, 41 ECAB 375, 385 (1990); 20 C.F.R. § 10.517(a).

⁴ Appellant lives in Merrick, NY; his residence has not changed since the date of injury, and the offered position is at his duty station in Brooklyn, NY.

The decisions of the Office of Workers' Compensation Programs dated April 27, 2000 and August 17, 1999 are reversed.

Dated, Washington, DC
June 20, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member