

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROCKEY N. MYSKEY and DEPARTMENT OF THE ARMY,
ARMY AMMUNITION PLANT, McAlester, OK

*Docket No. 00-2491; Submitted on the Record;
Issued June 11, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits.

Appellant, a 45-year-old van operator, filed a notice of traumatic injury alleging that on March 11, 1996 he was injured in a motor vehicle accident while in the performance of duty. The Office accepted appellant's claim for cervical and lumbosacral strains, right hip contusion and herniated disc at C5-6.

The Office terminated appellant's compensation by decision dated June 30, 1997. Appellant requested a review of the written record and by decision dated November 13, 1997, the hearing representative reversed the Office's June 30, 1997 decision.

Appellant returned to light-duty work on June 1, 1998. On June 30, 1998 appellant filed a notice of recurrence of disability, alleging that on June 3, 1998 he was no longer able to work due to severe pain. He underwent surgery on September 2, 1998 for a cervical fusion and the Office paid appropriate compensation.

The employing establishment offered appellant a light-duty position on April 14, 1999. By letter dated April 28, 1999, the Office informed appellant that the light-duty position was suitable and allowed 30 days for him to accept the position. Appellant declined this position on May 5, 1999, stating that the position was not medically suitable.

In a letter dated July 14, 1999, the Office informed appellant that his reasons for refusing the position were not sufficient and allowed him an additional 15 days to accept the position. By decision dated September 17, 1999, the Office terminated appellant's compensation, finding that he refused an offer of suitable work.

Appellant requested an oral hearing on September 29, 1999. By decision dated June 15, 2000, the hearing representative affirmed the September 17, 1999 decision.

The Board finds that the Office failed to meet its burden of proof to terminate appellant's compensation.

It is well settled that, once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.¹ As the Office, in this case, terminated appellant's compensation under 5 U.S.C. § 8106(c), the Office must establish that appellant refused an offer of suitable work.

Section 8106(c) of the Act² provides that a disabled employee, who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee is not entitled to compensation. Section 10.517(a) of the applicable regulations³ provides that 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. To justify termination of compensation, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.⁴

In this case, appellant's attending physician, Dr. James A. Rodgers, a Board-certified internist, completed a work restriction evaluation on February 25, 1999 indicating that appellant could sit for four hours and stand and walk for one hour each, but could perform no other physical duties. Dr. Rodgers stated that appellant could not sit for more than 30 minutes without changing position and that he could not stand for more than 30 minutes without back pain. He stated: "In a whole day, [appellant] probably sits [fewer] than four hours and assumes a recumbent position a great deal of time. Bending, lifting, stooping, squatting, kneeling and climbing are out of the question." He concluded that appellant was 100 percent economically disabled.

The employing establishment offered appellant the position of mobile equipment dispatcher. The position description stated: "You will not be expected or required to perform any tasks that are not within your work restrictions." The duties included receiving information on a continuing basis via telephone, radio and written reports and occasional filing, typing and sorting mail. The position description stated: "Performs other duties as assigned."

Dr. Rodgers reviewed the offered position and stated: "I do think that a light-duty position would be acceptable. You include a job description of a mobile equipment dispatcher, which you said may be stressful at times but would require mainly sitting and no significant bending, lifting and stooping." However, Dr. Rodgers also opined that appellant would have difficulty driving to work. He was not willing to change his work restrictions and stated that appellant could try the position. Dr. Rodgers added: "Complicating all this is his 'seizure

¹ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

² 5 U.S.C. § 8106(c)(2).

³ 20 C.F.R. § 10.517(a) (2000).

⁴ *Arthur C. Reck*, 47 ECAB 339, 341-42 (1995).

disorder' that may put him at risk [in] a stressful position" if he had a seizure and fell and hurt his head, neck or back."

This report is not sufficient to establish that the offered position is suitable. Although Dr. Rodgers indicated that a light-duty position was "acceptable," he stated that appellant would have difficulty commuting to work and that stressful conditions might cause a seizure. Furthermore, the employment description does not provide the specific physical requirements of the position. It is unclear how Dr. Rodgers reached his conclusions regarding the duties of sitting, with no bending, lifting and stooping required by the position.

The Office has the burden of establishing that the offered position is medically suitable and as the factual and medical evidence in the record does not establish that the physical duties of the position are within the restrictions established by appellant's physician, the Office failed to meet its burden of proof.

The June 15, 2000 and September 17, 1999 decisions of the Office of Workers' Compensation Programs are hereby reversed.

Dated, Washington, DC
June 11, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member