U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ALVIN CARLISLE and DEPARTMENT OF DEFENSE, DEFENSE LOGISTICS AGENCY, Tracy, CA

*Docket No. 01-327; Submitted on the Record;*
*Issued October 10, 2001*

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DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT, A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation on the grounds that he refused an offer of suitable work.

On January 10, 1998 appellant, then a 43-year-old material handler (forklift operator), sustained a right foot strain and contusion while in the performance of duty.

In a report dated April 7, 1998, Dr. Vatche Cabayan, appellant's attending Board-certified orthopedic surgeon, provided a history of appellant's condition and findings on examination and diagnosed a midfoot sprain. He described appellant's concern about the 90-minute commute to work. Dr. Cabayan stated that appellant could drive to work once he obtained a custom-made arch support.

In reports dated May 7 and 22, 1998, Dr. Cabayan indicated that appellant could work eight hours a day with restrictions, which included walking no more than three hours a day, standing no more than two hours a day and operating a motor vehicle for no longer than 30 minutes without a break.

In a report dated July 6, 1998, Dr. Cabayan stated that appellant was capable of driving to work because he could stop after 30 minutes of driving, if necessary, and stretch for a few minutes. He indicated that he had advised appellant that he was able to handle the commute.

On August 3, 1998 Dr. Cabayan was provided with a copy of the job offered to appellant which involved the duties of taking inventory, marking and packaging, sweeping and data entry and indicated that he could perform this job. The physical requirements of the job were described as follows:

> "Marking/packaging and data entry assignments involve sitting and use of one or both hands. Inventory and sweeping assignments involve walking, standing, pushing and use of both hands. Walking would be performed up to three hours a day and while standing would be performed up to two hours a day. Pushing would be involved when performing sweeping. The worker would alternate 'sit-down' work with stand/walk assignments throughout the workday. Lifting/ carrying would be limited to items weighing less than 10 pounds. The items lifted/carried would be a hand-held scanner, documents, pens/pencils, staple remover, stapler."

On August 6, 1998 the employing establishment provided appellant with a description of the job offer and he was asked to accept or reject the job offer by August 14, 1998. The employing establishment indicated that the job was permanent.

By letter dated August 7, 1998, the Office advised appellant that the modified material handler position offered by the employing establishment was suitable to his work capabilities. The Office stated that commuting to work was appellant's responsibility and, if he needed to rest for a few minutes en route to work, he should plan to leave for work a few minutes earlier in the day. Appellant was advised that if he refused the job offer without reasonable cause, his compensation would be terminated.

On August 12, 1998 appellant accepted the job offer. However, he subsequently refused to report to work, citing his belief that he could not handle a long commute.

In reports dated September 2 and 30, 1998, Dr. John Lavorgna, a Board-certified orthopedic surgeon and Office referral physician, opined that appellant was capable of performing the duties of the light-duty job as of August 6, 1998. He stated that appellant was able to perform light-duty work for eight hours a day with restrictions which included a five- to ten-minute break each hour when standing, walking, or driving. Dr. Lavorgna added that appellant's employment injury had resolved as of September 2, 1998 and any continuing problems were due to his preexisting nonindustrial arthritic condition.

By letter dated September 14, 1998, the Office advised appellant that his refusal to report to work was not justified and gave him an additional 15 days to accept the position without penalty. The Office advised appellant that a disabled employee, who refuses or neglects to work after suitable work is offered to him, is not entitled to compensation.[1] On September 22, 1998 the Office granted an extension to October 8, 1998.

[1] *See* 5 U.S.C. § 8106(c).

In reports dated September 14, 1998, Dr. Cabayan indicated that appellant could perform his regular duties on December 1, 1998. He noted appellant's concern about the drive to work and stated: "Presently, he is not commenting about … getting out of the car in the middle of the night as much as he is claiming he is in danger of injuring other people when he cannot press on the brakes or foot pedal for acceleration." Dr. Cabayan added that appellant could perform his light-duty job within the restrictions described in previous reports.

In a report dated September 28, 1998, Dr. Cabayan indicated that he had reviewed Dr. Lavorgna's report and felt that it was consistent with his own recommendations of work restrictions.

In a report dated October 14, 1998, Dr. Cabayan noted that appellant felt that his condition was worse but indicated there was no medical explanation as to why his foot would be worse with minimal activities. He stated:

> "He brought up issues about what kind of shoes he wears. I told him once he gets to work we can look into issues of modification and tailor them as needed."

By decision dated November 19, 1998, the Office terminated appellant's compensation effective August 6, 1998 on the grounds that he refused an offer of suitable work without good cause.[2]

By letter dated December 16, 1998, appellant requested a hearing and submitted additional evidence.

In a disability certificate dated February 27, 1998, Dr. A. McCole indicated that appellant could not wear safety shoes until April 1, 1998.

In a report dated January 4, 1999, Dr. Cabayan stated that appellant was wearing safety shoes that were very heavy and he wanted to be precluded from wearing such shoes. He stated:

> "I certainly have no problem with him avoiding such shoes whenever possible. In essence, if it is an environment where he is going to be jeopardizing himself, then obviously he needs the shoes; but, if otherwise he is doing a sitting type of job in an area which is relatively safe, I have no problem with him precluding himself from such shoes for the time being."

At the June 15, 1999 hearing, appellant testified that he had no difficulty doing the light-duty position but experienced pain when driving and also felt he should not drive while taking medication. Appellant stated that he feared for his safety if he pulled his car off the road in unknown areas while he rested his foot. However, he indicated that he was able to handle the commute when he returned to work on December 1, 1998. Appellant also stated that the heavy safety shoes that he was required to wear caused discomfort in his foot.

[2] The record shows that appellant returned to work on December 1, 1998.

By decision dated September 24, 1999, the Office hearing representative affirmed the Office's November 19, 1998 decision to terminate appellant's compensation benefits but modified the decision to change the effective date of termination to November 19, 1998 because the Office did not issue its decision until that date.

In a form report dated November 23, 1999, Dr. Cabayan stated that appellant should not work in temperatures below 40 degrees and should not wear safety shoes.[3] In a report dated November 23, 1999, Dr. Cabayan stated that appellant was told on November 8, 1999 that he should not be working in the regular warehouse area because of his restrictions against using safety shoes and avoiding cold temperatures and prolonged standing and walking. In a disability certificate dated December 6, 1999, Dr. Cabayan stated that appellant was precluded from a cold environment. In a report dated December 23, 1999, he stated that appellant should be precluded from wearing steel toe shoes and working in cold environments.

By letter dated June 16, 2000, appellant requested reconsideration and submitted additional evidence. He argued that his light-duty job was not suitable because it was a temporary job, he had a long commute to work and he was required to wear safety shoes. Appellant stated that the requirement of wearing safety shoes was not communicated to either Drs. Cabayan or Lavorgna.

By decision dated September 11, 2000, the Office denied appellant's request on the grounds that the evidence submitted by appellant was not sufficient to warrant modification of its September 24, 1999 decision.[4]

The Board finds that the Office met its burden of proof in terminating appellant's compensation benefits on the grounds that he refused an offer of suitable work.

Once the Office accepts a claim it has the burden of proving that the disability has ceased or lessened before it may terminate or modify compensation benefits.[5]

Under section 8106(c)(2) of the Federal Employees' Compensation Act[6] the Office may terminate the compensation of a disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.[7] Section 10.517 of Part 20 of the Code of Federal Regulations[8] 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

[3] A third comment by Dr. Cabayan was illegible.

[4] This case record contains additional evidence that was not before the Office at the time it issued its September 11, 2000 decision. The Board has no jurisdiction to review this evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c); *Robert D. Clark*, 48 ECAB 422, 428 (1997).

[5] *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

[6] 5 U.S.C. § 8106(c)(2).

[7] *Camillo R. DeArcangelis*, 42 ECAB 941, 943 (1991).

[8] 20 C.F.R. § 10.517 (1999).

such refusal or failure to work was reasonable or justified and shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.[9] To justify termination, the Office must show that the work offered was suitable[10] and must inform the employee of the consequences of refusal to accept such employment.[11]

In this case, appellant accepted the job offer but did not report for work or provide any evidence that the position was outside his physical limitations as recommended by his attending physician.

Appellant argued that the position was not suitable because it was a temporary job, he was required to wear safety shoes and he had a long commute to work. However, the job offer made to appellant by the employing establishment on August 6, 1998 indicated that the job was permanent, not temporary. Further, his attending physician, Dr. Cabayan, indicated that appellant could drive the distance to work as long as he took a break from driving when needed.

The job offer made to appellant did not indicate that he was required to wear safety shoes. Drs. Cabayan and Lavorgna reviewed the job description and indicated their approval of the position. The physicians did not indicate any special restrictions concerning footwear as of August 1998 when the job was offered. Although Dr. Cabayan added new work restrictions regarding cold temperatures and the use of safety shoes in his 1999 reports, this evidence is not relevant to the issue of whether appellant was capable of performing the duties of the position offered in August 1998.

Appellant failed to introduce any argument or any medical evidence establishing that he was not physically capable of performing the duties of the modified material handler position as offered on August 6, 1998. Therefore, the Office properly terminated appellant's compensation effective November 19, 1998 on the grounds that he refused an offer of suitable work.

[9] *Id.*

[10] *See Carl W. Putzier*, 37 ECAB 691, 700 (1986); *Herbert R. Oldham*, 35 ECAB 339, 346 (1983).

[11] *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

The September 11, 2000 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
October 10, 2001

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member