

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JAMES A. NICOTERO and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL CENTER, Pittsburgh, PA

*Docket No. 01-623; Submitted on the Record;  
Issued October 16, 2001*

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DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation on the grounds that he refused suitable work pursuant to 5 U.S.C. § 8106(c); and (2) whether the Office abused its discretion by refusing to reopen appellant's case for review of the merits pursuant to 5 U.S.C. § 8128.

On December 31, 1997 appellant, then a 61-year-old staff physician, filed a claim for an occupational disease, alleging that on November 30, 1997 he sustained an employment-related acute myocardial infarction.

By letter dated December 11, 1998, the Office accepted appellant's claim for acceleration and aggravation of atherosclerosis and myocardial infarction.

In a January 20, 1999 attending physician's report, Dr. Michael F. Hagerty, a Board-certified internist, indicated that appellant was totally disabled from December 1, 1997 through March 1, 1998 and partially disabled from March 2 through April 1, 1998. He added that appellant could perform light-duty work as of April 1, 1998.

By letter dated April 15, 1999, the employing establishment offered appellant the position of primary care physician. The position description provided that appellant would work 25 hours a week and was required to perform the normal duties of a primary care physician with the exception of emergency response or advanced life support care.

In an April 19, 1999 letter, the Office advised appellant that the employing establishment's job offer was suitable for his medical restrictions. The Office added that appellant had 30 days in which to accept the offered position or to provide an explanation of the reasons for refusing the job. The Office further advised appellant of the penalties for refusing an offer of suitable work under section 8106 of the Federal Employees' Compensation Act.

On April 21, 1999 appellant rejected the employing establishment's job offer based on his physical condition. He advised that he was working in his own practice 30 hours per week.

In a May 13, 1999 letter, the Office informed appellant that his reasons for rejecting the offered position were unacceptable and that he had 15 days in which to accept the offered position.

Dr. Kenneth C. Huber, a Board-certified internist and second opinion physician, submitted a report dated June 3, 1999 indicating that appellant should not accept the offered position due to his medical condition and the employing establishment's work environment.<sup>1</sup> By letter dated June 16, 1999, Dr. Huber submitted a revised version of his June 3, 1999 report, indicating that errors had been made in the previous report, but that they had now been corrected. Dr. Huber again found that appellant should not accept the position offered by the employing establishment.

By letter dated June 29, 1999, the Office referred appellant along with a statement of accepted facts, medical records and a list of specific questions to Dr. Charles Crispino, a Board-certified internist, for a second opinion examination.

Dr. Crispino submitted a July 19, 1999 report, indicating a review of appellant's medical records, his medical and social histories and his findings on physical and objective examination. He opined that appellant should not resume working 75 to 90 hours a week in a stressful environment. In an accompanying work capacity evaluation form, Dr. Crispino indicated that appellant could work four to six hours a day with certain restrictions and that appellant should avoid shift work, work-related emotional stress, deadlines and time pressures.

By letter dated July 29, 1999, the Office requested that Dr. Crispino submit additional information regarding whether appellant could work 25 hours per week in the position, which accompanied its letter.

In a supplemental report dated August 4, 1999, Dr. Crispino opined that based on the records provided to him, including a description of the position of primary care physician, appellant could work 25 hours a week in the offered position. He cautioned the Office to investigate the working environment at the employing establishment because he believed appellant could not work long hours in a stressful environment, perform shift work or take night call.

In a letter dated September 16, 1999, the employing establishment again offered appellant the position of primary care physician. He rejected the employing establishment's offer by letter dated September 21, 1999.

By letter dated October 1, 1999, the Office advised appellant that he had 30 days in which to accept the offered position or to provide an explanation of the reasons for refusing the job. The Office further advised appellant of the penalties for refusing an offer of suitable work

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<sup>1</sup> The Office originally referred appellant to Dr. Huber for a second opinion examination. He submitted a November 19, 1998 report finding that appellant's employment caused and aggravated his heart condition.

under section 8106 of the Act. On October 4, 1999 appellant rejected the employing establishment's job offer due to his heart condition and his work in his own practice.

By letter dated November 4, 1999, the Office advised appellant that his reasons for refusing the job offer were not valid and that he had 15 days in which to accept the offer.

By decision dated December 9, 1999, the Office terminated appellant's compensation on the grounds that he had refused suitable work. In a December 14, 1999 letter, appellant requested an oral hearing before an Office representative.

In a June 20, 2000 decision, the hearing representative affirmed the Office's decision. By letter dated November 6, 2000, appellant, through his counsel, requested reconsideration.

By decision dated November 29, 2000, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that appellant neither raised substantial legal questions nor included new and relevant evidence and thus, it was insufficient to warrant review of the prior decision.

The Board finds that the Office improperly terminated appellant's compensation on the grounds that he refused suitable work pursuant to 5 U.S.C. § 8106(c).

It is well settled that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>2</sup> This includes cases in which the Office terminates compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee under section 8106(c)(2).<sup>3</sup> The Board has recognized that section 8106(c) serves as a penalty provision as it may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment and, for this reason, will be narrowly construed.<sup>4</sup> The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by the medical evidence.<sup>5</sup>

Section 10.124(e)<sup>6</sup> of the Office's regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured 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.<sup>7</sup> To justify termination, the Office must show that the work offered

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<sup>2</sup> *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

<sup>3</sup> *Patrick A. Santucci*, 40 ECAB 151 (1988); *Donald M. Parker*, 39 ECAB 289 (1987); *Herman L. Anderson*, 36 ECAB 235 (1984).

<sup>4</sup> *Stephen R. Lubin*, 43 ECAB 564 (1992).

<sup>5</sup> *See John E. Lemker*, 45 ECAB 258 (1993); *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

<sup>6</sup> 20 C.F.R. § 10.124(e).

<sup>7</sup> *Maggie L. Moore*, 42 ECAB 484, 488 (1991); *reaff'd on recon.*, 43 ECAB 818 (1992).

was suitable<sup>8</sup> and must inform appellant of the consequences of refusal to accept such employment.<sup>9</sup> According to Office procedures, certain explanations for refusing an offer of suitable work are considered acceptable.<sup>10</sup>

The Board has stated that the weight of the medical evidence is determined by its reliability, its probative value and its convincing quality. The opportunity for and thoroughness of examination, the accuracy and completeness of the doctor's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the doctor's opinion are factors which enter into such evaluation.<sup>11</sup>

In terminating appellant's compensation, the Office relied on the August 4, 1999 report of Dr. Crispino, a second opinion physician. He stated:

"I believe it is inappropriate and unfair of you to ask me to render an opinion regarding a patient's employment based only on the records you have supplied to me and not based on my thorough evaluation of the total situation. Opinions rendered on the basis of limited data are likely to result in bias.

"Based on your instructions and based only on the information you provided me, [appellant] is certainly capable of working 25 hours per week as a primary care provider for [the employing establishment]. However, I feel it is appropriate for your office to thoroughly investigate the working conditions and stress levels at the [employing establishment] before rendering your final decision. In no circumstance is it appropriate or medically safe for [appellant] to work long hours in any stressful environment, to perform shift work or to take night call.

"Based solely on the job description provided to me ... and based on my review of [appellant's] history and examination of [him], it is appropriate for me to conclude that [he] can perform the job description assuming it is the only source of employment. Personally speaking, I believe it is appropriate that more than the job description be evaluated in reference to [appellant's] employment status. I trust that you will review information regarding the work environment at [the employing establishment] and its associated stress as detailed eloquently in Dr. Roger D. Sutton's report."<sup>12</sup>

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<sup>8</sup> See *Carl W. Putzier*, 37 ECAB 691 (1986); *Herbert R. Oldham*, 35 ECAB 339 (1983).

<sup>9</sup> See *Maggie L. Moore*, *supra* note 7; see also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(d)(1).

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(1)-(5).

<sup>11</sup> *Melvina Jackson*, 38 ECAB 43 (1987); *Naomi A. Lilly*, 10 ECAB 560 (1959).

<sup>12</sup> Dr. Sutton, a cardiologist, in his August 10, 1999 report, described the environment at the employing establishment, which included overwork by physicians due to downsizing by the employing establishment. He stated that being overworked would lead to extreme physical and emotional stress.

It appears that the Office failed to take into account the working conditions at the employing establishment. The evidence of record contains a handwritten report dated November 2, 1998 report from Dr. Sutton, a cardiologist. In this report, he indicated that appellant worked at the employing establishment during an unprecedented “downsizing” effort, which required appellant to work 90 hours per week. Dr. Sutton further indicated that he had been a physician at the employing establishment for several years and that he could attest to the devastating amount of physical and emotional stress which befell the remaining medical staff.

In his August 10, 1999 report, Dr. Sutton described the environment at the employing establishment. He stated:

“At the present time, the [employing establishment] continued in its efforts to down-size to the point at which there is absolutely no flexibility as to [physician] coverage of inpatient and outpatient responsibilities. It is self evident that a physician’s duty to his patient has no time frame; it is full time, 24 hours a day seven days a week and does not fit into a time card. Physicians are under everlasting pressure to serve their patient’s needs, no matter the time. Whenever even a single [physician] is absent from the patient care roster, even for one day, utter chaos ensues, due to the heavy load often double-booked, assigned to each Doctor, part-time or full-time. Therefore, at the present time, any physician applicant for frontline clinical employment must be absolutely healthy and capable of managing a crushing workload in a sharply demarcated time. Absence due to illness is chaos for us. Secondly, we (including myself) staff physicians within the medical service are working 60 hours weekly with limited nursing and clerical support, leading to extreme physical/emotional stresses. Considering [appellant’s] precarious health, it is obvious to me that such stresses even in a part-time setting are bound to eventuate in considerable absenteeism due to illness, making for an intolerable situation for the rest of us.”

Dr. Sutton indicated a review of appellant’s medical records and stated that he was even more determined to oppose the rehiring of appellant on a part-time basis.

Based on the evidence above, the Board finds that the Office improperly invoked the penalty provision of section 8106(c) in this case.<sup>13</sup>

The June 20, 2000 decision of the Office of Workers’ Compensation Programs is hereby reversed.

Dated, Washington, DC  
October 16, 2001

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<sup>13</sup> In view of the Board’s decision, the issue regarding the denial of appellant’s request for reconsideration is moot. The Board also notes that the Office failed to make a determination as to whether appellant’s actual earnings fairly and reasonably represented his wage-earning capacity. See *Michael E. Moravec*, 46 ECAB 492 (1995).

David S. Gerson  
Member

Willie T.C. Thomas  
Member

Priscilla Anne Schwab  
Alternate Member