

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROLAND L. PHELPS and DEPARTMENT OF LABOR, MINE SAFETY &
HEALTH ADMINISTRATION, Grand Junction, CO

*Docket No. 01-596; Submitted on the Record;
Issued April 16, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

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

On September 14, 1987 appellant, then a 51-year-old coal mine inspector, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1), alleging that he was exposed to insecticide on September 11, 1987.¹ The Office accepted the claim for organophosphate poisoning. The Office subsequently accepted his recurrence claim for ongoing residuals of organophosphate poisoning, cognitive dysfunction, subtle tremors and gait instability on August 7, 1995. Appellant also subsequently filed claims for sustained injuries between May 30, 1989 and October 4, 1994.² The Office accepted back and neck sprains, cervical strain superimposed upon degenerative changes, right shoulder cuff tear and right medial meniscus tear for which surgical repair was authorized.³ Appellant performed various light-duty positions subsequent to his March 4, 1993 injury until his employment was terminated effective April 10, 1998.

On April 10, 1998 appellant filed for disability benefits on the basis that he was terminated by the employing establishment due to his employment injuries.⁴ He also filed a

¹ This was assigned claim number 50-034948. The Board notes that the Office also accepted appellant's claim for a hearing loss, claim number 25-0348027.

² The Office assigned these injuries claim numbers 11-0108725, 11-121217, 11-0132063 and 11-0136658.

³ Regarding appellant's November 3, 1992 injury, claim number 11-0121217, the Office terminated appellant's compensation benefits effective November 18, 1996 on the basis that he had recovered from his cervical strain. This was affirmed by a hearing representative in a decision dated November 21, 1997.

⁴ The employing establishment removed appellant from its employment due to its inability to accommodate his restrictions effective April 10, 1998.

claim for a recurrence of total disability (Form CA-2a) due to his accepted September 10, 1987 employment injury on April 10, 1998. On February 26, 1999 appellant elected to have benefits under the Federal Employees' Compensation Act effective April 11, 1998. On June 3, 1999 the Office placed appellant on the automatic rolls for temporary total disability.⁵

In a July 9, 1999 report, Dr. Scott J. Primack, a second opinion Board-certified physiatrist, reviewed a statement of accepted facts, a July 2, 1999 functional capacity evaluation (FCE), objective testing and the medical records. He concluded that appellant was capable of working full time with restrictions. Dr. Primack noted the following lifting restrictions:

“[Appellant] is capable of lifting 35 pounds occasionally from the floor to knee and knee to waist level. For his left upper extremity, he can lift up to 15 pounds occasionally and 10 pounds frequently at all levels from the ground to above his head. However, in the right upper extremity, [appellant] should not lift more than five pounds occasionally above the level of his head.”

Dr. Primack noted appellant had no restrictions on sitting and that he “should limit ambulation to 60 minutes straight” due to knee problems. He opined that appellant should not crawl or squat due to balance problems due to appellant's accepted organophosphate poisoning. In a July 14, 1999 work capacity evaluation form (OWCP-5c), Dr. Primack noted that appellant could work eight hours per day with restrictions on sitting, walking, standing, reaching above the shoulder and twisting.

On January 26, 2000 Dr. Primack reviewed the job requirements for a modified secretary (office automation) position and concluded that appellant was physically capable of performing the duties of the position.

On February 11 and 17, 2000 the employing establishment offered appellant the position of modified secretary (office automation), working eight hours per day in Lakewood, Colorado. He was advised that the Office would pay relocation costs as appellant resided in Olathe, Colorado, which was approximately 300 miles away.

In responses dated March 1 and 20, 2000, appellant declined the position on the basis of his current physical restrictions, future deterioration of his physical condition, lack of qualifications and knowledge of the position of office automation and lack of computer training.

On April 6, 2000 the Office informed appellant that the modified position was found suitable to his physical limitations and that he had 30 days to either accept the offered position or provide reasons for refusing the position. The Office advised appellant of the consequences of refusing a suitable job without adequate justification.

In an April 24, 2000 letter, appellant declined the position. He stated that he could not perform the offered position as he lacked the necessary qualifications and knowledge and his physical impairments, including fibromyalgia, prevented him from being able to perform certain

⁵ The Office consolidated claim numbers 50-034948, 11-0121217, 11-0132063, 11-0136658 on January 8, 1999 under claim number 50-034948.

critical portions of the position. In a supplemental letter dated April 28, 2000, appellant noted that the prohibitive financial cost of finding an equivalent home, advised that his wife suffered from manic depression such that relocating to Denver would be “a severe threat to her emotional well being” and asserted that the position “could require a 10-hour to 11-hour day with the likelihood of a commute to work and home.”

By letter dated May 8, 2000, the Office advised appellant that the reasons he had provided for refusing the position were found unacceptable and informed him that he had an additional 15 days to accept the position.

By letter dated May 19, 2000, appellant reiterated his reasons for refusing the position by saying that the job was not suitable as he could not physically endure the position for any length of time due to nerve and muscle pain caused by his organophosphate poisoning.

In a letter dated May 23, 2000, the Office advised appellant as to the type of medical evidence to submit regarding his wife’s manic depressive disorder.

In a June 7, 2000 letter, appellant indicated that his wife had been treated by M. Scott Fisher, Ed.D. and consulting psychologist, who had relocated and requests to have copies of treatment records had been unsuccessful. He stated his wife refused to relocate to Denver because she required support from her friends and immediate family.

By letter dated August 21, 2000, the Office advised appellant that the reasons he had provided for refusing the position were unacceptable and informed him that he had an additional 15 days to accept the position. The Office informed appellant that if a response was not received within 15 days that a final decision would be issued and no further reasons for refusing the position would be considered.

Appellant, in an August 29, 2000 letter, indicated that his refusal of the position was based upon his wife’s health, the prohibitive financial cost of relocating to Denver, his son’s hemophilia and appellant’s fibromyalgia. He did not submit any medical evidence regarding the illness of either his wife or son.

In a decision dated September 14, 2000, the Office terminated appellant’s compensation benefits effective October 7, 2000 on the basis that he refused an offer of suitable employment.

Appellant requested reconsideration in a letter dated October 3, 2000 and submitted evidence in support of his request. He reiterated his argument regarding the expense of relocating to Denver. In a September 27, 2000 letter, Dr. Fisher opined that appellant’s relationship with his spouse “would not stand the stress of a move and it is unlikely that Betty’s health would be served by a move away from her present area.” In a letter dated September 20, 2000, Susan J. Geraghty, RN, noted appellant’s son, who lived in Fruita, had severe hemophilia which causes crippling arthritis. She noted that “it would be a great loss to [appellant’s son] if his father moved out of the area.”

By merit decision dated November 1, 2000, the Office denied appellant's request for modification of its prior decision.⁶

The Board finds that the Office properly terminated 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 justifying termination or modification of compensation benefits. 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. To justify such a termination, the Office must show that the work offered was suitable.⁷

Under section 8106(c)(2) of the Act,⁸ the Office may terminate the 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.⁹ Section 10.516 of the Code of Federal Regulations¹⁰ 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.¹¹ To justify termination of compensation, the Office must show that the work offered was suitable¹² and must inform appellant of the consequences of refusal to accept such employment.¹³

Office procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.¹⁴

⁶ The Board notes that, on appeal, appellant has submitted new evidence. However, the Board cannot consider evidence that was not before the Office at the time of the final decision; *see Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35 (1952); 20 C.F.R. § 501.2(c)(1). Appellant may resubmit this evidence and legal contentions to the Office accompanied by a request for reconsideration pursuant to 5 U.S.C. § 8128(a). 20 C.F.R. § 501.2(c).

⁷ *Alfred Gomez*, 53 ECAB ____ (Docket No. 00-1817, issued October 9, 2001).

⁸ 5 U.S.C. § 8106(c)(2).

⁹ *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

¹⁰ 20 C.F.R. § 10.516

¹¹ *Camillo R. DeArcangelis*, *supra* note 9; *see* 20 C.F.R. § 10.516.

¹² *See Carl W. Putzier*, 37 ECAB 691 (1986); *Herbert R. Oldham*, 35 ECAB 339 (1983).

¹³ *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.813.11(c) (December 1991).

¹⁴ *C.W. Hopkins*, 47 ECAB 725 (1996); *see Patsy R. Tatum*, 44 ECAB 490, 495 (1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5 (July 1997).

Unacceptable reasons include relocation for personal desire or financial gain, lack of promotion potential or job security.¹⁵

The Board finds that the medical evidence of record establishes that appellant was capable of performing the position of secretary based upon the opinion of Dr. Primack. The record contains no medical evidence indicating appellant would be incapable of performing the offered position. The Office's procedure manual indicates that, once a claimant has been informed that the Office finds the job suitable and that compensation will be terminated if the job offer is not accepted, there are some acceptable reasons for refusing to accept an offer of suitable employment.¹⁶

In support of his refusal, appellant contended that selling his house and relocating would cause him a financial hardship. The Board has held that financial advantage derived from remaining in a different location will not justify a refusal of an offer of suitable work.¹⁷ Furthermore, appellant was advised that he would be entitled to reasonable relocation expenses to assist him.

Appellant also argues that he is unable to move because of both of his wife's illness and his son's hemophilia. In support of this contention, appellant submitted a report from Dr. Fisher who opined that appellant's spouse could "not stand the stress of a move" and a report by Ms. Geraghty, a nurse, stating it would be a great loss for appellant's son if he moved out of the area. The Office's procedure manual provides examples of acceptable reasons for refusing a position. One such acceptable reason, when a claimant is no longer on the employing establishment's rolls, is when the medical condition of a family member contraindicates relocating.¹⁸ The medical conditions of appellant's wife and son could, therefore, justify a refusal to accept a job offer.¹⁹ In this case, however, appellant has not submitted any medical evidence documenting that a medical condition regarding his wife or son exists which contraindicated his move to Lakewood, Colorado, from Olathe, Colorado. In support of his wife's illness, appellant submitted a report from Dr. Fisher listed as a "consulting psychologist." Section 8101(2) of the Act provides that the term "physician" includes "clinical psychologists" within the scope of their practice as defined by state law.²⁰ While associated with psychological health services in Salt Lake City, Utah, Dr. Fisher's degree is listed as doctorate in education. Dr. Fisher is not a "clinical psychologist" nor are his reports those of a "physician" as defined

¹⁵ *Arthur C. Reck*, 47 ECAB 339 (1996).

¹⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.10 (July 1997).

¹⁷ *See Richard S. Gumper*, 43 ECAB 811 (1992).

¹⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(b)(3) (July 1996).

¹⁹ Section 814.5(b)(3) is applicable to claimants that have been "separated by formal personnel action" from the employing establishment. *Id.*, Chapter 2.814.5(b). The record indicates that appellant had been separated from employment by formal personnel action.

²⁰ 5 U.S.C. § 8101(2).

under the Act.²¹ For this reason, his reports have no probative value on the question of the emotional condition of appellant's spouse. Regarding appellant's son's illness, appellant has failed to submit any medical evidence showing that his son's condition prevents his relocating. The September 20, 2000 letter by Ms. Geraghty, a nurse, is not probative as a nurse is not a "physician" within the meaning of the Act.²²

The Board thus finds that the Office properly terminated appellant's compensation benefits based upon his refusal to accept a suitable position.

The November 1, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
April 16, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

²¹ See *Frederick C. Smith*, 48 ECAB 132 (1996).

²² 5 U.S.C. § 8101(2) which defines "physician" as including surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law; *see also Joseph N. Fassi*, 42 ECAB 231 (1991) (medical evidence signed only by a registered nurse or nurse practitioner is generally not probative evidence).