U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

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In the Matter of PAUL D. KAULBACK and DEPARTMENT OF THE NAVY, NAVAL AIR STATION, Brunswick, ME

*Docket No. 02-1587; Submitted on the Record;*
*Issued December 10, 2002*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation because he refused an offer of suitable work pursuant to section 8106 of the Federal Employees' Compensation Act.[1]

Appellant's claim, filed on March 17, 1982, was accepted for a lumbosacral strain after he hurt his back while fastening wood strapping to concrete. He had a laminectomy on November 20, 1982 and filed recurrence of disability claims on February 2 and June 1, 1983, which were also accepted. On September 9, 1984 the employing establishment terminated appellant.

Subsequently, the Office referred appellant for vocational rehabilitation and Dr. Carl A. Brinkman, a Board-certified neurosurgeon and appellant's treating physician, released him to full-time work with some restrictions. Based on Dr. Brinkman's March 10, 1986 report, the Office issued a wage-earning capacity determination on July 8, 1996 and reduced appellant's compensation.

Appellant disagreed with this decision and requested a hearing, which was held on December 4, 1986. On February 27, 1987 the hearing representative affirmed the Office's decision. In reports dated March 21, 1988, April 14, 1989 and April 11, 1990, Dr. Brinkman reiterated that appellant could work full time in a sedentary position.

The Office again referred appellant for vocational services and Dr. Brinkman continued to opine that appellant was fit for work with minimal limitations on bending and lifting. After he retired, Dr. Thomas F. Mehalic, a Board-certified neurosurgeon, took over appellant's treatment and also found him to be neurologically intact.

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[1] 5 U.S.C. §§ 8101-8193.

On July 31, 1995 after appellant completed a two-year training course in building construction, the Office referred him for a second opinion evaluation to Dr. Philip Salib, a Board-certified orthopedic surgeon. Based on his August 10, 1995 report, the Office issued a notice of proposed termination of compensation on October 4, 1995.

Appellant disagreed with this decision and submitted a November 8, 1995 report from Dr. James G. Wepsic, a Board-certified neurosurgeon. On April 3, 1996 the Office terminated appellant's compensation on the grounds that he had no residual disability related to the 1982 injury. Appellant requested a hearing, but the hearing representative found a conflict in the medical opinion evidence between Drs. Salib and Wepsic over whether appellant had any residual impairment and was capable of working without restrictions. The case was, therefore, remanded on September 11, 1997 for referral to an impartial medical examiner.

On remand, the Office referred appellant to Dr. Robert C. Cantu, a Board-certified neurosurgeon, who examined appellant on February 11, 1998 and found that he still had residuals of the 1982 injury. Dr. Cantu concluded that appellant could return to his preinjury job with restrictions of lifting no more than 50 pounds and no repetitive bending, stooping and straining.

On June 17, 1998 the employing establishment offered appellant a clerk's position, based on the restrictions listed by Dr. Cantu. Appellant refused this offer on July 3, 1998 because he felt that the cost of daily commuting from Hudson, Massachusetts, where he had relocated, to Brunswick, Maine would be prohibitive.

The Office notified appellant on July 31, 1998 that the position was found to be suitable, provided him 30 days to accept the job or explain his refusal and related the consequences of refusing suitable work. Appellant again refused the job offer in a letter dated August 26, 1998, noting that a daily 147-mile, 3-hour commute one way would be "a practical impossibility." He added that the work offered was inconsistent with his background and training as a carpenter, that Dr. Wepsic had limited him to four hours' work a day and that his sitting restriction would be violated by the long commute.

By letter dated December 7, 1998, the Office informed appellant that, although he had declined the job because of the commute, the employing establishment would pay for any relocation expenses and that the job was still available and considered suitable. The Office added that the duties and physical limitations of the offered position met the limitations set by Dr. Cantu. The Office provided appellant another 30 days to accept the position or provide reasons for refusing it and stated that any reasons he provided would be considered.

Appellant did not respond within 30 days[2] and on January 11, 1999 the Office terminated his compensation on the grounds that he refused an offer of suitable work. Appellant requested a hearing, noting that Dr. Cantu was not his physician and that Dr. Wepsic had concluded in a report dated January 13, 1999 that he could work only four hours a day, not eight.

Following the hearing on July 19, 1999, the hearing representative found that appellant had refused an offer of suitable work and was, therefore, no longer entitled to compensation. The hearing representative noted that Dr. Cantu resolved the conflict of medical opinion between Drs. Wepsic and Salib over how many hours appellant could work and that appellant had not responded to the Office's December 7, 1999 letter within 30 days.

On July 19, 2000 appellant asked the Office to authorize a medical examination by Dr. Gary M. Weiss, a Board-certified neurologist, because of severe lower back pain. By letter dated October 3, 2000, appellant requested reconsideration and submitted reports from Dr. Weiss. On November 15, 2000 the Office denied modification of its prior decision. The Office found that the conclusions of Dr. Weiss were insufficient to overcome the weight of the impartial medical examiner's opinion.

Appellant again requested reconsideration on November 13, 2001 and submitted a report from Dr. Linda I. Bland, a Board-certified neurosurgeon. On March 14, 2002 the Office denied modification of its prior decision, noting that the issue was not whether appellant's back condition had deteriorated but rather whether he was capable of full time light duty in 1998.

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

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation, including cases in which the Office terminates compensation under section 8106(c) for refusal to accept suitable work.[3]

Under section 8106(c)(2) of the Act,[4] the Office may terminate compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.[5] However, to justify such termination, the Office must show that the

[2] A December 16, 1998 memorandum indicated that appellant called the Office and said that he could not accept the job because of a residence change. In a letter dated January 7, 1999 and received by the Office on January 12, 1999, one day after the termination decision, appellant's attorney explained that appellant had recently married and had no prospects for housing near his former employer. The letter added that Dr. Cantu was not appellant's treating physician, that appellant was limited in the amount of sitting he could do at one time and that he had been trained in building construction, not for being a clerk.

[3] 5 U.S.C. § 8106(c); *Henry W. Sheperd, III*, 48 ECAB 382, 385 (1997); *Shirley B. Livingston*, 42 ECAB 855, 861 (1991).

[4] 5 U.S.C. § 8106(c)(2).

[5] *Martha A. McConnell*, 50 ECAB 129, 131 (1998).

work offered was suitable[6] and must inform the employee of the consequences of a refusal to accept employment deemed suitable.[7]

Once the Office establishes that the work offered was suitable, the burden of proof shifts to the employee who refuses to work to show that such refusal was reasonable or justified.[8] The issue of whether an employee has the physical ability to perform the duties of the position offered is a medical question that must be resolved by medical evidence.[9]

Section 10.124(c) of the Code of Federal Regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured shall be provided with the opportunity to show that his actions were reasonable or justified.[10] Thus, before terminating compensation, the Office must review the employee's proffered reasons for refusing or neglecting to work.[11]

In situations where opposing medical opinions on an issue are of virtually equal evidentiary weight and rationale, the case shall be referred for an impartial medical examination to resolve the conflict in medical opinion.[12] The opinion of the specialist properly chosen to resolve the conflict must be given special weight if it is sufficiently well rationalized and based on a proper factual background.[13]

In this case, the Office properly determined that a conflict of medical opinion existed over whether appellant had the capability of full-time light-duty work. Appellant's physician, Dr. Wepsic, stated after examining appellant on November 8, 1995 that he could work 8 hours a day with certain restrictions -- lifting no more than 30 pounds, siting for no more than 1 hour continuously and infrequent bending -- but that he "doubted" appellant would return to full-time carpentry.

In his August 28, 1997 report, Dr. Wepsic stated that appellant had been self-employed as carpenter[14] and intended to continue doing that work. Appellant was capable of carrying out lighter carpentry work on a part-time basis for four hours a day. Dr. Wepsic imposed restrictions

[6] *Marie Fryer*, 50 ECAB 190, 191 (1998).

[7] *Ronald M. Jones*, 48 ECAB 600, 602 (1997).

[8] *Deborah Hancock*, 49 ECAB 606, 608 (1998).

[9] *Marilyn D. Polk*, 44 ECAB 673, 680 (1993).

[10] 20 C.F.R. § 10.124(c).

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

[12] *Richard L. Rhodes*, 50 ECAB 259, 263 (1999).

[13] *Sherry A. Hunt*, 49 ECAB 467, 471 (1998).

[14] In claiming ongoing compensation, appellant submitted a listing of the carpentry jobs he had done in 1996 and 1997 and his earnings.

of lifting no more than 40 pounds, sitting for no more than 1 hour continuously and infrequent bending.

In his August 10, 1995 report, Dr. Salib, the Office's referral physician, found that appellant was capable of performing any kind of full-time work without restrictions. Because of this conflict, the hearing representative reversed the termination of compensation on September 11, 1997 and remanded the case for the Office to resolve the issue.

On remand the Office stated in a memorandum that its referral to Dr. Cantu was to resolve a conflict in the medical opinion evidence over whether appellant could work full time without restrictions. Dr. Cantu examined appellant on February 11, 1998 and found him capable of full-time, light carpentry work, with similar restrictions of no repetitive bending, stooping or straining and a weight limit of 50 pounds.

Dr. Cantu reviewed a statement of accepted facts and the history of appellant's treatment and diagnostic testing for his back condition, including the early reports of Dr. Brinkman and his successor, Dr. Mehalic, both of whom found appellant capable of light work. While Dr. Cantu noted residual disability from the 1982 injury, which prevented appellant from returning to his date-of-injury position, he found appellant capable of full-time work within the listed restrictions.

Dr. Cantu explained his clinical findings and provided medical rationale for his conclusion that appellant could work full time. Thus, Dr. Cantu provided an opinion that was sufficiently well rationalized to support his conclusion that appellant was capable of returning to light-duty work. The Board finds that Dr. Cantu's report is entitled to the special weight accorded to impartial medical examiners and establishes that appellant was capable of performing the duties of the offered position.[15]

By letter dated May 18, 1998, appellant was informed that the Office would seek placement for him with the employing establishment, based on Dr. Cantu's report. Subsequently, the employing establishment offered the clerk's position, noting appellant's physical restrictions. The work was "mostly sedentary" in an office setting, with some walking and bending required when filing. The Office found this position to be suitable for appellant's work capabilities and informed him on July 31, 1998 of the 30-day requirement for accepting the position or providing reasons for refusing it.

Appellant responded that he had been living in Hudson for the past 3 years, which was 147 miles from the employing establishment and would require a 6-hour round-trip commute. Appellant added that Dr. Wepsic had limited him to 4 hours of work a day the year previously and had stated that he could sit for no more than 20 minutes without changing position. The Office responded that the employing establishment would pay relocation expenses and gave appellant another 30 days to accept the position. When he did not respond in a timely manner, the Office terminated his compensation.

[15] *See Sherry A. Hunt, supra* note 13 (finding that the opinion of the impartial medical examiner that appellant could perform the requirements of the limited-duty position for eight hours was entitled to special weight).

The Board finds that the Office complied with its procedural requirements by advising appellant that the position offered was suitable, that the job remained available to him, that the penalty for refusing the offered position was termination of compensation and that he had 30 days to accept the position or explain his refusal. Appellant was informed that his main reason for refusing the offered job -- the long commute -- could be resolved by relocating at the employing establishment's expense.

When appellant failed to respond to the Office's December 7, 1998 letter within 30 days, the Office properly terminated his compensation without providing him an additional opportunity to accept the position without penalty.[16] In view of the fact that the appellant's primary reason for refusing the position was considered and resolved by the Office, the Board finds that appellant was properly informed of the consequences of refusing suitable work.[17]

In support of his request for reconsideration, appellant offered the August 15, 2000 report and subsequent treatment notes of Dr. Weiss, who diagnosed a herniated nucleus pulpous at L4-5 with radiculopathy and restricted appellant to four hours of work a day. The issue of how many hours appellant could work was resolved by Dr. Cantu as the impartial specialist. Further, Dr. Weiss failed to explain why appellant was restricted in working or provide any evidence such as a functional capacity evaluation to support his opinion. Therefore, the Board finds that his report is insufficiently probative to overcome the special weight of the impartial medical examiner.

The September 21, 2001 report from Dr. Bland is similarly flawed. She opined that appellant's recurrent disc herniations were causally related to the accepted work injury in 1982, but offered no opinion on his capacity for work, merely noting that appellant "wished" to work light duty four hours a day and completing a release-to-work form.

The opinion of Dr. Cantu, the impartial medical examiner, establishes that appellant was capable of performing the duties of the offered position and the record establishes that the Office followed the requisite procedures in determining that the job offer represented suitable work. Therefore, the Board finds that the Office properly terminated appellant's wage-loss compensation.[18]

The March 14, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC

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[16] *See Deborah Hancock*, 49 ECAB 606, 608 (1998) (finding that appellant had proper notice of the consequences of refusing suitable work after she advised the Office that she continued to experience disabling pain).

[17] *See Howard Y. Miyashiro*, 51 ECAB 253, 255 (1999) (finding that appellant presented insufficient evidence to justify his assertion that relocation would be financially prohibitive and the Office properly determined that the offered position was suitable).

[18] *See Linda Blue*, 50 ECAB 227, 229 (1999) (finding that the medical evidence established that appellant was capable of performing the duties of the offered position which required left-handed data entry).

December 10, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member