

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DALE W. SCHUMACHER and DEPARTMENT OF THE AIR FORCE,  
ELLSWORTH AIR FORCE BASE, SD

*Docket No. 00-2259; Submitted on the Record;  
Issued January 25, 2002*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's claim for compensation on and after January 1, 1997 on the grounds that he abandoned suitable work; and (2) whether the Office properly denied appellant's request for reconsideration.

On December 3, 1996 appellant, then a 54-year-old vehicle maintenance mechanic, filed an occupational disease claim alleging that he sustained a back injury in the performance of duty. He first sought medical treatment for his condition on June 9, 1975. By decision dated June 14, 1999, the Office accepted his claim for aggravation of degenerative disc disease of the cervical spine.<sup>1</sup> After back surgery on May 16, 1994, appellant returned to work on August 3, 1994 with restrictions. Following his second back surgery on February 20, 1996, he returned to work in a light-duty capacity on April 15, 1996.

In a report dated November 25, 1996, Dr. Larry Teuber, appellant's attending neurosurgeon, noted that he was essentially asymptomatic.

In a statement dated December 2, 1996, appellant stated that he would no longer be employed as of December 31, 1996. He stated that his position "[had] been identified in a RIF [reduction-in-force] at [the employing establishment]."

Effective December 31, 1996 appellant voluntarily retired from his position at the employing establishment under the Voluntary Separation Incentive Program and received \$25,000.00 incentive pay for his voluntary retirement.

In a letter dated July 22, 1999, an employing establishment compensation administrator stated that following appellant's return to work after his February 20, 1996 surgery, his work

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<sup>1</sup> The Office initially denied appellant's claim by decision dated October 29, 1997.

assignment did not change but he was provided with assistance whenever it was needed, such as when strenuous labor was involved. The employing establishment stated that appellant was not involved in a reduction-in-force, that his position and others were projected to be abolished and separation incentives were offered to preclude the need to take reduction-in-force actions. It stated that appellant was offered an incentive, accepted it, and retired effective December 31, 1996.

In a memorandum dated July 23, 1999, the employing establishment stated that following surgery in 1996 appellant returned to his same work assignment and appellant would still be working had he not voluntarily elected to retire.

On December 3, 1999 appellant filed a claim for compensation on and after January 1, 1997.

By decision dated January 13, 2000, the Office denied appellant's claim for compensation on and after January 1, 1997 on the grounds that under section 8106 of the Federal Employees' Compensation Act<sup>2</sup> he was not entitled to compensation because he neglected to work after suitable work had been secured for him. The Office stated that appellant had voluntarily retired as of December 31, 1996 pursuant to a voluntary separation incentive program.

By letter dated January 27, 2000, appellant requested reconsideration and submitted additional evidence. He also argued that the Office failed to advise him of "the option of disability versus [Voluntary Separation Incentive Program] retirement."

Appellant submitted an October 3, 1996 memorandum in which a representative of the Civilian Personnel Office explained the Voluntary Separation Incentive Program.

In an October 9, 1996 memorandum addressed to appellant, the base commander stated that 28 civilian positions were due to be eliminated effective April 1, 1997. He stated:

"1. I am sure you have heard that an arbitrary reduction in our civilian workforce has been directed for FY 97.... Although we have a number of vacant positions to cushion the impact, there are not enough to preclude affecting some current employees.

"2. Each group commander was tasked to identify, within their units, those authorizations necessary to satisfy this reduction.... In our efforts to avoid adversely impacting any more employees than absolutely necessary, voluntary separation incentives will again be offered.

"3. This 'employee-based' separation incentive program will be used to the extent necessary ... to preclude adversely impacting an employee by reduction-in-force and ... to stay within our funding levels...."

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<sup>2</sup> 5 U.S.C. § 8106.

In a memorandum to appellant dated October 10, 1996, the commander of appellant's work unit stated:

"1. This is to advise you that the position you occupy was nominated to be canceled in order to meet the Ellsworth AFB reduction requirement. The effective date of the cancellation was April 1, 1997.

"2. This is *not, repeat, not* a reduction-in-force notification. You can be assured that every effort will be made to minimize adversely affecting you or any other civilian employee as a result of this decision. (Emphasis in the original.)

"3. If you are mobile and desire to do so, you are eligible immediately to register in the Department of Defense Priority Placement Program for possible placement at other locations.... If you are interested in a possible voluntary separation incentive, forms may be obtained...."

By decision dated February 14, 2000, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted with his request was immaterial and not sufficient to warrant further merit review.

By letter dated February 28, 2000, appellant requested reconsideration and submitted additional evidence. Appellant alleged that he would have lost his job due to a reduction-in-force if he had not voluntarily retired under the Voluntary Separation Incentive Program. He also asserted that his work-related condition had worsened since December 31, 1996.

In an Office of Personnel Management (OPM) form dated November 18, 1996, appellant advised OPM that he had applied for compensation benefits under the Act.

Appellant submitted a copy of a magnetic resonance imaging report dated November 18, 1998 and copies of notes regarding epidural steroid injections on December 11, 1998.

In a report dated December 24, 1998, Dr. Teuber diagnosed right C8 radiculopathy and recommended that appellant continue his physical therapy and consider surgery if his condition worsened. In a report dated February 25, 2000, Dr. Teuber stated that appellant was not capable of performing the job that he held prior to his voluntary retirement.

By decision dated April 11, 2000, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted in support of the request was cumulative and not sufficient to warrant further merit review.

The Board finds that the Office did not properly determine that appellant had abandoned suitable work.

Section 8106(c)(2) of the Act provides in pertinent part, "A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation."<sup>3</sup> However, to justify such termination, the Office must show that the work

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<sup>3</sup> 5 U.S.C. § 8106(c)(2).

offered was suitable.<sup>4</sup> An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.<sup>5</sup>

The Office's implementing regulations provide, in pertinent part:

“If an employee cannot return to the job held at the time of injury due to partial disability from the effects of the work-related injury, but has recovered enough to perform some type of work, he or she must seek work. In the alternative, the employee must accept suitable work offered to him or her.... This work may be with the original employer or through job placement efforts made by or on behalf of [the Office].<sup>6</sup>”

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“[The Office] shall advise the employee that it has found the offered work to be suitable<sup>7</sup> and afford the employee 30 days to accept the job or present any reasons to counter [the Office's] finding of suitability. If the employee presents such reasons, and [the Office] determines that the reasons are unacceptable, it will notify the employee of that determination and that he or she has 15 days in which to accept the offered work without penalty. At that point in time, [the Office's] notification need not state the reasons for finding that the employee's reasons are not acceptable.”<sup>8</sup>

The Office's implementing regulations further provide:

“(a) 5 U.S.C. § 8106(c) provides that a partially disabled employee who refuses to seek suitable work or refuses, or neglects to work after suitable work is offered to or arranged for him or her, is not entitled to compensation. An employee who refuses or neglects to work after suitable work has been offered or secured for him or her has the burden to show that this refusal or failure to work was reasonable or justified.

“(b) After providing the two notices described in section 10.516, [the Office] will terminate the employee's entitlement to further compensation under 5 U.S.C.

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<sup>4</sup> See *David P. Camacho*, 40 ECAB 267, 275 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341, 345 (1981).

<sup>5</sup> See *Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

<sup>6</sup> 20 C.F.R. § 515(b) (1999).

<sup>7</sup> In determining what constitutes “suitable work,” the Office considers the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work, and other relevant factors; see 20 C.F.R. § 500(b) (1999).

<sup>8</sup> 20 C.F.R. § 10.516 (1999).

§ 8105, 8106 and 8107, as provided by 5 U.S.C. § 8106(c)(2). However, the employee remains entitled to medical benefits...”<sup>9</sup>

The Board has held that due process and elementary fairness require that the Office observe certain procedures before terminating a claimant’s monetary benefits under section 8106(c)(2) of the Act. In order to ensure regularity and impartiality in adjudicating claims, and secure similar treatment of similar cases, the Office must not only inform each claimant of the provisions of the above statute, but also inform him or her that a specific position offered is suitable; the consequences of refusal of the position; and allow the claimant a reasonable period to accept or reject the position or submit evidence or reasons why the position is not suitable and cannot be accepted. If a claimant submits evidence or reasons of both, the Office must evaluate the new evidence or reasons submitted and inform the claimant of its decision as to whether the evidence or reasons submitted was accepted or rejected. Claimants should be informed in the latter communication of the final intentions of the Office and given a reasonable period to make the requisite decision if any such further action is required.<sup>10</sup>

In this case, appellant filed a claim for compensation on and after January 1, 1997. He voluntarily retired as of December 31, 1996 but claimed that his work-related condition had worsened since that date. He also alleged that he would have lost his job due to a reduction-in-force had he not retired.

The Board finds that the Office did not evaluate appellant’s stated reasons for stopping work pursuant to its own procedure manual. The Office did not advise appellant that the reasons he provided for abandoning the suitable work position were rejected and did not provide appellant a final opportunity to accept or refuse the position, prior to the termination of his compensation. The Office therefore did not meet its burden of proof to establish that appellant had abandoned suitable work.<sup>11</sup>

In light of the Board’s resolution of the first issue, the second issue in this case is moot.

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<sup>9</sup> 20 C.F.R. § 10.517 (1999).

<sup>10</sup> *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff’d on recon.*, 43 ECAB (1992).

<sup>11</sup> *See Mary G. Allen*, 50 ECAB 103, 105-06 (1998).

The decisions of the Office of Workers' Compensation Programs dated April 11, February 14 and January 13, 2000 are reversed.

Dated, Washington, DC  
January 25, 2002

David S. Gerson  
Member

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member