

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID BUDZIK and U.S. POSTAL SERVICE,
POST OFFICE, Brooklyn, OH

*Docket No. 02-96; Submitted on the Record;
Issued May 23, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation for refusal to accept suitable work.

The Board has duly reviewed the case record in this appeal and finds that the Office properly terminated appellant's compensation for refusal to accept suitable work.

Section 8106(c)(2) of the Federal Employees' Compensation Act states that a partially disabled employee who refuses to seek suitable work or neglects to work after suitable work is offered to, procured by, or secured for him is not entitled to compensation."¹ The Office has authority under this section to terminate compensation for any partially disabled employee who refuses suitable work when it is offered. An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal was justified.²

This case was previously before the Board.³ By decision and order dated April 11, 2001, the Board affirmed the Office's December 29, 1999 decision terminating appellant's compensation for refusal to accept suitable work.⁴ The Board's April 11, 2001 decision is herein incorporated by reference.

Subsequent to the Board's April 11, 2001 decision, appellant requested reconsideration by letter dated July 16, 2001.

¹ 5 U.S.C. § 8106(c)(2).

² 20 C.F.R. § 10.517(a).

³ See Docket No. 00-1199 (issued April 11, 2001).

⁴ The Office's December 29, 1999 decision affirmed a March 10, 1999 Office decision terminating appellant's compensation effective that date.

By decision dated August 23, 2001, the Office denied modification of its December 29, 1999 decision.⁵

The Board finds that the Office properly terminated appellant's compensation for refusal to accept suitable work.

Following the prior Board decision, appellant submitted a May 31, 2000 decision from the Department of Veterans Affairs that found him unemployable effective August 9, 1998 due to a service-related disability. However, as the Board noted in its April 11, 2001 decision, a finding of disability under one federal statute does not establish disability under the Act.⁶ A finding by another agency that appellant is unemployable is insufficient by itself to show that appellant could not perform the duties of the position offered to him. Appellant must submit medical evidence to establish that he was physically unable to perform the job requirements of the position offered.

Appellant submitted medical evidence from a social worker, a physician's assistant, and a nurse. However, a social worker, physician's assistant, or nurse is not a "physician" as defined in the Act.⁷ Lay individuals such as physician's assistants, nurse practitioners, and social workers are not competent to render a medical opinion.⁸ Therefore, this evidence is of no probative value on the issue of whether appellant was physically able to perform the job offered to him.

Appellant submitted copies of diagnostic tests, including x-rays, magnetic resonance imaging scans, and an electromyogram for various dates between August 13, 1993 and May 14, 1999. These reports do not address the issue of whether appellant was capable of performing the job offered to him as of March 10, 1999, the date his compensation was terminated for refusal to accept suitable work. Therefore, this evidence does not discharge appellant's burden of proof.

⁵ The Board notes that by letter dated August 8, 2001, received by the Office on September 5, 2001, appellant requested reconsideration. The Office issued a merit decision dated December 3, 2001 affirming its August 23, 2001 decision. However, the Board and the Office cannot have simultaneous jurisdiction over the same issue in the same case; *see Russell E. Lerman*, 43 ECAB 770, 772 (1992); *Douglas E. Billings*, 41 ECAB 880, 894-95 (1990). As appellant filed his appeal with the Board on September 28, 2001 on the issue of termination for refusal of suitable work as set forth in the Office's August 23, 2001 decision, the Office had no jurisdiction to issue its December 3, 2001 decision on that same issue. Therefore the December 3, 2001 Office decision is null and void.

⁶ *See Daniel Deparini*, 44 ECAB 657, 659-60 (1993).

⁷ As defined by the Act in 5 U.S.C. § 8101(2), "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by state law.

⁸ *See Arnold A. Alley*, 44 ECAB 912, 921 (1992); *Sheila Arbour*, 43 ECAB 779, 787-88 (1992).

The decision of the Office of Workers' Compensation Programs dated August 23, 2001 is affirmed.

Dated, Washington, DC
May 23, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member