

FACTUAL HISTORY

The Office accepted that on September 21, 2004 appellant, then a 40-year-old police officer, sustained a left knee contusion when he jumped over a concrete barricade to chase a suspect.¹ Appellant received compensation for periods of disability.

In June 2005 appellant underwent left ACL repair surgery. On September 13, 2005 Dr. Daniel R. Cavazos, an attending Board-certified orthopedic surgeon, advised that appellant was totally disabled from all work. He noted that appellant needed to aggressively exercise his hamstring muscles in order to strengthen them.

In 2007 the Office referred appellant to Dr. Alexander L. Lambert, II, a Board-certified orthopedic surgeon, for evaluation of his ability to work. In a July 5, 2007 report, Dr. Lambert diagnosed left knee persistent ACL instability, left knee chondromalacia and left knee pain. He found that appellant could not return to his regular work as a police officer or a job that required any type of running, jumping, crawling, squatting or performing medium-to-heavy labor. However, appellant could perform limited-duty work for eight hours a day. On a July 5, 2007 work restriction form, Dr. Lambert advised that appellant could perform the following actions for up to one hour at a time: walking, standing, bending, stooping, pushing up to 40 pounds, pulling up to 30 pounds and lifting up to 25 pounds. He could not engage in kneeling, climbing, running, jumping, crawling, squatting or medium-to-heavy labor.²

On May 9, 2008 the employing establishment offered appellant a modified job as a security clerk on a full-time basis. The job involved providing customer service with respect to the issuance of vehicle decals and required the performance of the following actions for up to one hour at a time: walking, standing, bending, stooping, pushing up to 40 pounds, pulling up to 30 pounds and lifting up to 25 pounds. It did not require squatting, kneeling or climbing.

On May 28, 2008 appellant spoke to the Office rehabilitation counselor and advised that he did not wish to accept the offered position because it involved taking a pay cut from his police officer job. His counselor notified him that the offered position was vocationally suitable and that taking the position would not require a pay cut.

In an August 6, 2008 letter, the Office advised appellant of its determination that the security clerk position offered by the employing establishment was suitable. It informed him that his compensation would be terminated if he did not accept the position or provide good cause for not doing so within 30 days of the date of the letter.³

In a September 11, 2008 letter, appellant stated, "This is written notification of my desire to terminate workers comp and commence my retirement effective immediately."

¹ Appellant underwent three surgeries on his left anterior cruciate ligament (ACL) in the late 1980s and early 1990s.

² Dr. Cavazos was asked to provide an opinion on appellant's ability to work but it does not appear that such a report was obtained.

³ On June 24, 2008 the employing establishment confirmed that the position was still available.

In a September 23, 2008 letter, the Office advised appellant that his reasons for not accepting the security clerk position were unjustified. It notified him that his compensation would be terminated if he did not accept the position within 15 days of the date of the letter. Appellant did not accept the security clerk position offered by the employing establishment.

In an October 29, 2008 decision, the Office terminated appellant's monetary compensation effective October 29, 2008 on the grounds that he refused an offer of suitable work.

In a May 15, 2009 letter, counsel requested reconsideration arguing that the Office did not follow the standards for termination based on refusal of suitable work.⁴

In a November 12, 2009 decision, the Office affirmed the October 29, 2008 decision. It noted that appellant's concern about taking a pay cut to accept the offered security clerk position and his pursuit of disability retirement benefits from OPM were not valid reasons for failing to accept the position.

LEGAL PRECEDENT

Section 8106(c)(2) of the Federal Employees' Compensation 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."⁵ However, to justify such termination, the Office must show that the work offered was suitable.⁶ 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.⁷

ANALYSIS

The Office accepted that on September 21, 2004 appellant, then a 40-year-old police officer, sustained a left knee contusion when he jumped over a concrete barricade to chase a suspect. Appellant received compensation from the Office for periods of disability. It terminated his monetary compensation effective October 29, 2008 on the grounds that he refused an offer of suitable work.

The evidence of record established that appellant was capable of performing the security clerk position offered by the employing establishment in May 2008 and determined by the Office to be suitable. The job involved providing customer service with respect to the issuance of vehicle decals and allowed for the following actions for up to one hour at a time: walking, standing, bending, stooping, pushing up to 40 pounds, pulling up to 30 pounds and lifting up to

⁴ Appellant submitted a document electing a disability retirement effective October 31, 2008 as well as other materials relating to his transfer from the Act to Office of Personnel Management (OPM) benefits.

⁵ 5 U.S.C. § 8106(c)(2).

⁶ *David P. Camacho*, 40 ECAB 267, 275 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341, 345 (1981).

⁷ 20 C.F.R. § 10.124; see *Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

25 pounds. It did not require squatting, kneeling or climbing. The record does not reveal that the security clerk position was temporary or seasonal in nature.⁸

In determining that appellant was physically capable of performing the security clerk position, the Office properly relied on the July 5, 2007 opinion of Dr. Lambert, a Board-certified orthopedic surgeon who served as an Office referral physician.⁹ Dr. Lambert stated that appellant could perform the following actions for up to one hour at a time: walking, standing, bending, stooping, pushing up to 40 pounds, pulling up to 30 pounds and lifting up to 25 pounds. He could not engage in kneeling, climbing, running, jumping, crawling, squatting, or medium-to-heavy labor. The Board notes that the duties of the security clerk position are within the work restrictions provided by Dr. Lambert. There is no medical evidence to establish that appellant could not physically perform the position. Moreover, the vocational rehabilitation counselor approved the position and noted that appellant had previously worked as a police officer, a much more complex job involving security.

The Board finds that the Office has established that the security clerk position offered by the employing establishment is suitable. As noted, once the Office has established that a particular position is suitable, 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. In rejecting the offered position, appellant raised issues relating to possible loss of pay and his election to receive disability retirement, but he did not explain how these matters supported his rejection of the offered position.¹⁰ The Board has carefully reviewed the evidence and argument submitted by appellant in support of his refusal of the security clerk position and finds that it is not sufficient to justify his refusal of the position.

For these reasons, the Office properly terminated appellant's compensation effective October 29, 2008 on the grounds that he refused an offer of suitable work.¹¹

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation effective October 29, 2008 on the grounds that he refused an offer of suitable work.

⁸ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4b (July 1997).

⁹ It was appropriate to refer appellant to Dr. Lambert as the Office was unable to obtain a current report from appellant's attending orthopedic surgeon.

¹⁰ The Board notes that the record reflects that appellant would not have taken a pay cut by accepting the security clerk position.

¹¹ The Board finds that the Office complied with its procedural requirements prior to terminating appellant's compensation, including providing appellant with an opportunity to accept the security clerk position after informing him that his reasons for initially refusing the position were not valid; see generally *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 12, 2009 is affirmed.

Issued: September 21, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board