

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GEORGE E. WILLS and DEPARTMENT OF LABOR,
MINE SAFETY & HEALTH ADMINISTRATION, Summersville, W.Va.

*Docket No. 97-646; Submitted on the Record;
Issued October 22, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

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

In the present case, the Office accepted that appellant sustained patellar tendinitis and a medial meniscus tear of the left knee in the performance of duty. Appellant stopped working on October 18, 1993 and began receiving compensation for temporary total disability.

In a letter dated February 8, 1995, the employing establishment advised appellant that it was offering him the position of mine safety and health specialist. The Office, by letter dated February 13, 1995, advised appellant that it found that position to be suitable. Appellant was advised that if he had good reason for not accepting this position, he should provide the reasons in writing to the Office by March 15, 1995, or his compensation would be terminated under 5 U.S.C. § 8106.

On February 20, 1995 appellant indicated in writing that he declined the offered position, stating in part that "it is very unfair to ask a person at the age of 62 ½, who is still having problems with the injury and taking medication for pain and inflammation, to move to the area and cause additional stress."

In a letter dated March 15, 1995, the Office stated that it found the reasons offered for declining the position to be unacceptable and that appellant had 15 days to accept the position. Appellant submitted a letter on March 28, 1995, noting that the job offered would result in a pay reduction and he stated that he was not trained for the desk job.

In a decision dated April 10, 1995, the Office terminated appellant's compensation effective April 30, 1995, on the grounds that he had refused an offer of suitable work. Following an April 8, 1996 hearing, an Office hearing representative affirmed the termination by decision dated October 7, 1996.

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

5 U.S.C. § 8106(c) 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." 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.¹ To justify such a termination, the Office must show that the work offered was suitable.² 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.³

In the present case, the Office sent a description of the position of mine safety and health specialist to the attending physician, Dr. Syed Zahir, an orthopedic surgeon. In a report dated October 6, 1994, Dr. Zahir indicated that appellant could perform the duties of the position. There is no contrary medical evidence of record. The Board, therefore, finds that the Office properly found the offered position to be medically suitable. In accordance with established procedures, the Office advised appellant that the position was found to be suitable and informed him of the consequences of refusal to accept the offered position.⁴

With regard to the reasons offered by appellant for declining the position, the Board finds they are not considered acceptable reasons for refusal. In his February 20, 1995 statement, appellant alleged that he would have to move,⁵ and indicated that he was over 62 years of age and still taking medication, which would render the acceptance of a new job too stressful. It is well established that a claimant's preference for the area, in which he currently resides, or personal dislike of the position offered, are not acceptable reasons for refusing an offered position.⁶ Appellant also stated that he had requested a second opinion referral from the Office, but the medical evidence, as noted above, indicated that appellant could perform the sedentary position and appellant did not submit any additional relevant medical evidence on this issue.⁷

¹ *Henry P. Gilmore*, 46 ECAB 709 (1995).

² *John E. Lemker*, 45 ECAB 258 (1993).

³ *Catherine G. Hammond*, 41 ECAB 375, 385 (1990); 20 C.F.R. § 10.124(c).

⁴ *Maggie L. Moore*, 42 ECAB 484 (1991); *reaff'd on recon.*, 43 ECAB 818 (1992).

⁵ Appellant's duty station at the time of injury was Summersville, West Virginia; the offered position was in Mount Hope, West Virginia, which appellant asserted was too long a commute from his current residence. The Board notes that the job offer included moving expenses.

⁶ See *Fred L. Nelly*, 46 ECAB 142 (1994); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.5(c) (July 1997).

⁷ The record does contain evidence received after the October 7, 1996 decision, but the Board cannot review such evidence on this appeal since it is limited to evidence that was before the Office at the time of the final decision. 20 C.F.R. § 501.2(c).

The Office, in accordance with established procedures, advised appellant that his reasons were not acceptable and he was given an additional 15 days to accept the position.⁸

The Board notes that in his undated statement received on March 28, 1995, as well as at the April 8, 1996 hearing, appellant asserted that he was not properly qualified for the offered position. Appellant stated that he did not have the proper educational background or training. The job description, however, does not require a specific educational background and the employing establishment indicated that appellant's experience as a mine inspector was adequate preparation. In his undated statement appellant also noted that the offered position would result in a reduction of pay. As the Office indicated in its February 13, 1995 letter, appellant would be compensated for any loss in wage-earning capacity.

Accordingly, the Board finds that appellant did not provide acceptable reasons for refusing the mine safety and health specialist position in this case. The Office properly found the position to be suitable and followed established procedures prior to termination. The Board, therefore, finds that appellant's compensation is properly terminated under 5 U.S.C. § 8106.

The decision of the Office of Workers' Compensation Programs dated October 7, 1996 is affirmed.

Dated, Washington, D.C.
October 22, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

⁸ *Maggie L. Moore, supra* note 4.