

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of RICHARD F. WILLIAMS and GOVERNMENT PRINTING OFFICE,  
Washington, DC

*Docket No. 00-1555; Submitted on the Record;  
Issued April 23, 2002*

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DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,  
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.

On April 1, 1993 appellant, then a 48-year-old elevator repairman, sustained an injury to his low back by moving a motor. The Office accepted that appellant sustained a lumbosacral strain and a herniated disc at L4-5, for which it authorized surgery. On July 6, 1995 appellant underwent a laminectomy at L4-5 and a free fragment discectomy. Appellant returned to limited duty on November 13, 1995. He again stopped work on March 18, 1996 and the Office accepted his claim for a recurrence of disability beginning that date.

On November 20, 1996 appellant's application for disability retirement was approved by the Office of Personnel Management and appellant retired from the employing establishment effective December 21, 1996.

On September 17, 1998 the employing establishment offered appellant a position as a limited-duty clerical assistant. By letter dated September 25, 1998, appellant advised the employing establishment that he was unable to accept this offer, as he was "physically unable to drive the three hours a day it would take to commute to and from work." He stated that he preferred to retire rather than take the offered position.

By letter dated September 29, 1998, the Office advised appellant that it had found the limited-duty clerical assistant position to be suitable. The Office allotted appellant 30 days to accept the offer or to explain his reasons for refusing it, and advised him that if he refused an offer suitable work, he would not be entitled to compensation for wage loss or for a schedule award.

Appellant submitted a report dated September 25, 1998 from his attending physician, Dr. Frederick T. Sutter, who stated, "[Appellant] has been instructed that they have offered him a sedentary position; however, the driving is unacceptable for him, as I have mentioned that he

cannot do this.” Dr. Sutter also stated, “Patient is only capable of sedentary work and should not drive any more than 20 minutes or so.” Appellant also submitted a form completed on October 16, 1998 by which he elected benefits under the Civil Service Retirement Act in lieu of those under the Federal Employees’ Compensation Act, effective November 1, 1998.

By letter dated October 29, 1998, the Office notified appellant that it had found his reasons for refusing the employing establishment’s offer unacceptable. The Office allotted appellant 15 days to accept the offer, after which it would proceed with a final decision.

By decision dated January 5, 1999, the Office terminated appellant’s monetary compensation effective November 1, 1998 on the grounds that he refused an offer of suitable work.<sup>1</sup> The Office found that appellant had forfeited his entitlement to compensation for continuing wage loss or for a schedule award, but that he remained entitled to medical benefits for his accepted condition.

Appellant requested a hearing, but later changed this request to one for a review of the written record.

By decision dated December 14, 1999, an Office hearing representative found that the evidence established that appellant was capable of performing the duties of the offered position of assistant clerk, that appellant’s inability to drive to the offered position was not dispositive, and that the Office properly terminated appellant’s compensation for refusing suitable work.

By letter dated February 23, 2000, appellant requested reconsideration, contending that retirement was an acceptable reason for refusing an offer of employment.

By decision dated March 20, 2000, the Office denied modification of its prior decisions.

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

Under section 8106(c)(2) of the Federal Employees’ Compensation Act, the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.<sup>2</sup> To justify termination of compensation, the Office must establish that the work offered was suitable.<sup>3</sup> The Board has held that a position is not suitable if the employee is unable to drive to and from work because of residuals.<sup>4</sup> Section 10.516 of the Code of Federal Regulations<sup>5</sup> provides that an employee who refuses or neglects to

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<sup>1</sup> As of November 1, 1998, appellant relocated to Myrtle Beach, South Carolina from Lusby, Maryland.

<sup>2</sup> 5 U.S.C. § 8106(c)(2) provides in pertinent part: “A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered to, procured by, or secured for him; is not entitled to compensation.”

<sup>3</sup> *David P. Camacho*, 40 ECAB 267 (1988).

<sup>4</sup> *Janice S. Hodges*, 52 ECAB \_\_\_\_ (Docket No. 00-2793, issued May 24, 2001); *Donna M. Stroud*, 51 ECAB (Docket No. 98-476, issued January 5, 2000).

<sup>5</sup> 20 C.F.R. § 10.516.

work after suitable work has been offered or secured for the employee has the burden of showing that such refusal or failure to work was reasonable or justified, and shall be provided with the opportunity to make such showing before a determination is made with respect to termination of entitlement to compensation.<sup>6</sup> The Office's procedure manual provides that an acceptable reason for refusing a job offer is that the employee is "unable to travel to the job because of residuals of the injury."<sup>7</sup>

In his September 25, 1998 response to the employing establishment's offer, appellant stated that he was unable to accept the job offer because he was physically unable to drive the required commute to and from work. In a September 25, 1998 report, Dr. Sutter stated that appellant could not do the driving necessary to accept the offered position. He found that appellant could drive only 20 to 30 minutes and this opinion is consistent with his reports dated June 13, 1997 and October 13, 1998. In a report dated March 26, 1997, Dr. Sutter explained the basis of appellant's driving restriction:

"His biggest problem is that as soon as he sits down in the car for longer than five minutes, his foot will go numb and then, in another ten minutes, he will have considerable pain and needs to shift rather dramatically. Car rides longer than 20 to 30 minutes are actually very uncomfortable for him."

The Office has not established that the position offered to appellant has the physical capacity to drive the commute to and from work. Appellant submitted medical evidence from Dr. Sutter which addressed his physical limitations in this regard. The Office did not further develop this aspect of the case. The Office hearing representative was correct in stating in her December 14, 1999 decision that a preference for the area in which the employee currently resides is not an acceptable reason for refusing an offer of employment,<sup>8</sup> but that principle does not apply to the present case. Appellant submitted medical evidence to support his contention that his employment-related back condition prevents him from commuting to and from work. When supported by medical evidence, as in this case, this is an acceptable reason for not accepting an offer of employment and establishes that the employing establishment's job offer was not suitable.

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<sup>6</sup> See *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5a(5) (March 1996).

<sup>8</sup> *Fred L. Nelly*, 46 ECAB 142 (1994).

The March 20, 2000 and December 14, 1999 decisions of the Office of Workers' Compensation Programs are reversed.

Dated, Washington, DC  
April 23, 2002

Michael J. Walsh  
Chairman

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member