

lifting and standing.³ On March 8, 1991 the employing establishment forwarded to Dr. Neidhart a copy of appellant's position description and requested an opinion concerning appellant's physical restrictions. On March 13, 1991 Dr. Neidhart released appellant to full-time work, with continuous driving limited to 30 minutes and 2 hours cumulative per day, intermittent lifting of no more than 10 pounds for two hours a day, and additional restrictions on sitting, standing and walking. In a March 13, 1991 narrative report, Dr. Neidhart noted that he reviewed a position description which modified appellant's job by restricting his marketing territory to the local region. Dr. Neidhart stated:

"I think with some modifications with regard to his geographical area of responsibility and time scheduling, [appellant] should be able to function in that capacity. His main problem ... is his inability to sit in one position over any extended period or to stand still, without moving, for any extended period. These restrictions have severely limited his capacity to return to work. If modifications in his work activities can be made to accommodate to these, then I think that he may be able to function adequately."⁴

On March 19, 1991 the employing establishment advised appellant of a job offer which included modifications of his former position to be effective April 29, 1991. A copy of the modified-position description was forwarded to the Office. On March 28, 1991 the Office advised appellant that it had reviewed the offered position of modified-bond salesman and found the position to be suitable to his work capabilities. The Office advised appellant that he had 30 days in which to either accept the position or provide an explanation of the reasons for refusing it. Appellant was notified of the provisions of section 8106(c)(2) in the event his reasons for refusing the job were not justified.

On April 22, 1991 the Office received a March 29, 1991 note from Dr. Neidhart who indicated that appellant was considering alternative work and stated that it was unrealistic that appellant could return to a position requiring prolonged sitting and driving. He noted that appellant had been given physical restrictions on March 13, 1991 which "can be considered permanent." In an April 12, 1991 report, Dr. Neidhart stated that appellant was seen in follow-up for his back injury. He noted that appellant complained of "anxiety and depression related to the stresses of the situation with his employer and his inability to resolve these issues." Dr. Neidhart referred appellant to Dr. Edward S. Naimark, a clinical psychologist, for pain management counseling and recommended a formal functional capacity evaluation.

In an April 22, 1991 letter from his attorney, appellant rejected the modified position offered by the employing establishment. He contended that Dr. Neidhart had informed appellant that he was unable to "perform in this position or any other at this time," and noted that appellant had been referred for treatment of depression caused by his employment injury.

³ The employing establishment noted that promotional representatives generally were on travel 20 percent of their time and that appellant made frequent overnight trips to El Paso, 600 miles away. The employing establishment noted that a promotional representative was free to arrange for local messenger service to transport any promotional materials in advance of scheduled appointments.

⁴ In a March 15, 1991 report, Dr. Neidhart noted that he discussed the physical limitations with appellant, who felt he was unable to return to work. Dr. Neidhart stated: "On a medical basis he can function within the restrictions imposed."

By compensation order dated April 29, 1991 the Office terminated appellant's wage-loss compensation under section 8106(c)(2) finding that appellant had neglected to work after suitable work was offered to him.⁵

On May 2, 1991 the Office received the April 19, 1991 report of Dr. Neidhart, who stated that appellant complained of headaches with nausea and anxiety, associated with walking. He noted chronic back pain, depression and anxiety and stated that appellant "at this point is not fit to return to work either at his regular job or any light-duty status until his depression and anxiety are under better control. I think that his depression and the aggravation of his anxiety attacks are a direct result of this work injury and the conflicts currently arising with his return to work." In an April 29, 1991 report Dr. Neidhart noted that he was referring appellant for psychiatric consultation with Dr. Carolyn Schwartz, a Board-certified psychiatrist.

On May 24, 1991 appellant requested an oral hearing before an Office hearing representative which was held on June 7, 1992. Appellant submitted the May 15, 1991 report of Dr. Neidhart, who stated that appellant was being treated by Dr. Schwartz and Dr. Naimark for depression and suicidal risk. Dr. Neidhart noted that appellant's depression was related to his accepted back injury and opined that appellant was permanently unable to return to his previous job. He opined that, upon reviewing the modified-position description, appellant was still required to travel frequently and get in and out of cars. Dr. Neidhart stated, "I do not think that [appellant] is able to do this or even modifying his duty status to avoid prolonged sitting and lifting and carrying are not adequate modifications to allow him to return to this job." Appellant also submitted treatment notes from Dr. Naimark which reviewed appellant's concern about returning to work because he was unable to lift boxes of promotional material or get in and out cars on a frequent basis.

Appellant also submitted medical records related to his hospitalization for suicidal ideation and treatment between June 6 to July 19, 1991 for major depression and generalized anxiety disorder with panic attacks. In a July 19, 1991 discharge report, Dr. Neil Arnet, a Board-certified psychiatrist, diagnosed major depression, single episode severe, panic disorder, and mild Benzodiazepine dependence. Dr. Arnet noted the presence of obsessive compulsive, schizoid, and self-defeating personality traits, as well as a physical condition characterized by hypertension, migraine headaches, a back injury, and obesity. In reports dated March 23 and June 29, 1992, Dr. Arnet related appellant's emotional condition to his September 18, 1990 employment injury. He stated appellant's depression was a result of the pain associated with his lower back injury and opined that appellant was unable to perform the modified work offered by the employing establishment.

In a June 24, 1992 report Dr. Neidhart indicated that he reviewed appellant's medical records and stated that appellant's orthopedic injury precluded him from accepting the modified-job offer of April 1991. He stated: "The injury and pain were totally disabling and he could not perform the modified-job offer as I reviewed the job description."

By decision dated August 17, 1992, the Office hearing representative set aside the April 29, 1991 suitable work determination finding that appellant had submitted sufficient medical evidence to warrant further development of the issue of whether he was capable of returning to modified

⁵ Appellant was terminated from the employing establishment on May 20, 1991.

employment. The hearing representative remanded the case for development of whether appellant's emotional condition was causally related to his employment injury and medical development as to the extent of residual disability due to appellant's accepted low back condition.

On October 14, 1992 the Office referred appellant, together with a statement of accepted facts, to Dr. Emmette Altman, a Board-certified orthopedic surgeon. In a November 4, 1992 report, Dr. Altman provided a history of appellant's employment injury and medical treatment and reported his findings on physical examination. He noted that lumbosacral x-ray obtained in 1988 revealed hypertrophy of the lamina and pedicles at L5-S1 with a mild spinal stenosis. X-rays obtained by Dr. Altman revealed some spinal stenosis at L5-S1 and hypertrophy of the foramina and pedicles in that area. Dr. Altman reviewed the records related to appellant's treatment for depression and pain management with physiotherapy, and stated:

"I feel [appellant] sprained his back on September 18, 1990. He has an underlying spinal stenosis with pedicle and lamina hypertrophy. He received extensive physiotherapies, expensive psychological counselling and treatment, also medications. From an orthopedic standpoint, I believe he could perform light duty that has been offered to him. I do not believe that he could continue to do his original job driving two to five hours a day all over the state and down to El Paso, Texas. I believe his psychological problem far outweighs the orthopedic findings and problem. I do not believe that [appellant] requires any further physiotherapy, but he should continue with an exercise program of his own."

Dr. Altman provided a work tolerance evaluation in which he found appellant capable of full time work subject to restrictions on sitting intermittently for 5 hours and lifting more than 20 pounds.

In a December 2, 1992 letter, the Office advised appellant that, based on the examination of Dr. Altman, it was reinstating the April 29, 1991 termination decision by which further compensation benefits were denied based on appellant's refusal of a suitable light-duty position. The Office informed appellant that Dr. Altman considered him "capable of performing the light-duty job that was offered [and that] [t]herfore the decision to deny compensation benefits for refusal to accept the light-duty position will stand as is."

On December 9, 1992 the Office referred appellant to Dr. G. Michael Dempsey, a Board-certified psychiatrist, for a second opinion psychiatric evaluation. In a February 26, 1992 report, Dr. Dempsey stated that Dr. Arnet was present during his evaluation of appellant and that he had reviewed a written statement provided by appellant concerning his anxiety and depression. Dr. Dempsey reported continued use of medication for concentration problems, sleep disturbances, and crying spells which occurred twice daily. He diagnosed dysthymia (chronic, mild depression) with an episode of major depression in the Spring of 1991, a generalized anxiety disorder dating back to 1976, and a well-documented panic disorder which was aggravated in April 1991. Dr. Dempsey also diagnosed a schizoid personality disorder and possibly avoidant personality disorder. He opined that appellant's September 18, 1990 work injury temporarily aggravated his preexisting anxiety and/or panic disorder and that Dr. Naimark's reports noted on August 6, 1991 that appellant was markedly improved and, on February 4, 1992, indicated that appellant was significantly improved. Dr. Dempsey stated that appellant's back strain was not the sort of stressor which would ordinarily precipitate a chronic, disabling psychiatric condition and noted that appellant's history revealed a longstanding

anxiety and personality disorder. He indicated, however, that appellant's current psychiatric disability was not related to the September 18, 1990 employment injury and recommended continuing treatment with antidepressant medications. In a supplemental report, Dr. Dempsey reviewed appellant's treatment for his emotional condition and stated that the temporary exacerbation of appellant's preexisting personality disorder by the employment injury resolved by February 1992.

The record reflects that the Office accepted a temporary aggravation of appellant's emotional condition due to the September 18, 1990 employment injury which ceased as of February 1992.

On March 11, 1993 the Office issued a notice of proposed termination of medical benefits. The Office advised appellant that, based on the reports of Drs. Altman and Dempsey, he was found "physically and psychiatrically capable of performing the modified job offered to him" in 1991 and that the medical evidence established that he no longer had any residuals of his back strain or the temporary aggravation of his emotional condition. The Office gave appellant 30 days to submit further medical evidence.

By compensation order dated April 12, 1993, the Office terminated appellant's compensation benefits. In an attached memorandum, it was noted that appellant's entitlement to further compensation "should be terminated under section 8106(c)(2)" and that the medical evidence established that appellant no longer had residuals of his September 18, 1990 employment injury.

Appellant, through his attorney, requested reconsideration of the April 12, 1993 decision contending that the report by Dr. Altman was insufficient to establish that appellant could return to work on April 29, 1991, and that the statement of accepted facts did not make reference to the change of opinion of Dr. Neidhart concerning appellant's ability to perform the modified job offered to him. Appellant submitted a December 23, 1992 report from Dr. Neidhart, who explained that he changed his opinion concerning appellant's ability to perform the modified-duty job offered to him based on appellant's difficulty in mobility in getting in and out of cars, which was a major factor of the position. He also noted that he took into account appellant's fear of reinjury. Appellant also contested the findings of Dr. Dempsey.

On July 21, 1993 the Office denied modification of the April 12, 1993 decision.

The Board finds that the Office improperly terminated appellant's compensation benefits, effective April 29, 1991, on the grounds that he refused an offer of suitable work.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.⁶ Under section 8106(c)(2) of the Federal Employees' Compensation Act,⁷ the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to

⁶ *David W. Green*, 43 ECAB 883 (1992).

⁷ 5 U.S.C. § 8106(c)(2).

procured by, or secured for the employee.⁸ The Board has recognized that section 8106(c) serve as a penalty provision as it may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment and, for this reason, will be narrowly construed.⁹ The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by the medical evidence.¹⁰

In the present case, the Office accepted that appellant sustained a low back strain due to the September 18, 1990 employment injury. Based on reports submitted by appellant's attending orthopedic surgeon, Dr. Neidhart, the employing establishment provided a description of alternative modified employment available to appellant as a modified-bond salesman and a job offer was extended on March 19, 1991 to be effective April 29, 1991. A copy of the modified-position description was forwarded to the Office which, on March 28, 1991, advised appellant that the modified position was found suitable to his work capabilities. Appellant was properly notified of the provisions of section 8106(c)(2) and allowed the opportunity to provide reasons for refusing the job offer.¹¹

On April 22, 1991 appellant rejected the modified position offered by the employing establishment and contended that Dr. Neidhart had determined that he was unable to perform in the modified position. Appellant also contended that he sustained depression due to his accepted employment injury which impaired his ability to perform the position offered by the employing establishment.¹² Section 10.124(c) of the Office's regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured 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 a showing before a determination is made with respect to termination of entitlement to compensation.¹³

Following issuance of the April 29, 1991 decision terminating appellant's compensation benefits under section 8106(c)(2), the Office received additional medical evidence from Dr. Neidhart which found appellant disabled for work due to chronic back pain and depression and unable to

⁸ *Patrick A. Santucci*, 40 ECAB 151 (1988); *Donald M. Parker*, 39 ECAB 289 (1987); *Herman L. Anderson*, 36 ECAB 235, 239 (1984).

⁹ *Stephen R. Lubin*, 43 ECAB 564 (1992).

¹⁰ *See John E. Lemker*, 45 ECAB ____ (Docket No. 93-325, issued December 22, 1993); *Camillo F. DeArcangelis*, 42 ECAB 941 (1991).

¹¹ *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

¹² The Office procedure notes that, if medical reports in the record document a condition which has arisen since the compensable injury, and this condition disables the claimant from the offered job, the job will be considered unsuitable, even if the subsequently-acquired condition is not work related. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-earning Capacity*, Chapter 2-814.4(b)(4) (December 1993).

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

return to his regular job or the light-duty position offered to him. Additional reports from Drs. Schwartz, Naimark and Arnet were received relating to treatment of appellant's emotional condition.

Based on this additional medical evidence, on August 17, 1992 the Office hearing representative properly set aside the April 29, 1991 suitable work decision, remanding the case for further development of the medical evidence with regard to the residuals due to the accepted low back strain and whether appellant's emotional condition was causally related to his employment injury in order to determine whether appellant was capable of returning to modified employment.¹⁴ The Board notes that, as the April 29, 1991 suitable work determination was set aside, appellant's entitlement to compensation benefits for total disability should have been reinstated by the Office pending development of the medical evidence as it had not established that appellant was capable of performing the modified position offered on March 19, 1991 as of that date.¹⁵

error 1

The Office subsequently referred appellant for examination by Dr. Altman, a Board-certified orthopedic surgeon, who opined on November 4, 1992 that appellant could perform the light-duty position which had been offered and provided a work tolerance evaluation setting forth physical restrictions for full time work. Based on this examination, the Office advised appellant by letter of December 2, 1992 that the April 29, 1991 suitable work termination decision would be reinstated. The Board finds that this was error on the part of the Office as there is no evidence that it secured confirmation from the employing establishment to establish that the modified position, first offered appellant on March 19, 1991, remained open and available to appellant as of December 1992.¹⁶

error 2

Further, the Board finds that the medical opinion of Dr. Altman, the second opinion referring orthopedic surgeon, is in conflict with the medical opinion of Dr. Neidhart, appellant's attending orthopedic surgeon, as to whether residuals of appellant's back condition preclude him from performing the duties of the modified position of bond salesman.¹⁷ This conflict necessitates referral of appellant to an impartial medical specialist.¹⁸

error 3

With regard to appellant's emotional condition, the Office accepted that appellant sustained a temporary aggravation of anxiety and panic disorder due to the September 18, 1990 employment injury based on the medical opinion of Dr. Dempsey, who conducted a second opinion evaluation. He opined that the period of disability related to the temporary aggravation extended from

¹⁴ The Procedure Manual provides at Chapter 2-814.5(d) (December 1993) that in refusing an offer of employment, if it is not possible to determine whether a claimant's reason for refusal is justified without further investigation of the issues, the claims examiner should contact the claimant for clarifying information and set another 30-day deadline. The employing establishment should be contacted again and asked to keep the job offer open during this period.

¹⁵ *Id.* at Chapter 2-814.5(d)(2) (December 1993).

¹⁶ *See id.* at Chapter 2-814.5(d) (December 1993).

¹⁷ *Id.* at Chapter 2-814.5(a)(4)(b) (December 1993).

¹⁸ *See* 5 U.S.C. § 8123(a).

Dempsey & Job

September 18, 1990 to February 4, 1992, which the Board notes encompasses the March 19, 1991 job offer extended by the employing establishment.

As the Office accepted appellant's emotional condition, it has the burden of proof to establish that disability related to such condition ceased by February 4, 1992.¹⁹ The Board finds that the opinion of Dr. Dempsey is in conflict with the medical opinion of Dr. Arnet, appellant's attending psychiatrist, who opined that appellant remains disabled due to residuals of his employment-related emotional condition and unable to perform the duties of the modified-job offer. This conflict necessitates the referral of appellant to an impartial medical specialist for an opinion on the nature and extent of psychiatric disability causally related to the September 18, 1990 employment injury.

Conroy

Based on the conflicts in medical opinion regarding appellant's physical and psychiatric disabilities, the Board will reverse the April 12 and July 21, 1993 decisions of the Office which terminated his compensation benefits finding that he no longer has residuals of his back strain or emotional condition. The Office has failed to establish that appellant had the capacity to perform the duties of the offered modified position as of April 29, 1991, that the position was suitable to his work capacity as of that date, or that the position remained open and available to appellant after 1991.

The July 21 and April 12, 1993 decisions of the Office of Workers' Compensation Programs are hereby reversed.

Dated, Washington, D.C.
September 11, 1995

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

*Comp payable
from 4-29-91*

¹⁹ See *supra* note 6.