U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MOSES LATTIMORE, JR. and U.S. POSTAL SERVICE, POST OFFICE, Baltimore, Md.

Docket No. 97-2523; Submitted on the Record;
Issued March 19, 1998

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits on the grounds that he refused an offer of suitable work.

The Board has duly reviewed the case on appeal and finds that the Office met its burden of proof to terminate appellant's compensation benefits.

The Office accepted that appellant sustained a back strain, strained left shoulder and strained left knee due to his federal employment. The Office granted appellant schedule awards totaling 17 percent permanent impairment of his left knee and entered appellant on the periodic rolls.

On July 25, 1996 the employing establishment offered appellant a light-duty position. The Office informed appellant on October 18, 1996 that it found the position was suitable and allowed 30 days for him to accept the position or offer his reasons for refusal. Appellant offered his reasons for refusing the position on August 2 and November 10, 1996. The Office informed appellant that his reasons were unacceptable on June 12, 1997 and allowed him an additional 15 days to accept the position. On June 24, 1997 appellant again refused the position, and the Office terminated appellant's compensation benefits by decision dated June 30, 1997 finding he refused an offer of suitable work.[1]

It is well settled that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[2] As the Office in this case terminated

[1] The Board notes that following the Office's June 30, 1997 decision, appellant submitted additional new evidence. As the Office did not consider this evidence in reaching a final decision, the Board may not review it for the first time on appeal; *see* 20 C.F.R. § 501.2(c).

[2] *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

appellant's compensation under 5 U.S.C. § 8106(c), the Office must establish that appellant refused an offer of suitable work.

Section 8106(c) of the Federal Employees' Compensation Act[3] provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee is not entitled to compensation. Section 10.124(c) of the applicable regulations[4] provides that an employee who refuses or neglects to work after suitable work has been offered or secure 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. To justify termination of compensation, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[5]

In a report dated January 4, 1995, Dr. Neal I. Aronson, a Board-certified neurosurgeon, completed a report finding that appellant was capable of performing limited part-time employment of a sedentary type. Dr. Richard H. Mack, a Board-certified orthopedic surgeon, completed a report on January 23, 1995 indicating that appellant did not require further treatment and providing work restrictions. He stated appellant had long ago reached maximum medical improvement. Dr. Robert C. Abrams, a Board-certified orthopedic surgeon, provided appellant's work restrictions on March 5, 1996.

The employing establishment offered appellant the position of modified distribution clerk on July 25, 1996. Dr. Mack reviewed the position on November 4, 1996 and stated that he agreed with the restrictions provided. However, Dr. Mack also stated that appellant would require a chair or stool with a back rather than the rest bar as provided and that appellant's return to work should be on a trial basis. The employing establishment indicated its willingness to comply with this additional restriction. On November 25, 1996 Dr. Mack indicated that appellant's restrictions were appropriate despite a recurrence of low back pain.

The weight of the medical evidence establishes that the light-duty position offered by the employing establishment was in accordance with appellant's work restrictions. Dr. Mack provided thorough reports explaining his findings and concluding that, although appellant would experience temporary increases in back pain, his work restrictions were in accordance with appellant's capacity for work. The only medical evidence disputing this finding is an August 5, 1996 report from Dr. Aronson finding appellant was totally disabled. This report does not offer any new findings or medical rationale in support of appellant's total disability and directly contradicts Dr. Aronson's earlier report that appellant was capable of limited duty. The Board finds that the Office properly concluded that Dr. Mack's well-rationalized reports established that appellant was capable of performing the physical duties of the offered position and that it therefore constituted suitable work.

[3] 5 U.S.C. § 8106(c)(2).

[4] 20 C.F.R. § 10.124(c).

[5] *Arthur C. Reck*, 47 ECAB ___ (Docket No. 94-1072, issued December 4, 1995).

Appellant refused the position on the basis that the Office could not guarantee that he would not sustain future injury. Appellant also refused the position based on the duration of the job, noting that Dr. Mack indicated that appellant's return to work was provisional as he could not predict appellant's response. The Board has held that the possibility of a future injury does not constitute an injury under the Act and therefore no compensation can be paid for such a possibility.[6] Therefore, appellant's fear that he might sustain a future injury or aggravation is not a sufficient reason to refuse suitable work. Appellant also alleged that he was not released to return to work, that Dr. Mack was not informed of the work requirements, the job offer or work tolerance. The Board finds that Dr. Mack's reports do not support these allegations.

As appellant did not offer valid reasons for refusing the position, the Office properly informed him of the deficiencies and allowed him 15 days to accept the position. Appellant declined and the Office properly found that appellant had refused an offer of suitable work and terminated his compensation benefits effective July 20, 1997.

The decision of the Office of Workers' Compensation Programs dated June 30, 1997 is hereby affirmed.

Dated, Washington, D.C.
March 19, 1998

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

[6] *Gaetan F. Valenza*, 39 ECAB 1349, 1356 (1988).