U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DON W. LEWIS and DEPARTMENT OF AGRICULTURE, FOREST SERVICE, Gainesville, Ga.

Docket No. 98-1024; Oral Argument Held February 9, 1999; Issued April 2, 1999

Appearances: *John W. Sherrod, Esq.*, for appellant; *Sheldon G. Turley, Jr., Esq.*, for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT, A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits effective February 2, 1997 on the grounds that appellant refused an offer of suitable work.

The Office accepted that on January 30, 1981 appellant, then a 45-year-old forester, in the performance of duty, sustained a spinal subluxation at L4-5. Thereafter the Office accepted that on February 11, 1981 appellant sustained a bilateral herniated disc at L5-S1, for which he underwent surgery in August 1984 and again in December 1984. These cases were thereafter combined. Appellant was then placed on the periodic rolls for receipt of compensation.

On October 13, 1995 the employing establishment offered appellant the full-time "totally sedentary" position of resource specialist, and enclosed a position description. Appellant did not respond to this job offer.

By report dated November 20, 1995, Dr. Holmes B. Marchman, a Board-certified specialist in physical medicine and rehabilitation, reviewed appellant's history and current symptoms, reported objective testing results upon physical examination, and, noting that it was difficult to determine what appellant's functional capacity was at that time, recommended that he undergo a functional capacity evaluation. Dr. Marchman opined, regarding appellant's ability to return to work, "I do not believe he would tolerate a job at his current status, regardless of how sedentary the job is," and he cited several reasons including appellant's chronic pain, "which will make any work attempt difficult unless his endurance and strength is increased so that he can functionally cope with the work environment." Dr. Marchman opined, "The odds of [appellant] returning to work are almost nonexistent based on his history and current status."

On February 22, 1996 the Office referred appellant, with a statement of accepted facts and questions to be answered, for a second opinion examination regarding his ability to return to work, to Dr. Keith A. Sanders, a Board-certified neurologist. By report dated March 12, 1996, Dr. Sanders reviewed appellant's history and current symptoms, reported positive objective testing results upon physical examination, and opined that there was disabling residual of the L5-S1 disc herniation and surgery. Dr. Sanders diagnosed chronic bilateral S1 radiculopathy and noted that appellant's residual pain did limit functioning, and he indicated that he would order a functional capacities evaluation because he doubted that appellant could perform the offered job.

A functional capacity evaluation (FCE) was completed on May 9, 1996 by an occupational therapist and a case manager, which recommended that appellant demonstrated the ability to perform light/medium level work with a maximum lifting ability of 30 pounds from knee to waist level and 25 pounds from waist to overhead level. Specific activity restrictions were also noted. The FCE was not certified or interpreted by a physician.

On June 18, 1996 the employing establishment again offered appellant a job that was "well within the restrictions of this [appellant]," and it cited to the functional capacity evaluation conclusions.

By letter dated June 20, 1996, Dr. Sanders opined that appellant "should not return to work until we clarify the best medical or surgical treatment for his lower back pain." Dr. Sanders recommended that appellant see a neurosurgeon for consultation. A subsequent report from the consulting neurosurgeon did not discuss appellant's ability to return to work.

By letter dated June 21, 1996, appellant, through his representative, declined the job offer, stating that the refusal was based upon the notes and reports of appellant's treating physicians, including the neurologist.

By letter dated September 15, 1996, the Office requested that Dr. Sanders complete a work capacity form and offer an opinion as to whether appellant could physically perform the offered position.

By report dated October 23, 1996, Dr. Sanders replied on one sentence, referencing his history and examination of appellant and the FCE: "I think it is possible for [appellant] to physically perform the duties of the job being offered by the agency." Attached was a work capacity evaluation stating "please see work capacity evaluation for details."

On November 19, 1996 the Office advised appellant that the position of resource specialist was found to be suitable to his work capabilities, and that he had 30 days within which to accept the position or provide his reasons for refusing, and it advised him of the provisions of 5 U.S.C. § 8106(c)(2).

The results of a December 5 and 6, 1996 FCE of appellant were reported by a physical therapist. The FCE was not certified by a physician.

By report dated December 17, 1996, Dr. John N. Range, a family practitioner and appellant's treating physician, indicated that appellant had been under his care since 1986, noted

that he had referred appellant for a FCE, assessed the FCE results, and noted that during the December 5 and 6, 1996 FCE appellant had experienced marked pain which lasted for four days afterward. Dr. Range reported positive objective findings upon his physical examination of appellant, and opined:

> "[Appellant] has been out of the job for over 10 years, and is not able to undertake the duties of the job from the standpoint of chronic pain which keeps him from being able to concentrate. It is also my observation that he appears to be emotionally labile and would not be able to undertake the stresses of the job, which he also states he no longer feels able to successfully undertake. He does note that he has not used any of his knowledge as a forester during the past 10 years, and feels that he has lost this to a sufficient degree that he could not undertake this job.
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> "In ending, it is my opinion that because of the length of time he has been out of productive employment due to the chronic pain situation; the other multiple disorders that he has in the neck, shoulders and arms; and because of his emotional status I do not feel that he will be able to return to productive work at the forest service."

By letter dated December 26, 1996, the Office advised appellant that the recently submitted medical evidence in support of his refusal of the offered position was reviewed and found to be "unacceptable." It stated that the medical evidence was "subjective in nature," and it gave appellant another 15 days within which to accept the position. Appellant did not accept the offered position.

By decision dated January 27, 1997, the Office found appellant refused to work after a suitable job offer was made by his employer. The Office noted that Dr. Range's FCE was from a physical therapist, and it remarked that the tests and the FCE was not probative unless they are interpreted by a medical doctor.[1] The Office found that Dr. Sanders' report carried the weight of the medical evidence as he was a neurologist and Dr. Range was only a family practitioner. It determined that appellant could work, that the position offered was suitable, and that appellant refused the position without good cause, and it therefore invoked the penalty provision of 5 U.S.C. § 8106(c)(2).

By letter dated February 3, 1997, appellant, through his representative, requested reconsideration of the January 27, 1997 termination of compensation. By letter dated February 11, 1997, appellant, through his representative, requested a hearing on the January 27, 1997 termination of compensation. By letter dated April 28, 1997, the Office advised that an examination of the written record by the hearing representative would be conducted.

[1] The Board notes that the May 9, 1996 FCE upon which the Office based its determination of job suitability was not interpreted by any physician and, therefore, in accordance with the Office's own explanation, it lacked probity.

By decision dated June 19, 1997, the hearing representative affirmed the January 27, 1997 compensation termination decision finding that the offered job was suitable.[2] The hearing representative found that Dr. Sanders provided "a detailed and well-rationalized" report and that the position offered was suitable. The hearing representative determined that the Office properly invoked the penalty provision of 5 U.S.C. § 8106(c)(2).

By letter dated September 11, 1997, appellant, through his representative, requested a formal hearing on the termination of his compensation.

By decision dated November 20, 1997, the Office noted that appellant was not by right entitled to a second hearing/review of the written record, and it denied appellant's hearing request finding that the issue in the case could equally well be addressed by requesting reconsideration and submitting further evidence.

By letter dated December 10, 1997, appellant, through his representative, requested reconsideration of the termination decision. Appellant submitted argument claiming that the offered position was no more than a ploy to terminate benefits, and that the offered and actual job descriptions differed.

By decision dated January 9, 1998, the Office denied appellant's request for a review of his case on its merits, finding that the arguments made had already been addressed by the hearing representative.

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation.

Section 8106(c)(2) of the Federal Employees' Compensation Act states that a partially disabled employee who refuses to seek suitable work, or refuses or neglects to work after suitable work is offered to, procured by, or secured for him is not entitled to compensation.[3] The Office has authority under this section to terminate compensation for any partially disabled employee who refuses suitable work when it is offered. Before compensation can be terminated, however, the Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work, and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.[4] In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision,[5] the Office has

[2] In his written decision, the hearing representative, in stating the facts, incorrectly cited to a June 7, 1996 limited-duty job offer from the U.S. Postal Service to another claimant, Randy E. Holloway, that was erroneously included as part of appellant's case record, as the job offered to appellant which he refused.

[3] 5 U.S.C. § 8106(c)(2).

[4] *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

[5] Section 8106(c) serves 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; *see Robert Dickerson*, 46 ECAB 1002 (1995).

the burden of showing that the work offered to and refused by appellant was suitable,[6] and must inform appellant of the consequences of refusal to accept such employment.[7]

In this case the Office did not meet its burden of proof to demonstrate that appellant could work, due to an unresolved conflict in medical opinion evidence. The medical evidence of record demonstrates that, although the Office second opinion specialist, Dr. Sanders, opined that appellant could perform the duties of the offered position, both Drs. Marchman and Range, appellant's physicians, opined that appellant could not tolerate working, even in a sedentary position.

The Act, at 5 U.S.C. § 8123(a), in pertinent part, provides: "If there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." As the Office did not do this, the conflict in medical opinion evidence remains unresolved and therefore the Office did not meet its burden to demonstrate that appellant could indeed work.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated January 9, 1998, November 20, June 19 and January 27, 1997 are hereby reversed.

Dated, Washington, D.C.
April 2, 1999

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

[6] *Glen L. Sinclair*, 36 ECAB 664 (1985).

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