U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JACKIE H. WILLIS and DEPARTMENT OF THE NAVY, NAVAL AIR REWORK FACILITY, MARINE CORPS AIR STATION CHERRY POINT, N.C.

Docket No. 97-1357; Submitted on the Record;
Issued March 24, 1999

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective November 10, 1996, finding that he had refused an offer of suitable employment; and (2) whether the Office abused its discretion by denying appellant's request for an oral hearing under 5 U.S.C. § 8124.

The Office accepted that on September 19, 1989 appellant, then a 51-year-old carpenter, sustained a left inguinal hernia, a lumbosacral strain and lumbar disc protrusion at L4-5 when a board kicked up and struck his left lower abdomen and groin area. Appellant was placed on the periodic rolls for receipt of compensation and his treating physician, Dr. Mark Worthen, a Board-certified family practitioner, continued to certify that he remained disabled due to his accepted conditions.

Dr. Robert F. Wilfong, a Board-certified neurosurgeon, performed a lumbar laminectomy at L3-4 and 5 on March 2, 1992 and thereafter found that appellant was totally disabled. Discharge diagnosis was noted as lumbar disc disease and lumbar stenosis. Over one year later Dr. Wilfong opined that appellant had achieved maximum benefits from the surgery, but noted that appellant still felt that he had too much pain to do any gainful employment.

The Office referred appellant for a second opinion evaluation on June 23, 1993 to Dr. Noel B. Rogers, a Board-certified orthopedic surgeon, regarding the degree of appellant's disability and whether he could return to work. By report dated July 22, 1993, Dr. Rogers reviewed appellant's history, performed a physical examination and diagnosed status post lumbar laminectomy, possible neurologic residuals involving the left lower extremity and lumbosacral degenerative disease. He opined that appellant could return to light-duty work 8 hours a day making use of his carpentry skills with activity restrictions and limitations on lifting over 20 pounds.

On January 13, 1994 Dr. Wilfong reiterated that he considered appellant totally disabled.

The Office determined that a conflict in medical opinion evidence was created between Drs. Worthen and Wilfong and the second opinion examiner, Dr. Rogers. The Office referred appellant, together with a statement of accepted facts, questions to be answered and the complete case record to Dr. Irl J. Wentz, a Board-certified orthopedic surgeon selected as an impartial medical specialist. By report dated April 19, 1994, Dr. Wentz reviewed appellant's history, performed a physical examination and noted that appellant claimed that he tried to perform light-duty work in January 1994 but that it was too difficult and that his wife had to drive him to work. He noted that spinal x-rays revealed mild degenerative arthritis at L5-S1 and that the findings post laminectomy at L4-5 were primarily a spinal canal stenosis. Dr. Wentz found a neurological deficit in the left lower extremity, but he did not causally relate it to the accepted incident of a board striking appellant's left abdomen or groin, nor did he relate it to appellant's subsequent spinal stenosis surgery. He opined that simply driving should not aggravate appellant's pain and he opined that appellant could work a half-day light-duty work schedule with a 15-pound lifting limit. Dr. Wentz opined that appellant "has difficulty stooping and bending more than one hour, intermittently. Twisting and climbing [are] not possible, standing in place up to one-half hour. Walking up to one-half hour. Limit lifting to 10 [to] 15 pounds, intermittently, stair climbing activity should be limited and may need to use an elevator." He opined that appellant could work four hours per day and that the light-duty position the employing establishment offered appellant on December 16, 1993 was within appellant's ability to perform safely.[1]

On May 12, 1994 the Office requested that the employing establishment amend the job requirements of the position offered to appellant to conform with the work restrictions outlined in Dr. Wentz's April 19, 1994 report and then resubmit the job description for review. By memorandum dated August 30, 1994, the physical demands of the position of maintenance clerk were restructured to include intermittent sitting up to four hours per day with intermittent walking for not more than one-half hour continuous totaling up to two hours per day and intermittent standing not more than one-half hour continuous. Occasional stooping and bending might be necessary for some filing duties requiring less than 1 hour of intermittent activity with intermittent lifting of not more than 15 pounds. No squatting, kneeling, twisting or climbing stairs or ladders was required.

On September 27, 1994 an employing establishment investigator was advised that on September 26, 1994 appellant was observed operating a 19-foot "southern skimmer" type vessel bouncing in choppy seas due to winds of approximately 15 to 20 miles per hour, standing at the steering console, without wearing any back brace or support and without having any apparent discomfort or difficulty while operating the vessel. The observer also noted that the vessel contained a large amount of fish-type net, that appellant appeared mobile and flexible and that appellant continued this activity for 20 to 30 minutes.

[1] On December 16, 1993 the employing establishment offered appellant a position answering phone calls, clocking leave, preparing weekly overtime reports, monitoring primary equipment status and shop expenditures, calling in maintenance tickets and maintaining records of hours expended on various functions. The position required up to five hours a day sitting, intermittent walking two hours per day, and an occasional visit to the Division office ascending one flight of stairs.

On December 7, 1994 the employing establishment offered appellant the position of maintenance clerk, advising that it had no unusual physical demands with minimal amounts of sitting, walking and standing and it advised that the position duties were within his physical limitations. Appellant declined the offer stating "chronic back pain with periodic radiating pain down one or both legs. The medicines for my condition make me tired and sleepy. The frequent standing and sitting would certainly aggravate my back and further disable me. The daily reading of fine print in files and manuscripts would be difficult considering my complete left eye blindness and 20/50 right eye."

On January 12, 1995 the employing establishment reoffered appellant the maintenance clerk job advising that it was a part-time position four hours per day, nine days per two-week pay period. Appellant was advised that the position would fully accommodate the physical limitations outlined by Dr. Wentz. On January 26, 1995 appellant declined the offered position citing the medications he was taking and stating that he had been advised by his doctor that walking and standing on concrete would further harm his health.

On February 14, 1995 the Office sent Dr. Wentz a copy of the job description for maintenance clerk and asked whether he believed appellant was capable of performing the physical requirements of this job. By response dated March 13, 1995, Dr. Wentz indicated that appellant was limited to walking one-half hour at a time and could only do so two to three times per day. He further noted that the pain medications appellant was taking might impair his driving ability.

By letter dated August 1, 1996, the Office advised appellant that he had been offered a position as a maintenance clerk, which was found by the Office to be suitable to his work capabilities. He was advised that the position was currently available, that he would be paid compensation based upon the difference between the pay of the offered position and the pay of his date-of-injury position and that he still had the opportunity to accept the offer. Appellant was advised that the impartial medical specialist's report constituted the weight of the medical evidence on his ability to work, and that the offered position was within Dr. Wentz's work limitations. Appellant was given 30 days within which to accept the position or to provide an explanation of the reasons for refusing. The Office also advised appellant of the consequences of refusing suitable work.

By report dated August 29, 1996, Dr. Worthen opined that appellant was unable to sit for more than a short period without developing pain and would probably not be able to handle a clerk's job.

Appellant explained in a September 1, 1996 letter why he could not return to work. Appellant claimed that his medications limited his ability to drive that he had severe back and pain in both legs, that his wife had to drive him everywhere and that he was currently taking Darvon, Ultram and Tylenol #3 with codeine for pain, and Ativan (lorazepam) (an anti-anxiety/sedative agent) and Flexeril (cyclobenzaprine) (a muscle relaxant).

On September 11, 1996 the Office advised appellant that his reasons for refusal had been found unacceptable as the medical report from his family practitioner did not outweigh the findings of the impartial specialist, Dr. Wentz. The Office advised that appellant had 15 days

within which to accept the offered job without penalty and that if he did not accept it, all compensation payments would be terminated.

By decision dated October 17, 1996, the Office terminated appellant's compensation entitlement effective November 10, 1996, finding that he refused to work after a suitable job offer was made. The Office found that Dr. Wentz's well-rationalized report constituted the weight of the medical opinion evidence on the issue of whether appellant could work and on what his working restrictions were. It noted that the offered position of maintenance clerk was within Dr. Wentz's work restrictions, that appellant was advised of the consequences of refusal of suitable work and that his reasons for refusal were found to be unacceptable.

By letter dated December 2, 1996, appellant requested an oral hearing.

By decision dated January 13, 1997, the Branch of Hearings and Review found that appellant's request for a hearing was untimely made, such that he was not by right entitled to a hearing and it further considered the matter and determined that his request should be denied because the issue could be equally well addressed by submission of further evidence with a request for reconsideration to the Office.

The Board finds that the Office properly terminated appellant's compensation effective November 10, 1996, finding that he had refused an offer of suitable employment.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits and this includes cases in which the Office terminates compensation under section 8106(c) of the Federal Employees' Compensation Act for refusing to accept suitable work or neglecting to perform suitable work.[2] To justify a termination under 5 U.S.C. § 8106(c) the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment. An employee who refuses or neglects to work after suitable work has been offered, has the burden of showing that such refusal to work was justified.[3]

The Board notes that it was appropriate for the Office to invoke the penalty provision of section 8106(c) in the present case and that the Office properly applied the provision. The record contains sufficient evidence to meet the Office's burden to show that the light-duty part-time position that was offered to appellant was suitable. A conflict in medical opinion evidence between Drs. Worthen and Wilfong, who contended that appellant remained totally disabled and Dr. Rogers, who opined that appellant could work eight hours a day light duty, arose which was resolved by the impartial medical specialist, Dr. Wentz, in a thorough and complete, well-rationalized report based upon an accurate factual and medical history of the case.

When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual

[2] *Henry P. Gilmore*, 46 ECAB 709 (1995).

[3] *Michael E. Moravec*, 46 ECAB 492 (1995); *Fred J. Nelly*, 46 ECAB 142 (1994).

background, must be given special weight.[4] In this case, Dr. Wentz's report, therefore, must be accorded that special weight, resulting in it constituting the weight of the medical opinion evidence on the issue of whether appellant can return to work and on his work restrictions.

Dr. Wentz opined that appellant could return to work four hours per day light duty with limits on stooping and bending for more than one hour, limits on standing for more than one-half hour, limits on walking for more than one-half hour, no twisting or climbing, a lifting limit of 15 pounds intermittently and limited stair climbing activity. The position of maintenance clerk that was offered to appellant was well within these restrictions. Further, the Office complied with its procedural requirements by letter dated August 1, 1996 advising appellant that the light-duty part-time position of maintenance clerk was suitable, was currently available and that he had 30 days to accept the position or to provide an explanation for refusing it, that any explanation provided by him as to reasons for refusal would be considered and that his wage-loss compensation would be terminated if he refused suitable work without a valid reason.

Given that the Office has shown that the light-duty part-time position of maintenance clerk was suitable, the burden shifts to appellant to show that his refusal to work in that position was justified.[5] Appellant refused to accept the maintenance clerk position claiming that he had chronic pain, that his medications made him sleepy, that his wife had to drive him everywhere, that frequent sitting and standing would aggravate his back, that walking and standing on concrete would harm his health and that daily reading fine print would be difficult.

On September 11, 1996 the Office advised appellant that the reasons he had provided were not found to be valid and it gave him an additional 15 days within which to accept the position. He did not accept the position and thereafter the Office terminated his compensation entitlement effective November 10, 1996.

The Board finds that the evidence of record establishes that appellant is capable of performing the duties of the light-duty part-time maintenance clerk position that was offered by the employing establishment. The weight of the medical evidence of record supports that appellant can work four hours per day light duty with intermittent sitting, standing and walking not to exceed one-half hour continuous and with no lifting over 15 pounds and no twisting or climbing ladders or stairs. Although appellant claims that he is too disabled by chronic pain to work, Dr. Wentz's examination and opinion did not support a basis for this allegation. In support of this allegation appellant provided more reports from Drs. Worthen and Wilfong which merely stated that appellant was totally disabled by pain for work. The Board notes that these unrationalized reports merely repeat prior assessments and do not outweigh the probative value of Dr. Wentz's impartial medical examination report, as Drs. Worthen and Wilfong were on one side of the conflict that Dr. Wentz resolved, such that their additional reports are insufficient to overcome the special weight accorded Dr. Wentz's opinion or to create a new conflict with it.[6]

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[4] *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

[5] *See Catherine G. Hammond*, 41 ECAB 375 (1990); *David P. Camacho*, 40 ECAB 267 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341 (1981); 20 C.F.R. § 10.124.

[6] *Dorothy Sidwell*, 41 ECAB 857 (1990); *see also Helga Risor (Windell A. Risor)*, 41 ECAB 939 (1990) (additional reports from Office medical adviser, who was on one side of a conflict resolved by an impartial medical

Further, the Board notes that these reports reveal that neither Drs. Worthen nor Wilfong were aware of the level of physical activity appellant was observed performing outside of the medical setting, such as driving his truck, handling a boat on rough seas and using a weedeater for an extended period, all without apparent difficulty. Consequently, there is no probative medical support for appellant's contentions of continuing chronic disabling pain.

The Board also notes that nothing in the offered position description requires that appellant drive a vehicle, such that his claim that his wife had to drive him everywhere is irrelevant. Additionally, appellant's fears about frequent sitting and standing and about standing and walking on concrete are unfounded as nothing in the position description required frequent sitting and standing or standing and walking on concrete, as Dr. Wentz clearly stated that appellant was capable of safely sitting for one-half hour, standing for one-half hour and walking for one-half hour and as the offered position required no more sitting, standing or walking than that and further, as the work was to be performed in an office setting, such that appellant would not be standing or walking on concrete. Moreover, appellant's reservations about his medications and about daily reading of fine print are not valid reasons for refusal as nothing in the position description requires extremely high levels of mental alertness, such as is required for the operation of certain machinery, trucks or boats, or requires that appellant daily read significant amounts of fine print. The Board notes that the position duties only require that appellant see well enough to maintain files and records, requisition supplies, complete work tickets, clock leave, respond to requests, prepare an overtime report once a week, monitor equipment status and occasionally use a computer. Daily reading of fine print is not required. Additionally, the Board notes that appellant's claim of disability due to visual impairment is not supported by either of his own physicians or by Dr. Wentz's evaluation.

For these reasons the Office properly found that appellant's refusal of the offered position was unjustified and properly terminated his compensation entitlement effective November 10, 1996.

specialist, could not be used as a basis for creating another conflict in medical opinion).

The Board further finds that the Office did not abuse its discretion by denying appellant's request for an oral hearing under 5 U.S.C. § 8124.

Section 8124(b)(1) of the Act provides in pertinent part as follows:

> "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."[7]

The Office's procedures implementing this section of the Act are found in the Code of Federal Regulations at 20 C.F.R. § 10.131(a). This paragraph, which concerns the preliminary review of a case by an Office hearing representative to determine whether the hearing request is timely and whether the case is in posture for a hearing, states in pertinent part as follows:

> "A claimant is not entitled to an oral hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request, or if a request for reconsideration of the decision is made pursuant to 5 U.S.C. § 8128(a) and § 10.138(b) of this subpart prior to requesting a hearing, or if review of the written record as provided by paragraph (b) of the section has been obtained."[8]

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made of such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[9] Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right for a hearing,[10] when the request is made after the 30-day period for requesting a hearing[11] and when the request is for a second hearing on the same issue.[12] In these instances, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.[13] The Office's procedures, which require the Office to exercise its

[7] 5 U.S.C. § 8124(b)(1)

[8] 20 C.F.R. § 10.131(a).

[9] *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

[10] *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

[11] *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

[12] *Johnny S. Henderson*, *supra* note 9.

[13] *Id.*; *Rudolph Bermann*, *supra* note 10.

discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.[14]

In the present case, the Office issued its decision terminating appellant's compensation entitlement on October 17, 1996. Appellant requested a hearing in a letter dated December 2, 1996. A hearing request must be made within 30 days of the issuance of the decision as determined by the postmark of the request.[15] Since appellant did not request a hearing within 30 days of the Office's August 22, 1996 decision, he was not entitled to a hearing under section 8124 as a matter of right.

The Office, in its discretion, considered appellant's hearing request in its January 13, 1997 decision and denied the request on the basis that appellant could pursue his claim by requesting reconsideration and submitting additional pertinent evidence. An abuse of discretion can be shown only through proof of manifest error, a manifestly unreasonable exercise of judgment, action of the kind that no conscientious person acting intelligently would reasonably have taken prejudice, partiality, intentional wrong or action against logic.[16] There is no evidence in the case record to establish that the Office abused its discretion in refusing to grant appellant's hearing request.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated January 13, 1997 and October 17, 1996 are hereby affirmed.

Dated, Washington, D.C.
March 24, 1999

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

[14] *See Herbert C. Holley, supra* note 11.

[15] 20 C.F.R. § 10.131(a).

[16] *See Sherwood Brown*, 32 ECAB 1847 (1981) and cases cited therein.