U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM W. NEVILLE and U.S. POSTAL SERVICE,
POST OFFICE, Dearborn, MI

Docket No. 99-550; Submitted on the Record;
Issued January 4, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective November 7, 1997 on the grounds that he refused an offer of suitable work.

On April 23, 1970 appellant, then a 39-year-old letter carrier, filed a notice of traumatic injury and claim, alleging that he sustained injuries after a fall on February 25, 1970 while in the performance of duty. He initially returned to work on February 27, 1970 but stopped work on March 30, 1970. The Office accepted appellant's claim for compression of the L5, postlaminectomy syndrome, a ruptured disc and chronic pain syndrome. Appellant underwent surgical procedures in May 1970 and May 1990 that were related to his back conditions. Appellant filed an application for disability retirement which was accepted by the Office of Personnel Management effective August 24, 1972.

In a letter dated August 11, 1997, the employing establishment offered appellant a rehabilitation position as a part-time modified carrier technician, requiring walking to 13 carrier cases in a row and visually checking for mail sleepers, changing carrier case labels weighing less than one ounce and sorting no obvious value mail while in a seated position.[1] Appellant was to begin work at 10:30 a.m. and end his tour of duty at 2:30 p.m. The employing establishment noted the following physical requirements: working 4 hours a day, no lifting over 15 pounds, occasionally, no repetitive bending or twisting, sitting and standing for 30 minutes a maximum of 2 hours per 8-hour day and walking 30 minutes for a maximum of 3 hours per 8-hour day. Dr. Gregory P. Graziano, a Board-certified orthopedic surgeon and appellant's treating physician, reviewed the May 5, 1997 job offer from the employing establishment which had an identical physical requirements section as that contained in the August 11, 1997 job offer. In a letter dated May 20, 1997, Dr. Graziano noted that he had reviewed the job offer and indicated

[1] The employing establishment made several prior offers to appellant on May 5, June 10, July 10 and August 1, 1997. However, these offers were revised after further discussion with appellant's treating physician.

that appellant should have a flexible starting time between 10:00 a.m. and 10:30 a.m. and that the job offer should state that appellant had a standing and sitting option with the ability to stretch periodically. In a letter dated August 19, 1997, the Office advised appellant that the offered position of modified carrier technician was suitable and within his work capabilities as detailed in the December 9, 1996 and June 13, 1997 reports of Dr. Graziano and the November 11, 1996 work capacity evaluation form. The Office notified appellant that if he refused the position without reasonable cause, his compensation could be terminated pursuant to 5 U.S.C. § 8106(c) of the Federal Employees' Compensation Act. It allowed appellant 30 days to provide an explanation if he refused the offer. By letter dated September 14, 1997, appellant disagreed with the Office's conclusion that the offered position was suitable. Appellant also submitted a report dated September 12, 1997 from Dr. Graziano in which he reiterated his previously noted restrictions, *i.e.*, no lifting over 15 pounds, flexible start times and no sustained positions with appellant being able to change positions as needed. Dr. Graziano added "if [appellant] is to be employed outside a close range to his house, ½ hour or 45 minutes of time should be allowed for him to get to work, and this is to be included in his work restrictions." In a letter dated September 25, 1997, the Office advised appellant that he had 15 days to accept the modified carrier technician position, finding that the medical evidence supported his ability to do this job and his inability to accept the offer was not justified.

By decision dated November 7, 1997, the Office terminated appellant's compensation effective that date on the grounds that he refused an offer of suitable work. In a decision dated and finalized August 6, 1998, an Office hearing representative affirmed the November 7, 1997 decision of the Office.

The Board finds that the Office properly terminated appellant's compensation effective November 7, 1997.

Under the Act,[2] once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of compensation.[3] After the Office determines that an employee has a disability causally related to his or her employment, the Office may not terminate compensation without establishing that its original determination was erroneous or that the disability has ceased or is no longer related to the employment injury.[4]

Section 8106(c)(2) of the Act provides in pertinent part, "A partially disabled employee who refuses or neglects to work after suitable work is offered is not entitled to compensation."[5] However, to justify such termination, the Office must show that the work offered is suitable.[6]

[2] 5 U.S.C. §§ 8101-8193.

[3] *William Kandel*, 43 ECAB 1011 (1992).

[4] *Carl D. Johnson*, 46 ECAB 804 (1995).

[5] 5 U.S.C. § 8106(c)(2).

[6] *David P. Comacho*, 40 ECAB 267 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341 (1981).

An employee who refuses or neglects to work after suitable work has been offered to him or her has the burden of showing that such refusal of work was justified.[7]

In the present case, the initial issue to be resolved is whether the position offered was suitable within the meaning of the Act and regulations. The regulations governing the Act provide several steps that must be followed prior to the determination that the position offered is suitable. The Office properly requested information from appellant's treating physician concerning whether appellant would be capable of performing the duties of a modified carrier technician as set forth in the May 5, 1997 job offer. After Dr. Graziano indicated that appellant would require a flexible start time between 10:00 a.m. and 10:30 a.m. to permit him to do his morning exercises, the offer was revised to require appellant to start work at 10:30 a.m. The revised offer also indicated that appellant could stand or sit and stretch periodically. Dr. Graziano did not provide any substantive changes to appellant's physical limitations and the physical requirements are identical in the May 5 and August 11, 1997 offers. Although Dr. Graziano indicated that appellant should be allowed time to get to work and that this should be included in his work restrictions, he does not explain what he means by this ambiguous statement. The Office indicated that the distance for the commute was reasonable as appellant testified that he drove 25 minutes 3 to 4 times a week for a water exercise program. In addition, it is not clear exactly what Dr. Graziano is requesting be included in appellant's work restrictions. Since the Office required that the employing establishment delay appellant's start time till 10:30 a.m., appellant appears to have sufficient time to get to work. Moreover, as Dr. Graziano has not provided any rationale for his request that this "restriction" be included as part of appellant's limitations, the physician's conclusion is not rationalized and does not overcome his earlier findings concerning appellant's physical capabilities which were documented and adequately explained. Therefore, the August 11, 1997 job offer is consistent with the probative findings of Dr. Graziano concerning appellant's capacity for work and the Office properly determined that this position was suitable. Consequently, the Office properly terminated appellant's compensation based on his refusal of this position.

[7] 20 C.F.R. § 10.124; *see Catherine G. Hammond*, 41 ECAB 375 (1990).

The decisions of the Office of Workers' Compensation Programs dated August 6, 1998 and November 7, 1997 are hereby affirmed.

Dated, Washington, D.C.
January 4, 2000

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member