U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CARL E. MORGAN and U.S. POSTAL SERVICE,
POST OFFICE, Gary, IN

Docket No. 99-1007; Submitted on the Record;
Issued January 5, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective December 5, 1998 on the grounds that he refused an offer of suitable work.

In the present case, the Office accepted that on September 20, 1965, appellant, then a 32-year-old letter carrier, sustained an employment-related back injury while attempting to avoid being attacked by a patron's dog. He stopped work the following day and underwent medical treatment. The Office accepted appellant's claim for herniated disc at L4-5 necessitating a lumbar laminectomy, performed on October 7, 1965. Appellant returned to work on March 9, 1966 and continued to work until January 15, 1976, when he stopped work completely. The Office subsequently accepted the additional conditions of a degenerative disc at L4-5 with associated spinal instability and residual radiculitis of the L5-S1 nerve roots of the left lower extremity. On February 6, 1976 appellant underwent a second lumbar laminectomy and gutter fusion. The Office placed appellant on the periodic rolls and paid appropriate compensation benefits. The Office continued to solicit regular medical reports from appellant's treating physicians, Dr. Randall C. Morgan, Jr. and his associate, Dr. Alexander C. Miller, both Board-certified orthopedic surgeons and from second opinion physicians. Second opinion reports obtained in 1985, 1988 and 1990 indicated that appellant could perform some form of work and rehabilitation efforts were commenced. However, rehabilitation efforts did not result in a medically suitable job offer, therefore, in 1991, rehabilitation efforts ceased.

By letter dated May 21, 1992, the Office requested a detailed medical update from appellant's treating physician. In a response dated September 17, 1992, appellant's treating physician, Dr. Morgan, submitted a report to the Office in which he noted the results of his most recent examination and stated that appellant remained totally disabled as a result of his 1965 employment injury and that there had been no changes with respect to his clinical condition. On June 7, 1993 the Office again requested an update from Dr. Morgan but did not receive a response. By letter dated August 2, 1994, the Office requested an additional update from

Dr. Morgan, noting that the last medical report submitted by the physician was dated September 17, 1992. In response, Dr. Miller and Dr. Morgan's associate, submitted a report dated August 11, 1994. In his report, Dr. Miller listed his findings on recent physical examination and concluded that there was no change in appellant's clinical condition and that he remained totally disabled. By letter dated February 11, 1995, the Office requested a supplemental report from Dr. Miller, but did not receive a response. In a letter dated August 12, 1996, the Office again requested that Dr. Miller submit a detailed update on appellant's condition, however, this letter was returned to the Office with a notation from the employing establishment that Dr. Miller was no longer at that address.

As appellant had not submitted any recent medical reports and the Office was unable to obtain the necessary information from his treating physicians on January 28, 1998 the Office referred appellant to Dr. Julie Wehner, a Board-certified orthopedic surgeon, for a second opinion medical evaluation. In a report dated February 18, 1998, Dr. Wehner stated that appellant could return to work eight hours a day in a sedentary position, within specified physical restrictions.

On August 31, 1998 the employing establishment offered appellant a position as a modified distribution clerk. The position corresponded exactly to the physical restrictions delineated by Dr. Wehner. On September 8, 1998 the Office advised appellant that the full-time modified distribution clerk position had been found to be suitable to his capabilities and was currently available. Appellant was advised that he should accept the position or provide an explanation for refusing the position within 30 days. He was further advised that if his reason for refusing the job was based upon a medical condition, he should submit sufficient medical evidence to substantiate his condition. Finally, the Office informed appellant that if he failed to accept the offered position and failed to demonstrate that the failure was justified, his compensation would be terminated.

On September 8, 1998 appellant declined to accept the offered position, stating that he was unable to accept the job without knowing what future retirement benefit options were open to him. In a letter dated September 19, 1998, appellant stated that he lacked the physical and emotional strength to return to work. No additional medical evidence was received by the Office.

By letter dated November 3, 1998, the Office informed appellant that his reasons for refusing the position were not acceptable and noted that he had not submitted any medical evidence in support of his assertion that he was physically unable to work. The Office allowed an additional 15 days for appellant to accept the position.

By letter dated November 11, 1998, appellant again stated that he remained totally disabled as a result of his employment injuries.

After determining that the offered job remained available, by decision dated December 4, 1998, the Office terminated appellant's compensation benefits finding that he refused an offer of suitable work.

By letter received by the Office on December 29, 1998, appellant stated that he was "requesting an appeal to be reinstated into workers compensation," and submitted a December 23, 1998 medical report from his treating physician, Dr. Morgan.

Upon receipt of appellant's letter requesting an appeal, the Office forwarded appellant's letter and the accompanying medical evidence to the Employees' Compensation Appeals Board, where it was docketed.

The Board finds that the Office properly terminated appellant's compensation on the grounds that he refused an offer of suitable work.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits.[1] This includes cases in which the Office terminates compensation under section 8106(c)(2) of the Federal Employees' Compensation Act for refusal to accept suitable work.

Section 8106(c)(2)[2] of the Act 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(e)[3] 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 showing before a determination is made with respect to termination of entitlement to compensation.[4] To justify termination, the Office must show that the work offered was suitable,[5] and must inform appellant of the consequences of refusal to accept such employment.[6] According to Office procedures, certain explanations for refusing an offer of suitable work are considered acceptable.[7]

The Office properly terminated appellant's compensation benefits for neglecting to work after suitable work was procured for him. The employing establishment identified a sedentary modified distribution clerk position within the restrictions delineated by Dr. Wehner and advised appellant of the offered position on August 31, 1998. The Office reviewed the position description and medical evidence and notified appellant of its determination by September 8, 1998 letter stating that the offered position was within his capabilities. The Office further

[1] *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

[2] 5 U.S.C. § 8106(c)(2).

[3] 20 C.F.R. § 10.124(c).

[4] *Maggie L. Moore*, 42 ECAB 484, 488 (1991); *reaff'd on recon.*, 43 ECAB 818 (1992).

[5] *See Carl W. Putzier*, 37 ECAB 691 (1986); *Herbert R. Oldham*, 35 ECAB 339 (1983).

[6] *See Maggie L. Moore*, *supra* note 4; *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(d)(1).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(1)-(5).

advised appellant that if he refused to accept the position his compensation could be terminated. After reviewing appellant's reasons for refusal and finding them unjustified, the Office allowed appellant an additional 15 days to accept the position.

Appellant responded by letters dated September 19 and November 9, 1998, stating that he could not accept the position because his medical condition prevented him from holding a job. However, the determination of whether an employee is physically capable of performing the job is a medical question that must be resolved by medical evidence.[8] An employee's contention that his condition would prevent him from performing the required employment duties is of no probative value and will not be deemed a reasonable or justifiable ground for refusing suitable work where the medical evidence of record indicates that the position offered is consistent with appellant's physical limitations.[9] The weight of the medical evidence in this case establishes that appellant was capable of performing the offered modified distribution clerk position.

The Board finds that the weight of the medical evidence in this case rests with Dr. Wehner, an Office referral physician. In her February 18, 1998 report, she provided a detailed history of injury and treatment, reviewed the medical record and objective diagnostic test results and stated that appellant was status post laminectomy L4-5 and status post fusion of L4 to sacrum. Dr. Wehner noted that appellant's objective findings included some residual employment-related weakness of the left leg and big toe. She further noted that appellant's current condition was not one of significant pain based on appellant's own statements that he did not take pain medication and was able to ride his bicycle 8 to 10 miles a day during the summer. Dr. Wehner explained that appellant was not able to perform his former job as a letter carrier, but could perform a sedentary job where he was able to sit or stand as tolerated with no lifting over 20 pounds. On an accompanying work capacity evaluation Form OWCP 5(c), she indicated appellant's specific capacities for various activities.

The medical evidence indicates that the position offered is consistent with appellant's physical limitations and there is insufficient support for appellant's stated reasons in declining the job offer. Although appellant alleged that he was physically unable to work, he did not submit any recent medical evidence to substantiate his claimed inability to perform the duties of the modified distribution clerk position as offered to him by the employing establishment.

Therefore, the refusal of the job offer cannot be deemed reasonable or justified, and the Office properly terminated appellant's compensation.

[8] *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

[9] *Id.*

The decision of the Office of Workers' Compensation Programs dated December 4, 1998 is hereby affirmed.[10]

Dated, Washington, D.C.
January 5, 2000

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member

[10] On appeal, appellant submitted a December 23, 1998 report from Dr. Morgan, his treating physician. However, the Board cannot consider new evidence on appeal. Appellant can submit the report and additional medical evidence to the Office and request reconsideration of its decision.