

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VINCENT INTERLANDE and U.S. POSTAL SERVICE,
POST OFFICE, Springfield, MA

*Docket No. 98-1674; Submitted on the Record;
Issued March 6, 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 monetary compensation entitlement on the grounds that he refused an offer of suitable work.

The Office accepted that on February 8, 1974 appellant, a mail clerk born on May 28, 1926, sustained a herniated disc in the performance of duty. Concurrent disability not due to injury was noted to include hypertension, insulin-dependent diabetes, varicose veins, obesity, esophagitis and a psychiatric problem. Appellant stopped work on February 8, 1974 and did not return; he was placed on the periodic rolls and has received compensation for temporary total disability since that time.

Appellant came under the care of Dr. Thomas C. Wilson, a Board-certified orthopedic surgeon, on December 14, 1981 when he opined that appellant was totally disabled due to the limitations he had in performing normal activities of daily living.

By work restriction evaluation dated August 30, 1985, Dr. Ellen Luthi, a Board-certified neurologist, checked "no" indicating that appellant could not work eight hours per day.

By report dated June 16, 1987, Dr. Wilson noted that appellant's back condition had not changed since last seen, but noted that he experienced numbness in both legs particularly when he was standing and was experiencing pain in his feet and was known to have varicose veins. As well as the diabetes.

By report dated May 31, 1989, Dr. Wilson noted that appellant was using crutches and a walker for ambulation due to back and right leg pain and that he was complaining of numbness in both feet and in both hands conceivably due to his diabetes.

By report dated May 22, 1991, Dr. Wilson discussed appellant's ongoing symptomatology and therapy and he opined that appellant continued to be unemployable at that time.

By report dated May 3, 1993, Dr. Wilson noted that during the course of appellant's treatment he had seen little that would allow him to make any other conclusion than he made in 1981 that appellant was totally disabled from performing his prescribed duties.

By report dated June 30, 1994, Dr. Wilson noted that appellant's back had shown no improvement, that he was having increasing difficulty with performing normal everyday functions and that he had little tolerance for physical exertion.¹ He noted that appellant had significant loss of spinal motion and that he had more numbness in his toes probably secondary to his diabetes. On June 3, 1993 Dr. Wilson completed a work restriction evaluation form noting that appellant could not work eight hours per day and doubting that he would need vocational rehabilitation due to his age.

By work capacity evaluation for musculoskeletal conditions, (Form OWCP-5c) dated July 1, 1994, Dr. Wilson noted that all of appellant's activities would be limited by the recurrence of pain, stiffness, aching, etc., that he would not assign activity restrictions because he was not working and that, as far as he knew, appellant was not a candidate for employment. Dr. Wilson noted that appellant did have medical problems such as diabetes, but that the medical factors which needed to be considered in finding suitable work for him would have to be provided by his medical physician.²

In a report dated May 22, 1995, Dr. Wilson noted that appellant's symptoms had not significantly changed, but he also noted that appellant continued to be followed elsewhere for problems secondary to his diabetes and other medical conditions and noted that he had no record as to appellant's other conditions' overall implications as to his medical state.

In a letter to the Office dated May 30, 1995, Dr. Wilson noted that from an orthopedic point of view there had been no specific change in appellant's condition, but noted that appellant then was 69 years old and that "it would appear that his other medical conditions are interfering with what originally was a chronic back pain." He noted that appellant then had diabetic neuropathy, which was becoming a significant problem to him and a limit to his activities. Dr. Wilson noted that appellant was restricted from kneeling, bending, twisting or lifting, could

¹ A June 27, 1994 magnetic resonance imaging (MRI) scan was reported as demonstrating a moderate-sized left-of-center disc herniation at L2-3, and posterior osteophyte formation/disc bulging at L3-4, mild bulging of disc material and posterior osteophyte formation at L4-5, and posterior osteophyte formation and moderate facet hypertrophy at L5-S1.

² Dr. Wilson had noted on June 3, 1993 that appellant was under the care of Dr. Statatis at the Veterans Administration Hospital for his insulin-dependent diabetes and Dr. Vakkur for neurology, specifically diabetic neuropathy mostly affecting the lower extremities. At that time he also noted that appellant complained of difficulty sitting for any significant period due to left side low back pain, that it was a stabbing pain which interfered with sleep and posture, and that he had right groin and leg pain when arising from a sitting position. A work restriction evaluation that date signed by Dr. Wilson indicated that appellant could not work eight hours per day, and noted that he doubted that appellant would need vocational rehabilitation services as he was 67 years old.

only stand for short periods of time and needed to be in a position where he could have constant changing of his posture from sitting to standing. He noted that appellant had both subjective and objective numbness in his feet which was felt to be secondary to his diabetic neuropathy.

By letter to the Office dated May 21, 1996, Dr. Wilson opined that appellant's orthopedic situation had not changed; he described appellant's pain symptoms with prolonged standing and walking and noted that appellant was "known to have significant diabetic neuropathy and currently has significant swelling in the lower extremities." Dr. Wilson recommended further orthopedic evaluation with Dr. Charles A. Mick, a Board-certified orthopedic surgeon specializing in spinal problems.

On June 10, 1996 Dr. Wilson completed a Form OWCP-5c work capacity evaluation noting that appellant, then 70 years old, could work eight hours per day, that his work environment should be sedentary with position changes from sitting to standing and that he should limit activities "all as listed" with an arrow pointing to "(e.g., kneeling, standing, bending, twisting, reaching and lifting)".³ He did not answer the form question as to whether appellant had any limitations due to any preexisting or nonwork-related condition, but Dr. Wilson noted that appellant's diabetes and hypertension were other factors which needed to be considered in the identification of a position for appellant.

No further medical evidence was obtained by the Office as to appellant's limitations due to his preexisting and nonwork-related conditions, nor were these conditions or appellant's age evidently considered by the Office in its determination that appellant could work eight hours per day.

On July 8, 1996 the employing establishment offered appellant the position of limited-duty clerk, which required answering telephone calls and taking messages, stuffing envelopes during mailing periods, filing reports, data input on a computer, express mail tracking, opening pouches, sorting and stapling express mail reports for filing and answering the service window, verifying bank deposits. The medical restrictions listed on the job offer were "sedentary work" and "change position as needed."

By letter dated August 1, 1996, the Office advised appellant that the offered position was determined to be suitable and that he had 30 days within which to accept it and it advised of the provisions of 5 U.S.C. § 8106(c).⁴

By response dated August 15, 1996, appellant's representative rejected the offered position of modified clerk, and in support submitted all of Dr. Wilson's reports dating from 1981 all noting no change in appellant's orthopedic condition and noting that appellant was not a candidate for employment. The representative noted that appellant was 70 years old and had

³ No medical rationale was presented for these form report conclusions, nor was any explanation presented as to why Dr. Wilson suddenly changed his opinion from past reports in which he had opined that appellant was not a candidate for employment.

⁴ The offered position was not reviewed or approved of by Dr. Wilson or by any of appellant's other treating physicians for his various medical conditions.

been suffering significantly increased pain over the years and could not perform the offered position. The representative also noted that the job offer failed to provide any restriction for appellant's limitation of standing and argued that the offer was not suitable.

By letter dated September 4, 1996, the Office found that appellant's reasons for refusal of the position were not suitable and it advised that he had 15 days within which to accept the job. The Office advised that Dr. Wilson had unequivocally stated that appellant could work eight hours per day with "certain physical restrictions (no kneeling, bending, twisting, reaching, lifting and the freedom to change position as necessary for your comfort)."⁵

Appellant did not accept the offered position and by decision dated September 26, 1996, the Office terminated appellant's compensation entitlement finding that he had refused an offer of suitable employment. The Office found that the weight of the medical evidence supported that appellant was capable of performing the duties of a modified clerk.

By letter dated October 9, 1996, appellant, through his representative, requested an oral argument. In support of his request, appellant submitted a November 20, 1996 report from Dr. Mick, to whom Dr. Wilson had referred him, which reviewed appellant's history of injury and treatment, noted that appellant was 70 years old, and noted that he had a medical history of diabetes, phlebitis and long-standing diabetic neuropathy in both feet. Dr. Mick performed an examination, reviewed the radiographic evidence and opined that at that time appellant remained disabled and unable to return to work at the employing establishment.

A hearing was held on June 16, 1997 at which appellant testified. By decision dated August 28, 1997, the hearing representative affirmed the September 26, 1996 termination decision, finding that no further evidence had been submitted and dismissing appellant's testimony that he had trouble sitting and standing. The hearing representative found that the medical evidence clearly supported appellant's ability to perform the duties of the position and that there was no evidence which conflicted with Dr. Wilson's form report opinion.⁶

Appellant requested reconsideration and in support he submitted further evidence.

By report dated June 4, 1997, Dr. Mick noted that appellant was then 71 years old, that he remained significantly limited in his activities, that he could stand for 15 to 30 minutes at a time before he needed to rest and could sit for about an hour and that he was unable to do any significant bending, lifting, twisting or stooping down. Regarding the offered job, he stated that he was not sure of appellant's current endurance levels and could not estimate how long appellant would be able to tolerate such a job. Dr. Mick opined that appellant had significant impairments in his overall work ability and that it was impossible at that time to tell whether appellant would be able to tolerate the job described.

⁵ The Board notes that on the work restriction evaluation the "all as listed" arrow pointed to multiple listed activities which included standing.

⁶ The Board notes that the hearing representative clearly omitted review of the November 20, 1996 report of Dr. Mick which had been submitted to the record on December 16, 1996.

By report dated November 12, 1997, Dr. Mick opined that appellant would not tolerate a return to work for eight hours per day.

By decision dated February 5, 1998, the Office denied modification of the prior decision finding that the evidence submitted in support was insufficient to warrant modification. The Office found that Dr. Mick had not provided any rationale for his opinion that appellant was unable to work and that Dr. Wilson had signed his form report stating that appellant could work eight hours per day with restrictions.

The Board finds that appellant did not refuse an offer of suitable work.

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.⁷ 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.⁸ In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that appellant can work, considering the entirety of his physical conditions and that the work offered to and refused by appellant was suitable.⁹

The Office did not meet its burden of proof in this case.

In the instant case, Dr. Wilson's single June 10, 1996 OWCP-5c form report, the only report of record stating that appellant could work eight hours a day with restrictions, is insufficient, due to lack of any medical rationale and due to its unexplained disagreement with all of his previous reports which addressed appellant's disability status and found total disability,¹⁰ to constitute the weight of the medical opinion evidence in establishing that appellant is only partially disabled and able to work eight hours a day. As this report was merely a form report without any explanation or rationale supporting its statements, it is conclusory and hence of diminished probative value.¹¹

⁷ 5 U.S.C. § 8106(c)(2).

⁸ *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

⁹ *Glen L. Sinclair*, 36 ECAB 664 (1985).

¹⁰ See, e.g., *Patrick A. Santucci*, 40 ECAB 151 (1988); *Carol J. Bernard*, 37 ECAB 471 (1986) (Office's burden is not met if the doctor's reports are contradictory).

¹¹ See *Leon Harris Ford*, 31 ECAB 514 (1980); *Neil Oliver*, 31 ECAB 400 (1980); *Leontine F. Lucas*, 30 ECAB 925 (1979).

Dr. Wilson, who is an orthopedist, opined on December 14, 1981 that appellant was totally disabled for work due to the limitations he experienced in performing the normal activities of daily living. On May 22, 1991 he opined that appellant continued to be unemployable. On May 3, 1993 Dr. Wilson opined that appellant continued to be totally disabled. On June 3, 1993 he indicated that appellant could not work eight hours per day and doubted he would need vocational rehabilitation due to his age. On July 1, 1994 Dr. Wilson opined that appellant was not a candidate for employment. However, on June 10, 1996 Dr. Wilson reversed himself without explanation or rationale and wrote “8” to indicate that appellant could work and to indicate how many hours appellant might work. As this is inconsistent from all of his previous reports addressing disability, is totally unexplained and does not appear to be based upon any objective findings, this notation is of greatly reduced probative value such that it is insufficient to conclusively establish that appellant is no longer totally disabled.¹²

Further, in these reports, Dr. Wilson also noted that appellant’s status with respect to the condition which disabled him had not changed, lessened or improved and he indicated on July 1, 1994 that appellant had other significant medical problems such as diabetes which “needed to be considered in identification of a position” which would be suitable for appellant. The Office, however, failed to provide such consideration of appellant’s other conditions as recommended by Dr. Wilson and as he was not an internist or a neurologist, Dr. Wilson did not offer and was not qualified to offer, any opinion as to the effect of appellant’s other conditions on his ability to work, addressing solely the orthopedic aspect of this case.

The Federal (FECA) Procedure Manual, Part -- 2, Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4 (b)(4) (December 1993) states that if medical reports in the record document a condition which has arisen since the compensable injury and this condition disables the claimant from the offered job, the job will be considered unsuitable (even if the subsequently-acquired condition is not work related). The procedure manual, at Chapter 2.814.8 (a)(2) and (4), further states that in assessing suitability of a position, aspects which must be considered include the degree of physical impairment (including impairments resulting from both injury-related and preexisting conditions) and the claimant’s age.¹³

In the instant case, although the medical evidence of record supports that appellant has ongoing problems with his diabetes control, for which he underwent hospitalizations, diabetic neuropathies, lower extremity numbness and pain, dependent edema, varicose veins, little tolerance for physical exertion, osteodegenerative changes throughout his lower spine, difficulties with sitting and standing and stabbing right groin and leg pain upon changing position from sitting to standing and was under treatment with an internist/endocrinologist for his ongoing diabetes management and a neurologist for his diabetic neuropathies, the Office neglected to obtain any statements from these physicians as to appellant’s ability to tolerate any kind of work related to the conditions for which they were treating him and it also failed to

¹² See, e.g., *Lillian M. Jones*, 34 ECAB 379, 381 (1982) (the Board has held that such an entry on a form report has little probative value where there is no explanation or rationale supporting the opinion).

¹³ See also 20 C.F.R. § 10.124(c).

obtain any medical opinion from an internal medicine or physical capacity evaluation viewpoint as to appellant's physical endurance, aged 71 at the most recent denial of modification,¹⁴ to handle any 8-hour per day job plus a commute.

Therefore, the Office failed to establish that, considering appellant's preexisting and post-injury conditions in addition to his accepted employment injury, and considering his endurance and stamina at his age, he was capable of working an 8-hour per day job of any kind.

Further, the Office failed to establish that the offered position was suitable as it failed to obtain appropriate medical evidence which considered the impact of appellant's preexisting and subsequently manifested conditions and his advanced age, on his ability to perform the duties of the offered position.

Additionally, since the report of Dr. Wilson cannot constitute the weight of the medical evidence and with the addition to the record of Dr. Mick's opinions supporting total disability, there now arises a conflict in medical opinion evidence which requires resolution before any determination of suitable work can be made.

Therefore, the decisions of the Office of Workers' Compensation Programs dated February 5, 1998 and August 28, 1997 are hereby reversed.

Dated, Washington, D.C.
March 6, 2000

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member

¹⁴ Currently aged 73-years.