U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JIM WILSON and DEPARTMENT OF THE ARMY,
BLUE GRASS army DEPOT, Lexington, KY

Docket No. 98-1854; Submitted on the Record;
Issued May 5, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits pursuant to 5 U.S.C. § 8106(2) on the grounds that he refused suitable work.

On September 14, 1989 appellant filed a notice of occupational injury alleging that he fell down a flight of stairs on February 17, 1989 in the course of his federal employment and suffered bruises on the back of his head and neck. The Office subsequently accepted the claim for a low back strain with left sciatica and a permanent aggravation of spondylolisthesis and awarded compensation for total temporary disability. On October 28, 1992 appellant filed a notice of recurrence of disability and the Office again authorized compensation for total temporary disability.

On April 18, 1995 Dr. Don H. Pennington indicated that he treated appellant for an injury he sustained while working with a carpenter on a bathroom.

On September 14, 1995 Thomas P. Ciranna indicated that he witnessed appellant carrying large bags of groceries, climbing stairs, entering and exiting an elevated pick-up truck.

On April 16, 1996 Dr. Rebecca R. Floyd, appellant's treating physician and a Board-certified family practitioner, completed a work restriction evaluation indicating that appellant could sit and stand for one hour per day, but he could not walk, lift, bend, squat, climb, kneel or twist. She stated that appellant could lift up to 10 pounds, but he could not perform simple grasping or reach above the shoulder on the right side. She further indicated that appellant should avoid the cold, dampness, heights and high speed working. Dr. Floyd concluded that appellant could work zero hours per day because he could not tolerate the stress of work.

On June 13, 1996 the Office referred appellant to Dr. Peter Irwin for a second opinion evaluation. On July 23, 1996 Dr. Irwin reviewed the history of appellant's injury and the

treatment received, including the accepted July 11, 1990 surgery of a Gill procedure and fusion. Dr. Irwin then performed a complete physical examination. He noted that appellant displayed an intention tremor of the right hand because the tremor occurred only when appellant was asked to perform certain functions. He diagnosed a lumbar strain with left sciatica, right elbow tendinitis, fractures of both hands with sequelae, a 1953 leg fracture, L-5 spinal bifida occulta with bilateral spondylolysis, moderate facet degeneration at L5-S1, healed peptic ulcer disease, L5-S1 spondylolisthesis and adult onset diabetes mellitus.

Dr. Irwin then noted that a functional capacity assessment was carried out by his physical therapist on July 9 and 10, 1996. The physical therapist indicated that appellant could only lift 12.5 pounds bilaterally or on his left side to waist level; that he could only lift 10 pounds bilaterally from the waist to eye level and 7.5 pounds on the left side only for this distance; that he could lift 5 pounds to waist level and carry 12.5 pounds up to 100 feet. The physical therapist indicated that appellant self-limited his performance during the lifting tests and that the tests failed to reflect maximum performance. The physical therapist concluded that appellant could perform at a sedentary work level. He found that appellant should avoid forward bent postures and positions; perform minimal repeated forward bending; perform frequent reversal of postures and positions to decrease the stress on the spine; and alternate sitting, standing and walking. Finally, the physical therapist stated that appellant should minimally use his right upper extremity for lifting tasks.

Dr. Irwin reviewed the physical therapist's functional capacity assessment evaluation. He stated that it was well done, reflected appellant's physical capabilities and was consistent with his sedentary lifestyle. Dr. Irwin concluded that appellant's submaximal effort was a normal reaction for a patient with failed back syndrome. He concluded that appellant was unable to return to any type of gainful occupation.

On July 18, 1996 Orville G. Owen, an employing establishment compensation investigator, indicated that he was videotaping appellant's residence from a public street. He indicated that he subsequently drove off and was chased by appellant. Mr. Owen stated that appellant blocked him at an intersection, jumped out of his vehicle and threatened to beat him. He stated that appellant continued to threaten him even after he informed appellant that he was a compensation investigator. Mr. Owen stated that he observed ladders and a tractor with a back hoe at appellant's home. He stated that he observed appellant doing some type of painting or scraping around the windows of the home.

On August 22, 1996 the Office wrote to Dr. Irwin providing the details of Investigator Owen's July 18, 1996 report. The Office asked Dr. Irwin if his opinion that appellant remained disabled from all employment remained the same, given the fact that appellant's lifestyle was not as sedentary as previously indicated.

On September 5, 1996 Dr. Irwin indicated that, after discovering appellant's lifestyle was not as sedentary as previously believed, he no longer felt he was disabled from all employment. He stated that appellant had the physical capacities listed on the functional capacities assessment conducted by his physical therapist and, therefore, he could perform sedentary work. Dr. Irwin completed a work capacity evaluation form repeating the functional assessment provided by his

physical therapist on July 9 and 10, 1996 and stating that appellant could work four hours per day with these restrictions.

On November 18, 1996 the employing establishment offered appellant a limited-duty job as a clerk based on the physical restrictions provided by Dr. Irwin.

On November 27, 1996 appellant indicated that he could not accept the job offer because of the deteriorating condition of his right hand and the fact that he could only walk with a crutch.

In a letter dated December 4, 1996, the Office allowed appellant 30 days to either accept the position or provide an explanation for refusing it. The Office informed appellant that if he refused the limited-duty job offer he would not be entitled to compensation pursuant to 5 U.S.C. § 8106(2).

On December 16, 1996 appellant indicated that his doctor did not believe that he was capable of performing the limited-duty position.

On January 7, 1997 Mr. Owen reasserted the items found in his July 18, 1996 statement. He added that he observed appellant using his right hand to perform ham radio tasks and that he used both hands to run wire around the backyard attached to an antenna. Mr. Owen also noted that after the vehicle chase, appellant walked with a normal gait and had no problem getting in and out of his truck.

In a letter dated January 9, 1997, the Office indicated that it found appellant's reasons for refusing the position unacceptable. The Office allowed appellant 15 days to accept the job offer before it would issue a final decision.

By decision dated January 30, 1997, the Office terminated appellant's compensation for wage loss and for a schedule award because he refused suitable work without a justified reason.

On February 8, 1997 appellant requested an oral hearing,

At a hearing held on December 10, 1997, appellant testified that he had difficulty walking and that he could not fully bend without pain. He indicated that he had difficulty lifting and he could not raise his hand above chest level without radiating back pain. Appellant also indicated he had trouble writing. He denied climbing ladders and indicated that his son worked around the house with the ladders. Appellant stated that his son also used the tractor and backhoe on his property. He denied painting around the windows and stated that the windows did not require paint because they were aluminum. Appellant noted, however, that the window sills were made of wood. He denied painting the window sills or shutters. Appellant stated that his storm windows did not require scraping because they were removed prior to painting. He stated that he had a contract to paint his house in December 1995 with Kelly Huett and subsequently provided a copy of the contract. Appellant stated he was unable to paint the house. He indicated that Mr. Huett painted most of his house in April 1996, except for two troubled places. Appellant stated that the project was completed by June 1996. He denied painting or scraping windows in July 1996. Appellant also denied performing any of the painting. Mr. Huett later testified that he performed all the painting pursuant to a contract and that he never

witnessed appellant performing any work. He also stated that no paint was on the windows that required scraping. Appellant's wife subsequently confirmed appellant's assertion that he did not perform any painting or scraping or any other work at home.

At the hearing, appellant further stated that on the morning of July 18, 1996 he was in his ham radio shack electronically turning the antenna. He stated that when he operated his ham radio he would sit and stand alternatively. Appellant stated that he was unable to type due to carpal tunnel and elbow problems. He stated that a neighbor called his house to tell him a man with a gun was videotaping his property. Appellant stated he observed the man 970 feet away on a public road. He indicated that he entered his vehicle and approached the man, but that the man drove off. Appellant stated that he could not drive for long periods of time or less than 50 miles. He stated that he did not drive faster than 30 miles per hour and that he caught up with the man within 2 miles. Appellant stated that he did not hit the man and even displayed his arms on the side of the truck to show that he was unarmed. He indicated that after catching up with the investigator with his vehicle he exited it very slowly. He stated that the investigator threatened him first and failed to identify himself for 15 to 20 minutes. Appellant admitted to threatening to beat the investigator and stated he was found guilty in court of making physical threats.

On October 14, 1997 David G. Whisman, an employing establishment compensation investigator, indicated that he observed appellant enter a pick-up truck and drive four to five miles to a store. He stated that he observed appellant purchase a loaf a bread, a half gallon of milk and another item. Mr. Whisman noted that appellant carried the groceries and opened the vehicle door with his right hand without hesitation. He stated that appellant walked with a normal gait and showed no sign of physical impairment.

By decision dated March 16, 1998, the Office hearing representative found that appellant's assertion that he was not performing physical activities as reported by the employing establishment's investigators was not credible. The hearing representative indicated that appellant's assertion that he did not work on his house was irrelevant since the investigator stated he observed appellant working on his ham radio house. He noted that the investigators had more credibility than appellant because he was convicted of threatening the investigator. Moreover, Mr. Whisman stated that the fact that appellant admitted chasing down and threatening the investigator established that he was not severely disabled. The hearing representative also stated that an April 18, 1995 medical report noted that appellant helped a carpenter perform work on a bathroom, an activity similar to that found by the investigator. He also noted that appellant provided a submaximal effort on his functional capacity evaluation further tainting his credibility. The hearing representative also stated that, in his November 27, 1996 letter, appellant stated for the only time that he needed a crutch to walk and that he could not use his right hand. Consequently, the Office hearing representative found that Dr. Irwin's statement of disability was based on a valid factual background and that, therefore, the job offer was suitable. He, therefore, affirmed the Office's January 30, 1997 decision, terminating appellant's compensation for refusing suitable work.

The Board finds that the Office properly terminated appellant's compensation benefits pursuant to 5 U.S.C. § 8106(2) on the grounds that he refused suitable work.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[1] This burden of proof is applicable if the Office terminates compensation pursuant to 5 U.S.C. § 8106(c) for refusal to accept suitable work.

Under section 8106(c)(2) of the Federal Employees' Compensation Act,[2] the Office may terminate the compensation of a disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.[3] Section 10.124(c) of the Code of Federal Regulations[4] provides that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee 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.[5] To justify termination of compensation, the Office must show that the work offered was suitable[6] and must inform appellant of the consequences of refusal to accept such employment.[7]

In this case, the medical evidence establishes that appellant is capable of performing the limited-duty position offered. The employing establishment offered appellant a position as a clerk based on the physical restrictions provided by Dr. Irwin in his September 5, 1996 report. Dr. Irwin's opinion is supported by a complete physical examination and extensive testing, performed by his physical therapist. Appellant asserts that Dr. Irwin mistakenly concluded that he did not live a sedentary life based on the July 18, 1996 report of an employing establishment compensation investigator. Nevertheless, appellant admitted at the hearing that he chased down and threatened the investigator with physical violence on July 18, 1996. Moreover, the record contains a medical report dated April 18, 1995 indicating that appellant performed carpentry work and an uncontradicted statement from Thomas P. Ciranna on September 14, 1995 indicating that he witnessed appellant carrying large bags of groceries, climbing stairs and climbing up into the cab of a large pick-up truck. These events, in addition to the compensation investigator's assertion that he witnessed appellant working around his ham radio shack, establish that appellant did not lead a sedentary lifestyle. Accordingly, Dr. Irwin's opinion, based on a proper factual background and supported by physical findings, is entitled to great weight.[8]

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[1] *Frederick Justiniano*, 45 ECAB 491 (1994).

[2] 5 U.S.C. § 8106(2).

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

[4] 20 C.F.R. § 10.124(c).

[5] *Camillo R. DeArcangelis*, *supra* note 3; *see* 20 C.F.R. § 10.124(e).

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

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

[8] *Charles E. Burke*, 47 ECAB 185 (1995).

In contrast, Dr. Floyd, appellant's treating physician and a Board-certified family practitioner, gave no indication that she was aware of appellant's active lifestyle in her April 16, 1996 report finding that appellant could not tolerate the stress of work. Consequently, Dr. Irwin's opinion constitutes the weight of the medical evidence and the Office properly relied on his opinion to find that the limited-duty position offered was suitable.[9] Accordingly, the Office properly terminated appellant's compensation benefits upon his refusal to accept suitable employment after informing him of the consequences of his refusal.

The decision of the Office of Workers' Compensation Programs dated March 16, 1998 is affirmed.

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

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

[9] *Id.*