U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JONATHON STUBBLEFIELD, JR. and U.S. POSTAL SERVICE, POST OFFICE, Falls Church, VA

Docket No. 99-2480; Oral Argument Held July 20, 2000; Issued November 3, 2000

Appearances: *Ty Muarry, Esq.*, for appellant; *Sheldon G. Turley, Jr., Esq.*, for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation benefits effective May 25, 1999 on the grounds that he refused an offer of suitable work.

On March 16, 1992 appellant filed a traumatic injury claim for injuries sustained when a dog bit him after he fell to the ground on March 14, 1992, the date he stopped work. The Office accepted the claim on May 13, 1992 for a dog bite in the right arm, colles fracture of the right wrist, compression fracture at L1, multiple lacerations and contusion of the right leg. Appellant was placed on the automatic rolls for temporary total disability. The Office subsequently accepted that appellant sustained carpal tunnel syndrome in his right hand and authorized surgery.

On October 18, 1996 the Office referred appellant to Dr. William A. Hanff, a Board-certified orthopedic surgeon, for a second opinion evaluation on the extent of appellant's disability and whether he was capable of working.

In a November 5, 1996 report, Dr. Hanff opined that appellant would be capable of performing his position as a letter carrier, but that his renal disability precluded his ability to work as a letter carrier. In a work capacity evaluation form (OWCP-5c) dated November 5, 1996, Dr. Hanff opined that appellant had no limitations due to his employment injury, but that he could not work. In response to an Office request for clarification, Dr. Hanff in a December 17, 1996 letter, opined that appellant's disability was due to his renal failure and "that, if it were not for his kidney failure, this patient would be able to return to letter carrier capacities."

In progress notes dated December 23, 1996, Dr. Rida N. Azer, an attending Board-certified orthopedic surgeon, opined that appellant's "conditions and their treatment and the residuals are caused by his injury of March 14, 1992 when he was at work he was attacked by a dog and sustained injuries to the right wrist and the lumbar spine as well as multiple lacerations." Dr. Azer indicate that due to his employment injuries, appellant had permanent restrictions on kneeling, bending, stooping, squatting, pushing, lifting heavy objects, pulling and using his right hand in strenuous or repetitive movements.

On July 7, 1998 the Office referred appellant to Dr. Wayne C. Lindsey, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict in the medical opinion evidence between Dr. Hanff and Dr. Azer regarding the extent of appellant's employment-related disability.

In a report dated July 21, 1998, Dr. Lindsey set forth findings on a physical examination, review of the medical records, statement of accepted facts and employment injury history. He concluded that appellant's colles fracture had healed, that he had no deficits due to his carpal tunnel syndrome, that compression fracture did not appear debilitating and appellant had full flexibility in the spine. However, Dr. Lindsey opined that appellant appeared "to have a weakened state consistent with his overall disease process of the kidneys" and that appellant's "severe kidney condition with pending renal transplant" was unrelated to his accepted employment injuries and was due to his hypertensive disease.[1] Regarding appellant's work restriction, Dr. Lindsey opined that appellant was capable of working eight hours a day with no limitations in appellant's fine motor upper extremity movements, but that the physician "would not allow him to perform activities requiring standing greater than 2 hours without a 15-minute rest" and that he could not lift more than 50 pounds. As to kneeling, reaching, bending and twisting, Dr. Lindsey indicated that appellant was capable of performing these activities.

On October 2, 1998 the Office referred appellant for vocational rehabilitation based upon Dr. Lindsey's opinion that he was capable of working.

On February 22, 1999 Dr. Timothy R. Shaver, appellant's attending physician Board-certified in surgery and critical care surgery, released appellant to return to work following the kidney transplant. Dr. Shaver stated that the job description provided by the employing establishment looked okay.

On February 22, 1999 the employing establishment offered appellant a permanent modified casual position with restrictions, including intermittent sitting every 2 hours, no intermittent standing and walking every 2 hours with 15 minutes of rest after the 2 hours and a lifting restriction of 50 pounds. The duties included delivering parcels and express mail weighing less than 50 pounds, assisting customers as a lobby director, answering phones and handling customer inquires, casing mail on carrier routes, maintaining records on carrier routes, walking routes with a 15-minute rest period after 2 hours, mounted delivery and working CFS mail and deliver mail to VIM. In an attached letter dated February 22, 1999, the employing

[1] Appellant received a kidney transplant in August 1998.

establishment requested appellant to sign the attached form after reading it and noted that, if he declined the position, to provide his reasons for declining the job offer.

In a February 24, 1999 report of telephone call, the Office noted that appellant had telephoned and indicated that he was unable to perform the position offered by the employing establishment as it was inconsistent with his work restrictions and had not been approved by Dr. Shaver. The Office informed appellant that the physical restrictions had been established previously and had been put on hold due to his kidney transplant.

By letter dated April 6, 1999, the Office advised appellant that the position was suitable and informed him of the consequences of refusing suitable work under 5 U.S.C. § 8106(c)(2). Appellant did not respond to the April 6, 1999 letter.

By decision dated May 25, 1999, the Office terminated appellant's compensation benefits effective May 25, 1999 on the grounds that he had refused an offer of suitable work.

Appellant requested reconsideration by letter dated June 28, 1999, and submitted two office notes from Dr. Azer in support of his request. Appellant also stated that he had not received the April 6, 1999 letter advising him of the consequences of refusing an offer of suitable employment. In reports dated March 1 and June 14, 1999, Dr. Azer indicated he had reviewed the position description and that appellant was not capable of performing the position. He opined that appellant was totally disabled and unfit for employment in reports dated June 14, March 1 and February 15, 1999.

In a July 19, 1999 merit decision, the Office denied modification of the May 25, 1999 decision.

The Board finds that the Office met its burden of proof in terminating appellant's compensation benefits effective May 25, 1999 on the grounds that he refused an offer of suitable work.

Once the Office accepts a claim it has the burden of proving that the employee's disability has ceased or lessened before it may terminate or modify compensation benefits.[2] Section 8106(c)(2) of the Act[3] provides that the Office may terminate the compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[4] The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.[5]

[2] *Karen L. Mayewski*, 45 ECAB 219, 221 (1993); *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

[3] 5 U.S.C. §§ 8101-8193; 5 U.S.C. § 8106(c)(2).

[4] *Camillo R. DeArcangelis*, 42 ECAB 941, 943 (1991).

[5] *Stephen R. Lubin*, 43 ECAB 564, 573 (1992).

The implementing regulation[6] 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 a showing before entitlement to compensation is terminated.[7] To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.[8]

Office procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.[9] The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by medical evidence.[10]

With respect to the procedural requirements of termination under section 8106(c), the Board has held that the Office must inform appellant of the consequences of refusal to accept suitable work and allow appellant an opportunity to provide reasons for refusing the offered position.[11] If appellant presents reasons for refusing the offered position, the Office must inform the employee if it finds the reasons inadequate to justify the refusal of the offered position and afford appellant a final opportunity to accept the position.[12]

In the present case, appellant contends that he never received the April 6, 1999 letter from the Office advising him that the Office had found the job to be suitable and informing him of the consequences for not accepting the position. The record indicates that this letter was sent to appellant's current address, which has not changed since he filed his claim. Under the mailbox rule the Board has held that in the absence of evidence to the contrary, it is presumed that a notice mailed to an individual in the ordinary course of business was received by that individual.[13] Therefore, the Board finds that the Office did comply with the procedural requirements of section 8106(c)(2). The April 6, 1999 letter notified appellant that his reasons for declining the job were unacceptable and provided him an additional period to accept the position prior to termination.

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[6] 20 C.F.R. § 10.124(c).

[7] *John E. Lemker*, 45 ECAB 258, 263 (1993).

[8] *Maggie L. Moore*, 42 ECAB 484, 487 (1991), *aff'd on recon.*, 43 ECAB 818 (1992).

[9] *C.W. Hopkins*, 47 ECAB 725 (1996); *see Patsy R. Tatum*, 44 ECAB 490, 495 (1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5 (July 1997).

[10] *Marilyn D. Polk*, 44 ECAB 673, 680 (1993).

[11] *Maggie L. Moore*, *supra* note 8.

[12] *Id.*

[13] *A.C. Clyburn*, 47 ECAB 153 (1995); *Charles R. Hibbs*, 43 ECAB 699, 701 (1992).

The determination of suitability in this case was based on the reports of Dr. Lindsey, a Board-certified orthopedic surgeon selected as an impartial medical specialist and Dr. Shaver, appellant's attending physician Board-certified in surgery and critical care surgery, who performed his kidney transplant. The Office had found that a conflict existed between the attending physician, Dr. Azer, who had opined that appellant was totally disabled from any employment, and Dr. Hanff, a second opinion orthopedic surgeon, who indicated in a report that appellant could work in a sedentary position. The Office also submitted a copy of the job description to Dr. Shaver who concurred with Dr. Lindsey that appellant was capable of performing the position offered by the employing establishment.

It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[14] The Board finds that the evidence from Dr. Lindsey represents the weight of the evidence regarding appellant's physical limitations from his accepted employment injury. Furthermore, Dr. Shaver supports Dr. Lindsey's opinion that appellant is capable of performing the position of modified causal carrier. Dr. Shaver, after reviewing the job description, opined on February 22, 1999 that appellant had recovered from his kidney transplant and was capable of performing the offered position. Thus, the Board finds that the opinions of Drs. Lindsey and Shaver establish that appellant is capable of performing the duties of the modified position. The Office, therefore, properly found that the offered position was suitable in this case.

Accordingly, the Board finds that the Office properly determined that appellant rejected an offer of suitable employment and met its burden of proof in terminating his monetary compensation benefits under section 8106(c).

Subsequent to the termination of his benefits, appellant requested reconsideration and submitted additional progress notes from Dr. Azer who opined that appellant was permanently disabled from working. The Board notes that in his progress notes, Dr. Azer repeats his prior assessment that appellant is permanently and totally disabled. His new progress notes do not outweigh the probative value of Dr. Lindsey's impartial medical examination report. Dr. Azer was on one side of the conflict that Dr. Lindsey resolved and his additional reports are insufficient to overcome the special weight accorded Dr. Lindsey's opinion or to create a new conflict with it.[15]

Inasmuch as appellant failed to establish that he was medically unable to perform the duties of the offered position and the Office complied with its required procedures, the Board finds that the Office properly terminated appellant's compensation for refusing suitable work.

[14] *Harrison Combs, Jr.*, 45 ECA 716, 727 (1994).

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

The decisions of the Office of Workers' Compensation Programs dated July 19 and May 25, 1999 are hereby affirmed.

Dated, Washington, DC
November 3, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member