U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN W. BELLMER and U.S. POSTAL SERVICE,
POST OFFICE, West Lynn, MA

Docket No. 99-2225; Oral Argument Held December 7, 2000;
Issued January 24, 2001

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

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
VALERIE D. EVANS-HARRELL

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective March 29, 1998, on the grounds that he refused an offer of suitable work.

On October 19, 1988 appellant, then a 38-year-old letter carrier, injured his lower back when he tripped over a plastic loop. He filed a traumatic injury claim on the date of injury, which the Office accepted for lumbar strain on December 9, 1988. The Office paid appellant appropriate compensation for temporary total disability.

By decision dated August 15, 1991, the Office terminated appellant's compensation benefits effective August 31, 1991, on the grounds that he refused an offer of suitable work.

By letter dated September 10, 1991, appellant's attorney requested reconsideration.

By decision dated January 22, 1992, the Office set aside the August 15, 1991 decision and restored appellant's temporary total disability compensation retroactive to September 1, 1991.

By decision dated January 7, 1997, the Office terminated appellant's compensation benefits, effective February 2, 1997, on the grounds that he refused an offer of suitable work.

By letter dated February 18, 1997, appellant requested reconsideration. Appellant noted that he had returned to work on modified light duty.

By decision dated May 21, 1997, the Office set aside the January 7, 1997 decision in light of appellant's January 20, 1997 acceptance of the employing establishment's offer of light-duty work.[1]

On March 19, 1997 appellant filed a Form CA-2, notice of recurrence of disability, alleging that he sustained a recurrence of disability as of March 18, 1997 which was caused or aggravated by his October 19, 1988 employment injury. The Office accepted this claim on August 8, 1997, and paid appellant appropriate compensation for total disability. The Office placed appellant on the periodic rolls on October 12, 1997.

By letters dated September 30, 1997, the Office referred appellant to Dr. James G. Manson, a Board-certified orthopedic surgeon, and Dr. Brian S. Mercer, a Board-certified orthopedic surgeon and a specialist in neurology, for a second opinion panel examination.

In a report dated November 5, 1997, after reviewing appellant's medical records, the statement of facts, and stating findings on examination, Drs. Manson and Mercer stated that appellant had residuals of his October 18, 1988 work injury with permanent aggravation of his preexisting lumbosacral degenerative disc/spine disease. They stated:

> "It is the opinion of the panel that [appellant] is presently capable of returning to a part-time light-duty job previously held from [January 20, 1997] to [March 18, 1997] as described in the [s]tatement of [a]ccepted [f]acts. A new job is described as handling 10 pieces of letter sized mail or 4 to 6 inches of flat mail at a time placing each piece of mail in holes at a distribution case. A stool is provided to offer him for standing and sitting as comfort dictates. He also would do administrative duties such as answering the [tele]phone and updating mail route books. The job would involve no lifting of more than 10 pounds ...[,] ... no reaching and working above shoulder level ...[,] ... and no repetitive movements of the feet.... [Appellant] was given an opportunity to alternate from sitting to walking and standing to allow for comfort. This job may be performed on a four-hour per day basis. This judgment is based upon his examination showing no motor weakness and the current examination showing no new objective abnormalities on the left lower extremity to correlate with the increased symptoms reported of the left lower extremity following his work activities of March 18, 1997. The panel does recommend that a repeat lumbosacral magnetic resonance imaging [MRI] scan be performed to assess the left lumbosacral nerve roots more fully."

On January 21, 1998 the employing establishment offered appellant a modified job as a part-time letter carrier, for four hours per day, within the physical restrictions outlined by Drs. Manson and Mercer. The duties of the job included updating route books and postal forms, light sorting of mail, requiring handling approximately 10 pieces of letter-size mail at a time or 4 to 6 inches of flats, with casing restricted to his medical limitations. The job description also stated that a stool would be provided to accommodate sitting requirements and as comfort

[1] The statement of accepted facts dated September 26, 1997 indicates that appellant returned to a modified, light-duty job for four hours per day on January 20, 1997.

dictated, and indicated that other duties would be assigned by a supervisor within his medical limitations.

By letter dated January 22, 1998, the Office advised appellant that a suitable position was available and that he had 30 days to either accept the job or provide a reasonable, acceptable explanation for refusing the offer. The Office stated that if appellant refused the job or failed to report to work within 30 days without reasonable cause, it would terminate his compensation pursuant to 5 U.S.C. § 8106(c)(2).[2]

By letter dated February 5, 1998, the Office requested that appellant's treating physician, Dr. John J. Walsh, a Board-certified orthopedic surgeon, review a copy of the January 21, 1998 job offer and job description, which accompanied the letter, and render his opinion as to whether appellant was able to perform the modified job.

By letter dated February 18, 1998, appellant refused the modified job offer.

In a report dated February 20, 1998, Dr. Walsh stated:

> "[Appellant] has been under my care and treatment for injuries he reported occurr[ing] in 1988. He has had multiple surgical procedures on the left knee and recent symptoms in his right knee related to persistent traumatic patellofemoral arthritis, confirmed by MRI of the knee taken in January of 1997. [Electromyelogram] EMG also done in November of 1997 confirmed the presence of a chronic right S1 radiculopathy.
>
> "He has a loss of function of 15 percent of the whole person and 37.5 percent loss of function of the lower extremity. It is anticipated that he may require eventual definitive surgery in the form of a total joint arthroplasty. At the present time he is too orthopedically young for such a procedure.
>
> "It is my opinion that [appellant] is totally and permanently disabled at the present time and he is unable to perform any gainful employment at this time."

By decision dated March 16, 1998, the Office found that appellant was not entitled to compensation benefits, effective March 29, 1998, on the grounds that he had refused to accept a suitable job offer.

By letter dated March 15, 1999, appellant's attorney requested reconsideration. In support of his claim, appellant submitted: a February 16, 1998 report from Dr. Cynthia H. Kahn, a Board-certified anesthesiologist; an October 14, 1998 report from Dr. Robert Shapiro, a Board-certified orthopedic surgeon; a November 10, 1998 report from Dr. James S. Hewson, a Board-certified orthopedic surgeon; and a February 25, 1999 report from Dr. Joseph F. Arena, a Board-certified neurosurgeon.

[2] 5 U.S.C. § 8106(c)(2).

In her February 16, 1998 report, Dr. Kahn stated:

> "[Appellant] is permanently and totally disabled. His condition is severe and often can progress to even further pain and disability. Given the fact that he attempted a return to work only to experience a severe and long-standing deterioration in his condition must lead to the conclusion that he is unable now and will be unable to return to work in the future. He has complied with all treatment recommendations.... Patients with his diagnosis often require long-term pain management and management and many eventually require an implantable device such as a spinal cord stimulator or intrathecal pump."

In his October 14, 1998 report, Dr. Shapiro diagnosed degenerative post-traumatic arthritis of both knees, and severe and permanent traumatic injuries to his lower back, specifically a herniated lumbar disc on the right at L5-S1 with secondary right lower limb radiculopathy and postoperative arachnoiditis. He stated:

> "[I]t is ... reasonable to conclude that what [appellant] has in his low back, with the findings in myelography and magnetic scanning, represents a condition that will not tolerate very much stress. Consequently, while there has been a difference of opinion among the various examiners as to whether he can work, whether he can work four hours a day, whether he can lift things, whether he can stand or sit still, etc., it appears to me from an objective observation that this is probably an artificial array of work capacities. With the painful situation that can be anticipated following this type of injury and surgery[,] and the development of a permanent radiculopathy and arachnoiditis, added to what he has already had in the right knee dating to his other industrial accidents with continuing disabling symptoms, added again to the previous injury to the other knee with the same type of continuing disabling symptoms, it appears ... unreasonable to think of this man ... being able to perform anything ... adequately ... [or] to consider him employable…. I agree with the examiners who term this man permanently and totally disabled."

In his November 10, 1998 report, Dr. Hewson concluded that appellant had significant osteoarthritis of both knees and advised that his left knee had a previous existing arthritic change. He also submitted a work restriction evaluation report dated November 10, 1998, which outlined appellant's work restrictions based on both his back and knee injuries.

In his February 25, 1999 report, Dr. Arena diagnosed intractable pain in appellant's back and legs, discogenic and post-surgical, with the possibility of new radiculopathy on the left side. He recommended a lumbar myelography, followed by computerized axial tomography (CAT) scanning, to confirm the diagnosis of arachnoiditis and, more importantly, to define the new radiculopathy on the left side which could produce significant possible surgical treatment. Dr. Arena related that appellant was quite compelling in his insistence that any effort to return to work was frustrated by more pain in both legs and in his back. He concluded that given appellant's history, physical examination and nondiagnostic imaging studies, he was considered totally disabled from his usual job.

By decision dated June 14, 1999, the Office denied modification, finding that appellant did not submit medical evidence sufficient to warrant modification of the March 16, 1998 decision. The Office found that the submitted evidence was insufficient to overcome the special weight of medical opinion as represented by Drs. Manson and Mercer, the "referee physicians chosen to resolve a conflict in medical opinion."

The Board finds that the Office failed to meet its burden of proof to terminate appellant's compensation benefits on the grounds that he refused an offer of suitable work.

In the present case, there was disagreement between Drs. Manson and Mercer, the second opinion physicians, and Dr. Walsh, appellant's treating physician, regarding whether appellant remained totally disabled due at least in part to residuals from his October 19, 1988 work injury, and therefore whether he was able to perform the modified job offered by the employing establishment. Drs. Manson and Mercer opined in their November 5, 1997 report that appellant could work a 4-hour day at the modified job he held from January 20 through March 18, 1997, so long as his job duties were adjusted, consistent with his physical restrictions; *e.g.*, no lifting of more than 10 pounds, no reaching and working above the shoulder level, and no repetitive movements of the feet. This report was subsequently forwarded to Dr. Walsh, who opined in his February 20, 1998 report that appellant was still permanently and totally disabled, creating a conflict in the medical evidence. In its March 16, 1998 termination decision, however, the Office erred in ignoring the conflict and finding that the second opinion report of Drs. Manson and Mercer represented the weight of the medical evidence in terminating compensation. When such conflicts in medical opinion arise, 5 U.S.C. § 8123(a) requires the Office to appoint a third or "referee" physician, also known as an "impartial medical examiner."[3] It was therefore incumbent upon the Office in its June 14, 1999 decision to refer the case to a properly selected impartial medical examiner, using the Office procedures, to resolve the existing conflict between Dr. Walsh on the one hand and Drs. Manson and Mercer on the other. The Office erred in its June 14, 1999 decision, in denying modification of the March 16, 1998 termination decision, and erred in stating that Drs. Manson and Mercer were impartial medical examiners who resolved the conflict in medical evidence as the Office referred appellant to this panel for a second opinion panel evaluation.[4] Accordingly, as the Office did not refer the case back for a properly selected impartial medical examiner, there remains an unresolved conflict in medical opinion.[5]

[3] Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part, "(i)f there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." *See Dallas E. Mopps*, 44 ECAB 454 (1993).

[4] Drs. Manson and Mercer were not selected on a rotational basis; thus, their selection did not resolve the conflict between medical opinions in this case. The Office procedure manual contemplates that impartial medical specialists will be selected on a strict rotating basis in order to negate any appearance that preferential treatment exists between a particular physician and the Office. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(a)(3) (March 1994).

[5] *See Shirley L. Steib*, 46 ECAB 309 (1994); *Vernon E. Gaskins*, 39 ECAB 746 (1988).

The decision of the Office of Workers' Compensation Programs dated June 14, 1999 is reversed.

Dated, Washington, DC
January 24, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Valerie D. Evans-Harrell
Alternate Member