U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THOMAS C. DAMATO and DEPARTMENT OF THE ARMY,
U.S. ARMY ARDEC, Picatinny Arsenal, NJ

Docket No. 99-1106; Submitted on the Record;
Issued March 6, 2001

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective March 31, 1996 on the grounds that he refused an offer of suitable work.

On May 14, 1992 appellant, then a 34-year-old heavy mobile equipment mechanic, filed a claim for a traumatic injury to his lower back on that date while bending over and picking up a drain pan. The Office accepted appellant's claim for an acute lumbosacral strain. Concurrent conditions which the Office did not accept as being due to the work injury included degenerative disc disease at L4-5 and S1 nerve root irritation. Appellant stopped work on May 14, 1992 and did not return.

On January 30, 1996 the employing establishment offered appellant a full-time, light-duty position as an unclassified duties/transportation clerk based upon a February 13, 1995 work restriction evaluation (Form OWCP-5) by Dr. Peter A. Feinstein, a Board-certified orthopedic surgeon, who served as an impartial medical examiner in this case. By letter dated February 8, 1996, the Office advised appellant that the position was suitable and informed him of the consequences of refusing suitable work as set forth in 5 U.S.C. § 8106(c). By letters dated February 5 and 21, 1996, appellant indicated that he could not perform the duties of the offered position due to his medical condition.

Since the evidence of file contained an updated magnetic resonance imaging (MRI) report, the Office requested that Dr. Feinstein review his examination results, the work restrictions contained on Form OWCP-5, and the updated MRI report, to determine whether appellant was capable of performing the requirements of the selected position. By letter dated February 16, 1996, he indicated that the report of the MRI scan dated May 2, 1995 was negative for any impingement on nerve roots with evidence of extensive degenerative disc disease from L2 to S1. Dr. Feinstein opined that the results were consistent with his overall impression of appellant at the time of his examination. He reviewed the light-duty position of unclassified

transportation clerk and opined that appellant could work such a position. On March 12, 1996 an Office medical adviser reviewed the medical evidence of record and agreed with Dr. Feinstein that appellant could do the selected position.

By letter dated March 12, 1996, the Office advised appellant that the MRI examination of 1995 was forwarded to Dr. Feinstein for his review and the case was reviewed by the Office medical adviser, who both found the job description to be within appellant's physical capabilities. Accordingly, the Office advised appellant that his reasons for refusing the position were not acceptable, that the position remained open and that he had 15 days within which to accept the position.

By decision dated March 27, 1996, the Office terminated appellant's compensation effective March 31, 1996 on the grounds that appellant was no longer totally disabled and he refused an offer of suitable work. In a decision dated December 1, 1997, an Office hearing representative affirmed the decision. By decision dated May 19, 1998, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was not sufficient to warrant modification of the prior decision. In a decision dated September 15, 1998, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was not sufficient to reopen the case for merit review. By decision dated January 29, 1999, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was not sufficient to warrant modification of the prior decision.

The Board has duly reviewed the case record on appeal and finds that the Office properly terminated appellant's compensation effective March 31, 1996 under 5 U.S.C. § 8106(c) based on his refusal to accept suitable employment.

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 or her is not entitled to compensation.[1] The Office has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects 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 requirements of the position.[2] To justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty position, the Office has the burden of showing that the work offered to and refused or neglected by appellant was suitable.[3]

The determination of whether appellant is capable of performing the offered position is a medical question that must be resolved by medical evidence.[4] The Board finds that the weight of

[1] 5 U.S.C. § 8106(c)(2).

[2] *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

[3] *Glen L. Sinclair*, 36 ECAB 664 (1985).

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

probative medical evidence establishes that the position offered was within appellant's medical restrictions.

In the instant case, the Office properly determined that there was a conflict in medical evidence between the opinions of appellant's attending physicians, Drs. James L. Scales, a Board-certified orthopedic surgeon, James W. Dwyer, a Board-certified orthopedic surgeon and an Office referral physician and Joseph R. Sgarlat, a Board-certified orthopedic surgeon, regarding whether appellant remained totally disabled. The Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Feinstein for an impartial medical examination.

When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[5]

In a report dated February 15, 1995, Dr. Feinstein discussed appellant's employment injury, his history of medical treatment, including treatment and evaluation for back pain and problems in the 1980's and 1990's and the results of objective studies, including the actual MRI film dated December 18, 1992 of the lumbosacral spine. He further listed detailed findings on physical examination and noted appellant's current complaints of problems with his back. Dr. Feinstein stated that, despite appellant's subjective complaints of limited activities, his physical examination was consistent with a very mild residual from lumbosacral spine strain or sprain with no evidence of radiculopathy. This was further confirmed on an objective basis by an MRI scan, which did not show any disc herniation or pathology consistent with nerve root compromise or impingement. He noted that appellant had degenerative disc disease which was long standing in nature and nontraumatic. Dr. Feinstein stated that appellant probably had superimposed a mild sprain or strain on this. He opined that appellant could work at a sedentary job which would allow him to sit and stand and was clerical in nature, provided the intervals were maximum of one-half hour at a time. In a work restriction evaluation (OWCP-5c) dated February 13, 1995, Dr. Feinstein found that appellant could work an 8-hour day with the following limitations: no lifting over 10 pounds, limited kneeling, standing and bending and having the flexibility to sit and stand up to half-hour intervals.

Dr. Feinstein provided a thorough and well-rationalized report based upon an accurate factual and medical history of the case and thus his report is entitled to special weight. The position of an unclassified duties/transportation clerk was within the restrictions provided by Dr. Feinstein. Moreover, the recent MRI examination of 1995 was forwarded to Dr. Feinstein for his review and the case was reviewed by the Office medical adviser, who both found the job description to be within appellant's physical capabilities. Therefore, the weight of the medical evidence, as represented by the February 15, 1995 and February 16, 1996 reports of Dr. Feinstein, establishes that appellant was capable of performing the duties of the light-duty full-time unclassified duties/transportation clerk position offered by the employing establishment.

[5] *Carl Epstein*, 38 ECAB 539 (1987).

The Office further complied with its procedural requirements by advising appellant, in a letter dated February 8, 1996, that the position of unclassified duties transportation clerk was suitable and providing him 30 days to accept the position or provide an explanation for refusing it and of the consequences of refusing suitable work. By letter dated March 12, 1996, the Office advised appellant that his reasons for refusing the position were not valid and gave him an additional 15 days within which to accept the position, which it determined remained available. As appellant did not submit any additional medical evidence in support of his refusal, the Office properly terminated appellant's compensation benefits effective March 31, 1996 on the grounds that suitable work was refused.

Following the termination of his benefits, appellant submitted numerous medical reports documenting the progression of his back condition, including surgical intervention on August 13, 1997 which was not authorized by the Office. In an April 15, 1997 report, Dr. Ian Foster advised that appellant has a very symptomatic L5-S1 radiculopathy on the left and bilateral sacroiliitis and was in disbelief that appellant's claim had only been accepted for a low back strain. Dr. Foster did not address appellant's specific work restrictions; further, the report is devoid of any rationale or detailed physical findings and thus is not probative to the issue at hand, which is whether appellant was capable of performing the offered position of unclassified transportation clerk as of March 31, 1996.

In a May 8, 1997 report, Dr. Otakar R. Hubschmann, a Board-certified neurosurgeon, advised that appellant has discogenic back pain with symptoms consistent with central herniated nucleus pulpous at L4-5 and bilateral left greater than right L5 radiculopathy. He noted that the 1996 MRI was of poor quality and recommended a new MRI. In a June 2, 1997 report, Dr. Hubschmann advised that the new MRI showed disc degeneration at L4-5 with a foraminal stenosis at L4-5. A surgical procedure involving bilateral L4-5 and L5-S1 NAK cage fusion was recommended. Appellant underwent the recommended surgical procedure on August 13, 1997, without authorization from the Office, which revealed a herniated disc at L4-5 and L5-S1. In a September 22, 1997 report, Dr. Hubschmann advised that appellant was not able to perform the role of a transportation clerk prior to his recommended surgery. He stated that appellant's symptoms include severe pain while sitting and in changing position from sitting to standing and vice versa. Dr. Hubschmann advised that, based on the provided job description, appellant was not able to perform light duty. In a February 10, 1998 report, he stated that appellant's herniated lumbar disc, which was confirmed in surgery, resulted in chronic back pain. Dr. Hubschmann opined that this was in all medical probability, the result of an injury he sustained at work on May 14, 1992.

Dr. Hubschmann's reports fail to provide a well-reasoned opinion to support that appellant's inability to work resulted from the 1992 work injury as opposed to his degenerative back condition, which has been extensively documented prior to his 1992 work injury. Moreover, Dr. Hubschmann's opinion that appellant could not perform the selected position is unsupported by medical rationale and, therefore, is insufficient to outweigh the probative value of Dr. Feinstein's impartial medical examination report which specifically advised that appellant have the flexibility to sit and stand up to half-hour intervals.[6] Additionally, although

[6] *Jacquelyn L. Oliver*, 48 ECAB 232 (1996) (medical reports unsupported by rationale are of diminished probative value).

Dr. Hubschmann generally opined that appellant's herniated lumbar disc was related to the 1992 work injury, his opinion is devoid of any explanation as to how the herniated disc originated and its relationship to the 1992 work injury. Dr. Hubschmann's opinion is insufficient to establish appellant's disability from the offered position. Furthermore, there is no medical evidence in file to support that the disc herniation which the 1997 surgical procedure revealed is related to the 1992 work injury.

Appellant contends that the termination of his workers' compensation benefits should have been immediately overturned once the Office received the neurosurgeons findings that he had a herniated disc. Although the 1997 surgery revealed a herniated disc, there was no medical evidence definitely supporting that the herniated disc was causally related to the 1992 work injury and not due to appellant's preexisting degenerative back condition. As previously noted, Dr. Hubschmann's opinion is insufficient to overcome the report of Dr. Feinstein who found that appellant was capable of performing the offered position of unclassified transportation clerk as of March 31, 1996. Appellant further argues that since he was operated on two levels, one to remove the herniated disc and two to remove the degenerated disc, the herniated disc is not due to his preexisting degenerative condition. Although appellant may have properly recounted what his physician explained to him, this does not overcome the fact that the record is devoid of any well-rationalized medical opinion causally relating the herniated disc to appellant's 1992 work injury and that it rendered appellant totally disabled from performing the offered position as of March 31, 1996. Appellant's contention that the Office's physicians (*i.e.*, the second opinion and impartial medical specialist) opinions were fraudulent as they did not interpret the MRI films as showing a herniated disc, is unfounded. A physician's opinion is one based on a medical probability given the objective and subjective evidence before them. There is no showing that the physicians were doing anything other than interpreting the medical evidence before them.

Appellant also argues that the Office abused its power in terminating his benefits. Contrary to appellant's contention that the Office erred by not sending him a copy of the Statement of Accepted Facts (SOAF), the Office is not required to send out such a copy unless the appellant specifically requests it. Although appellant contends that the results of the MRI films should have been listed, this is not required data for the SOAF. Moreover, objective tests, such as an MRI, should be reviewed by each physician in order for them to render their opinion on an employee's condition. In this case, Dr. Feinstein, the impartial medical examiner, rendered his opinion on appellant's ability to work in the selected position based on the current information available at the time. Although appellant requests that his SOAF be updated to reflect that a herniated disc was excised on August 13, 1997, this request has no bearing on the issue of whether appellant's denial of benefits due to the rejection of suitable work as the condition of herniated disc has not been accepted as causally related to the 1992 work injury.

Appellant has also submitted articles on lumbar disc disease. These submissions do not contain a medical opinion concerning any causal relationship between appellant's claimed conditions and his work injury of May 14, 1992. The Board has held that newspaper clippings, medical texts and excerpts from publications are of no evidentiary value in establishing the causal relationship between a claimed condition and an employee's federal employment as such materials are of general application and are not determinative of whether the specific condition

claimed is related to the particular employment factors alleged by the employee.[7] Therefore, this evidence does not pertain to the relevant issue of the case, *i.e.*, whether appellant has properly refused an offer of suitable employment.

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).

The decisions of the Office of Workers' Compensation Programs dated January 29, 1999, September 15 and May 19, 1998 are hereby affirmed.

Dated, Washington, DC
March 6, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

[7] *William C. Bush*, 40 ECAB 1064, 1075 (1989).