U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANDRE L. BURKE and U.S. POSTAL SERVICE,
WEST TRENTON POST OFFICE, Trenton, NJ

Docket No. 00-534; Submitted on the Record;
Issued October 11, 2001

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant refused suitable work.

The Office accepted that on August 7, 1995 appellant, then a 24-year-old letter carrier, sustained L4–5 and L5-S1 disc herniations when he lifted a box. He was on limited duty through September 1995, then returned to regular duty. Appellant received intermittent wage-loss compensation through April 16, 1998.[1]

In an August 12, 1997 report, Dr. Frederick McEliece, an attending Board-certified neurosurgeon, opined that the persistence of appellant's symptoms despite conservative treatment and the nature of his "obvious anatomic lesions" required L4-5 decompression and discectomy and L5-S1 decompression. Dr. McEliece performed these procedures on September 26, 1997. Appellant underwent a physical therapy and work hardening program beginning in January 1998.

In a January 15, 1998 report, Dr. McEliece noted that appellant's symptoms had improved "from his preoperative state but residual complaint as far as his back is concerned with stiffness after sitting and pain after increased level of activity, some persistent paresthesias in the lateral foot and calf and occasional twinges of pain several times a day for 5 to 20 minutes at a time, especially noted with increased level of activity." He restricted appellant "to half days" at work "at least on an opening basis," and limited "bending, lifting, stooping, twisting, standing and sitting to relatively brief periods so he has the opportunity to change position. He should certainly not be involved in chronic lifting but should be able to lift at least 10 pounds 3 or 4 times an hour for several hours a day."

[1] The Office also accepted a January 25, 1997 recurrence of disability.

In a January 15, 1998 work capacity evaluation, Dr. McEliece limited appellant to lifting 10 pounds up to 4 times an hour, up to 2 hours a day. "No frequent bends -- lifts -- stoop -- twist -- sit." He noted that appellant could work only four hours a day. Dr. McEliece opined that the restrictions would remain from three to six months, with maximum medical improvement three to nine months from September 1997.

On February 2, 1998 the employing establishment offered appellant a limited-duty job as a modified clerk-carrier, with a 2:00 to 6:00 p.m. shift, Sundays and "rotating" days off. Duties of the position included: "CFS mail, NIXI mail, answer telephones, clear carrier of accountables, case letter and flat mail." Sitting and standing were required intermittently up to 2 hours per day, lifting no more than 10 pound up to 4 times an hour for 2 hours per day, intermittent stooping and no bending or twisting.

In a February 13, 1998 letter, received by the employing establishment that day, appellant "den[ied] the mail casing part of the job description," because he could not "bend and lift the trays of mail to case [it]," and "the way that mail cases are set up, there will be too much twisting of my back," which is "not suitable for any twisting at all." Appellant also noted that he preferred a different work schedule as he and his wife worked different shifts to care for their children at home.

In a February 25, 1998 letter, the Office advised appellant that the offered position was within his medical restrictions and commuting area and had been determined to be suitable work. The Office also advised appellant of the penalties of the Federal Employees' Compensation Act[2] for refusing suitable work.

In a March 4, 1998 letter, appellant asserted that the offered position was not suitable work because it was not within Dr. McEliece's restrictions. He submitted copies of medical reports previously of record.

In a March 31, 1998 letter, the Office found that the evidence appellant submitted was insufficient to change its determination that the job offer was within the restrictions set forth by Dr. McEliece. The Office reminded appellant of the penalty provisions for refusing suitable work and afforded him 15 days in which to accept employment or his benefits would be terminated.

In a March 31, 1998 letter, Dr. McEliece noted that appellant described "the work that was offered to him, the majority of which he felt he could perform although one aspect of the job," casing mail, "according to [appellant's] description," required "frequent bending, lifting, stooping, twisting and the like. This, from his description, is a portion of his job that could not be performed and was the reason" for appellant refusing the position. Dr. McEliece recommended continued physical therapy and a work hardening program.

[2] 5 U.S.C. §§ 8101-8193; § 8106(c).

By decision dated April 16, 1998, the Office terminated appellant's wage-loss compensation benefits effective that day on the grounds that he had refused an offer of suitable work.

Appellant disagreed with this decision and in an April 24, 1998 letter requested an oral hearing, which was held on May 27, 1999. Appellant testified that he could not lift trays of mail, weighing an average of 20 to 30 pounds, to case them. He also alleged that he could not bend, stoop and twist in the process of casing mail. Appellant asserted that Dr. McEliece's March 31, 1998 letter clearly stated that casing mail was not within appellant's medical restrictions.

He submitted additional evidence, including Dr. McEliece's March 31, 1998 prescription for additional physical therapy and therapy notes from April to June 1998.

In a June 11, 1998 note, Dr. McEliece stated that appellant had "progressive improvement … having reached a plateau that I think is at once acceptable but certainly not complete in comparison with his former state."

In an October 8, 1998 note, Dr. McEliece stated that appellant had returned to work "with nominal restrictions," but was still casing mail, "which involved physical activities of bending, lifting, stooping, twisting and the like which cause aggravation of the problem and if continued are likely to result in his inability to work." He recommended that the previous restrictions be followed, including "no bending, twisting, stooping, or squatting," and no standing for more than two hours with the ability to change positions.

On June 22, 1999 Dr. McEliece stated that appellant had no symptoms or restrictions and could "work full duty at this time."

By decision dated August 4, 1999, the Office hearing representative affirmed the Office's April 16, 1998 decision, finding that the Office properly terminated appellant's wage-loss compensation on the grounds that he refused an offer of suitable work. The hearing representative found the job offer "consistent with the physical restrictions advised by Dr. McEliece." The hearing representative found that the job offer "clearly stipulated that the physical demands would require no lifting over 10 pounds intermittent standing and stooping and no bending or twisting." Dr. McEliece advised no frequent bending, lifting, stooping or twisting, but did not prohibit these activities.

The Board finds that the Office properly terminated appellant's compensation benefits because he refused an offer of suitable work.

Section 8106(c) of the Act provides, in pertinent part, that a partially disabled employee who refuses to seek work, or refuses or neglects to work after suitable work is offered to, procured by, or secured for him; is not entitled to compensation.[3]

The threshold issue is whether the offered position was in fact suitable work. Once the Office accepts a claim, it has the burden of justifying termination of compensation under

[3] 5 U.S.C. § 8106(c).

5 U.S.C. § 8106(c)(2) for a claimant's refusal to accept suitable work.[4] To establish that appellant has refused or abandoned suitable work, the Office must first substantiate that the position offered was consistent with appellant's physical limitations, provide notice to the claimant of the penalty provision under section 8106(c)(2) and give the claimant a reasonable period to accept or reject the position or submit evidence or reasons why the position is not suitable and determine whether the reasons for declining or refusing the position were justified.[5]

The record demonstrates that the modified clerk-carrier position offered appellant on February 2, 1998 was within the work restrictions set forth by Dr. McEliece, appellant's attending Board-certified neurosurgeon. He restricted appellant to working 4 hours a day, with limited bending, stooping and twisting, lifting restricted to fewer than 10 pounds no more than 3 to 4 times an hour, frequent changes of position and rest periods. The February 2, 1998 limited-duty job offer repeated these restrictions and enumerated the duties, including casing mail, found to be within those restrictions.

In declining the offered position, appellant specifically objected to the requirement of casing mail because it would require twisting, bending and lifting in excess of his restrictions. However, appellant submitted insufficient medical evidence to establish that the offered position was not within the work limitations set forth by Dr. McEliece.

On January 15, 1998, prior to the February 2, 1998 job offer, Dr. McEliece limited appellant to working four hours a day with "[n]o frequent bends -- lifts -- stoop -- twist -- sit," and infrequent lifting up to 10 pounds. He reviewed the job offer on March 31, 1998, noting that appellant objected to casing mail because, "according to [appellant's] description," it required "frequent bending, lifting, stooping, twisting and the like. … [F]rom [appellant's] description," casing mail "is a portion of his job that could not be performed…."

Thus, Dr. McEliece noted appellant's objections to casing mail, but did not offer his own medical opinion explaining how and why appellant was medically unable to perform the job duties described in the February 2, 1998 offer. He did not raise any specific objection to the offered position, or assert that any aspect of appellant's medical condition would prevent him from performing those duties. Therefore, Dr. McEliece's report does not establish that appellant was medically incapable of performing the duties of the offered position.

Consequently, the Office properly invoked the penalty provision of section 8106(c) of the Act in terminating appellant's wage-loss compensation benefits effective April 16, 1998, on the grounds that the limited-duty job offer made to him on February 2, 1998 was within his medical restrictions and was, therefore, properly determined to be suitable work.

The August 4, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

[4] *Shirley B. Livingston*, 42 ECAB 855 (1991).

[5] *John E. Lemker*, 45 ECAB 258 (1993); *Mary A. Howard*, 45 ECAB 646 (1994); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

Dated, Washington, DC
October 11, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member