U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRANK PAOLA and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Providence, RI

Docket No. 01-827; Submitted on the Record;
Issued July 22, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's wage compensation based on his refusal to accept suitable work.

On July 15, 1986 appellant, then a 54-year-old electronics mechanic, injured his left arm in the performance of duty while installing a wall-mounted television set. The Office accepted the claim for a left rotator cuff tear and authorized surgical repair with acromioplasty performed on October 24, 1986. He was off work from October 24, 1986 to February 11, 1987 and returned to light duty. After approximately one year, the light-duty position was discontinued by the employing establishment and appellant remained off work under September 1991. He then returned to a light-duty job as program assistant, gradually increasing from four to eight hours per week.

On August 24, 1994 appellant filed a notice of occupational disease alleging that he suffered from a repetitive hand condition caused by factors of his employment. The Office accepted the claim for right carpal tunnel syndrome and authorized a surgical release performed on May 23, 1995. Appellant next underwent a flexor tenolysis and tenosynovectomy and release of A1 pulley or the right third and fourth fingers and retinacular cyst removal on the right hand were performed on September 5, 1996. He did not return to work after the September 5, 1996 surgery and began receiving compensation on the periodic rolls.[1]

Appellant's two claims were doubled and his left and right arm conditions are now referenced under case number 010322914.

In a September 25, 1998 report, Dr. Akelman noted that appellant was two months post surgery of the right hand to excise recurrent palmar Dupuytren's contracture of his fourth finger

[1] He has undergone right Dupytren's release of palm and ring finger on October 30, 1997 and excision of right recurrent Dupuytren's contracture on July 28, 1998.

trigger. He opined that appellant could return to modified light-duty work with arm splint and restrictions including no lifting over 20 pounds and no repetitive work with his right arm.

Dr. Akelman also prepared a work capacity evaluation form on September 25, 1998 releasing appellant to work for four hours per day with the following restrictions: reaching only two to four hours; no reaching above shoulder or twisting; pushing, pulling and lifting limited to four hours. He further imposed a 20-pound limit lifting restriction and advised that appellant should take two 30-minute breaks per day.

Based on the OWCP-5 work restriction form, the employing establishment offered appellant a light-duty job as telephone operator for four hours per day. The job description noted light lifting under two pounds; bending, squatting, climbing, kneeling and twisting was under one hour per day and there was to be no reaching above the shoulder required in the position.

In a letter dated April 6, 1999 letter, the Office advised appellant that the telephone operator position was deemed to be suitable work. The Office informed appellant that he had 30 days to either accept the job offer or provide reasons for refusing the position or else he risked termination of his compensation.

On April 19, 1999 Dr. Akelman advised the Office that it was his opinion that the job of telephone operator required repetitive work and would not be compatible with appellant's work restrictions.

After further discussion of the nature of the job offer with the employing establishment, the Office sent an April 26, 1999 letter to Dr. Akelman requesting an explanation for his opinion that the job was repetitive. Dr. Akelman was advised that it did not appear that he had a clear picture of the actual job. The letter noted that, for example, the claimant would be using a headset rather than a standard telephone receiver, among other modifications. Dr. Akelman was provided with the name and telephone number of a human resource specialist, who had worked on the job offer and was advised to contact this person if he had any questions. In addition, Dr. Akelman was asked to review the job offer, which was attached, to explain which duties did not fall within his restrictions and to make changes to meet appellant's restrictions. The letter stated that if the Office did not receive a response from Dr. Akelman within two weeks, it would be assumed that he considered the job to be suitable.

In two letters dated May 6, 1999, Dr. Akelman stated, "Unless there is work that is only able to be done by one hand ... the job description ... of telephone operator is clearly repetitive and requires both hands and wrists. In my [September 25, 1998 report][,] I limited the amount of repetitive motion that this patient could do with his hands and wrists." He also reiterated that the job of a telephone operator was work he felt to be "repetitive in nature." Dr. Akelman also indicated that appellant was experiencing numbness and pain in his left hand and indicated that appellant's diagnosis was left thumb carpometacarpal joint arthrosis and left shoulder impingement as well as the diagnosis of right third and fourth finger stenosing tenosynovitis and right palmar Dupuytren's contracture. He requested authorization to perform surgery on appellant's left extremity.

On May 31, 1999 the Office contacted the employing establishment once again requesting a written description of exactly what the job of telephone operator required. In response, the employing establishment provided a job description stating under "Physical Demands" that the "Position involves various periods of sitting and standing. This is a light-duty position and does not require any lifting of more than three to six pounds. Incumbent would wear a headset and one finger of one hand to press a button to answer the [tele]phone."

In a June 29, 1999 report, Dr. Andrew Green, a Board-certified orthopedist, noted that appellant had a long history of left shoulder problems following a work injury. He reported physical findings and diagnosed left shoulder impingement syndrome, status post rotator cuff repair, left acromiclavicular joint arthritis and left biceps rupture.

The record indicates that appellant's treating physician submitted various requests for authorization of surgery to include exploration of the left rotator cuff and basal joint arthroplasty of his left thumb.

The Office referred appellant for a second opinion evaluation with Dr. Vaughn Gooding, a Board-certified orthopedic surgeon and hand specialist, on November 11, 1999. In a report dated November 16, 1999, Dr. Gooding reviewed a copy of the medical record, a statement of accepted facts and a copy of the job description. He stated:

> "I do not think this patient is physically capable of performing the duties of his original job largely because of his limitation of left shoulder function. I agree with Dr. Akelman that he should not be involved in the kind of repetitive activities such as typing which was involved in his previous light-duty job as a program assistant. I believe the patient is capable of performing the light-duty job described as telephone operator. This is to involve sitting or standing for four hours a day. It does not require lifting more than three to six pounds and would involve using one finger of either hand to press a button and answer the [tele]phone. I believe these activities are within his capabilities and that he could perform this job without undue risk to his health."

Dr. Gooding concluded that left thumb carpal metacarpal arthroplasty might relieve appellant's left-hand symptoms but he could not causally relate appellant's left-hand condition to work factors.[2]

Based on Dr. Gooding's report, the employing establishment again offered the light-duty telephone operator position to the claimant. Under physical demands it was noted, "Position involves various periods of sitting and standing. This is a light-duty position and does not require any lifting of more than one to two pounds. Incumbent would wear a headset and one finger of one hand to press a button to answer the [tele]phone." This is identical to the description provided to Dr. Gooding, except that the weight limitation was changed from three to six pounds to one to two pounds.

[2] Because Dr. Akelman had requested authorization to perform surgery on appellant's left thumb, the Office requested that Dr. Gooding provide his opinion on this issue in addition to the work capacity issue.

On December 29, 1999 the Office advised appellant that the offered position was deemed suitable work and that he had 30 days to either accept the position or provide reasons for refusing the job or else he risked termination of his compensation.

In a January 22, 2000 letter, appellant's counsel expressed concern with Dr. Gooding's opinion. He noted that Dr. Gooding had found that appellant's left thumb condition was not work related. Appellant questioned whether the physician had been provided with a copy of all of appellant's medical records.

In a January 20, 2000 letter, the Office advised appellant that Dr. Gooding had been provided with all of the medical records, including those sent with his letter. Therefore, there was no reason to request Dr. Gooding to reconsider his opinion.

On February 11, 2000 the Office received a telephone call from the employing establishment advising that appellant had gone to the work site to see the activities and workstation of a telephone operator and that he would like to speak to his claims examiner. The claims examiner spoke to the claimant, who stated that he felt the job was repetitive and that it was not described properly in the job description. The claimant stated that he would have to use both arms and hands and that he would have to use a keyboard. It was decided that the rehabilitation counselor would accompany him to the job site and provide the Office with an evaluation addressing whether the duties fall within the claimant's medical restrictions and whether it had been accurately described by the employing establishment. Appellant was advised that the 30-day limit for accepting the position or providing his reasons for refusal were to be extended until after the vocational rehabilitation counselor prepared the work site evaluation.

Dr. Akelman submitted a letter dated February 4, 2000, stating:

> "The patient's ability to work and work restrictions are unchanged since my letter of May 1999. Please note that the patient has shown me the job description that Dr. Gooding was given to make his opinion for you. It is my opinion based on a reasonable degree of medical certainty that Dr. Gooding's agreement to the telephone operator job was based on a job description that was not complete. The job description did not mention that during this type of work that the patient would have to operate a switchboard and only mentions using a finger to push a button. This is clearly different that (sic) the report that was sent to [appellant] dated [April 6, 1999] that I reviewed when I objected to whether he could return to this job."

On February 18, 2000 appellant and the vocational rehabilitation counselor visited the work site where they met with the human resources specialist and observed the telephone operators performing the job. The vocational rehabilitation counselor reported that "From 2:00 p.m. to 4:30 p.m., [appellant] would assist two other operators, the volume of calls would be a total of 30 to 40 calls (Tuesday, Wednesday, Thursday) during that time period to be split between the three operators ... the volume of calls may be somewhat higher on Mondays and Fridays. From 4:30 p.m. to 6:00 p.m., [appellant] would assist the night operator with an average of 7 to 10 calls total for the two of them during that time frame." The counselor's evaluation

noted that "the tasks of answering incoming calls and routing to the appropriate extension can be performed with one finger. [Appellant] was wearing a splint or a brace on his right hand and would still be able to answer the telephone and key in the correct extension with one finger…. Each operator station has a computer keyboard but the position offered [appellant] would not involve use of this."

The vocational rehabilitation counselor stated further, "Regarding other physical demands, there is essentially no lifting involved other than lifting log books. As such, the description of the job not requiring any lifting of more than one to two [pounds] appears to be accurate. It is also possible for him to operate the telephone system while in a standing position. This would enable him to alternate sitting and standing positions while on the job. The employer has offered to obtain a cushion for the [injured worker's] wrists at the station."

In a March 8, 2000 letter, the Office advised appellant that his reasons for refusing the job offer were not justified in view of the rehabilitation counselor's work site evaluation. He was also informed that he had 15 days to accept the job and that further reasons for refusal would not be considered during the 15-day period.

Appellant did not respond to the March 8, 2000 letter. The record indicates that appellant decided to take his retirement benefits, beginning in Apri1 2000.

In a decision dated April 4, 2000, the Office terminated appellant's compensation based on his failure to accept an offer of suitable work.

In a report dated June 9, 2000, Dr. Akelman noted that appellant continued to complain of right shoulder pain and pain in the right hand related to his right shoulder impingement and right carpal tunnel syndrome. He indicated that appellant's work restrictions remained unchanged.

Appellant requested a hearing, which was held on September 26, 2000.

In a decision dated December 20, 2000, an Office hearing representative affirmed the Office's September 26, 2000 decision.

The Board finds that the Office properly terminated appellant's compensation 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 employees' disability has ceased or lessened before it may terminate or modify compensation benefits.[3] Section 8106(c)(2) of the Federal Employees' Compensation Act[4] provides that the Office may terminate 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.[5] The Board has recognized

[3] *Karen L. Mayewski*, 45 ECAB 219 (1993); *Betty F. Wade*, 37 ECAB 556 (1986).

[4] 5 U.S.C. § 8106(c)(2); *see also* 20 C.F.R. § 10.516 (1999).

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

that section 8106(c) is a penalty provision that must be narrowly construed.[6] 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.[7]

Section 8106's implementing regulation[8] 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.[9]

In this case, the Office has accepted that appellant suffers from bilateral hand and shoulder conditions due to work injuries. Appellant's treating physician opined that appellant could return to work so long as he did not perform repetitive work with his extremities. The employing establishment offered appellant a job as a telephone operator, which the Office deemed to be suitable work. Appellant, however, refused the job offer based on various statements from Dr. Akelman that stated his opinion that a telephone operator position must require repetitive motion of the hands in answering the switchboard. The Office sought clarification from the employing establishment as to the exact physical requirements of the offered job. A rehabilitation counselor specifically visited the work site and determined that it was basically sedentary in nature, that appellant would wear a headset and would only have to use one finger to push buttons to answer telephone calls. An Office referral physician confirmed that appellant could perform the job of a telephone operator as specified in the more detailed job description prepared at the request of the Office. Dr. Akelman also indicated that his original opinion that appellant could not perform the job of a telephone operator was based on the earliest job description. He has not offered an opinion on appellant's ability to perform the job of a telephone operator after the rehabilitation counselor visited the work site and prepared the updated job description. Because the report from the Office referral physician is a reasoned medical report and concludes that appellant can perform the duties of a telephone operator, the Office correctly determined that the job offer constituted suitable work.

The Board also finds that Office procedures were properly followed in notifying appellant of the penalties for refusing an offer of suitable work. The Office properly issued a suitability determination letter advising appellant that he had 30 days to accept the job or provide reasons for refusing the offer of suitable work or else he risked termination of his compensation. When appellant refused to accept the job offer, the Office provided appellant an additional 15 days to accept the position prior to terminating his benefits. Since the requisite procedures were followed by the Office, the Board concludes that the Office met its burden of proof in terminating appellant's compensation on the grounds that he refused an offer of suitable work.

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

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

[8] 20 C.F.R. § 10.516 (1999).

[9] *Id*.

The decision of the Office of Workers' Compensation Programs dated December 20, 2000 is hereby affirmed.

Dated, Washington, DC
July 22, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member