U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES A. SERINO and U.S. POSTAL SERVICE,
POST OFFICE, Lynn, MA

Docket No. 01-608; Submitted on the Record;
Issued June 24, 2002

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs abused its discretion in terminating appellant's compensation under 5 U.S.C. § 8106(c) based on his refusal to accept suitable employment as offered by the employing establishment.

This case has been before the Board previously. By decision dated October 6, 2000, the Board found that the Office erred when it rejected appellant's argument that his injury prevented him from traveling from his home to the proposed place of employment as this was a medical question and his physician, Dr. John Walsh, a Board-certified orthopedic surgeon, opined that prolonged driving would aggravate his symptoms. The Board concluded that, as appellant raised an error of law, the Office improperly denied his request for reconsideration.[1] The law and the facts as set forth in the previous Board decision are incorporated herein by reference.

Subsequent to the Board's October 6, 2000 decision, in a decision dated November 30, 2000, the Office denied modification of its May 9, 1997 decision, in which an Office hearing representative affirmed a November 1, 1996 decision terminating appellant's wage-loss compensation on the grounds that he refused an offer of suitable work. The instant appeal follows.

The Board finds that the Office did not meet its burden of proof in terminating appellant's wage-loss compensation.

Section 8106(c)(2) of the Federal Employees' Compensation Act[2] provides in pertinent part, "A partially disabled employee who ... refuses or neglects to work after suitable work is offered ... is not entitled to compensation."[3] To prevail under this provision, the Office must

[1] Docket No. 99-506.

[2] 5 U.S.C. §§ 8101-8193.

[3] 5 U.S.C. § 8106(c)(2).

show that the work offered was suitable and must inform the employee of the consequences of refusal to accept such employment.[4] An employee who refuses or neglects to work after suitable work has been offered has the burden of showing that such refusal to work was justified.[5] The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.[6]

The implementing regulation 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]

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.[8] In assessing medical evidence, the number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for and the thoroughness of physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[9]

In the present case, the Board finds that a conflict remains regarding whether appellant has the physical capability of commuting to work. The record reflects that, after finding that a conflict existed between appellant's treating Board-certified orthopedic surgeon, Dr. Walsh and Dr. John Duff, who had provided a second opinion evaluation for the Office on November 17, 1994, the Office referred appellant to Dr. James S. Hewson, a Board-certified orthopedic surgeon.

By report dated December 12, 1994, Dr. Hewson noted the history of injury to appellant's left knee in 1987 with multiple surgical procedures and appellant's complaints of pain. He diagnosed patellar femoral arthritis, status post arthroscopies and arthrotomies of the left knee and advised that appellant had a residual disability due to a combination of previous injuries and the 1987 employment injury as well as a 1991 injury in which his daughter kicked his left knee. Dr. Hewson concluded that appellant was precluded from working as a letter carrier but could perform sedentary work eight hours a day which did not involve squatting, deep knee bending, stair climbing or forced walking or standing.

---

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

[5] *See Michael I. Schaffer*, 46 ECAB 845 (1995).

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

[7] 20 C.F.R. § 10.517(a) (1999).

[8] *See Marilyn D. Polk*, 44 ECAB 673 (1993).

[9] *See Connie Johns*, 44 ECAB 560 (1993).

On September 15, 1995 the employing establishment offered appellant a limited-duty position based on the restrictions provided by Dr. Hewson. At that time, appellant submitted a treatment note dated September 24, 1996, in which Dr. Walsh stated:

> "[Appellant] reevaluated today. Continues symptomatic referable to his left knee when he has to use the knee for repetitive or sustained use. Prolonged driving aggravates his symptoms and he notices episodes of swelling when the knee is aggravated. It is under control with activity modification and [left blank]. Continue conservative management program. In my opinion he remains disabled. Reevaluate in the future."

In a report dated October 3, 1996, Dr. Walsh stated:[10]

> "It is my opinion that [appellant] is unable to drive long distances at this time. When evaluated recently on September 24, 1996 he was still symptomatic referable to his left knee when he has to use the knee for repetitive or sustained use. He has also noticed swelling in his knee while driving. At this time [appellant] is unable to drive any long distances."

In situations where there are 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 specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[11] The record in the instant case indicates that appellant's home is approximately 30 miles from the offered job location. Dr. Hewson, the impartial medical specialist, did not note any restrictions regarding appellant's ability to drive to the offered position. Appellant's treating physician, Dr. Walsh, advised that appellant could not drive "long distances."

Office procedures provide that an acceptable reason for refusing a job offer is that the medical evidence establishes that the employee is unable to travel to the job because of residuals of the employment-related injury.[12] Furthermore, the Board has held that the Office should consider appellant's ability to commute to the duty station of an offered position.[13] The Board, therefore, finds that, as a conflict remained regarding this aspect of the case, the Office did not meets its burden of proof to terminate appellant's compensation under section 8106(d).

[10] Dr. Walsh also provided an April 8, 1997 treatment note in which he merely advised that appellant was unchanged orthopedically.

[11] *See Kathryn Haggerty*, 45 ECAB 383 (1994); *Edward E. Wright*, 43 ECAB 702 (1992).

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(5) (July 1996).

[13] *Donna M. Stroud*, 51 ECAB ___ (Docket No. 98-476, issued January 5, 2000).

The decision of the Office of Workers' Compensation Programs dated November 30, 2000 is hereby reversed.

Dated, Washington, DC
June 24, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member