U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM J. TREBS and DEPARTMENT OF AGRICULTURE, FOREST SERVICE, Marcell, MN

Docket No. 02-1213; Submitted on the Record;
Issued November 20, 2002

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation because he refused an offer of suitable work pursuant to section 8106 of the Federal Employees' Compensation Act.[1]

Appellant, then a 29-year-old forester, first filed a traumatic injury claim on December 5, 1972, when he slid down some icy stairs and landed on a concrete floor. He had surgery to repair a herniated disc at L4-5 in January 1973. Appellant's next claim filed on August 16, 1977 was accepted for a low back strain.

Appellant missed work intermittently and on December 22, 1982 filed a recurrence of disability claim, noting several occasions of missing work over the past five years. On January 31, 1983 the Office accepted appellant's "continued back problems" as causally related to the 1972 injury.

On July 9, 1991 appellant stopped work and had back surgery on November 25, 1992. In January 1993 he had rotator cuff surgery for a nonwork injury. On August 1, 1994 the employing establishment asked the Office to refer appellant to an occupational therapist to see what kind of work he could do. The letter noted that appellant had flown to England in 1993, which entailed extended sitting, yet he had told the employing establishment a month earlier that he could not sit for more than five minutes at a time.[2]

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[1] 5 U.S.C. §§ 8101-8193.

[2] The record contains later instances of similar vacations involving prolonged sitting time, which appellant apparently took without difficulty. An April 25, 1997 letter described a camping trip in July 1993 on which appellant was observed carrying backpacks, gas cans, paddles and other gear during a 350-mile canoe and hiking vacation over 5 days.

By letter dated October 1997, the Office asked appellant's treating physician, Dr. Richard E. Freeman, Board certified in neurosurgery, to provide a current medical report on appellant's condition. In his January 13, 1998 report, he reiterated previous findings regarding appellant's chronic condition and suggested updated functional testing.

A magnetic resonance imaging (MRI) scan on July 16, 1998 found no significant changes from the 1994 scan. Dr. Freeman stated on July 6, 1998 that he "suspected" appellant would be able to perform the duties of a modified forestry position.

On July 31, 1998 he concluded that appellant could work in a sedentary to light capacity, with restrictions -- sitting for two hours of every eight, standing one hour during a workday and walking up to four hours, with freedom to change positions as necessary. No forward bending while standing and only rarely while sitting. Weight limit of 10 pounds in both hands. Dr. Freeman added that his clinical assessment of appellant had not changed since November 1997.

By letter dated August 17, 1998, the employing establishment offered appellant a modified-duty job in line with the restrictions imposed by Dr. Freeman. Appellant objected, but Dr. Freeman reviewed the job offer and stated on September 28, 1998 that appellant "should be able to perform the duties suggested." He recommended that appellant start at four hours a day for three weeks and work up to full time, by increasing his time by an hour a week. The employing establishment revised the work schedule, included a stand-up desk, and reissued the job offer to appellant on November 10, 1998.[3]

The Office notified appellant that the position was found to be suitable, provided him 30 days to accept the job or explain his refusal, and provided the consequences of refusing suitable work. Appellant stated that he would neither accept nor reject the offered position, expressed his questions and concerns about the job and the law, and added that perhaps he should have another functional capacity evaluation.

The Office again asked Dr. Freeman to review the job offer, including the commuting time. Dr. Freeman reiterated on February 2, 1999 that appellant "could perform the work in question." The employing establishment again offered appellant the job and the Office issued another 30-day letter on March 4, 1999.

On March 9, 1999 the rehabilitation counselor reported that it was obvious that appellant was resisting a return to work.[4] On April 5, 1999 appellant saw Dr. Freeman again and complained that he would have to drive to work one hour each way and that would use up his allotted two-hour sitting per day. Dr. Freeman concluded: "Based on the chronicity of his

[3] The position consisted of supporting natural resource planning for the White Mountain National Forest through publishing documents, monitoring projects and budget spending, and assisting with analysis and policy.

[4] Subsequently, the rehabilitation counselor stated on April 30, 2001 that the employing establishment was "frustrated" at appellant's resistance to a return to work because he had been reported as canoeing in a lake, hunting and dragging a deer out of the woods, and injuring his foot after he fell off a roof.

problem and his lack of ability to work since 1991, it appears obvious that he is totally disabled from employment as a forester."

The Office informed the employing establishment that suitability was in abeyance because of Dr. Freeman's report. The Office developed a statement of accepted facts and referred appellant to Dr. Daniel Schmelka, a Board-certified neuro-surgeon, for a second opinion. On February 25, 2000 he diagnosed arachnoiditis and chronic pain syndrome but found appellant free of any hard neurological signs in his back. Dr. Schmelka reported no neurologic deficits or reflex changes and intact muscle power. He added that appellant could not return to his job as a forester but was capable of sedentary to light work.

Dr. Freeman referred appellant to Dr. Charles V. Burton, Board-certified in neurosurgery. He examined appellant on January 21, 2000 and diagnosed underlying congenital juvenile discogenic disease, noting that appellant's 23-year-old son had the same ailment. Dr. Burton concluded that appellant was "neurologically intact" and that his pain problem did not indicate that adhesive arachnoiditis was his primary problem. He found appellant capable of working in a light-duty capacity.

Based on a subsequent report from Dr. Schmelka, the employing establishment again offered appellant the light-duty position, which the Office found to be suitable in a letter dated July 25, 2000. Subsequently, the Office authorized a functional capacity evaluation recommended by Dr. Freeman.

Dr. Freeman reviewed the results of the functional capacity evaluation done on September 7, 2000 and concluded that appellant would have difficulty complying with the demands of the offered position because of his restrictions on sitting, standing and walking. Dr. Freeman stated that the job was "not approved" on a medical basis and that driving one and a half hours to and from work was contraindicated.

On October 16, 2000 the Office asked Dr. Freeman to elaborate on how the September 7, 2000 evaluation affected appellant's ability to do the job and to explain, with medical rationale, his concern about appellant driving to work. Dr. Freeman responded on October 30, 2000 that appellant should be able to perform the duties of the offered position. He would have some difficulty in driving to work but multiple stops on the way could allow him to make the drive.

The employing establishment offered appellant the same position on November 9, 2000, and the Office issued another 30-day letter on November 13, 2000, finding the job to be suitable. Appellant responded that the job offer was "premature" and requested a 30-day extension.

On November 29, 2000 Dr. Freeman noted appellant's concerns, stated that there had been no change in his neurological status since December 13, 1999, and concluded that there was some question regarding appellant's employment on an economically competitive basis. He added: "One needs to consider [appellant's] travel situation as part of his workday as the travel will impact and affect what he can do at work."

Responding to a December 18, 2000 letter from the Office, Dr. Freeman emphasized that frequent changes of position were necessary to accommodate appellant's restrictions on

standing, sitting and walking. Considering the travel time to and from work, he concluded that appellant could tolerate only four hours of work each day.

Based on Dr. Freeman's clarifications, the employing establishment revised its job offer on April 9, 2001 to reflect four hours of work in an office setting in compliance with all physical restrictions. The Office found the position to be suitable on April 10, 2001 and provided appellant 30 days to respond.

Appellant again requested a delay in responding until after he visited the job site and Dr. Freeman. On May 11, 2001 the Office informed appellant that he had 15 days to accept the job offer or face termination of his compensation. On May 22, 2001 Dr. Freeman stated the appellant's travel time must be considered as part of his total sitting activity allowed during the course of the workday.

On May 25, 2001 appellant informed the Office: "I accept the job offered to me as long as it meets the limitations specified in the functional capacity evaluation. It is my contention that the job offered does not meet these limitations." On June 5, 2001 both the employing establishment and the Office informed appellant that he was scheduled to start the part-time position on June 11, 2001, that failure to report to work would be considered a rejection of the job offer, and that his compensation would be adjusted accordingly.

Appellant wrote to the Office on June 7, 2001 that he had previously planned a vacation from June 8 to June 18, 2001 and could not start work on June 11, 2001. A June 8, 2001 memorandum to the file stated that appellant was requesting an extension of the starting date because he was on vacation.[5]

On June 14, 2001 the Office terminated appellant's compensation on the grounds that he refused an offer of suitable work. The Office noted that appellant had accepted the job offer on May 25, 2001, after which the employing establishment installed the special furniture appellant required and notified him on June 5, 2001 of the June 11, 2001 starting date. The Office concluded that because appellant had not previously requested leave from June 8, 2001, his failure to report to work constituted rejection of the offered position.

Appellant requested an oral hearing, which was held on November 29, 2001. On February 21, 2002 the hearing representative found that appellant had refused an offer of suitable work and that the Office properly terminated his wage-loss compensation on that basis.

The Board finds that the Office met its burden of proof in terminating appellant's compensation because he refused an offer of suitable work.

[5] Appellant returned to work for fewer than 4 hours a day, using sick and annual leave, until he retired effective July 31, 2001, after 25 years of service.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation, including cases in which the Office terminates compensation under section 8106(c) for refusal to accept suitable work.[6]

Under section 8106(c)(2) of the Act,[7] the Office may terminate compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[8] However, to justify such termination, the Office must show that the work offered was suitable,[9] and must inform the employee of the consequences of a refusal to accept employment deemed suitable.[10]

Once the Office establishes that the work offered was suitable, the burden of proof shifts to the employee who refuses to work to show that such refusal was reasonable or justified.[11] The issue of whether an employee has the physical ability to perform the duties of the position offered is a medical question that must be resolved by medical evidence.[12]

Section 10.124(c) of the Code of Federal Regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured shall be provided with the opportunity to show that his actions were reasonable or justified.[13] Thus, before terminating compensation, the Office must review the employee's proffered reasons for refusing or neglecting to work.[14]

In this case, the initial job offer dated August 17, 1998 was based on the physical limitations found by Dr. Freeman. Dr. Freeman stated in his January 13, 1998 report that he felt in May 1993 that appellant could do sedentary to light-duty work within his restrictions noted then. He added that appellant continued to suffer from a disabling work-related low back condition and that there were no basic changes in the restrictions on his activities. Appellant expressed concerns about the job, but Dr. Freeman reiterated on February 9, 1999 that appellant could perform the work, starting at four hours a day and increasing to full time.

While Dr. Freeman initially found that driving one and a half hours to and from work was contraindicated because of sitting limitations, he later addressed appellant's concerns regarding

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[6] 5 U.S.C. § 8106(c); *Henry W. Sheperd, III*, 48 ECAB 382, 385 (1997); *Shirley B. Livingston*, 42 ECAB 855, 861 (1991).

[7] 5 U.S.C. § 8106(c)(2).

[8] *Martha A. McConnell*, 50 ECAB 129, 131 (1998).

[9] *Marie Fryer*, 50 ECAB 190, 191 (1998).

[10] *Ronald M. Jones*, 48 ECAB 600, 602 (1997).

[11] *Deborah Hancock*, 49 ECAB 606, 608 (1998).

[12] *Marilyn D. Polk*, 44 ECAB 673, 680 (1993).

[13] 20 C.F.R. § 10.124(c).

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

the commute on October 30, 2000 when he noted that appellant could stop along the way if necessary. Thereafter, Dr. Freeman simply commented that travel time should be considered and reduced appellant's workday to four hours, which was reflected in the revised job offer dated April 9, 2001.

Appellant objected to accepting the job offer because he believed that the limitations in the September 7, 2000 functional capacity evaluation were not met. However, Dr. Freeman answered the Office's question on this issue by stating on October 30, 2000 that appellant should be able to perform the listed duties.

On November 10, 1998, July 25 and November 13, 2000, and April 10 and May 11, 2001, the Office complied with its procedural requirements by advising appellant that the position offered was suitable, that the job remained available to him, that the penalty for refusing the offered position was termination of compensation, and that he had 30 days to accept the position or explain his refusal. The May 11, 2001 letter informed appellant that his reasons for believing that the job did not comply with the restrictions listed in the functional capacity evaluation were not acceptable and that he had 15 days to accept the job offer or face termination of his compensation.

On June 5, 2001 both the Office and the employing establishment informed appellant of the June 11, 2001 starting date and of the consequences of failing to report for work. This notification followed more than two years of negotiating by appellant, his treating physician and the employing establishment over the job duties and working conditions of the offered position to ensure that all of appellant's physical limitations would be accommodated. The fact that appellant had planned a vacation is irrelevant to the issue of whether he refused suitable work. In view of these circumstances, the Board finds that appellant was well aware of the consequences of refusing to report to work.

The opinions of the three physicians establish that appellant was capable of performing the duties of the offered position and the record establishes that the Office followed the requisite procedures in determining that the job offer represented suitable work. Therefore, the Board finds that the Office properly terminated appellant's wage-loss compensation.[15]

[15] *See Linda Blue*, 50 ECAB 227, 229 (1999) (finding that the medical evidence established that appellant was capable of performing the duties of the offered position which required left-handed data entry).

The February 21, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
November 20, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member