U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MURLE W. WALKER and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Biloxi, MS

Docket No. 03-829; Submitted on the Record;
Issued June 11, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

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

On January 8, 1997 appellant, then a 47-year-old housekeeper, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1), alleging that he sustained a back injury in the performance of duty. The Office accepted the claim for back and neck sprains; appellant underwent back surgery on July 18, 1997. Appellant worked intermittently in a light-duty position and then stopped working in November 1998.

The Office referred appellant, a statement of accepted facts and medical records to Dr. Howard L. Smith, a Board-certified neurosurgeon. In a report dated October 14, 1999, Dr. Smith provided a history and results on examination. He diagnosed failed back syndrome with instability at L3-4. In a report dated November 19, 1999, Dr. Smith noted x-ray results and opined that appellant would benefit from a fusion at L3-4. In a report dated December 21, 1999, he stated that a functional capacity evaluation indicated that appellant could work in a light category job. Dr. Smith completed a work capacity evaluation (Form OWCP-5c) on December 30, 1999. He did not respond on the form to questions regarding whether appellant could work eight hours per day; the restrictions provided indicate that appellant could work up to four hours per day.[1]

In a report dated March 23, 2001, an attending general practitioner, Dr. Joseph Faison, provided a form report outlining appellant's physical capabilities. Dr. Faison reported that appellant could sit up to two hours per day, but was not capable of working full time.

[1] In a January 4, 2000 memorandum of telephone call, an Office rehabilitation nurse noted that Dr. Smith's OWCP-5c indicated that appellant could work four hours per day. An Office memorandum dated November 16, 2000 incorrectly stated that Dr. Smith released appellant to work eight hours per day.

By letter dated October 24, 2001, the employing establishment offered appellant a full-time position as a clerk. On November 9, 2001 appellant rejected the offer, stating that, on the advice of his physicians, he was unable to accept the position.

In a letter dated November 21, 2001, the Office advised appellant that it found the offered position to be suitable. The Office indicated that appellant had 30 days to accept the position or provide a reason for refusing; the provisions of 5 U.S.C. § 8106(c)(2) were discussed.

Appellant submitted a form report dated December 10, 2001 from Dr. Faison, who indicated that appellant could work less than one hour per day. By letter dated January 16, 2002, the Office advised appellant that his reasons for refusing the position were not sufficient. The Office stated that Dr. Faison did not provide a complete report that supported the refusal to accept the offered position. Appellant was notified that he had 15 days to accept the position or his compensation would be terminated.

By decision dated February 15, 2000, the Office terminated appellant's compensation effective February 24, 2002 on the grounds that he refused an offer of suitable work. The Office stated that weight of the medical evidence was represented by Dr. Smith.

The Board finds that the Office did not meet its burden of proof to terminate compensation.

5 U.S.C. § 8106(c) provides in pertinent part, "A partially disabled employee who … (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation." It is the Office's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.[2] To justify such a termination, the Office must show that the work offered was suitable.[3] An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.[4]

The Office found that the offered position was medically suitable, and noted the medical evidence from the referral physician, Dr. Smith, who examined appellant on October 14, 1999 and his work restriction evaluation was dated December 30, 1999. His reports do not provide current medical restrictions for a job offer dated October 29, 2001 and a termination decision dated February 15, 2002.[5] As such they are of diminished probative value. The Board does not concur with the finding that Dr. Smith reported that appellant was capable of full-time work. His work restriction evaluation does not state that appellant was capable of working eight hours, and the restrictions on specific activities are limited to four hours per day or less. In addition, the

[2] *Henry P. Gilmore*, 46 ECAB 709 (1995).

[3] *John E. Lemker*, 45 ECAB 258 (1993).

[4] *Catherine G. Hammond*, 41 ECAB 375, 385 (1990); 20 C.F.R. § 10.517(a).

[5] *See, e.g., Anthony Pestana* 39 ECAB 980 (1988) (medical report submitted two years prior to a wage-earning capacity determination did not establish appellant's current work capacity).

current medical evidence from the attending physician, Dr. Faison, did not support that appellant was capable of full-time work.

It is, as noted above, the Office's burden to establish that the offered position was medically suitable.[6] Based on the evidence of record, the Board finds that the Office clearly did not meet its burden of proof in this case.

The decision of the Office of Workers' Compensation Programs dated February 15, 2002 is reversed.

Dated, Washington, DC
June 11, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

[6] *John E. Lemker, supra* note 3.