U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT J. COOK, JR. and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Atlanta, GA

Docket No. 02-1648; Submitted on the Record;
Issued March 20, 2003

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs has met its burden of proof to terminate appellant's wage-loss compensation benefits on the grounds that he refused an offer of suitable employment.

This is the second appeal before the Board.[1] In a May 13, 1999 decision, the Board reversed the Office's termination of benefits based on the grounds that appellant abandoned suitable work. The Board found that the Office denied appellant a reasonable opportunity to accept an offer of suitable work. The law and facts as set forth in the Board's decision are incorporated by reference.

On February 9, 2001 the employing establishment offered appellant the position of modified distribution clerk. The position incorporated his restrictions, including no walking more than 150 feet from the parking lot to his duty station. Duties included answering the telephone, processing "return to sender postage due catalogs," and other administrative duties within his restrictions. Appellant returned to work on March 12, 2001, had intermittent periods of disability and stopped work on April 1, 2001.

On July 2, 2001 the Office referred appellant to Dr. Hartley L. Falbaum, a Board-certified orthopedic surgeon, to resolve a conflict in the medical opinion evidence between Dr. Ralph D'Auria, an attending Board-certified physiatrist, and Dr. Harold H. Alexander, a second opinion Board-certified orthopedic surgeon, on appellant's ability to perform a modified job. The Office also requested the physician to specifically note appellant's "lifting restrictions and the distance he can walk to the work site."

In a July 16, 2001 report, after reviewing the medical evidence, a physical examination, a statement of accepted facts and a copy of the modified job position, Dr. Falbaum diagnosed

[1] Docket No. 97-2171 (issued May 13, 1999).

cervical and lumbar spondylosis, "subacromial impingement syndrome of the right shoulder," and left knee "severe tricompartmental arthritis." He concluded that appellant was capable of performing the modified job and that appellant was capable of walking a distance of 175 from the parking lot to his duty station. In support of this conclusion, Dr. Falbaum opined:

> "I believe that these are certainly reasonable offers. I believe that [appellant] should be able to do these things. He would not be able to cover 175 feet rapidly, but should be able to cover it at a reasonable walking pace. The distance from the parking lot back to our office is easily that far and he appeared to have no ill effect from that."

By letter dated November 6, 2001, the Office noted that appellant had accepted the light-duty job as modified distribution clerk on March 12, 2001, but stopped work on April 3, 2001. The Office advised appellant that, based upon the report of Dr. Falbaum, the impartial medical examiner, he was capable of performing the modified position, including walking of 175 feet from the parking lot to the workplace. The Office advised appellant that the position has been found suitable and that he had 30 days to accept the position.

In a letter dated November 21, 2001, appellant contended that the position was unsuitable. He noted that Dr. Falbaum failed to note that he had a handicap parking permit which allowed him to park closer to the physician's office.

On December 10, 2001 the Office advised appellant that his reasons for refusing the modified position were unacceptable and that he had 15 days to return to work.

In a letter dated December 19, 2001, appellant responded and enclosed reports dated May 29 and December 18, 2001 from Dr. D'Auria, who stated that the offered position was unsuitable as "it required a lengthy walk which exceeded the restrictions imposed by his left knee problem" which caused appellant to have "exacerbations of his complaints after each of his efforts to return to work the first day back." Dr. D'Auria stated that he was "in agreement with Dr. Alexander's recommendations for a return to work with restrictions and the sole reasons for my having kept [appellant] off of work has been the failure of his supervisors to fully accommodate the appropriate medically based restrictions on his activities."

In a December 18, 2001 report, Dr. D'Auria noted:

> "Please see enclosed letter dated March 29, 2001. It still pertains. Walking limit should be less than 100 feet. Other limits for knee, low back and shoulder have been enumerated previously. [Appellant] wants to try to work if you can accommodate his restrictions."

By decision dated January 11, 2002, the Office finalized the proposal to terminate appellant's wage-loss compensation on the basis that he refused suitable work.

The Board finds that the Office met its burden of proof to terminate appellant's wage-loss compensation benefits on the grounds that he refused an offer of suitable employment.

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.[2]

Under section 8106(c)(2) of the Federal Employees' Compensation Act,[3] 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.[4] However, to justify such termination, the Office must show that the work offered was suitable[5] and must inform the employee of the consequences of a refusal to accept employment deemed suitable.[6]

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.[7] 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.[8]

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.[9]

The Board finds that the report of the referee medical specialist is entitled to such weight.[10] Dr. Falbaum reviewed the entire case record and statement of accepted facts. He examined appellant thoroughly and related clinical findings. Dr. Falbaum concluded that appellant was capable of performing the modified job and was capable of walking a distance of 175 feet from the parking lot to his duty station. He provided an opinion that is sufficiently well rationalized to resolve the issue of whether appellant was capable of performing the duties of the offered position.

The medical evidence appellant submitted subsequent to Dr. Falbaum's report is insufficient to overcome the special weight accorded Dr. Falbaum's medical opinion. In his

---

[2] 5 U.S.C. § 8106(c); *Henry W. Sheperd, III*, 48 ECAB 382, 385 (1997); *Shirley B. Livingston*, 42 ECAB 855, 861 (1991).

[3] 5 U.S.C. § 8106(c)(2).

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

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

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

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

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

[9] *James M. Frasher*, 53 ECAB ___ (Docket No. 01-362, issued September 25, 2002).

[10] *See Susan L. Dunnigan*, 49 ECAB 267, 270 (1998) (medical evidence established that appellant was capable of performing the duties of the position offered by the employing establishment).

May 29, 2001 report, Dr. D'Auria concluded that the offered position was unsuitable due to the lengthy walk from the parking lot to appellant's duty station which the physician opined exceeded restrictions on appellant's left knee. Dr. D'Auria, in his December 18, 2001 report, indicated that appellant's walking limit was less than 100 feet and requested that these restrictions be accommodated. Dr. D'Auria, appellant's attending physician, was on one side of the conflict resolved by Dr. Falbaum. Therefore, his additional reports are insufficient to overcome the special weight accorded the impartial medical examiner's opinion or create a new conflict.[11] Dr. Falbaum's opinion represents the weight of the medical evidence establishing that appellant is 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.

The January 11, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
March 20, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[11] *See Thomas Bauer*, 46 ECAB 257, 265 (1994), citing *Virginia Davis-Banks*, 44 ECAB 389, 392 (1993) (additional reports of physicians who were on one side of the conflict resolved by the impartial medical examiner is insufficient to overcome the evidentiary weight accorded to that specialist's report or create a new conflict).