U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELISEO SALGADO and U.S. POSTAL SERVICE,
POST OFFICE, Shelton, CT

Docket No. 03-1373; Submitted on the Record;
Issued November 21, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation effective February 20, 2002 on the grounds that he refused an offer of suitable work.

This is the second appeal in the present case. In a July 20, 2000 decision, the Board set aside the February 2, 1999 decision of the Office, finding that there was a conflict in medical opinion as to the extent of permanent impairment of appellant's left arm.[1] The law and the facts as set forth in the Board's decision are incorporated herein by reference.[2]

Appellant submitted various medical records from Dr. David E. Gross, a Board-certified orthopedist, dated January 18 to September 26, 2000. He diagnosed left ulnar neuropathy and suggested left ulnar nerve transposition surgery to relieve appellant's symptoms. In an operative report dated July 5, 2000, Dr. Gross noted performing a left ulnar nerve transposition and application of a long-arm splint. His postoperative diagnosis was left ulnar nerve entrapment neuropathy. Dr. Gross' follow-up notes indicated that appellant was healing properly. In a report dated September 26, 2000, he indicated that appellant still experienced numbness of the left hand and indicated that it swelled at times. Dr. Gross noted that appellant had reached maximum medical improvement and advised that appellant had a ten percent permanent impairment of the left arm. He noted that appellant could return to light-duty work which did not require heavy/repetitive use of the left arm or hand and with restrictions on lifting up to 15 pounds. In a prescription note dated September 26, 2000, Dr. Gross indicated that appellant could return to inside desk light work with no lifting of the left upper extremity.

Appellant was referred to the Office medical adviser who reviewed Dr. Gross' September 26, 2000 report and agreed that appellant sustained a ten percent impairment of the

[1] Appellant's claim was accepted for contusion of the left elbow and ulnar neuritis.

[2] Docket No. 99-1605.

left upper extremity. In a decision dated December 4, 2000, the Office granted appellant a schedule award for a ten percent permanent impairment of the left upper extremity.

Appellant continued to submit reports from Dr. Gross, who reported on appellant's treatment for his left arm condition. In a report dated September 25, 2001, Dr. Gross noted, upon physical examination, that there was no atrophy, the intrinsic strength was excellent, there was full range of motion for the elbow and no frank neurovascular deficit. He advised that no further active treatment was necessary and indicated that appellant was able to continue working within his previously outlined restrictions. Dr. Gross prepared a work restriction evaluation dated September 25, 2001 and reiterated the same physical restrictions.

On November 27, 2001 the Office referred appellant for vocational rehabilitation. On December 21, 2001 the employing establishment offered appellant a modified light-duty position conforming with the physical restrictions imposed by Dr. Gross. The job specified that appellant would work from 8:30 a.m. to 5:00 p.m., Monday through Friday. The job activities consisted of inside desk duties, light work with no lifting of the left upper extremity and responsibility for receiving incoming mail, date stamping and disseminating mail to the office staff, preparing outgoing accountable mail and maintaining a log of this mail. On occasion, appellant would copy case files, send out correspondence, maintain adequate inventory of office supplies, maintain a list of archive compensation cases, answer telephone calls, take telephone messages and announce guests to the office.

By letter dated December 22, 2001, the Office informed appellant that it had reviewed the position description and found the job offer suitable and within his physical limitations. Appellant was advised that he had 30 days to accept the position or offer his reasons for refusing. He was apprised of the penalty provisions of section 8106(c)(2) if he did not return to suitable work.[3]

In a letter dated January 11, 2002, appellant, through his attorney, declined the December 21, 2001 job offer. He indicated that the job offer did not conform with Dr. Gross' lifting restrictions and contended that he could not perform repetitious activities with the left arm. Appellant noted that he would have to drive 25 miles to the offered position in New York City. He also indicated that he intended to retire on December 21, 2001.

By letter dated January 23, 2002, the Office informed appellant that the reasons stated for his refusal of the offered position were found to be acceptable. The Office indicated that the position was within the restrictions as set forth by Dr. Gross and that appellant's pending retirement was an unacceptable reason for refusing suitable work. The Office provided appellant with 15 days to accept the job.

Appellant submitted a January 15, 2002 report from Dr. Gross in which the physician noted that appellant complained of pain in the left hand with numbing sensations. He indicated that appellant retired in December 2001 and had been offered a new position in New York City, three days prior to his retirement and appellant indicated that he could not do that job either. Dr. Gross advised that appellant experienced residuals of the left arm and that there were risks

[3] 5 U.S.C. § 8106 (c)(2).

that his condition could get worse. He noted that, upon physical examination, appellant had full range of motion of the left elbow, grip and grasp were acceptable, Tinel's and Phalen's signs were negative and strength was improved. Appellant, however, exhibited diminished sensibility of the left hand.

By decision dated February 20, 2002, the Office terminated appellant's compensation, finding that he refused an offer of suitable work.

Appellant requested a hearing before an Office hearing representative. The hearing was held on December 9, 2002. Appellant's attorney contended that the job offer was deficient because it did not specify the numbers of pieces of mail, accountables and file copies appellant would be required to handle. Appellant's attorney also argued that the job offer did not meet the restrictions provided by Dr. Gross, noting that Dr. Gross restricted appellant from repetitive use of the left arm and that the offered position could not be performed without using the left hand in a repetitive manner. By letter dated December 26, 2002, the employing establishment submitted additional evidence concerning the job offered appellant.

In a decision dated February 26, 2003, the Office hearing representative affirmed the February 20, 2003 decision.

The Board finds that the Office met its burden of proof to terminate appellant's compensation based on his refusal of suitable work.

Section 8106(c)(2) of the Federal Employees' Compensation Act provides that "a partially disabled employee who refuses or neglects to work after suitable work is offered is not entitled to compensation.[4] The Office must show that the work offered was suitable and must inform the employee of the consequences of refusal to accept employment. 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] Section 8106(c) will be narrowly construed as it serves as a penalty provision which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.[6]

The Office's implementing federal regulations[7] 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 establishing that such refusal or failure to return to work was reasonable or justified and shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.[8] To justify termination of compensation,

[4] 5 U.S.C. § 8106(c)(2).

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

[6] *See Robert Dickerson*, 46 ECAB 1002 (1995).

[7] 20 C.F.R. § 10.517 (1999).

[8] *Id.*

the Office must show that the work offered was suitable and inform the employee of the consequences of refusal to accept such employment.[9]

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.[10] 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.[11]

In this case, the Office established that the offered position of December 21, 2001 was suitable. Dr. Gross prepared a work restriction evaluation dated September 25, 2001 and noted that appellant could work with the same physical restrictions as previously listed on September 26, 2000. On September 26, 2000 Dr. Gross advised that appellant could return to light-duty work which did not require heavy/repetitive use of the left arm or hand. He cleared appellant to return to work with restrictions on lifting of 15 pounds and no repetitive use of the left arm.

The employing establishment offered appellant a modified light-duty position conforming with the physical restrictions set by Dr. Gross. The job noted that appellant would work from 8:30 a.m. to 5:00 p.m., Monday through Friday. The job duties consisted of inside desk duties, light work with no lifting of the left upper extremity. Appellant would be responsible for receiving incoming mail, date stamping and disseminating to the office staff, preparing outgoing accountable mail, maintaining a log of this mail, on occasion appellant would copy case files, sending out correspondence, maintaining an adequate inventory of office supplies, maintain a list of archive compensation cases, answering telephone calls, taking telephone messages and announcing guests to the office.

Appellant noted that the position would require him to lift over five pounds and perform repetitive duties. However, the job offer noted no lifting of the left upper extremity and noted that the assignment was "subject to adjustment(s) in accordance with your medical/physical progression." Dr. Gross set forth a lifting restriction of 15 pounds, not 5 pounds as indicated by appellant. Appellant also submitted a report from Dr. Gross dated January 15, 2002 who noted that appellant experienced residuals of the left arm and that there were risks that his condition could get worse. Dr. Gross' statements on appellant's return to work were prophylactic in nature and it is well established that fear of future injury is not compensable under the Act.[12] The

[9] *Arthur C. Reck*, 47 ECAB 339 (1995).

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

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

[12] *See Mary Geary*, 43 ECAB 300, 309 (1991); *Pat Lazzara*, 31 ECAB 1169, 1174 (1980) (finding that appellant's fear of a recurrence of disability upon return to work is not a basis for compensation).

evidence was insufficient to show that the offered position was not medically suitable. Dr. Gross' treatment note addressed appellant's symptoms but, did not discuss the suitability of the offered position. Dr. Gross did not provide an opinion specifically addressing the modified duty job offer or stating that the job offer did not conform to appellant's physical restrictions. Dr. Gross did not retract his prior reports which noted that appellant could return to light-duty work which did not require heavy/repetitive use of the left arm or hand, with restrictions on lifting of 15 pounds, inside desk light work with no lifting of the left upper extremity. The reports of Dr. Gross are not sufficient to establish that appellant remained totally disabled due to physical limitations on lifting at the time the job was offered or at any time prior to the termination of benefits.[13]

Appellant contended that the job was outside his commuting area as he worked in Woodbridge, NJ prior to his surgery and the new position was in New York City, approximately a 25-mile commute. However, Dr. Gross did not impose any restrictions on appellant commuting more than 25 miles. Appellant indicated that he intended on retiring as of December 21, 2001 and that this was a factor in his decision to decline the job offer. However, retirement is not an acceptable reason for refusing suitable work.[14] The medical evidence of record establishes that, at the time the job offer was made, appellant was capable of performing the modified position.

The Office properly demonstrated that the light-duty position offered appellant was suitable work based on the restrictions of Dr. Gross. The burden then shifted to appellant to show that his refusal to work in that position was justified.[15]

Following the Office's February 20, 2002 decision, appellant testified at the hearing and raised essentially the same arguments. However, as noted above, these arguments are insufficient to establish that the offered position was unsuitable and is, therefore, insufficient to meet appellant's burden of proof. Appellant also noted that the detailed description of the offered position provided by the employing establishment on December 26, 2002 revealed disparities between the duties of the job offer and those detailed by the employer. However the detailed description of the job duties as set forth by the employing establishment did not indicate that the job was not suitable, rather it clarified that the job was within appellant's medical restrictions. Therefore, appellant failed to submit any evidence or argument to show that the offered position was not medically suitable.[16]

[13] *See Gayle Harris*, 52 ECAB 319 (2001).

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, Reemployment: Determining Wage-Earning Capacity, Chapter 2.814.5(c) indicates that unacceptable reasons for refusing an offer of suitable work include the claimants; preference for the area in which he or she currently resides, personal dislike of the position offered or the work hours scheduled, potential for promotion and job security; *see also Stephen R. Lubin*, 43 ECAB 564 (1992) (finding that appellant's decision to accept retirement benefits did not justify his refusal of a position found to be suitable work).

[15] *See Ronald M. Jones*, 52 ECAB 190 (2000).

[16] *Id*.

In order to properly terminate appellant's compensation under section 8106, the Office must provide appellant notice of its finding that an offered position is suitable and give him an opportunity to accept or provide reasons for declining the position.[17] The record establishes that the Office properly followed the procedural requirements. By letter dated December 22, 2001, the Office advised appellant that a partially disabled employee who refused suitable work was not entitled to compensation, that the offered position had been found suitable and allotted him 30 days to either accept or provide reasons for refusing the position.

In a letter dated January 23, 2002, the Office advised appellant that the reasons given for not accepting the job offer were unacceptable. He was given an additional 15 days in which to respond. The record reflects that appellant responded to the Office's notice in a letter dated January 11, 2002 and indicated that the job offer did not conform to his physical restrictions. There is no evidence of a procedural defect in this case as the Office provided appellant with proper notice. He was offered a suitable position by the employing establishment and such offer was refused. Thus, under section 8106 of the Act, his compensation was properly terminated effective February 20, 2002.

The February 26, 2003 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
November 21, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

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