United States Department of Labor
Employees' Compensation Appeals Board

ROBERT E. SMITH, Appellant	)	
and	)	**Docket No. 04-167**
	)	**Issued: February 26, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Gadsden, AL, Employer	)	

Appearances:
Robert E. Smith, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On October 28, 2003 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated July 25, 2003, terminating his wage-loss compensation benefits. Under 20 C.F.R. §§ 501.2(c), 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office met its burden of proof to terminate appellant's compensation benefits effective July 25, 2003.

FACTUAL HISTORY

On July 2, 2001 appellant, then a 62-year-old postal clerk,[1] filed a traumatic injury claim alleging that on June 7, 2001 he injured his lower back while moving a wire full of mail. The Office accepted appellant's claim for acute lumbar strain, and subsequently expanded its acceptance to include permanent aggravation of degenerative arthritis. Appellant stopped work on July 2, 2001.

On May 14, 2002 appellant's treating physician, Dr. William R. Stewart, a Board-certified orthopedic surgeon, released appellant to return to part-time limited duty as of May 20, 2002. Dr. Stewart stated that appellant could work 4 hours a day, with no lifting over 15 pounds, waist to shoulder level work only, frequent position changes, and no stooping, squatting or bending from the waist. On May 22, 2003 appellant accepted a four-hour-a-day limited-duty job offer that complied with the restrictions set forth by Dr. Stewart.[2] However, rather than returning to work on the prescribed day, appellant instead retired from the employing establishment.

In an August 5, 2002 letter, the Office advised appellant that the employing establishment had offered him suitable work within his medical restrictions. The Office noted that appellant had 30 days in which to accept the offered position, or "provide an explanation of the reason(s) for abandoning it." The Office further advised appellant of the penalties for neglecting an offer of suitable work under section 8106 of the Federal Employees' Compensation Act.[3] By letter received August 28, 2002, appellant stated that he was unaware that he had been released for work by his physician. Appellant also submitted an additional medical report from Dr. Stewart dated August 8, 2002, in which the physician stated that appellant was not employable.

By letter dated September 17, 2002, the Office asked Dr. Stewart to clarify whether appellant could perform the limited-duty position, which was within the restrictions previously set forth by the physician. In a response received September 25, 2002, Dr. Stewart indicated that appellant could not perform the limited-duty position.

On November 18, 2002 the Office referred appellant, together with a statement of accepted facts, a list of questions to be answered, and the medical record to Dr. Robert A. Sparks, III, a Board-certified orthopedic surgeon, for a second opinion. In a letter dated June 30, 2003, the Office proposed to terminate appellant's compensation benefits on the grounds that the weight of the medical evidence, represented by the report of Dr. Sparks, the Office second opinion physician, established that appellant was no longer disabled for full-time work. After allowing appellant 30 days to respond, by decision dated July 25, 2003, the Office terminated

[1] The physical requirements of the postal clerk position include: intermittent lifting and carrying of up to 70 pounds for up to 7 hours; intermittent standing, walking, kneeling, bending, stooping, pulling and pushing for up to 7 hours; intermittent reaching above the shoulder for up to 1 hour; continuous sitting and simple grasping for up to 1 hour; and continuous twisting up to 8 hours.

[2] The limited-duty job offer consisted of 4 hours of work per day, with no lifting over 15 pounds, waist to shoulder level work only, frequent position changes, and no stooping, squatting, or bending from the waist.

[3] 5 U.S.C. § 8106.

appellant's wage-loss compensation benefits effective that date. Appellant continued to be entitled to medical benefits.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[4]

ANALYSIS

In this case, while appellant's treating physician, Dr. Stewart, a Board-certified orthopedic surgeon, released appellant to limited-duty work, effective May 20, 2002, he subsequently submitted reports in which he again stated that appellant was totally disabled for all work.

On December 16, 2002, at the request of the Office, appellant was examined by Dr. Sparks, a Board-certified orthopedic surgeon and Office referral physician. The Office provided Dr. Sparks with a statement of accepted facts, the medical evidence of record and a list of issues to be addressed. In his narrative report dated December 16, 2002, Dr. Sparks noted appellant's history with respect to his employment injuries, performed a complete physical examination, including range-of-motion testing, and reviewed the diagnostic test results. Dr. Sparks listed his diagnoses as aggravation of preexisting degenerative disc disease in the lumbar spine. The physician further stated that it was his opinion that appellant's degenerative arthritis was present on the day of his June 7, 2001 lifting injury, and that the injury had permanently aggravated the preexisting condition. With respect to appellant's ability to perform the duties of either his regular postal clerk position, or the modified limited-duty position, Dr. Sparks noted that no job descriptions had been enclosed for his review, but that he felt appellant was capable of performing clerical work as he understood it. Dr. Sparks concluded that appellant had reached maximum medical improvement, and completed a work capacity evaluation, Form OWCP-5, listing appellant's permanent restrictions of no reaching above the shoulder, no twisting, and no pushing, pulling, lifting, squatting, kneeling or climbing.

Upon receipt of Dr. Sparks' report, the Office sent Dr. Sparks copies of the regular and modified job descriptions, and asked the physician to provide his comments as to whether appellant could perform either position. In a supplemental report dated February 7, 2003, Dr. Sparks stated that appellant was not physically capable of performing his usual job as a postal clerk, because it required that he be able to lift 70 pounds intermittently throughout the workday. The physician stated that appellant was able to perform the duties of the limited-duty job, however, which included no lifting over 15 pounds, waist to shoulder level work only, frequent position changes, and no stooping, squatting, or bending from the waist. By letter dated April 3, 2003, the Office requested additional clarification from Dr. Sparks as to whether

[4] *Gloria J. Godfrey*, 52 ECAB 486 (2001).

appellant could perform the limited-duty position full time or only part time. In a response dated April 14, 2003, Dr. Sparks stated that appellant could perform the duties of the limited-duty position for eight hours per day.

In the present case, the Office terminated appellant's compensation after determining that appellant's disability had ceased. As used in the Act,[5] the term disability means incapacity because of an injury in employment to earn the wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity. The general test in determining loss of wage-earning capacity is whether the employment-caused impairment prevents the employee from engaging in the kind of work he was doing when he was injured.[6] In other words, if an employee is unable to perform the required duties of the job in which he was employed when injured, the employee is disabled.[7]

Appellant's treating physician, Dr. Stewart, found that appellant could not return to work in any capacity. Although Dr. Sparks, the Office referral physician, stated that appellant could perform limited duty, within certain restrictions, for eight hours a day, he also clearly stated that appellant was not capable of performing the duties of his date-of-injury position as a postal clerk, which required that appellant be able to lift up to 70 pounds. The medical evidence of record indicates that appellant is unable to perform work he was performing as a postal clerk when injured. Therefore, appellant continues to be disabled and the Office improperly terminated appellant's wage-loss compensation as of July 25, 2003.

CONCLUSION

The Board finds that the Office failed to meet its burden of proof to terminate appellant's wage-loss compensation benefits effective July 25, 2003.

[5] 5 U.S.C. §§ 8101-8193, 8102.

[6] *Marvin T. Schwartz*, 48 ECAB 521 (1997).

[7] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 25, 2003 is reversed.

Issued: February 26, 2004
Washington, DC

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member