U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MITCHELL E. LARSEN and DEPARTMENT OF DEFENSE, DISTRIBUTION DEPOT, Odgen, Utah

Docket No. 97-1604; Submitted on the Record; Issued March 15, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM, BRADLEY T. KNOTT

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 31, 1994 appellant, then a 44-year-old mechanic, filed a notice of traumatic injury, claiming that while loosening an oil filter underneath a truck on January 24, 1994 he felt a pop in his neck and experienced severe pain. The Office accepted the claim for a cervical strain and appellant returned to work on January 27, 1994.

Subsequently, appellant filed a claim for lost wages as of March 28, 1994, stating that he had extreme pain in his lower back and legs, and a CA-7 form claiming compensation from April 19 through July 19, 1994. In a letter dated November 2, 1994, the Office determined that appellant was eligible for 160 hours of compensation or a total of $1,714.12 from April 25 through May 23, 1994 and inquired whether he wished to buy back the leave he had used.

The Office also informed appellant that the employing establishment had offered him a light-duty position as a shop worker repairing and maintaining bicycles, that his physician, Dr. James S. Heiden, a Board-certified neurosurgeon, had approved the job as within his physical limitations, and that appellant had 30 days to accept the offer or explain his reasons for refusing.

Appellant responded with a November 9, 1994 letter from Dr. Heiden, who diagnosed low back pain and stated that although he had approved appellant's return to work on October 21, 1994, appellant had told him that the offered position was the same one he had done previously and that because the job involved a lot of bending and lifting, he could not return to work. Dr. Heiden stated that based on the information provided and appellant's attitude, appellant was not willing to return to any position at work.

On December 2, 1994 the Office stated that Dr. Heiden's letter was insufficient to establish that appellant remained disabled or justified in refusing the offered position. The Office explained that appellant's claim had been accepted for a neck strain and there was no medical evidence establishing his low back condition as related to the January 1994 injury. The Office provided appellant with 15 days to submit a rationalized medical opinion justifying his refusal to return to work.

On January 6, 1995 the Office terminated appellant's entitlement to compensation on the grounds that he had refused an offer of suitable work. Appellant timely requested a hearing which was held on October 22, 1996. Appellant testified that after his neck fusion surgery he returned to work in November 1991 and had no problems. Appellant stated that his failure to list back pain on his initial CA-1 notice in January 1994 was just an "oversight" and that he had told the employing establishment's physician, Dr. John D. Newton, a practitioner in internal medicine, that the January 24, 1994 incident had caused both neck and back pain.

On January 3, 1997 the hearing representative denied appellant's claim. The hearing representative noted that Dr. Heiden did not find appellant medically unable to perform the duties of the offered position; rather, appellant himself was unwilling to return to the employing establishment in any position.

The Board finds that the Office properly terminated appellant's entitlement to compensation on the grounds that he refused an offer of suitable work.

Once the Office accepts a claim it has the burden of proving that the employee's disability has ceased or lessened before it may terminate or modify compensation benefits.[1] Section 8106(c)(2) of the Federal Employees' Compensation Act[2] provides that the Office may terminate the compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[3] The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.[4]

The implementing regulation[5] 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 showing that such refusal or failure to work was reasonable or justified, and shall be provided with the opportunity to make such a showing before entitlement to compensation is terminated.[6] To

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[1] *Karen L. Mayewski*, 45 ECAB 219, 221 (1993); *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

[2] 5 U.S.C. §§ 8101-8193 (1974); 5 U.S.C. § 8106(c)(2).

[3] *Camillo R. DeArcangelis,* 42 ECAB 941, 943 (1991).

[4] *Stephen R. Lubin*, 43 ECAB 564, 573 (1992).

[5] 20 CFR § 10.124(c).

[6] *John E. Lemker*, 45 ECAB 258, 263 (1993).

justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.[7]

Office procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.[8] 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.[9]

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.[10]

In this case, appellant returned to work on January 27, 1994 but was placed on light duty after seeing Dr. Heiden, who diagnosed a cervical strain, on February 9, 1994. Although appellant filed a claim for lost wages due to severe back pain from March 28, 1994, he apparently continued working until April 19, 1994 when Dr. Heiden stated in a brief note that appellant was totally disabled until his back flare-up resolved.

In response to an Office inquiry, Dr. Heiden explained on July 28, 1994 that he had seen appellant only twice, in February and June 1994, when appellant stated that he had injured his back as well as his neck in January 1994. Dr. Heiden, who had performed appellant's cervical fusion surgery in 1991, reported that a March 29, 1994 x-ray showed mild levoscoliosis and a computerized tomographic (CT) scan showed mild disc protrusion at L5-S1 without herniation.

On examination in June 1994 Dr. Heiden found no true sciatic or radicular symptoms and diagnosed mechanical low back pain. Dr. Heiden added that appellant had stated he was not willing to go back to work, even on a light-duty status, and then repeated that he was unwilling and unable to return to work in any type of duty assignment. In an August 31, 1994 addendum, Dr. Heiden stated that appellant had "grave concerns" about returning to work "because of his physical status," and added that when he would be able to return even to light duty was indeterminate.

As the hearing representative noted, Dr. Heiden provided no medical rationale supporting appellant's inability to perform the duties of the offered position. In fact, Dr. Heiden had

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[7] *Maggie L. Moore*, 42 ECAB 484, 487 (1991), *aff'd on recon.*, 43 ECAB 818 (1992).

[8] *Patsy R. Tatum*, 44 ECAB 490, 495 (1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity,* Chapter 2.814.5 (May 1996).

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

[10] *Connie Johns*, 44 ECAB 560, 570 (1993).

reviewed the requirements of the offered position and stated on October 21, 1994 that he saw no medical reasons why appellant could not "start to work at this new light-duty position as soon as possible."

In his November 9, 1994 report, Dr. Heiden himself did not find that appellant was incapable of doing the light-duty job. Rather, he stated that based on information provided by appellant and his current attitude, Dr. Heiden did "not believe" that appellant was willing to return to any work at the employing establishment. The mere facts that appellant told Dr. Heiden that he could not do the work, and that Dr. Heiden reported appellant's opinion to the Office, do not constitute a rationalized medical opinion sufficient to warrant a refusal of light-duty employment.[11]

Inasmuch as appellant's back condition was never accepted as a work-related injury and appellant provided insufficient medical evidence to justify his refusal of an offer of suitable work, the Board finds that the Office properly terminated his entitlement to compensation.

The Board also finds that the Office complied with its procedural requirements by providing notice to appellant that the offered position was found to be suitable and that the penalty for unjustified refusal of the offer was termination of compensation.[12]

Appellant argues on appeal that he never received any compensation for his injury. The record shows that appellant used a combination of sick and annual leave, along with leave without pay, from January through June 1994, and was paid exactly what he was due. The Office determined that appellant was eligible for leave buy-back, but appellant did not respond to the Office's November 2, 1994 letter indicating whether he wished to repurchase leave or whether he was in a leave-without-pay status. Therefore, the Board rejects appellant's argument.

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[11] *See Lizzie M. Greer*, 49 ECAB ___ (Docket No. 96-2682, issued September 21, 1998) (finding that appellant's belief that she was unable to perform the offered light-duty job because she was physically incapacitated due to joint pain in her wrist was insufficient, absent supporting medical evidence, to justify her refusal of an offer of suitable work).

[12] *See C.W. Hopkins*, 47 ECAB 725, 727 (1996) (noting that once the Office advises a claimant that his or her reasons for refusing an offer of suitable work are unacceptable and that he or she has 15 days to accept the offered position, the claimant submits further reasons or supporting evidence at his or her own risk).

The January 6, 1997 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
March 15, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member