U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM J. RUBIO and DEPARTMENT OF AIR FORCE, BROOKS AIR FORCE BASE, Tex.

Docket No. 96-972; Submitted on the Record;
Issued April 1, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation because he refused an offer of suitable work.

On April 13, 1993 appellant, then a 48-year-old motor vehicle operator, filed a notice of traumatic injury, claiming that he was injured when the forklift he was driving in reverse was struck broadside by an automobile whose driver had failed to yield the right of way. The Office accepted a cervical strain and a contusion of the right leg, chest and paid appropriate compensation.

The Office subsequently referred appellant, along with a statement of accepted facts and a list of questions, to Dr. Robert L. Jones, Jr., a Board-certified orthopedic surgeon, for a second opinion evaluation. Dr. Jones examined appellant on October 18, 1993 and found full range of motion of the cervical spine and upper extremities with no muscle spasm or external abnormalities. He noted slight subjective tenderness and a history of cervical strain without objective findings to confirm this diagnosis.

Dr. Jones reviewed x-rays, a magnetic resonance imaging (MRI) scan and a computerized tomographic (CT) scan, which revealed spondylolysis and spondylolisthesis with collapse of the disc space as well as degenerative disc disease involving L5-S1. He reported the results of an electromyogram (EMG) which showed a median nerve compression at the right wrist but found no clinical symptoms of carpal tunnel syndrome. Dr. Jones stated that there were no limiting factors concerning the cervical spine or upper extremities but appellant's preexisting spondylolisthesis with arthritic changes "was probably aggravated by the incident in question and the aggravation may be permanent."

In response to the Office's questions, Dr. Jones stated that he found no evidence of a current cervical strain or right leg or chest contusion. However, appellant's low back disability was "medically connected" to the April 13, 1993 incident and would prevent appellant from

returning to his motor vehicle position. Dr. Jones added that appellant's obesity would hasten the deterioration in his back and "some symptom magnification and functional overlay" would delay the healing process. Dr. Jones completed a work restriction evaluation, stating that appellant could work 8 hours a day on light duty, limited to lifting no more than 10 pounds.

On November 4, 1993 the Office asked Dr. Thomas W. Mieras, Board-certified in internal medicine and appellant's treating physician, to comment on Dr. Jones' report. Dr. Mieras completed a disability form on March 9, 1994, stating that appellant was unable to lift his arms, grip or carry objects well and was totally disabled with severe headaches, bilateral carpal tunnel syndrome and chronic pain from the April 13, 1993 incident.

On January 21, 1994 the employing establishment submitted to the Office a light-duty position description and on March 30, 1994 the Office asked Dr. Jones to review this job offer in light of the work restriction form he had completed. Dr. Jones responded on April 4, 1994 that appellant would be able to return to the described light-duty position, in which he would not be required to drive but would process paperwork, answer telephones, input data into a computer and perform supervisory duties at his desk for four hours a day, standing and walking intermittently for relief when needed. Dr. Jones stated that he had reviewed his entire file and that appellant's condition "was complicated by obesity and gross symptom magnification and functional overlay," but these aside, appellant could perform the required duties of the light-duty position.

Subsequently, Dr. Mieras referred appellant to Dr. Michael P. Barker, Board-certified in physical medicine and rehabilitation, who examined appellant on April 7, 1994 and noted his impressions of chronic pain in the cervical and trapezius muscles and right lower back, most likely bilateral carpal tunnel syndrome, possible left shoulder impingement syndrome, obesity with severe deconditioning and medication use.

On June 7, 1994 the Office informed appellant that he had 30 days in which to accept the offered light-duty position or explain his reasons for refusing the job. On June 6 and 29, 1994 Dr. Mieras completed medical report forms stating that appellant was still totally disabled due to the April 23, 1993 incident and indicating that his prognosis was poor. On July 27, 1994 Dr. Mieras completed a similar form and recommended that appellant continue with physical therapy. Also in the record are office treatment notes dated May 9 and 13, and July 1, 1994 regarding appellant's carpal tunnel syndrome.

On July 15, 1994 the Office informed appellant that his reasons for refusing the light-duty position were unacceptable and that he had 15 days to accept the job. The Office stated that it would not consider any further reasons for refusal and that if appellant did not respond in writing within that time, it would issue a final decision.

On July 29, 1994 appellant wrote to the Office stating that he had reported to work on June 6, 1994 and showed his supervisor a May 9, 1994 disability form completed by Dr. Mieras but the supervisor placed appellant on absent-without-leave status. Appellant stated that he was

not refusing the job but he had not been released by his physician to work and the Office could not expect him to return to work with "all my pain" and the medication.[1]

Subsequently, Dr. Ronald J. Washington, Board-certified in internal medicine, to whom Dr. Mieras had referred appellant, indicated that appellant was totally disabled on August 5 through 19, 1994 from lumbar syndrome, impairment of his strength, endurance, flexibility and emotional stress.

On August 25, 1994 the Office terminated appellant's compensation on the grounds that he had refused an offer of suitable work. The Office noted that the weight of the medical evidence rested with the October 18, 1993 report of Dr. Jones and that Dr. Mieras had failed to provide a rationalized medical opinion or comments on Dr. Jones' report.

Appellant requested an oral hearing, which was held on February 17, 1995. Appellant testified about returning to work on June 6, 1994 and again on October 27, 1994, when he became too weak and had to go to the clinic for treatment.[2] Appellant submitted an April 7, 1995 report from Dr. Mieras, who stated that appellant was having difficulty walking and was at risk for possible falls due to weakness resulting from disc disease and nerve root impingement.

In a decision dated June 14, 1995, the hearing representative affirmed the August 24, 1994 decision finding appellant refused an offer of suitable work. On September 11, 1995 appellant requested reconsideration on the grounds that he was justified in not accepting the offered position because his physician had not released him to work and he was suffering from such mental incapacity that he was unable to work.

On September 18, 1995 the Office denied appellant's request on the grounds that his letter was insufficient to warrant a review of the prior decision. On December 14, 1995 appellant again requested reconsideration and submitted injury and disability forms as well as a letter from Dr. Mieras, a psychiatric evaluation and a memorandum from his supervisor.

On January 19, 1996 the Office denied appellant's request on the grounds that the evidence submitted in support of reconsideration was immaterial and therefore insufficient to warrant review of the prior decision. The Office noted that none of the evidence addressed the issue of whether appellant was incapable of performing the duties of the offered position.

The Board finds that the Office failed to meet its burden of proof in terminating appellant's 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.[3]

[1] On July 21, 1994 appellant underwent carpal tunnel syndrome surgery.

[2] The record contains an undated notice of traumatic injury referring to the April 13, 1993 incident, a notice of recurrence of disability dated October 28, 1994 stating that after appellant returned to work on October 27, 1994 both his legs gave out and a memorandum from the employing establishment describing appellant's return to work.

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

Section 8106(c)(2) of the Federal Employees' Compensation Act[4] 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.[5] The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.[6]

The implementing regulation[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 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.[8] To 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.[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 light-duty position offered by the employing establishment was found to be within the physical restrictions specified by the second opinion physician, Dr. Jones, who completed a work restriction form on October 18, 1993 and stated that appellant was capable of returning to work. However, Dr. Mieras, appellant's treating physician and also Board-certified, consistently stated that appellant was totally disabled because of the April 13, 1993 incident and referred appellant to Dr. Washington, an internal medicine specialist. Dr. Washington also found appellant unable to work and recommended extensive rehabilitation and physical therapy.

Inasmuch as the reports of Drs. Mieras and Washington finding appellant disabled for work are in disagreement with Dr. Jones finding that appellant is capable of light-duty work, the

[4] 5 U.S.C. §§ 8101-8193 (1974); 5 U.S.C. § 8106(c)(2).

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

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

[7] 20 C.F.R. § 10.124(c).

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

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

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

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

Board finds a conflict in medical opinion pursuant to section 8123 of the Act,[12] which provides that if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination.[13]

The Board finds that the Office has failed to meet its burden of proof in terminating appellant's compensation.[14]

The January 19, 1996, September 18 and June 14, 1995 decisions of the Office of Workers' Compensation Programs are reversed.

Dated, Washington, D.C.
April 1, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[12] 5 U.S.C. § 8123(a).

[13] *Shirley L. Steib*, 46 ECAB 309, 316 (1994).

[14] *See Craig M. Crenshaw Jr.*, 40 ECAB 919, 923 (1989) (finding that the Office failed to meet its burden of proof because a conflict in the medical evidence was unresolved).