U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TYRA J. MATTHEWS and U.S. POSTAL SERVICE,
POST OFFICE, Rockmart, Ga.

Docket No. 96-1820; Submitted on the Record;
Issued August 5, 1998

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits on the grounds that he refused suitable work; (2) whether the Office properly terminated appellant's medical benefits on the grounds that his employment-related condition had ceased; (3) whether the Office properly refused to reopen appellant's claim for a merit review on September 9, 1995; and (4) whether the Office properly found that appellant was with fault with respect to creating an overpayment in the amount of $7,185.78 and that the recovery of the overpayment was not subject to waiver.

On June 30, 1993 appellant, then a 52-year-old rural mail carrier, filed a notice of traumatic injury alleging that he injured his neck and spine when struck from behind by a vehicle on June 28, 1993 while in the course of his federal employment.

On June 30, 1993 Dr. John G. Sparti, an osteopath and appellant's treating physician, diagnosed lumbar and thoracic somatic dysfunction. He indicated that appellant was totally disabled due to his employment injury.

On July 20, 1993 the Office accepted the claim for lumbar and thoracic strains and appellant received compensation for total temporary disability.

On December 9, 1993 the Office referred appellant to Dr. Thomas Dopson, a Board-certified orthopedic surgeon, for a second opinion examination. The Office also requested that Dr. Sparti complete a work restriction form.

On January 11, 1994 Dr. Dopson noted appellant's history and conducted a physical examination. He stated that a work hardening program would help appellant graduate back to his regular duties. He found that the June 1993 employment accident aggravated appellant's underlying degenerative disc disease at L5-S1. He estimated a return to work in four to six weeks. The Office subsequently requested that Dr. Sparti respond to Dr. Dopson's conclusions.

On January 12 and February 23, 1994 Dr. Sparti again diagnosed thoracic and lumbar somatic dysfunction with left upper and lower extremity paresthesis due to his employment injury and found that appellant was totally disabled.

On February 25, 1994 the Office referred the case, along with a copy of appellant's job description and a statement of accepted facts to Dr. John H. Gracy, a Board-certified orthopedic surgeon, to provide an impartial medical opinion examination.

On March 14, 1994 Dr. Gracy reviewed appellant's history and conducted a physical examination. He stated that appellant apparently had an aggravation of his preexisting lumbar disc disease as a result of his June 28, 1993 injury. He indicated that the aggravation "probably ceased on or about six months after injury…." He concluded that appellant's underlying disc disease could prevent appellant's return to work, but that appellant should undergo a functional capacities evaluation to determine what kind of work appellant was capable of performing. Finally, he stated that since he disagreed with some of Dr. Dopson's conclusions, he did not agree primarily with Dr. Dopson or Dr. Sparti.

On March 22, 1994 Dr. Dopson completed a work restriction evaluation. He indicated that appellant could continually sit, walk, or stand eight hours per day and that he could intermittently lift, bend, squat, climb, kneel or twist eight hours per day. He stated that appellant could lift 50 to 75 pounds, perform simple grasping, pushing and pulling, fine manipulation, reaching above the shoulder, operate foot controls and operate vehicles. He stated maximum medical improvement occurred on February 1, 1994.

On March 28, 1994 Dr. Sparti again diagnosed thoracic and lumbar somatic dysfunction with left upper and lower extremity paresthesis due to his employment injury and found that appellant was totally disabled.

On April 6, 1994 Dr. Gracy indicated that he essentially agreed with Dr. Dopson's work restriction recommendations and that after a work hardening program appellant could return to the work force.[1] Dr. Gracy further stated that it was difficult to tell how much of appellant's pain was still attributable to the June 1993 injury, but that probably a majority of the symptoms resulted from appellant's underlying disease.

On April 20, 1994 the employing establishment offered appellant a limited-duty position as modified rural carrier within his designated physical restrictions.

Appellant rejected the job offer on April 26, 1994 because Dr. Sparti would not let him perform the duties required due to severe spine problems.

On May 6, 1994 the Office allowed appellant 30 days to either accept the position or provide an explanation for refusing it.

[1] The record reveals that appellant started a work hardening program, but discontinued after two to three days.

On June 8, 1994 the Office requested that the employing establishment clarify its job offer by specifying the duties and physical requirements involved and by assuring that the job would be available for at least 90 days after its was offered.

On June 24, 1994 the employing establishment clarified its limited-duty job offer as a modified rural carrier.

Appellant rejected the job offer on June 27, 1994, stating his physician would not let him perform the duties required due to severe spine problems.

On June 30, 1994 the Office allowed appellant 30 days to either accept the position or provide further explanation for refusing it.

On August 3, 1994 the Office found that appellant's reasons for rejecting the job offer where unacceptable and gave him 15 days to accept the offer or his benefits would be terminated pursuant to 5 U.S.C. § 8106(c).

On August 17 and August 24, 1994 Dr. Sparti again diagnosed thoracic and lumbar somatic dysfunction with left upper and lower extremity paresthesis due to his employment injury and stated found that appellant remained totally disabled.

By decision dated August 18, 1994, the Office terminated appellant's entitlement to continuing wage-loss compensation because the medical evidence established that appellant refused suitable employment. The Office noted that both Dr. Dopson and Dr. Gray had approved the light-duty job offer.

In a letter dated August 30, 1994, appellant indicated that his supervisor informed him that the limited-duty position was not available. In a letter dated September 12, 1994, the employing establishment wrote to appellant that a limited-duty position was not available.

On October 7, 1994 the employing establishment withdrew the limited-duty job offer as no position was available within appellant's restrictions.

On November 2, 1994 the Office vacated its August 18, 1994 decision terminating benefits and compensation benefits were reinstated. In an accompanying memorandum, the Office noted that the offered position was not available. Moreover, the Office noted that the record was devoid of a rationalized medical opinion indicating that appellant's aggravation of degenerative disc disease had ceased.

On February 3, 1995 the Office requested that Dr. Sparti provide objective evidence supporting his assessment of total disability from the accepted employment injury.

On February 22, 1995 Dr. Sparti stated that postural evaluation and spine flexibility revealed decreased lateral flexion and extension throughout the lumbar region. He stated that x-rays revealed levoscoliosis with mild to hypertrophic spurring and rotoscoliosis with L5-S1 narrowing. Dr. Sparti noted that even though appellant had a preexisting back condition he suffered a significant new injury to his lumbar spine and thoracic areas. He stated that there was

also an exacerbation of his existing symptoms. He stated that appellant continued to have increased pain and decreased ability to perform normal functions despite his efforts to rehabilitate himself. He diagnosed lumbar somatic dysfunction, left lower extremity paresthesia, cardiac arrthymia, hepato-cellular disease and post-traumatic neuroses. Dr. Sparti indicated that due to appellant's slow rate of improvement he is not likely to return to normal activities. He also found that appellant had a depressive disorder with poor motivation to resume a position, which causes substantial discomfort due to injuries sustained in his employment accident. Based on appellant's injuries, he found that appellant was 100 percent disabled from his previous duties with the employing establishment.

On March 2, 1995 the employing establishment offered appellant another limited-duty position as a modified carrier, working at the mail recovery center. This position required continuous sitting and lifting of trays of mail up to 20 pounds.

The Office found the conflict in medical opinion between Drs. Sparti and Dopson was unresolved.

On March 16, 1995 the Office referred appellant, along with the entire record and a statement of accepted facts, to Dr. Howard L. Hecht, a Board-certified orthopedic surgeon, to resolve the conflict in the evidence over appellant's current restrictions for work due to the employment injury.

On April 3, 1995 the Office allowed appellant 30 days to either accept the position or provide an explanation for refusing it. The Office informed appellant that if he refused the limited-duty job offer he would not be entitled to compensation pursuant to 5 U.S.C. § 8106(2).

Dr. Hecht examined appellant on April 12, 1995. He reviewed appellant's history of injury and the treatment provided for his symptoms. Upon reviewing x-rays, he diagnosed degenerative spondylitis at L5-S1 which preceded the June 1993 injury. Dr. Hecht found that appellant was capable of a full and unrestricted work level of activity, the only limitation being no lifting of weight greater than 50 pounds on a repetitive basis. He also found that any of appellant's remaining symptoms would be unrelated to his accident of 1993.

In a decision dated June 23, 1995, the Office terminated appellant's compensation on or after June 25, 1995 because the evidence of file established that he refused suitable employment and terminated appellant's medical benefits because the weight of the medical evidence established that the injury-related conditions had resolved. The Office noted that appellant did not respond to its April 3, 1995 letter.

On July 24, 1995 appellant's representative requested reconsideration and submitted a letter dated July 14, 1995, in which appellant indicated that the limited-duty position of modified rural carrier did not exist and that he was physical unable to perform the duties described. Appellant also resubmitted Dr. Sparti's February 22, 1995 report and work restriction form.

By decision dated September 9, 1995, the Office denied appellant's request for reconsideration because the position offered appellant was at mail recovery center sorting mail

and lifting up to 20 pounds. The Office found Dr. Sparti's medical report to be repetitious of his prior reports.

Despite the decision of the Office terminating compensation benefits, appellant continued to receive compensation benefits from June 25 through September 16, 1995 in the amount of $7,185.78.

On October 17, 1995 the Office made a preliminary determination that an overpayment occurred in the amount of $7,185.78 because appellant continued to receive benefits after his compensation was terminated. The Office found that appellant was at fault because he knew or should have known he was not entitled to compensation benefits after receiving the Office's June 23, 1995 decision terminating compensation. Appellant was given 30 days to request a prerecoupment hearing.

In a decision dated November 15, 1995, the Office found that the preliminary finding that appellant was at fault in the creation of a $7,185.78 was correct.

The Board initially finds that the Office properly terminated appellant's compensation benefits pursuant to 5 U.S.C. § 8106(2) on the grounds that he refused suitable work.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[2] This burden of proof is applicable if the Office terminates compensation pursuant to 5 U.S.C. § 8106(c) for refusal to accept suitable work.

Under section 8106(c)(2) of the Federal Employees' Compensation Act,[3] 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.[4] Section 10.124(c) of the Code of Federal Regulations[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 showing before a determination is made with respect to termination of entitlement to compensation.[6] To justify termination of compensation, the Office must show that the work

[2] *Frederick Justiniano*, 45 ECAB 491 (1994).

[3] 5 U.S.C. § 8106(2).

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

[5] 20 C.F.R. § 10.124(c).

[6] *Camillo R. DeArcangelis*, *supra* note 4; *see* 20 C.F.R. § 10.124(e).

offered was suitable[7] and must inform appellant of the consequences of refusal to accept such employment.[8]

In this case, the Office properly determined that a conflict existed between the opinion of Dr. Sparti, an osteopath and appellant's treating physician and the opinion of Dr. Dopson, a Board-certified orthopedic surgeon, regarding whether appellant remained totally disabled from all employment. Dr. Sparti opined that appellant remained totally disabled from all employment, while Dr. Dopson concluded that appellant's disability had resolved. Due to the conflict, the Office referred appellant to Dr. Gracy, a Board-certified orthopedic surgeon, for an impartial medical examination pursuant to section 8123 of the Act.[9] Dr. Gracy, however, failed to resolve the conflict in the medical opinion evidence because he rendered an equivocal opinion. As Drs. Sparti and Dopson continued to offer conflicting opinions over appellant's current restrictions for work due to the employment injury, the Office properly requested an additional referee opinion from Dr. Hecht, a Board-certified orthopedic surgeon.[10]

Dr. Hecht reviewed appellant's history, his course of treatment, the objective tests and he conducted a physical examination. He found that because appellant had no neurological abnormalities he was capable of full and unrestricted work with the only limitation being no lifting of weights greater than 50 pounds on a repetitive basis. Because appellant's latest job offer did not require appellant to lift over 20 pounds, Dr. Hecht's opinion supports that the limited-duty position offered to appellant was suitable. Moreover, Dr. Hecht's well-rationalized and factually supported opinion is entitled to special weight based on his status as the impartial specialist.[11] Accordingly, the Office properly terminated appellant's compensation benefits upon his refusal to accept suitable employment after informing him of the consequences of his refusal of that employment.

The Office also properly terminated appellant's medical benefits on the grounds that his employment-related condition had ceased.

To terminate authorization for medical benefits, the Office must establish that appellant no longer has residual of an employment-related condition, which requires medical treatment.[12] In this case, the impartial medical specialist, Dr. Hecht determined that any of appellant's remaining symptoms were unrelated to his accident of 1993. As previously established, Dr. Hecht's well-rationalized and factually accurate opinion is entitled to special weight based

[7] *See Carl W. Putzier*, 37 ECAB 691 (1986); *Herbert R. Oldham*, 35 ECAB 339 (1983).

[8] *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.813.11(c) (December 1991).

[9] 5 U.S.C. § 8128 *et seq.*

[10] *Thomas Graves*, 38 ECAB 409 (1987).

[11] *See Jack R. Smith*, 41 ECAB 691 (1990).

[12] *Furman G. Peake*, 41 ECAB 361 (1990).

on his status as the referee examiner.[13] Consequently, the Office properly determined that appellant no longer had residuals of his employment-related condition.

The Board also finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for a merit review on September 9, 1995.

Under section 8128(a) of the Act,[14] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.138(b)(1) of the implementing federal regulations,[15] which provides that a claimant may obtain review of the merits of the claim by:

> "(i) Showing that the Office erroneously applied or interpreted a point of law; or
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> "(ii) Advancing a point of law or a fact not previously considered by the Office; or
>
> "(iii) Submitting relevant and pertinent evidence not previously considered by the Office."

Section 10.138(b)(2) provides that any application for review of the merits of the claim, which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.[16]

In support of his request for reconsideration, appellant and his representative argued that the job duties described in the March 2, 1995 limited-duty job offer were inappropriate to the position entitled "modified rural carrier." This argument, involving the title of the limited-duty position, is not relevant to resolving the issue of whether appellant was capable of performing the duties of the position offered, *i.e.*, working at the mail recovery center. Appellant and his representative further argued that the February 22, 1995 report and accompanying work restriction form rendered by Dr. Sparti established that he was incapable of performing the duties of the job offer. Because the Office previously considered this evidence, the Office properly found it was insufficient to warrant a merit review. The Office, therefore, did not abuse its discretion by refusing to reopen appellant's claim for a merit review in its September 9, 1995 decision.

Finally, the Board finds that appellant was with fault with respect to creating an overpayment in the amount of $7,185.78 and that the recovery of the overpayment was not subject to waiver.

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[13] *See Jack R. Smith*, *supra* note 11.

[14] 5 U.S.C. § 8128(a).

[15] 20 C.F.R. § 10.138(b)(1).

[16] 20 C.F.R. § 10.138(b)(2).

Section 8129 of the Act provides in pertinent part:

> "When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under the regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled….
>
> "(b) Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."[17]

Section 8129 of the Act provides for recovery of an overpayment when the individual is not without fault. Concerning whether an individual is with fault in creating an overpayment, the Office's regulations provide in relevant part:

> "In determining whether an individual is with fault, the Office will consider all pertinent circumstances, including age, intelligence, education and physical and mental condition. An individual is with fault in creation of an overpayment who:
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> > (1) Made an incorrect statement as to a material fact, which the individual knew or should have known to be incorrect; or
> >
> > (2) Failed to furnish information which the individual knew or should have known to be material; or
> >
> > (3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect."[18]

In this case, the Office informed appellant in its June 23, 1995 decision, that it was terminating his compensation benefits because he failed to accept suitable employment. Appellant, therefore, knew that he should not have received compensation totaling $7,185.78 for the period of June 25 through September 16, 1995 because these benefits had been terminated by the Office. Consequently, he is not without fault in the creation of the overpayment and it is not subject to waiver. The decision of the Office dated November 15, 1995 is therefore affirmed.

With respect to the recovery of the overpayment, the Board notes that its jurisdiction on appeal is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act.[19] As appellant is no longer receiving wage-loss

[17] 5 U.S.C. § 8129.

[18] 20 C.F.R. § 10.320(b).

[19] *Lewis George*, 45 ECAB 144 (1993).

compensation benefits, the Board does not have jurisdiction with respect to the Office's recovery of the overpayment under the Debt Collection Act.

The decisions of the Office of Workers' Compensation Program dated November 15, September 9 and June 23, 1995 are affirmed.

Dated, Washington, D.C.
August 5, 1998

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member