U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KENNETH R. LOVE and U.S. POSTAL SERVICE,
SAN FRANCISCO BULK MAIL CENTER, Richmond, Calif.

Docket No. 96-652; Submitted on the Record;
Issued December 22, 1998

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's monetary compensation benefits on the grounds that he refused an offer of suitable work; (2) whether the Office properly denied appellant's claim for an October 1995 recurrence of disability on the grounds that such claim was barred by the penalty provisions of section 8106 of the Federal Employees' Compensation Act; (3) whether the Office properly denied appellant's October 10, 1995 request for reconsideration; and (4) whether the Office properly found that appellant's accepted emotional condition had ceased as of September 14, 1993.

In the present case, the Office has accepted that on August 22, 1988, appellant, then a 33-year-old vehicle operations assistant, sustained an occipital contusion, cervical strain, lumbar strain, and L4-5 disc protrusion with nerve root irritation, when he fell from a chair. He stopped work on August 22, 1988, returned to limited duty as a vehicle operations assistant on July 17, 1989, stopped work again on approximately August 31, 1990 and did not return. Appellant received compensation for temporary total disability on the daily rolls and on the periodic rolls effective August 30, 1990. The Office also authorized an October 11, 1991 left L4-5 laminectomy to repair a "protruded intervertebral disc on the left side, L4-5 with nerve root compression," and accepted an adjustment disorder beginning June 5, 1990 and ending September 14, 1993.

In a June 10, 1991 report, Dr. Paul Lowinger, an attending Board-certified psychiatrist, diagnosed dysthymia, and psychological factors affecting appellant's physical condition resulting from his back and leg pain and weakness. He noted that appellant presently could not interact with coworkers, and could not meet deadlines due to fatigue, depression and headache. Dr. Lowinger opined that appellant could return to work on September 25, 1991. He did not submit any further reports of record.

In a September 14, 1992 report, Dr. Jeffrey Randall, an attending neurosurgeon, noted appellant's lumbar condition was permanent and stationary, and proscribed "heavy labor."

In a September 14, 1993 report, Dr. James R. Liles, a Board-certified psychiatrist and second opinion physician, reviewed the medical record and statement of accepted facts, and conducted a psychiatric examination. He observed that appellant perceived himself as more frustrated and angry than sad or depressed and had perceived himself as harassed and persecuted prior to the August 22, 1988 employment injury. Dr. Liles stated that appellant had insufficient symptomatology to permit a diagnosis of dysthymic disorder or psychological factors affecting his physical condition. He opined that appellant did not have an existing adjustment disorder or any psychiatric condition.[1]

In a November 23, 1994 report, Dr. Randall opined that the accepted occipital contusion and cervical strain no longer contributed to appellant's disability for work.

As the medical evidence indicated that appellant was no longer totally disabled for work due to the accepted conditions, by a March 8, 1995 letter, the employing establishment offered appellant the position of modified vehicle operations assistant. Duties included assigning truck yard locations, issuing passes, computer data entry and records maintenance, sitting or standing as desired. The position required intermittent walking and lifting up to 10 pounds. Appellant was directed to return an attached approval/disapproval form within 10 days.

By decision dated March 24, 1995, the Office found that, based on Dr. Liles' report, appellant's accepted emotional condition had ceased as of September 14, 1993.

By notice dated March 24, 1995, the Office advised appellant that the offered modified vehicle operations assistant position was determined to be suitable work, consistent with appellant's work history, training and work restrictions.[2] The Office advised appellant that under section 8106(c)(2) of the Act, a "partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for him is not entitled to compensation."[3]

On April 5, 1995 on the form provided by the employing establishment, appellant accepted the offered position, but in an attached letter, alleged that the employing establishment denied his right to bid on the position, and that the offered job was a "ploy" to get him off the compensation rolls. He concluded that he was "willing to work this position once" the Office approved additional psychiatric treatment. In an April 18, 1995 letter, appellant stated that he could not perform the offered position due to increased back pain.

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[1] In a September 27, 1993 report, Dr. Richard Komm, a clinical psychologist and second opinion physician, reviewed the statement of accepted facts and the medical record, conducted an interview and performed psychometric testing. He diagnosed a "phase of life problem or life circumstance problem," and a "schizotypal personality disorder." Dr. Komm did not opine that either diagnosis was work related.

[2] In a March 29, 1995 report, Dr. Randall reviewed the offered position's requirements and opined that appellant could perform those duties and "return to work at any time."

[3] 5 U.S.C. § 8106(c)(2).

In a May 9, 1995 letter, the Office noted that appellant provided no medical documentation of increased back pain, advised appellant that his stated reasons for refusing the offered suitable work were unacceptable, and that no further arguments would be accepted. The Office again advised appellant of the penalty provisions of section 8106(c)(2).[4]

In a May 17, 1995 report, Dr. Randall stated that appellant was in a May 5, 1995 automobile accident and diagnosed a "mild cervical strain and exacerbation of … chronic low back pain." He opined that appellant could return to work on June 1, 1995.[5]

In a June 29, 1995 letter, appellant stated that the May 5, 1995 injuries prevented him from working. He enclosed a June 30, 1995 work status report from Dr. Jonathan Francis, a physician under contract to the employing establishment, diagnosing a lumbar sprain and myofascitis and holding him off work from May 5 to September 15, 1995.

File memoranda indicate that on July 24, 1995, the Office determined that appellant did not respond to the June 23, 1995 letter, and had not returned to work. The Office noted that the offered modified vehicle operations assistant position remained available.

By decision dated July 31, 1995, the Office terminated appellant's wage-loss compensation effective August 20, 1995 on the grounds that appellant had refused an offer of suitable work under section 8106(c) of the Act, and provided insufficient medical evidence to justify his refusal. The Office noted appellant's medical benefits would continue.

In an August 3, 1995 report, Dr. Randall stated that appellant was neurologically stable and could "return to work in regard to his back condition."

In an August 25, 1995 report, Dr. Francis diagnosed "acute sprain of the spine with myofascitis due to a date of injury of May 5, 1995." He explained that because of appellant's previous back injury and surgery, appellant was "significantly injured" and unable to work due to pain, spasm, limited mobility and function of the lumbar spinal area."

The record indicates that on September 15, 1995, appellant returned to the employing establishment in the offered position.

In an October 10, 1995 letter, appellant requested reconsideration pertaining to the Office's nonpayment of compensation from August 20 to September 15, 1995.

On October 31, 1995 appellant filed a notice alleging a recurrence of disability beginning October 21, 1995. Appellant asserted he had been caused to sit "in improper chairs," work in

[4] In June 23 and 27, 1995 letters to appellant, the employing establishment noted that the modified job offer he accepted on April 5, 1995 was found to be suitable work. Appellant was directed to contact the medical unit for an appointment within five days of June 27, 1995 or he would be considered absent without leave (AWOL) and action to remove him from the compensation rolls could be initiated.

[5] In a May 19, 1995 report, Dr. Francis stated that appellant had sustained an aggravation of his chronic back condition in a May 5, 1995 automobile accident and would be off work until July 5, 1995. He noted limited range of motion and function of the lumbar spine.

"the night air" and under the pressure of a worsening pain condition. Appellant stated he had developed pneumonia as of October 21, 1995. Appellant's supervisor noted that appellant stopped work and his pay had stopped on October 22, 1995 and that appellant was provided an ergonomic chair and headset to accommodate his condition.

In a November 10, 1995 report, Dr. Francis noted findings on examination and diagnosed an acute post-traumatic cervical and lumbar sprains, "persistent myofascial pain syndrome with recurrence of previous injury dating to 1988 aggravated by environmental conditions … [and] suspected bronchitis and/or pneumonia, resolving." He released appellant to "regular work" as of January 2, 1996.

By decision dated December 18, 1995, the Office denied appellant's request for reconsideration on the grounds that as his September 15, 1995 return to work occurred after the Office's July 31, 1995 decision, his request for reconsideration was *prima facie* insufficient to warrant a merit review.

By decision dated December 19, 1995, the Office denied appellant's claim for recurrence of disability on the grounds that under 5 U.S.C. § 8106(c)(2), a worsening of appellant's condition or recurrence of disability did not warrant modification of the decision.

Regarding the first issue, the Board finds that the Office did not properly determine that appellant refused an offer of suitable work.

Section 8106(c)(2) of the Act provides in pertinent part, "A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered is not entitled to compensation."[6] To justify such termination, the Office must show that the work offered was suitable.[7] An employee who refuses or neglects to work after suitable work is offered has the burden of showing that the refusal to work was justified.[8]

In order to insure regularity and impartiality in adjudicating claims, the Office must not only inform each claimant of the provisions of the above statute, but also inform him or her that a specific position offered is suitable; the consequences of refusal of the position; and allow the claimant a reasonable period to accept or reject the position or submit evidence or reason why the position is not suitable and cannot be accepted. If a claimant submits evidence or reasons or both, the Office must evaluate the new evidence or reasons submitted and inform the claimant of its decision as to whether the evidence or reasons submitted were accepted or rejected. Claimants should be informed in the latter communication of the final intentions of the Office and given a reasonable period to make the requisite decision if any such further action is required. This procedure provides claimants the opportunity to make an informed decision as to

[6] 5 U.S.C. § 8106(c)(2).

[7] *David P. Camacho*, 40 ECAB 267 (1988).

[8] 20 C.F.R. § 10.124; *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

whether to accept or reject a job offer deemed valid by the Office prior to having his or her benefits terminated permanently.[9]

In the present case, the March 24, 1995 notice meets the Office's burden of proof of notifying appellant that the offered position was suitable work, and of the penalty provisions of section 8106(c)(2).

In an April 5 and 18, 1995 letters, appellant stated his reasons for declining the offered position, including that the offer was not made in accordance with employing establishment bidding procedures, and that he was disabled for work due to back pain and the accepted emotional condition. The Office informed appellant by May 9, 1995 letter that his reasons for refusing the suitable work position were unacceptable, and that no further arguments would be accepted. The Office again advised appellant of the penalty provisions of section 8106(c)(2).

Appellant then submitted a June 29, 1995 letter asserting that the May 5, 1995 injuries prevented him from working. He also enclosed new medical evidence, a June 30, 1995 work status report from Dr. Francis, diagnosing a lumbar sprain and myofascitis and holding appellant off work through September 15, 1995. Appellant's letter and Dr. Francis' report were received by the Office prior to July 24, 1995. However, file memoranda indicate that on July 24, 1995, the Office determined that appellant had not responded to the June 23, 1995 letter, and had not returned to work. This demonstrates that the Office did not review appellant's June 29, 1995 letter or Dr. Francis' June 30, 1995 report. The Board finds that the Office acted improperly in not considering this report before terminating appellant's compensation for refusing suitable work. It is necessary that the Office review all evidence submitted by a claimant and received by the Office prior to issuance of its final decision.[10]

The Board notes, however, that the Office has already afforded appellant the procedural protection envisioned by the Board's decision in *Maggie L. Moore*[11] and the remand on the prior appeal, as it considered appellant's reasons for refusing the offered position, advised appellant they were unacceptable, and thereafter afforded him 15 days to accept or refuse the offered position. Thus, although the Office cannot ignore evidence submitted after the period allotted for submitting reasons for not accepting an offered position, submission of such belated evidence does not require the Office to afford appellant another 15 days to accept or reject the position. Otherwise an appellant could postpone indefinitely the termination of his compensation for refusal of suitable work by offering new reasons each time the Office advises appellant that he must accept the position or have his compensation terminated.

Once the Office advises a claimant that his or her reasons for refusing an offered position are unacceptable and that he or she has 15 days to accept the position or have compensation terminated, the claimant submits further reasons and supporting evidence at his or her own risk.

[9] *Maggie L. Moore*, *supra* note 8.

[10] *C.W. Hopkins*, Docket No. 94-1025 (issued August 23, 1996); *William A. Couch*, 41 ECAB 548 (1990).

[11] *Supra* note 8.

Nevertheless, the Office must consider the reasons and evidence and can then concurrently reject them as unacceptable and terminate compensation.

As the Office failed to review appellant's June 29, 1995 letter and the enclosed evidence, the Office's July 31, 1995 decision terminating appellant's wage-loss compensation on the grounds that he refused or neglected an offer of suitable work must be reversed, and the case returned to the Office for payment of appropriate compensation for the period August 20 to September 14, 1995, and any other appropriate compensation benefits.

As the Office's July 31, 1995 decision terminating appellant's wage-loss compensation on the grounds that he had refused or neglected an offer of suitable work must be reversed, the second and third issues in this case are moot.

Regarding the fourth issue, the Board finds that the Office properly found that appellant's accepted emotional condition had ceased as of September 14, 1993.

When an employee claims a recurrence of or continuing disability causally related to an accepted employment injury, he or she has the burden of establishing by the weight of the reliable, probative and substantial medical evidence that the claimed period of disability is causally related to the accepted injury. As part of this burden, appellant must submit rationalized medical evidence based on a complete and accurate factual and medical background showing causal relationship.[12] An award of compensation may not be made on the basis of appellant's unsupported belief of causal relation.[13] In this case, appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between the accepted psychiatric conditions and his condition on and after September 14, 1993.[14]

Appellant did not submit psychiatric evidence directly addressing his mental state on and after September 14, 1993. The most recent psychiatric report of record is the June 10, 1991 report of Dr. Lowinger, an attending Board-certified psychiatrist. He diagnosed dysthymia, and psychological factors affecting physical condition, and opined that appellant could attempt a return to work as of September 25, 1991. Dr. Lowinger did not opine that appellant had any permanent work-related psychiatric condition. He did not submit additional reports of record.

The Board notes that the Office periodically advised appellant of the need to submit current medical reports regarding his accepted emotional conditions. However, appellant did not submit such reports other than Dr. Lowinger's June 10, 1991 report.

As appellant did not submit additional medical evidence addressing his emotional condition, the Office referred appellant to Dr. Liles, a Board-certified psychiatrist and second opinion physician. He submitted a detailed report dated September 14, 1993, finding insufficient symptomatology to support diagnoses of dysthymic disorder or psychological factors affecting

[12] *See Armando Colon*, 41 ECAB 563 (1990).

[13] *Ausberto Guzman*, 25 ECAB 362 (1974).

[14] *Dominic M. DeScala*, 37 ECAB 369, 372 (1986); *Bobby Melton*, 33 ECAB 1305, 1308-09 (1982).

physical condition, the two disorders originally diagnosed by Dr. Lowinger and accepted by the Office. Dr. Liles provided medical rationale explaining how and why the results of an interview and examination did not indicate that appellant had any psychiatric condition, and therefore could not be disabled for work due to a psychiatric condition. In its March 24, 1995 decision, the Office found that appellant's accepted emotional conditions had ceased as of September 14, 1993, the date of Dr. Liles' report. The Board finds that Dr. Liles' report is sufficiently rationalized and based on an accurate factual and medical history, and is therefore entitled to the weight of the medical evidence on the emotional condition issue.

Consequently, appellant has not met his burden of proof, as he submitted insufficient medical evidence indicating that the August 22, 1988 employment injury caused or aggravated any emotional condition on and after September 14, 1993.

The decision of the Office of Workers' Compensation Programs dated July 31, 1995 is hereby reversed; the decisions of the Office dated December 19 and 18, 1995 are set aside; the decision of the Office dated March 24, 1995 finding that appellant's accepted emotional condition ceased as of September 14, 1993 is affirmed.

Dated, Washington, D.C.
December 22, 1998

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member