U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRINLEY R. EVANS and DEPARTMENT OF THE NAVY
PHILADELPHIA NAVAL SHIPYARD, Philadelphia, Pa.

Docket No. 96-25; Submitted on the Record;
Issued January 27, 1998

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective November 13, 1994 on the grounds that he refused an offer of suitable work.

The Office accepted appellant's claim for contusions of the face, head, shoulder, neck and back, concussion, cervical and dorsal sprain, anxiety and depression. On October 22, 1991 appellant, then a 45-year-old police officer, was injured in a car accident during his federal employment. Appellant has not worked since his injury.

Appellant submitted evidence to document his ongoing disability. In an attending physician's report dated October 24, 1991, Dr. Harold H. Culton, appellant's treating physician and a general practitioner with a sub-specialty in dermatology, diagnosed cerebral concussion and cervical and dorsal strain. He checked the "yes" box stating that appellant's condition was related to his October 22, 1991 employment injury and provided no explanation although he was asked to provide an explanation only if there was doubt. Dr. Culton stated that appellant was totally disabled and referred him to other doctors for diagnostic testing. In a report dated November 7, 1991, he reiterated that appellant was totally disabled and subjected him to restrictions including intermittent lifting of 0 to 10 pounds and intermittent sitting, walking, bending and standing. Subsequent reports from Dr. Culton through January 6, 1992 document that appellant was totally disabled.

On October 29, 1991 Dr. Harry Cooper, an osteopath, interpreted x-rays of the thoracic spine as negative for fracture but showed mild degenerative changes. On December 19, 1991 Dr. Ralph A. Kahn, an osteopath, interpreted a cervical computerized axial tomography (CAT) scan as showing postero-lateral disc bulging at the C5-6 level and broad-based bulge at the C6-7 level with compression of the anterior thecal sac and emerging left nerve root. On January 11, 1992 Dr. Joel D. Swartz, a Board-certified diagnostic radiologist, stated that a CAT scan of the head was normal. On January 31, 1992 Dr. Julian Ungar-Sargon stated that neuromuscular

testing showed decreased range of motion of the neck with obvious spasm in the paraspinal muscles. On February 17, 1992 Dr. Mohan G. Desai, a Board-certified radiologist, interpreted a magnetic resonance imaging (MRI) scan of the cervical spine as showing mild bulging annulus at C5-6 and C6-7.

In a report dated June 1, 1992, Dr. Robert M. Cohen, a second-opinion physician and a neurologist, considered appellant's history of injury, performed a physical examination, and reviewed the diagnostic tests of record. He diagnosed post-concussion headache syndrome, slowly resolving, and post-traumatic cervical, thoracic and lumbosacral sprain/strain syndromes from which appellant had no residuals. Dr. Cohen stated that he "suspected traction (stretch/bruise) injuries" from which appellant also had no residuals. Dr. Cohen concluded that appellant's major problem was "sheer terror" when he felt any discomfort. He believed that once appellant strengthened his muscles and underwent four weeks of a work hardening, very active rehabilitation program, he would be able to work as a police officer.

In a report dated October 30, 1992, Dr. Leo McCluskey, a second-opinion physician and a Board-certified psychiatrist and neurologist, considered appellant's personal history, performed a physical examination, reviewed the diagnostic tests of record and concluded that appellant's neurological examination was normal. He stated that appellant's mood might be playing a significant role in the maintenance of his symptoms and he might well be depressed but he did not believe that the cause of such depression could be clearly attributable to the October 22, 1991 car accident. Dr. McCluskey stated that appellant had a long history of prior alcoholism and his difficulties with depression might stem from prior difficulties although he had no data to support that theory. He further stated that appellant seemed to be inordinately concerned about the possibility of a significant neurologic abnormality.

In a report dated November 2, 1992, Dr. Perry A. Berman, a second-opinion physician and a Board-certified psychiatrist and neurologist, considered appellant's personal history, performed a psychiatric examination, and reviewed the medical reports of record. Dr. Berman diagnosed somatoform pain disorder which he defined as a preoccupation with pain *in the absence of adequate physical findings* to account for the pain or its intensity, and histrionic personality. [As emphasized]. He stated that there were no objective findings that demonstrated a post-concussion syndrome, or anxiety or depression. Dr. Berman stated that appellant's problems were not solely limited to the car accident and that many of them preceded the accident and some have worsened. He stated that none of appellant's problems prohibited him from working *per se*. Dr. Berman stated that he did not think appellant appeared to be interested in returning to work but he recommended that appellant return to work, perhaps as a telephone receptionist or a secretarial-type person. He stated that possibly appellant could be permitted to lay down for two hours if he was in pain but, in time, once he realized he had to work even in pain, he would work a full day.

To resolve the conflict in the medical evidence as to whether appellant was disabled between appellant's treating physician, Dr. Culton and the second-opinion physicians, Dr. Cohen and Dr. Berman, the Office referred appellant to an impartial medical specialist, Dr. Craig A. Bogen, a Board-certified psychiatrist and neurologist with a sub-specialty in internal medicine. Dr. Bogen considered appellant's personal history, performed a physical examination, and

reviewed the diagnostic tests of record. He diagnosed chronic muscle contraction headaches, chronic musculoskeletal neck and mid-back pain, mild to moderate degenerative disc disease at C6 and C7, chronic tinnitus (improving), mild amaxophobia (fear of driving) and somatoform pain disorder. He stated he did not believe that many of those diagnoses could be clearly attributed, with any reasonable medical certainty, to the October 22, 1991 employment injury.

Dr. Bogen stated that appellant's neurological examination was normal and appellant's limited daily activities and stated level of disability were grossly out of proportion to the paucity of abnormalities on the physical examination and diagnostic studies, suggesting that symptom elaboration or motivational factors were substantial. He stated that appellant was fully capable of gainful employment, with allowances made for him to change his position between sitting and standing as needed. In an accompanying work restriction form dated February 18, 1994, Dr. Bogen stated appellant could work 8 hours, lift 20 to 50 pounds, sit intermittently for 8 hours, walk intermittently for 4 hours, stand intermittently for 5 hours, bend intermittently for 1 hour and lift intermittently for 3 hours.

By letter dated November 5, 1993, the employing establishment offered appellant the job of security clerk. The physical demands of the job were described as the employee sitting at a desk/counter and performing some standing, bending or carrying of light items of 15 pounds or less.

On June 24, 1994 the Office informed appellant that the offered position of security clerk was suitable and that the position was currently available. The Office provided appellant 30 days within which to either accept the position or provide an explanation for the reasons for refusing it. The Office advised appellant that his compensation would be terminated if he refused the offer and his refusal was not justified.

Appellant, through his attorney, submitted medical reports from Dr. Culton dated November 5, 1993 and March 30, 1994, from Dr. Richard W. Cohen, a Board-certified psychologist and neurologist, dated March 21, 1994 and from Dr. Joseph J. Robinson, a chiropractor, dated March 22, 1994 allegedly establishing that appellant was not physically capable of performing the job of security clerk. In his November 5, 1993 report, Dr. Culton diagnosed several conditions including discogenic disease at C5-6 and C6-7, cervical sprain and strain and depression and stated that appellant was totally disabled from performing his usual work of a police officer. In his March 30, 1994 report, Dr. Culton stated that appellant's complaints were solely the proximate results of his accident trauma and appellant was permanently and totally disabled. In his March 21, 1994 report, Dr. Richard Cohen stated that appellant continued to be depressed and anxious due to his October 22, 1991 accident and his condition would impair his ability to work.

In his March 22, 1994 report, Dr. Robinson diagnosed, *inter alia*, bulging annulus at C5-6 and C6-7, cervical and dorsal sprain and strain, and subluxation at C2-C7. He stated that appellant's injuries were directly related to his October 22, 1991 motor vehicle accident and that appellant was totally disabled from working as a police officer, and it was unlikely he ever would be able to perform that work.

By letter dated August 9, 1994, the Office informed appellant that the doctors' reports he submitted did not establish he was unable to perform the job of security clerk and had 15 days to accept the security clerk position.

Appellant's attorney submitted additional medical evidence consisting of Dr. Robinson's reports dated from May 19, 1992 through September 23, 1994. In the September 23, 1994 report, Dr. Robinson reiterated his diagnoses in his March 22, 1994 report and stated that it was unlikely appellant could perform the work of a police officer and that appellant could not perform excessive driving and should avoid excessive straining of the cervical spine. Dr. Robinson's other reports stated that appellant was totally disabled from working as a police officer.

By decision dated October 17, 1994, the Office terminated appellant's compensation effective November 13, 1994.

Appellant requested a hearing which was held on March 21, 1995. At the hearing, appellant testified that he did not think that he could perform the work of security guard because he had done that work prior to his October 22, 1991 employment injury and it involved prolonged standing as long lines of people would occasionally form and there was an opportunity to lean but not sit against a waist high stool. Appellant stated that the job was "pretty active" and he did not consider the job a "sit-down job," and that the job also involved bending and carrying.

Appellant also submitted additional medical evidence. In a report dated March 20, 1995, Dr. Richard Cohen essentially reiterated his findings in his March 21, 1994 report and concluded that appellant's depression and anxiety impaired his ability to work. In a report dated May 23, 1995, Dr. Robinson reiterated his diagnoses in his March 22, 1994 report and stated that appellant could not return to his preinjury job without restriction.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits. This includes cases in which the Office terminates compensation under 5 U.S.C. § 8106(c) for refusal to accept suitable work.[1]

Under section 8106(c)(2) of Federal Employees' Compensation Act[2] the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, or procured by, or secured for the employee.[3] Section 10.124(c) of the Office's regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured 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

[1] *John E. Lemker*, 45 ECAB 258, 263 (1993); *Shirley B. Livingston*, 42 ECAB 855, 860 (1991); *Maggie L. Moore*, 42 ECAB 484, 486 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[2] 5 U.S.C. § 8101 *et seq.*

[3] *H. Adrian Osborne*, 48 ECAB _____, (Docket No. 95-1968, issued June 26, 1997); *Patrick A. Sannucci*, 40 ECAB 151, 156 (1988).

a determination is made with respect to termination of entitlement to compensation.[4] To justify termination, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[5]

In this case, to resolve the conflict in the medical evidence between Dr. Culton's and Dr. Richard Cohen's and Dr. Berman's opinions as to whether appellant was disabled, the Office referred appellant to an impartial medical specialist, Dr. Bogen who diagnosed, *inter alia*, chronic muscle contraction headaches, chronic musculoskeletal neck and mid-back pain, and mild to moderate degenerative disc disease at C6 and C7. He did not believe that some of these diagnoses could be clearly attributed, with any reasonable medical certainty, to the October 22, 1991 employment injury. Dr. Bogen found that appellant's neurological examination was normal and appellant's stated level of disability was grossly out of proportion to the paucity of abnormalities on the physical examination and diagnostic studies which suggested that symptom elaboration or motivational factors were substantial. He stated that appellant was fully capable of gainful employment, with allowances made for him to change his position between sitting and standing as needed. Specifically, the restrictions he placed on appellant included lifting 20 to 50 pounds, sitting intermittently for 8 hours, walking intermittently for 4 hours, and standing intermittently for 5 hours.

In situations where there are opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[6] The Board find that Dr. Bogen's opinion is sufficiently well rationalized in establishing that appellant could perform the work of security guard and is based on a proper factual background. The physical restrictions Dr. Bogen placed on appellant included sitting and standing as needed and lifting 20 to 50 pounds are within the limitations of the security guard which are sedentary with some standing, bending or carrying of light items of 15 pounds or less. Therefore, as an impartial medical specialist, Dr. Bogen's opinion constitute the weight of the evidence.

The medical evidence appellant submitted subsequent to Dr. Bogen's opinion does not establish that appellant is unable to perform the work of a security guard. Dr. Robinson's opinion is not probative because Dr. Robinson is a chiropractor and, while he diagnosed subluxations, he did not submit any x-rays showing sublaxations of the spine.[7] He therefore does not qualify as a physician within the meaning of the Act. Dr. Culton's reports dated November 5, 1993 and March 30, 1994 state that appellant is permanently, totally disabled from working as a police officer or is totally disabled in general but do not provide a rationalized explanation as to how appellant's disabling condition is causally related to the October 22, 1991 employment injury.[8]

[4] 20 C.F.R. § 10.124(c); *see also Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

[5] *John E. Lemker*, *supra* note 1 at 263; *Maggie L. Moore*, *supra* note 1.

[6] *Kathryn Haggerty*, 45 ECAB 383, 389 (1994); *Jane B. Roanhaus*, 42 ECAB 288 (1990).

[7] *See Carol A. Dixon*, 43 ECAB 1065, 1070 (1992).

[8] *See Gary L. Fowler*, 45 ECAB 365, 371 (1994); *Kathy Marshall*, 45 ECAB 827, 832 (1994).

Dr. Richard Cohen's March 21, 1994 and March 20, 1995 reports state that appellant's depression and anxiety impair his ability to work, but they also do not provide a rationalized medical opinion as to how his depression and anxiety resulted from the October 22, 1991 employment injury. Additionally, they do not address whether appellant can perform the work of the security guard. Although appellant testified that, based on his past work experience on the job, he did not believe he could perform the work of a security guard because it was active and did not permit sitting and standing as needed, he did not present medical evidence to support his testimony. The Office therefore properly terminated benefits based on appellant's refusal to perform suitable alternate work.

The decisions of the Office of Workers' Compensation Programs dated July 3, 1995 and October 6, 1994 are affirmed.

Dated, Washington, D.C.
January 27, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member