U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAUL N. COLOSI and DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION, New York, N.Y.

Docket No. 96-778; Submitted on the Record;
Issued July 23, 1998

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits pursuant to 5 U.S.C. § 8106(2) on the grounds that he refused suitable work; and (2) whether the Office abused its discretion by refusing to reopen appellant's claim for a merit review on December 8, 1995.

On May 22, 1991 appellant, then a 30-year-old special agent, filed a notice of traumatic injury and claim for continuation of pay/compensation alleging that on May 21, 1991 he injured his back while performing stretching exercises in the performance of duty. The claim was accepted for thoracic and lumbar sprain, sciatica, myalgia, and myositis. The Office accepted a recurrence of disability on May 11, 1993 and paid compensation benefits for total disability. This claim was subsequently combined with appellant's December 30, 1987 claim for a neck and back injury incurred on December 29, 1987. The Office accepted the 1987 claim for cervical, thoracic, and lumbar strain and a subluxation C3-4, T10-11, and L4-5.

On February 16, 1994 Dr. Leon N. Costa, appellant's treating physician and a Board-certified orthopedic surgeon, completed a work restriction evaluation. Dr. Costa indicated that appellant could perform intermittent sitting, walking, and standing three hours per day. He indicated that appellant could perform intermittent lifting, bending, squatting, and kneeling one hour per day and that he should not climb or twist. Dr. Costa limited lifting to 10 to 20 pounds and stated that more than 15 minutes of operating a vehicle increased appellant's symptoms. He also noted that changes in temperature increased appellant's symptoms. He stated that appellant could work eight hours a day within the above restrictions, but that appellant should avoid prolonged driving. In an accompany letter of the same date, Dr. Costa stated that appellant had reached maximum improvement and that his residual condition was permanent. On February 28 and March 8, 1994 Dr. Costa submitted attending physician's report indicating that appellant remained totally disabled for his usual work.

On March 31, 1994 Dr. M. Barry Lipson, an orthopedic surgeon, reviewed appellant's history including his automobile accident in 1987 and his May 21, 1991 incident. Dr. Lipson reviewed magnetic resonance imaging dated August 9, 1991 and found the results were normal. He also found a October 14, 1991 bone scan was normal. Dr. Lipson diagnosed low back pain by subjective complaint.

On April 18, 1994 Dr. Lipson stated that a Cybex isokinectic back test completed on April 4, 1994 revealed abnormal findings with regard to strength deficits throughout all trunk movements. Dr. Lipson stated he did not feel appellant was completely disabled and he recommended an assessment to demonstrate his maximum work capabilities.

On March 22, 1994 Dr. Bong S. Lee, a Board-certified orthopedic surgeon, performed a fitness for duty examination for the employing establishment. He reviewed appellant's history and x-rays. He diagnosed chronic lower back pain of unknown origin. Dr. Lee indicated that his examination failed to reveal any objective findings to reflect traumatic pathology or any significant disorders of the musculoskeletal system with respect to the spine. He indicated that any physical restrictions were based solely on appellant's complaints. Dr. Lee stated that he provided work restrictions based on appellant's subjective complaints.

Dr. Lee's work restriction form indicated that appellant could perform intermittent lifting/carrying of 0 to 10 pounds 8 hours per day, of 10 to 20 pounds 4 hours per day, of 20 to 50 pounds 1 hours per day, and of 50 to 100 pounds 0 hours per day. He further indicated that appellant could intermittently sit, perform simple grasping, perform fine manipulation, and reach above his shoulder 8 hours a day. Dr. Lee further stated that appellant could intermittently walk or stand 6 hours per days and that he could climb stairs, kneel, bend, and stoop 4 hours per day. Finally, he stated that appellant could intermittently twist and pull/push 2 hours a day and climb ladder 1 hour per day.

In a letter dated August 5, 1994, the Office indicated that it was unable to provide compensation benefits based on the reports of Drs. Lipson and Lee. The Office further stated that if appellant was offered a job he would be expected to take it or risk the reduction or termination of compensation. Finally, the Office allowed appellant 15 days to submit additional medical evidence from Dr. Lipson.

By letter dated September 14, 1994, the employing establishment offered appellant a limited-duty job offer that it stated was within the medical mandates indicated in appellant's personnel file. He stated that appellant could be assigned to an off-site, that he was expected to work odd shifts or weekends, and that his duties would vary. The employing establishment indicated that it relied on Dr. Costa's work restriction evaluation in drafting the offer.

On November 17, 1994 the Office indicated that the employing establishment's job offer was invalid. It stated that the unspecified duties, administratively uncontrollable overtime, indecisive and unstable work locations, and odd shifts were not within the restrictions for light duty work. It, therefore, indicated that appellant was entitled to receive compensation for temporary total disability until it received a valid job offer.

On January 10, 1995 the employing establishment presented appellant with another limited-duty job offer. The job required intermittent walking , standing, and sitting in an office setting. Actual activities were providing written and oral communications regarding reports, telephone work, data processing, and giving administrative support. The position did not require prolonged driving, overtime, or lifting over 20 pounds. The employing establishment indicated that the duties were within the restrictions established by Dr. Lee in his March 22, 1994 work restriction evaluation.

The Office subsequently found that the job offer was suitable. It informed appellant that pursuant to 5 U.S.C. § 8106(c) that he would not be entitled to compensation if he refused the employment. Appellant was provided with 30 days to provide an explanation and/or rationalized medical evidence addressing why the job offer was not suitable. The Office reiterated this information in its March 7, 1995 letter and provided appellant with an additional 15 days to respond.

On February 25, 1995 appellant responded that the job offered was the same one he previously held when he was found to be disabled. Appellant indicated that he moved from Lawrenceville, New Jersey to Newtown, New Jersey. He stated he initially commuted, with the employing establishment's approval, 50 miles from Lawrenceville to New York City, New York. Appellant indicated that he was paid a bonus for living 50 miles away from New York City. He stated that after becoming disabled he moved six miles to Newtown and that the commute to New York City was comparable to his commute from Lawrenceville. Appellant stated that he was unable to commute from either location.

In support of his letter, appellant submitted a March 6, 1995 report from Dr. Costa indicating appellant needed a job transfer and that he could not return to his regular work. Dr. Costa indicated that appellant must avoid a long commute.

Appellant also submitted a January 24, 1994 report from Dr. David Weis, a doctor of osteopathy. Dr. Weis did not acknowledge appellant May 1991 employment incident, but otherwise reviewed appellant's history, and conducted an examination. He diagnosed a herniated nucleus pulposus L5-S1, left lumbar radiculitis, chronic post-traumatic lumbosacral sprain/strain, and myofascitis. He concluded only that appellant had a permanent functional orthopedic impairment of the lumbar spine.

On February 27, 1995 and on March 8, 1995 appellant refused the position offered on the basis that he was physically unable to perform the activities required.

By decision dated April 7, 1995, the Office terminated compensation because appellant failed to accept suitable employment.

On April 27, 1995 appellant requested an examination of the written record. He restated he was paid a bonus for living 50 miles from his work site and stated that the medical evidence established he was unable to make such a commute.

By decision dated August 11, 1995, the Office hearing representative affirmed the Office's April 7, 1995 decision. The hearing representative found that the weight of the medical

evidence rested with Drs. Lipson and Lee, who found that appellant was not totally disabled and that there was no objective evidence of disability. The hearing representative accorded little weight to Dr. Weis' opinion because he conducted his examination prior to Drs. Lipson and Lee. The hearing representative rejected appellant's argument that he could not drive to his work site because he found that other modes of transportation were available.

On September 7, 1995 appellant requested reconsideration. In support, appellant resubmitted reports from Dr. Costa which the Office previously considered. Appellant also resubmitted assessments from the Delaware Valley Physical Therapy Associates and from physical therapist, Eileen K. Romeiser.

By decision dated December 8, 1995, the Office refused to reopen appellant's claim for a merit review because appellant failed to raise substantive legal questions or new and relevant evidence.

The Board finds that the Office did not meet its burden to terminate appellant's compensation benefits on the grounds that he refused an offer of suitable work.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. 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. The Office has not met its burden in the present case.

Under section 8106(c)(2) of the Federal Employees' Compensation Act,[1] 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.[2] Section 10.124(c) of the Code of Federal Regulations[3] 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.[4] To justify termination of compensation, the Office must show that the work

[1] 5 U.S.C. § 8106(2).

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

[3] 20 C.F.R. § 10.124(c).

[4] *Camillo R, DeArcangelis*, *supra* note 2; *see* 20 C.F.R. § 10.124(e).

offered was suitable[5] and must inform appellant of the consequences of refusal to accept such employment.[6]

In this case, the Office has failed to establish by a preponderance of the evidence that the work offered was suitable. Appellant indicated that the employing establishment required him to work at least 50 miles from his work station in order to receive a salary bonus. Appellant's assertion was not contested by the employing establishment. It is, therefore, established that appellant's commute of 50 miles constituted a part of his previous employment and the subsequently offered limited-duty job.[7]

Dr. Costa, appellant's treating physician and a Board-certified orthopedic surgeon, provided the only medical opinion of record addressing whether appellant was physically capable of commuting from his home to the work site for the offered job in New York City. He stated in his February 16, 1994 work evaluation restriction that appellant must avoid prolonged driving and commutes. Dr. Costa repeated his prohibition against long commutes in his March 6, 1995 report. Accordingly, the weight of the medical evidence establishes that the work offered was not suitable.

Moreover, contrary to the Office's hearing representative's assertion, the record is devoid of any evidence establishing that appellant could use a different mode of transportation to reach the work site of the offered job. Because the Office failed to meet his burden to establish that the work offered was suitable, the Board will not address the second issue.

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

[6] *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).

[7] Because appellant moved only six miles from Lawrenceville, New Jersey to Newtown, New Jersey, his commute remained essentially the same and the move is not relevant to the outcome of this case.

The decision of the Office of Workers' Compensation Programs dated August 11, 1995 is reversed.

Dated, Washington, D.C.
July 23, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member