U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT D. REYNOLDS and DEPARTMENT OF THE AIR FORCE, EIELSON AIR FORCE BASE, Alas.

Docket No. 96-52; Submitted on the Record;
Issued June 15, 1998

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT, A. PETER KANJORSKI

The issues are: (1) whether appellant met his burden of proof in establishing that he was disabled from performing his light-duty job for four hours a day; and (2) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation because he refused an offer of suitable work.

On November 14, 1990 appellant, then a 41-year-old tractor operator, filed a notice of traumatic injury, claiming that he injured his back when he slipped and fell while pulling equipment. The Office accepted the claim for a lumbar strain. Appellant returned to light-duty work on December 6, 1990.

On November 19, 1992 appellant filed a notice of recurrence of disability, claiming that he was in constant pain, which increased with activity, and that he was unable to sit or stand for more than 20 to 30 minutes without experiencing excessive pain. The Office accepted the claim for a herniated disc at L4-5.[1] Appellant returned to light duty but missed work sporadically. He began to work part-time on light duty but did not work at all after December 1, 1993.

In a report dated October 27, 1993, Dr. Roy S. Pierson, a Board-certified orthopedic surgeon, recommended that appellant be placed in a work hardening program full time for three weeks and that he undergo counseling to address the depression caused by his back pain. Dr. Pierson, who had treated appellant since December 1, 1992, added that appellant continued to be symptomatic despite physical therapy, anti-inflammatory medication, and epidural steroid injections.

Based on the Office medical adviser's opinion that work hardening would offer nothing more than a self-directed exercise program, the Office, on December 15, 1993, denied

[1] Subsequently, the Office stated in a letter dated January 3, 1994 that a magnetic resonance imaging (MRI) scan on December 10, 1993 showed only annular bulging, not a herniated disc.

Dr. Pierson's request and authorized compensation for four hours a day. Dr. Pierson responded to the Office's decision in a December 28, 1993 report expressing his concerns about the Office's failure to provide services for appellant. The report stated:

> "[Appellant] has been seen in this office for nearly a year and a half for a low back problem. He has positive objective findings on MRI and has had some improvement with physical therapy. Most recently, in October of 1993, a work-hardening program of aggressive physical therapy, behavioral counseling, and biofeedback modalities was requested. This request has been denied, and in a telephone conversation, one of my office staff was told to pass a message to [appellant] that if he required a work-hardening program, he should 'work harder at work.'
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> "Attitudes and behaviors such as these in dealing with workers who have been injured on the job severely compromises the ability of these people to, first of all, obtain adequate care, and second of all, return to the work setting. It increases the stress level for the patient primarily, but also for your staff and my staff.
>
> "Please review this case and give attention to prescriptions written by me of care for this patient that have been denied. It is impossible for me to provide care without getting the support of the insurer, and if your agency is unwilling to support his case, please notify me in writing."

In an undated memorandum, Dr. Pierson disapproved a light-duty position offered by the employing establishment because appellant had not completed a vocational strengthening program as recommended. By letter dated September 29, 1994 the Office asked Dr. Pierson to explain how such a program would help appellant perform the light-duty job, which consisted of answering the telephone, taking messages, and operating a mobile radio. The Office added that appellant would not be referred for vocational strengthening if he could perform the light-duty job.

On January 30, 1995 the Office referred appellant, along with a statement of accepted facts and the medical records, to a panel of physicians, Dr. Harry S. Reese, a Board-certified orthopedic surgeon, and Dr. Raymond Valpey, a Board-certified neurologist.[2] In a report dated February 23, 1995, the physicians reviewed appellant's medical and work history, performed a thorough physical examination, and interpreted magnetic resonance imaging (MRI) scans and x-rays. In response to the Office's questions, the physicians diagnosed lumbosacral strain, degenerative disc disease at L4-5 with some bulging of the disc, and low back pain due to mild root irritation at L-5.

The physicians added that appellant stopped work on December 1, 1993 but they found "no objective reasons that would support a worsening of his back condition at that time." They

[2] Previously, the Office referred appellant to Drs. Edwin Lindig and Carl Unsicker, both Board-certified orthopedic surgeons, for second opinion evaluations, but neither physician responded completely to the Office's questions regarding appellant's ability to work.

noted the "subjective history that has resulted in [appellant] choosing not to return to sustained gainful employment."

The physicians related "some symptom magnification that causes [appellant's] subjective symptoms to be in excess of what can be documented objectively." In recommending a self-directed home exercise regimen to enhance appellant's conditioning, the physicians noted that appellant's emotional status clouded his own insight into his physical condition and played a role in his overall symptom magnification.

Finally, the physicians addressed the light-duty job offered to appellant by the employing establishment. They concluded that appellant was capable of performing the duties of answering the telephone, taking messages, and operating a mobile radio because his current condition, from strictly a physical perspective, would not preclude him from participating in such work activity.

On April 12, 1995 the Office notified appellant that the light-duty position offered by the employing establishment had been found to be suitable in view of the reports[3] from Drs. Reese and Valpey and that appellant had 30 days either to accept the offer or to provide acceptable reasons for declining it. In a letter dated April 24, 1995, appellant disagreed with the Office's April 12, 1995 letter and stated that Dr. Pierson had not released appellant to work and no suitable job offer had been made.

Appellant submitted a May 9, 1995 report from Dr. Pierson along with a duty status form stating that appellant should be off work until completion of vocational rehabilitation. Dr. Pierson stated that any release to light-duty work at this time without appropriate treatment is "very unlikely to succeed."

On May 12, 1995 the Office found appellant's refusal of the job offer to be unjustified and provided him with 15 days to accept the offer or lose his disability compensation. On June 26, 1995 the Office terminated appellant's compensation on the grounds that he had refused an offer of suitable work. The Office noted that appellant provided no objective evidence establishing that his back condition had worsened in 1993 and that Dr. Pierson never stated that the offered position was physically unsuitable.

The Board finds that the Office improperly terminated appellant's disability compensation on the grounds that he refused an offer of suitable work because appellant has met his burden of proof in establishing that his medical condition changed so as to prevent him from performing the requirements of his light-duty job.

[3] In a report dated March 30, 1995, the physicians clarified that the mild root irritation they diagnosed was causally related to the initial traumatic injury.

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.[4] Section 8106(c)(2) of the Federal Employees' Compensation Act[5] 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.[6] The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.[7]

The implementing regulation[8] 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.[9] 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.[10]

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.[11] Thus, when an employee, who is disabled from the job he held when injured, returns to a light-duty position, or the medical evidence of record establishes that he can perform the light-duty position, the employee has the burden of establishing by the weight of the reliable, probative, and substantial evidence that he cannot perform such light duty.[12] As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.[13]

In this case, appellant has submitted sufficient medical evidence to demonstrate that he could not work after December 1, 1993 because of pain caused by nerve root irritation. The panel physicians to whom the Office referred appellant diagnosed mild nerve root irritation, as shown by diagnostic studies, and related this condition to the initial traumatic injury accepted by the Office. While Dr. Pierson stated in a November 30, 1993 report that appellant's objective

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

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

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

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

[8] 20 C.F.R. § 10.124(c).

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

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

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

[12] *Richard E. Konnen*, 47 ECAB ___ (Docket No. 94-1158, issued February 16, 1996).

[13] *Gus N. Rodes*, 47 ECAB ___ (Docket No. 93-950, issued February 14, 1995).

examination was unchanged, he noted appellant's complaints of constant pain and concluded that appellant should be off work pending a work-hardening program.

Further, in a report dated April 20, 1994 Dr. Edwin Lindig, a Board-certified orthopedic surgeon, found persistent limitation of lumbar motion in appellant's back and agreed with Dr. Pierson that appellant needed physical reconditioning and could not work, even part time. Dr. Carl Unsicker, a second Board-certified orthopedic surgeon to whom the Office had referred appellant, stated in his August 31, 1994 report that appellant had only half the normal range of motion in his spine and would benefit by a work hardening program before returning to limited-duty status. Finally, Dr. James M. Foelsch, a Board-certified neurologist, concluded after a physical examination on February 28, 1994 that appellant showed evidence of mild radiculopathy by electromyography and peripheral neuropathy of undetermined etiology. Accordingly, appellant has met his burden of proof, and the Office's termination of his compensation is reversed.

However, the Board also finds that the case is not in posture for decision because of a conflict in the medical evidence on whether appellant's back condition has continued to prevent him from doing his light-duty job. Thus, this case must be remanded for further evidentiary development.

Section 8123 of the Act[14] 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 to resolve the conflict.[15] The Board has interpreted the statute to require more than a simple disagreement between two physicians. To constitute a true conflict of medical opinion, the opposing physicians' reports must be of virtually equal weight and rationale.[16]

In this case, the Board finds a conflict created by the opinion of Drs. Valpey and Reese, who found that appellant could return to his light-duty job, and the conclusion of Dr. Pierson that appellant required a work hardening program to alleviate his back pain before returning to work.[17]

On remand, the Office should refer appellant, the case record, and the statement of accepted facts to an appropriate medical specialist for an impartial medical evaluation pursuant to section 8123(a).[18] After such development of the case record as the Office deems necessary, a *de novo* decision shall be issued.

[14] 5 U.S.C. §§ 8101-8193 (1974); 5 U.S.C. § 8123(a); 20 C.F.R. § 10.408.

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

[16] *Adrienne L. Wintrip*, 38 ECAB 373, 379 (1987).

[17] *See George S. Johnson*, 43 ECAB 712, 716 (1992) (finding that a conflict in medical opinion was not resolved because the opinion of the referee physician was insufficiently rationalized; thus, further remand was required).

[18] *See* 20 C.F.R. § 10.408; *Debra S. Judkins*, 41 ECAB 616, 620 (1990).

The June 26, 1995 decision of the Office of Workers' Compensation Programs is reversed, and the case is remanded for further proceedings consistent with this opinion.

Dated, Washington, D.C.
June 15, 1998

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member