U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALAN W. KEHRLI and DEPARTMENT OF ENERGY, BONNEVILLE POWER ADMINISTRATION, Portland, Oreg.

Docket No. 95-2511; Submitted on the Record;
Issued March 26, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation because he refused an offer of suitable work.

On June 2, 1989 appellant, then a 59-year-old auditor, filed a notice of traumatic injury claiming that he hurt his back while lifting a box of records at work. The Office accepted the claim for a low back strain and appellant returned to work on October 17, 1989.

On December 12, 1989 appellant filed a notice of recurrence of disability, noting that his back discomfort prevented him from sitting at his desk long enough to perform any significant amount of work. Appellant stopped full-time work and retired on disability on June 1, 1990.[1]

Subsequently, the Office referred the claim file to the Office medical adviser, who stated on September 22, 1990 that appellant had no disability resulting from the accepted back condition. Because of a conflict of opinion with appellant's treating physician, Dr. Ray V. Grewe, Board-certified in neurological surgery, the Office referred appellant, along with the medical records and a statement of accepted facts, to Dr. George W. Cottrell, a Board-certified orthopedic surgeon, for an impartial medical examination. In a report dated May 15, 1991, Dr. Cottrell agreed that appellant was unable to perform the duties of an auditor and the Office accepted the recurrence claim.

On July 14, 1993 the Office referred appellant to Dr. John W. Thompson, a Board-certified orthopedic surgeon, who concluded that, based on appellant's regular physical activities of swimming, walking and playing golf, he should be able to perform the duties of the modified

[1] Appellant first injured his back in 1976 and underwent a laminectomy before returning to work. He retired on disability in 1981 but elected disability compensation and subsequently returned to work in 1987. In 1988, he filed a notice of traumatic injury, claiming that he hurt his back picking up his brief case. The Office accepted this claim for a lumbar strain.

auditor position as described by the employing establishment. In response to the Office's questions, Dr. Thompson stated that appellant could work for eight hours a day within the listed restrictions.

On September 30, 1993 the Office informed appellant that he had 30 days to accept the modified auditor position or provide reasons for refusing the offer. Appellant responded that he could not tolerate prolonged sitting and submitted three medical reports, including one from Dr. Grewe, who reiterated that appellant was disabled from work because of his back condition.

In response to the Office's questions, Dr. Grewe stated on November 13, 1993 that appellant's physical capacity should be evaluated to determine any special equipment needs or work restrictions, that appellant was medically stationary and that appellant was permanently limited to sedentary and "probably occasional" light work.

On December 3, 1993 the Office asked Dr. Grewe if appellant could sit or stand, alternating as needed, to perform the duties of the modified position. The Office added that if appellant accepted the position, the Office could request an on-site evaluation to determine if any special equipment was needed. Dr. Grewe responded that he wanted to "get out of the loop" of saying whether appellant could or could not perform the job and again suggested an objective physical evaluation.

Subsequently, the Office referred appellant for a physical capacity evaluation (PCE). Following a two-hour evaluation, the occupational therapist reported that if appellant were permitted to walk around as often as needed, he could "likely tolerate" the work activity of the auditor position in a graduated way from part time to full time. The therapist estimated that appellant could sit for two to three hours with frequent changes of position, stand five to six hours, with standard breaks and moving around and stand continuously for one to two hours. The therapist recommended a sit/stand adjustable work station with an ergonomic chair that would allow appellant to alternate between sitting and standing as needed. On April 18, 1994 Dr. Grewe indicated his agreement with the evaluation.

On April 20, 1994 the Office sent appellant copies of the evaluation and Dr. Grewe's letter. The Office informed appellant that he had 15 days to accept the offered position; his refusal would result in termination of his benefits. On April 22, 1994 appellant submitted letters from a former coworker and Dr. Cottrell, who stated that appellant was incapable of resuming full-time work even with a combination of sitting and standing and that appellant would experience occasional recurrences or flare ups of symptoms, which would incapacitate him for two or three months at time, thus precluding full-time employment.

On May 2, 1994 the Office informed appellant that Dr. Cottrell's opinion and the coworker's letter lacked probative value and that he had 30 days to accept the job offer. Subsequently, appellant submitted a PCE done on May 19, 1994 which concluded that appellant should not return to his previous position as an auditor because he was able to tolerate only 30 minutes of sitting at a time and that allowing him to move about every 20 minutes or so was not a realistic approach to performing his job. Dr. Cottrell concurred with this assessment.

On June 1, 1994 the Office informed appellant that he had 15 days to accept the job offer. The Office noted that the objective physical findings reported in the May 19, 1994 PCE were "very similar" to those of the occupational therapist who indicated in his April 6, 1994 report that appellant was capable of performing the job duties with modifications.

On June 3, 1994 the employing establishment agreed that appellant could return to part-time work with a scheduled return to full time over two months. The Office informed appellant of the scheduled return. On June 14, 1994 appellant declined the job offer.[2] On June 21, 1994 the Office terminated appellant's compensation, effective June 26, 1994, on the grounds that he had refused an offer of suitable work.

Appellant requested an oral hearing, which was held on January 4, 1995. Noting that the job offered to him was exactly the same job he had done in 1977 through 1980 and in 1987 to 1990, appellant testified that because of the physical requirements, he was able to work only 17 months out of 37 during the latter period, even with the freedom to walk around as needed for comfort. Appellant emphasized that he had attempted to work with the sit/stand arrangement, but that his back condition became worse with the amount of sitting or standing required to perform the duties of an auditor. Finally, appellant stated that the medical evidence established that he was not capable of full-time work because the physicians acknowledged that he would have flare ups of back pain resulting from his surgery, which would incapacitate him for significant periods of time.

On April 21, 1994 the hearing representative found that appellant was capable of returning to work in the modified auditor position and that the Office properly terminated his compensation because he refused an offer of suitable work. The hearing representative noted that both PCEs found appellant capable of performing sedentary duties.

The Board finds that the Office met its burden of proof in terminating appellant's compensation because he refused an offer of suitable work.

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

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[2] On June 16, 1994 appellant elected retirement benefits provided by the Office of Personnel Management.

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

[4] 5 U.S.C. §§ 8101-8193; 5 U.S.C. § 8106(c)(2).

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

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

The implementing regulation[7] 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.[8] 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.[9]

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.[10] In assessing medical evidence, the number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for and the thoroughness of, a physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[11]

In this case, appellant's own specialist, Dr. Grewe, recommended a PCE after being asked by the Office whether appellant could perform the duties of the modified auditor position. Dr. Grewe agreed with the assessment of an occupational therapist that, while appellant stated he could sit for no longer than 30 minutes at a time and could not stand for prolonged periods, a sit/stand adjustable work station would allow appellant to alternate as needed between sitting and standing and thus maintain productive work for longer periods. Dr. Grewe also agreed with the therapist's conclusion that appellant could tolerate the work activity of the modified auditor's position if he could walk around as often as needed.

While the May 23, 1994 PCE indicated that the success of appellant returning to full-time work was questionable, the report concluded that appellant could tolerate sitting for up to 30 minutes and that, if allowed to move around for five minutes, appellant could perform a sedentary job. Further, the physical findings on both PCEs were similar.

In his August 13, 1993 report, Dr. Thompson stated that he examined appellant in his office and that examination procedures were voluntary and limited by individual tolerances. While he reported no physical findings, he reviewed the medical records and diagnosed degenerative disc disease and chronic lumbar spine pain syndrome secondary to laminectomy at L4-5, L5-S1, as well as degenerative spondylolisthesis.

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[7] 20 C.F.R. § 10.124(c).

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

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

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

[11] *Connie Johns*, 44 ECAB 560, 570 (1993).

Dr. Thompson opined that, given that appellant walked five to six miles a day, swam three or four times a week and played golf several times a month, there was no reason why appellant could not perform the duties of the modified auditor position and should be able to retrieve information from file cabinets if he did not have to bend. Dr. Thompson added that appellant admitted he could sit without difficulty when his back was not bothering him and that if appellant could get up and sit down at his own discretion, working would not be a problem.

Dr. Cottrell's opinion in 1991 that appellant could not perform his duties as an auditor was based on the premise that the job at that time required sitting 95 percent of the time. In his October 19, 1993 report, Dr. Cottrell stated that his opinion remained the same, but the modified position offered to appellant in 1993 did not require sitting for 95 percent of the day. Dr. Cottrell was not informed of the physical demands of the 1993 job offer or of the modified work station. Thus, his opinion was based on an inaccurate premise and therefore lacks probative value.

Inasmuch as Dr. Grewe was most familiar with appellant's medical history and treatment and his opinion is supported by that of Dr. Thompson, the Board finds that their reports are sufficient to meet the Office's burden of proof in terminating benefits.

While appellant argues that the modified position was not suitable because its physical requirements were exactly the same as those of the previous job he was unable to do, the record reveals otherwise. The physical demands of the 1994 job included the ability to retrieve information from file cabinets, to sit at a desk for periods within appellant's discretion and to lift no more than three pounds. The 1987 job added the requirements of carrying five pounds, conducting field interviews and traveling by air and motor vehicle.[12]

Based on his history of being able to work only 20 months out of 60 in 1976 to 1981 and 17 months out of 37 in 1987 to 1990, appellant argues that he is not qualified for a full-time position because such work will result in incapacitating flare ups of back pain, which will disable him for long periods. Appellant points to the medical evidence in support of these periodic attacks of disabling pain.

While appellant is correct that Drs. Cottrell, Thompson and Grewe have predicted such flare ups, the Board has long held that a fear of future injury is not a basis for entitlement to disability compensation.[13] The medical evidence established appellant's ability to work at the time

[12] The 1994 position was an internal auditor, the previous position required field work.

[13] Fear of future injury is not compensable under the Act. *Mary A. Geary*, 43 ECAB 300, 309 (1991); *see Pat Lazzara*, 31 ECAB 1169, 1174 (1980) (finding that appellant's fear of a recurrence of disability upon return to work is not a basis for compensation).

of the job offer within the restrictions.[14] Therefore, his refusal to accept the modified position was not warranted.[15]

There is no medical evidence that appellant cannot alternate sitting and standing as necessary for his comfort. Appellant told the occupational therapist that his back would hurt if he sat for more than three hours a day in total, but Dr. Thompson stated that appellant could sit for three to four hours a day and no medical evidence contradicts that assessment. Further, the 1994 PCEs both conclude that appellant can perform sedentary work.

The Board also finds that the Office properly followed its procedures in terminating appellant's compensation. The Office informed appellant of the job offer twice and sent him copies of the PCE and Dr. Grewe's approval. On May 2, 1994 the Office informed appellant that the evidence he submitted lacked probative value and that he had 30 days to accept the position. After appellant submitted the May 19, 1994 PCE and Dr. Cottrell's opinion, the Office reviewed this evidence, found it to be insufficient and permitted appellant 15 days to accept the job or lose his compensation.

The January 4, 1995 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
March 26, 1998

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member

[14] *See Michael I. Schaffer*, 46 ECAB 845 (1995) (finding the medical evidence sufficient to establish that appellant was physically capable of performing the duties of the offered modified position).

[15] *See Edward P. Carroll*, 44 ECAB 331, 341 (1992) (finding that appellant's assertion of inability to work is not reasonable grounds for refusing suitable work absent supporting medical evidence).