

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JEFFREY F. REESE and U.S. POSTAL SERVICE,
LONG POINT STATION, Houston, TX

*Docket No. 99-1307; Submitted on the Record;
Issued April 19, 2000*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation for failure to accept a suitable job offer; and (2) whether the Office properly denied appellant's request for a review of the written record by a hearing officer.

On April 15, 1991 appellant, then a 26-year-old letter carrier, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that he injured his lower back when he backed into a tree while backing away from a dog attacking him. The Office accepted the claim for low back strain and lumbar disc syndrome L5-S1 with radiculitis of the left leg. Appellant stopped work on April 15, 1991. He was placed on the periodic rolls for receipt of compensation.

In a letter dated June 11, 1992, Dr. Zoran Cupic¹ noted that appellant had been under his care since April 15, 1991, that diagnostic tests were within normal limits, but recommended a referral for physical therapy treatment due to appellant's continued discomfort and pain complaints. Thus, Dr. Cupic, based upon appellant's continued pain and discomfort complaints, referred appellant to Dr. Anjali Jain² for intensive physical therapy treatment. The record contains various reports and prescription slips from Dr. Jain during the period July 3, 1992 to April 17, 1995 detailing physical therapy plans, which noted that appellant was not working.

The Office referred appellant, together with a statement of accepted facts, medical record and list of questions, for a second opinion evaluation on January 16, 1997 to Dr. Bernard Z. Albina, a Board-certified orthopedic surgeon.

¹ An attending Board-certified orthopedic surgeon.

² A physician Board-certified in physical medicine and rehabilitation.

In a report dated February 5, 1997, Dr. Albina, based upon a statement of accepted facts, a list of questions, a physical examination, review of the medical record and history of the employment injury, opined that appellant had a chronic lumbar sprain, lumbar disc syndrome at L5-S1, a herniated disc at L4-5 as confirmed by a March 1993 magnetic resonance imaging test and anxiety and possible depression. As to whether he could return to his usual employment, he indicated that appellant was unable to perform the position of mail carrier. Dr. Albina, however, opined the appellant could perform sedentary work depending upon a psychological evaluation.

By letter dated February 20, 1997, the Office requested clarification from Dr. Albina on his recommendation that appellant be referred for a psychological evaluation as the Office had not accepted a psychological condition as part of appellant's accepted work injury.

In a letter dated February 24, 1997, Dr. Albina recommended that appellant be referred for a psychological evaluation to determine whether he was capable of returning to work.

By letter dated April 3, 1997, the Office referred appellant, together with a copy of appellant's medical records, a statement of accepted facts, work restriction form and questions to be answered, to Dr. Theodore Pearlman, a Board-certified psychiatrist.

In a report dated April 21, 1997, Dr. Pearlman, based upon a review of the medical evidence and physical examination, diagnosed factitious disorder with predominantly physical signs and symptoms, low back strain and lumbar disc syndrome at L5-S1 with radiculitis in the left leg. He opined that, "as a result of [appellant] choosing to perpetuate the sick and disabled role, his daily activities are volitionally affected." Lastly, Dr. Pearlman indicated that appellant was capable of returning to work with the restrictions noted by Dr. Albina in his February 24, 1997 for four hours per day.

On December 29, 1997 the employing establishment offered appellant the position of modified clerk to conform with the work restrictions outlined by Drs. Albina and Pearlman. The limitations included no bending, kneeling or twisting; intermittent standing for 30 minutes at a time; no lifting above 10 pounds for 5 times per hour; and he can only work 4 hours per day.

Appellant declined the position on January 7, 1998.

On January 12, 1998 the Office referred appellant for vocational rehabilitation.

By letter dated January 21, 1998, the Office advised appellant that he had been offered a position as modified clerk, which the Office found to be a suitable job. He was advised that the position was currently available, that he would be compensated based upon the difference between pay of the offered position and the pay of his date-of-injury position and that he still had the opportunity to accept the offer. The Office advised appellant that he had 30 days within which to accept the position or provide an explanation for refusing. Appellant was also advised as to the consequences of his refusing the suitable job offer.

In a letter dated January 28, 1998, appellant refused the job offer stating his condition has gotten worse and requested to be evaluated by Dr. Cupic.

On March 5, 1998 Dr. Pearlman indicated that he had reviewed the modified job offered to appellant and determined that he was psychologically and physically able to perform the position of modified clerk.

By letter dated March 27, 1998, Dr. Albina indicated that he had reviewed the proposed job offer and opined that it was within his physical capacity to perform the job.

On March 26, 1998 the Office advised appellant that his reasons for refusal had been found unacceptable as both Drs. Albina and Pearlman determined that he was capable of performing the offered position. The Office advised appellant that he had 15 days within which to accept the offered job without penalty and that if he did not accept it, all compensation would be terminated.

By letter dated April 15, 1998, appellant declined the job offer.

In a decision dated April 27, 1998, the Office terminated appellant's compensation benefits effective May 31, 1998, finding that he refused to work after a suitable job offer was made.

In a letter dated May 15, 1998, appellant requested reconsideration and submitted various medical documents for the period June 4, 1992 through April 11, 1995.

In a nonmerit order dated May 26, 1998, the Office denied appellant's request for reconsideration on the basis that he failed to submit any new or relevant evidence. The Office noted that the evidence submitted by appellant predated the opinions of Drs. Albina and Pearlman and that he failed to submit medical evidence supporting his opinion that his condition had worsened. The Office thus determined that the medical evidence for the period 1992 through 1995 was irrelevant to the issue of his refusing the job offered in 1998.

In a letter dated August 18, 1998, appellant requested a review of the written record and reconsideration. In support of his request he submitted a November 13, 1998 report from Dr. James A. Ghadially, an attending Board-certified orthopedic surgeon.

In a July 29, 1998 report, Dr. Ghadially diagnosed a herniated disc at L4-5 and opined that consideration had not been given to his complaints of bowel and bladder problems. He urged "that consideration be given for medical coverage to be resumed, at the very least, so that the extent of his injuries could be fully documented."

In a report dated August 8, 1998, Dr. Vivek P. Kushwaha diagnosed L4-S1 degenerative disc disease with stenosis and herniation.

By decision dated September 23, 1998, the Branch of Hearings and Review found that appellant was not entitled as a matter of right to a review of the written record as he had previously requested reconsideration.

On October 3, 1998 appellant requested reconsideration and submitted an October 10, 1998 report from Dr. Jain, an attending physician, as well as resubmitting the reports from Drs. Kushwaha and Ghadially.

In the October 6, 1998 report, Dr. Jain diagnosed lumbar herniated nucleus pulposus and ruled out lumbar radiculopathy. He also opined that appellant was permanently disabled and would require “life-time medical care.”

In a merit decision dated October 27, 1998, the Office denied appellant’s request for modification of the prior decision. In the attached memorandum, the Office noted that the opinions of Drs. Kushwaha and Ghadially were insufficient to support modification as neither physician addressed the issue of appellant’s ability to work or whether he was totally disabled. Regarding Dr. Jain’s opinion, the Office found that his opinion was unreasoned as he failed to offer any medical explanation supporting his opinion that appellant was totally disabled. Thus, the Office found that the weight of the evidence remained with the opinions of Drs. Albina and Pearlman that appellant was capable of performing the offered job.

In a letter dated November 14, 1998, appellant requested reconsideration and submitted evidence in support of his request.

In a September 21, 1998 report, Dr. Jain diagnosed a herniated lumbar nucleus pulposus and lumbar radiculopathy, but offered no opinion as to whether appellant was capable of performing the offered position.

In a November 13, 1998 report, Dr. Ghadially opined that appellant was totally disabled and that he was unable to perform the job offered. In support of his opinion, he opined that appellant could perform the modified position as he could not sit for four hours all the time as he is incapable of sitting, walking or standing for more than five minutes.

In a decision dated January 22, 1999, the Office found the evidence insufficient to warrant modification of the prior decision. The Office found that Dr. Ghadially stated that the job offer was not appropriate as it would require appellant to sit for 4 hours per day when the job offer requires intermittent standing for 30 minutes.

The Board finds that the Office properly terminated appellant’s compensation for failure to accept a suitable job offer.

Section 8106(c)(2) of the Federal Employees’ Compensation Act³ states: “a partially disabled employee who: (1) refused to seek suitable work; or (2) refuses or neglects to work after suitable work is offered is not entitled to compensation.”⁴ An employee who refuses or

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8106(c)(2).

neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.⁵

In the present case, the record reflects that on December 29, 1997 the employing establishment offered appellant reemployment in a modified-duty position, four hours per day based upon the reports of Drs. Albina and Pearlman. On January 21, 1998 the Office complied with the procedural requirements by advising appellant of the suitability of the offered position, that the job remained open and available and that his failure to accept the offer, without justification, would result in the termination of his compensation for wage loss.

Appellant submitted a letter dated January 28, 1998, refusing the position stating that his condition had worsened without submitting any medical evidence to support his assertion. The position description was forwarded to Drs. Albina and Pearlman for their review. Both physicians noted that the position was within the restrictions they had noted in their reports and opined that appellant was capable of performing the position. The Office advised appellant on March 26, 1998 that he had not provided any justification for refusing the position and offered him an additional 15 days to accept the offered job without penalty. Appellant declined the job offer on April 15, 1998. Thereafter, on April 27, 1998, the Office terminated appellant's compensation benefits.

The Board finds that the Office properly determined that appellant had rejected an offer of suitable employment and met its burden of proof in terminating his monetary compensation benefits.⁶ The evidence of record establishes that, despite providing appellant with an opportunity to accept the position following notification of the Office's suitability determination and subsequent notification that his reasons for rejecting the job offer were insufficient, appellant did not accept the job offer. Appellant did not demonstrate or submit any evidence that the modified clerk position was outside his physical limitations as noted by Drs. Albina and Pearlman. The Office properly terminated appellant's compensation benefits effective May 31, 1998 based upon his refusal of an offer of suitable employment.

Following termination of her benefits appellant submitted reports from Drs. Ghadially, Jain and Kushwaha. In an August 8, 1998 report, Dr. Kushwaha diagnosed degenerative disc disease, but offered no opinion as to whether appellant could perform the part-time modified position of modified clerk. Similarly, Dr. Ghadially diagnosed a herniated disc, but offered no opinion as to whether appellant was capable of performing the offered position in a July 29, 1998 report. Dr. Jain in a September 21, 1998 report, also offered no opinion as to whether appellant was capable of performing the offered position. Thus, these three reports are irrelevant to the issue in this case. Dr. Ghadially in a November 13, 1998 report, opined that appellant was incapable of performing the position offered as appellant could not sit for four hours as appellant was incapable of sitting, standing or walking for more than five minutes. The position offered to appellant required intermittent standing for 30 minutes and thus, Dr. Ghadially's opinion is insufficient as it is based upon an erroneous assumption regarding

⁵ See *Michael I. Schaffer*, 46 ECAB 845 (1995); 20 C.F.R. § 10.124.

⁶ See *Karen L. Mayewski*, 45 ECAB 219 (1993); *Steven R. Lubin*, 43 ECAB 564 (1992).

appellant's offered position. Lastly, Dr. Jain, in an October 6, 1998 report, opined that appellant was totally disabled and would require lifetime medical care. Dr. Jain's opinion is unrationalized as the physician fails to give any medical rationale explaining how appellant's disability would preclude him from performing the duties in the modified clerk position. None of the opinions are sufficient to establish that appellant was incapable of performing the light-duty work according to the physical limitations provided by Drs. Albina and Pearlman. Thus, the Office properly denied appellant's request for reconsideration of the April 27, 1998 decision.

Next, the Board finds that the Office did not abuse its discretion in denying appellant's request for a review of the written record.

Section 8124(b) of the Act, concerning a claimant's entitlement to a hearing before an Office representative states:

"Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."⁷

The Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and the Office must exercise this discretionary authority in deciding whether to grant or deny a review of the written record by an Office hearings representative. Specifically, the Board has held that the Office has the discretion to grant or deny a request for review of the written record on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing, when the request is made after the 30-day period established for requesting a hearing, or when the request is for a second hearing on the same issue. The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.⁸ The Act⁹ is unequivocal that a claimant not satisfied with a decision of the Office has a right, upon timely request, to an oral hearing or written review of the record before a representative of the Office.¹⁰ The statutory right to a hearing pursuant to section 8124(b)(1) follows an initial decision of the Office.¹¹

In the instant case, appellant requested reconsideration of the April 27, 1998 decision, terminating his benefits which the Office denied in a nonmerit decision on May 26, 1998. Because appellant requested a written review of the record after he had requested reconsideration

⁷ 5 U.S.C. § 8124(b)(1).

⁸ *Henry Moreno*, 39 ECAB 475 (1988).

⁹ 5 U.S.C. §§ 8101-8193.

¹⁰ 5 U.S.C. § 8124(b); *Joe Brewer*, 48 ECAB 411 (1997); *Coral Falcon*, 43 ECAB 915, 917 (1992).

¹¹ *Eileen A. Nelson*, 46 ECAB 377, 380 (1994); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.10(b) (March 1997).

under section 8128(a) on May 15, 1998, he is not entitled to a review of the written under section 8124 as a matter of right. The Office properly exercised its discretion when it decided not to grant a discretionary hearing on the grounds that he could have his case further considered on reconsideration by submitting relevant medical evidence. Consequently, the Office properly denied appellant's September 23, 1998 request for a review of the written record.

The decisions of the Office of Workers' Compensation Programs dated January 22, 1999 and October 27, September 23, May 26 and April 27, 1998 are hereby affirmed.

Dated, Washington, D.C.
April 19, 2000

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member