U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICKY GREENWOOD and U.S. POSTAL SERVICE,
POST OFFICE, Birmingham, AL

Docket No. 98-1750; Submitted on the Record;
Issued August 11, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits on the grounds that he refused an offer of suitable work; and (2) whether the Office properly denied appellant's request for a hearing.

On January 10, 1990 appellant, then a 34-year-old motor vehicle operator, injured his low back when he tripped and fell in the performance of duty.[1] The Office accepted his traumatic injury claim for a right hip contusion and a herniated nucleus pulposus (HNP) at L4-5, L5-S1. Appellant stopped work on January 10, 1990 and has not returned. He received compensation for wage loss and medical benefits.

Appellant has been treated since his original July 14, 1989 injury by Dr. Robert Q. Craddock, a Board-certified neurosurgeon. He recommended several surgical procedures including a micro-lumbar discectomy on October 16, 1991 and an anterior/posterior lumbar discectomy and fusion at L4-S1 on March 13, 1992. Dr. Craddock also prescribed an orthopedic mattress and lift chair to relieve appellant's continuing symptoms of back pain.

Appellant underwent a computerized tomography (CT) scan of the lumbar spine on January 11, 1996. It was noted that "[appellant] appears to have lateral post-op fusion present at L5-S1. There is annular bulging disc slightly [asymmetrical on the right] at L4-5 ... a posterior spur or a calcified disc on the right cutting off the sac at L4-5" with sclerosis of the facet joints at L4-5. A lumbar mylegram conducted on January 11, 1996 revealed a "very minimal defect at the thecal sac at L4-5" with the rest of the disc spaces normal.

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[1] The Office previously accepted a claim filed by appellant for a lumbosacral strain and a herniated disc at L4-5 related to a lifting injury on July 14, 1989. Appellant underwent a micro-laminectomy/discectomy on October 9, 1989. He returned to work on January 2, 1990. The prior claim, 06-461818, has been doubled with the instant claim, 06-478919.

In a Form OWCP-5 dated May 23, 1996, Dr. Craddock noted that appellant could return to work for four hours per day. He also noted that appellant was restricted to standing, walking and lifting no more than one hour per day and sitting no more than six hours per day.

On August 22, 1996 the employing establishment offered appellant a position as modified part-time flexible distribution clerk. Appellant was to work six hours per day, repairing torn mail while sitting at a table. The position indicated that he would stand no more than one hour per day and was under a ten-pound lifting restriction.

Appellant declined the job offer on August 27, 1996.

The Office referred appellant for an examination with Dr. William D. Lindsay, a Board-certified orthopedic surgeon. In a report dated September 24, 1996, he noted appellant's history of multiple back injuries and physical findings. Dr. Lindsay stated that appellant had more subjective complaints of back pain than objective findings. He opined that appellant was capable of performing light duty with a lifting restriction of no more than 20 pounds.

Based on a conflict in the medical evidence regarding appellant's capacity to return to work, the Office originally referred appellant to Dr. John D. Compton, a Board-certified orthopedist. The record indicates that the Office subsequently referred appellant for a second impartial medical evaluation with Dr. Richard Harris because Dr. Compton worked in the same office as appellant's treating physician.

The Office referred appellant for an impartial medical evaluation with Dr. Richard Rex Harris. In a report dated June 17, 1997, he noted appellant's history of multiple back surgeries including disectomy and fusion. He noted physical findings and stated his impression as "post-spinal fusion 360 degrees and chronic back pain." Dr. Harris reported that appellant's range of motion was markedly restricted. He further noted that he had reviewed the August 22, 1996 job description and opined that appellant could do the job if there was absolutely no lifting, bending, stooping, climbing or crawling and if appellant was permitted to intermittently stand and sit to repair the torn mail.

On July 31, 1997 the employing establishment offered appellant the position of a part-time modified distribution clerk. The duties of the position were described as follows: "[Appellant] may alternate sitting/standing at a table to repair torn mail, which consists of taping torn mail and placing it in a plastic nixie bag to be processed through the mail stream -- there is no lifting, bending or stooping involved in this assignment; may correct addresses on missent/loop (nixes) while sitting at a table. Working in the same area as torn mail, may sit or stand to look through trays of firm letter mail for address errors." The job offer also noted that the position was consistent with restrictions provided by Dr. Harris including that appellant be permitted intermittent walking up to one hour per day.

Appellant signed the job offer on August 8, 1997, indicating that he rejected the job.[2]

In a letter dated September 12, 1997, the Office found that the position of a distribution clerk constituted work suitable with appellant's physical limitations. The Office advised appellant that he had 30 days to accept the job or provide his reasons for rejecting the job offer or else his benefits would be terminated.

Appellant did not respond to the September 12, 1997 Office suitability letter.

In a decision dated January 14, 1998, the Office terminated appellant's compensation on the grounds that he refused an offer of suitable work.

By letter dated January 28, 1998, the Office informed appellant that additional evidence he submitted after the January 14, 1998 decision would not be considered. The Office advised appellant of his right to request reconsideration.

In a letter dated February 24, 1998 and received by the Office on March 4, 1998, appellant requested a hearing and submitted additional medical evidence.

In a decision dated April 12, 1998, the Office denied appellant's hearing request because it was not timely filed within thirty days of the January 14, 1998 decision. The Office advised appellant that the issue in his case could equally well be resolved through the reconsideration process.

The Board finds that the Office properly found that appellant refused an offer of suitable work.[3]

Under section 8106(c)(2) of the Federal Employees' Compensation Act, the Office may terminate the compensation of an employee who refuses or neglects work after suitable work is offered to, procured by or secured for the employee.[4] Section 10.124(c) of the Code of Federal Regulations[5] 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 a determination is made with respect to termination of entitlement to

[2] Appellant's counsel noted in the August 8, 1997 letter that appellant was not able to perform the offered job because it required him to walk intermittently contrary to his medical restrictions. The Board's review of the record and job offer indicates that appellant was not required to walk at all in the modified position, rather, the employing establishment was prepared to allow appellant to walk intermittently if necessary.

[3] Appellant submitted additional medical evidence after the Office's January 14, 1998 decision; however, the Board does not have jurisdiction to review evidence on appeal that was not before the Office at the time it issued its final decision; *see* 20 C.F.R. § 501.2.

[4] 5 U.S.C. § 8106(c)(2) provides in pertinent part: "A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered to, procured by, or secured for him is not entitled to compensation." *See also Camilla R. DeArcangelis*, 42 ECAB 941 (1991).

[5] 20 C.F.R. § 10.124(c).

compensation.[6] To justify termination of compensation, the Office must establish that the work was suitable and must inform appellant of the consequences of refusal to accept such employment.[7]

In the instant case, the Office properly determined that a conflict existed in medical opinion as to the nature of light-duty work appellant was capable to perform given his continuing back condition. Appellant's treating physician opined that he could only work for 4 hours per day with no lifting while the Office referral physician concluded that appellant could work for 6 hours per day with a lifting restriction of no more than 20 pounds.[8]

To resolve the conflict, the Office referred appellant to an impartial medical specialist, Dr. Harris, who opined that appellant could work six hours per day with restrictions of no lifting. He also opined that appellant could only work in a job that allowed appellant the opportunity to intermittently sit and stand depending on his comfort level.

The Board finds that the Office properly relied on the opinion of the impartial medical specialist in determining appellant's capacity to work.[9] The employing establishment crafted a position and offered appellant a job based on those restrictions on July 31, 1997. Although the Office properly deemed the position of modified distribution clerk to be suitable work, appellant refused the position without explanation. Thereafter, the Office issued a decision terminating appellant's compensation. Because the Office has properly complied with all of the requisite procedural requirements, the Board concludes that the Office properly terminated appellant's compensation benefits.

The Board also finds that the Office properly denied appellant's request for a hearing.

Section 8124(b)(1) of the Act provides:

> "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section 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."[10]

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[6] *Camilla R. DeArcangelis, supra* note 4.

[7] *David P. Camacho*, 40 ECAB 267 (1988); *see also Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[8] Section 8123(a) of the Act provides that, "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." 5 U.S.C. § 8123(a).

[9] In situations when there exists a conflict and the case is referred to an impartial medical specialist for the purpose of resolving that conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight. *Rosie E. Garner*, 48 ECAB 220 (1996). The Board finds the opinion of Dr. Harris to be sufficiently well rationalized and based upon a proper factual background.

[10] 5 U.S.C. § 8124(b)(1).

A claimant is not entitled to a hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request.[11] The Office has discretion, however, to grant or deny a request that is made after this 30-day period.[12] In such a case, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.[13]

Appellant's request for an oral hearing dated February 24, 1998 and received by the Office on March 4, 1998, is outside of the 30-day deadline for filing a hearing request, given that the Office's final decision was issued on January 14, 1998. For this reason, appellant is not entitled to a hearing as a matter of right. The Office properly found appellant's request to be untimely, but nonetheless considered the matter in relation to the issue involved and correctly advised appellant that he could pursue the issue involved through the reconsideration process. As appellant may in fact pursue his claim by submitting to the appropriate regional Office new and relevant medical evidence with a request for reconsideration, the Board finds that the Office did not abuse its discretion in denying appellant's request for a hearing.[14]

The decisions of the Office of Workers' Compensation Programs dated April 12 and January 14, 1998 are hereby affirmed.

Dated, Washington, D.C.
August 14, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

[11] 20 C.F.R. § 10.131(a)-(b).

[12] *Herbert C. Holley*, 33 ECAB 140 (1981).

[13] *Rudolph Bermann*, 26 ECAB 354 (1975).

[14] The Board has held that the denial of a hearing on these grounds is a proper exercise of the Office's discretion. *E.g., Jeff Micono*, 39 ECAB 617 (1988).