U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ERNEST M. WOOD and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Johnson City, TN

Docket No. 98-2032; Submitted on the Record;
Issued August 11, 2000

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation entitlement, effective June 17, 1997, on the grounds that he refused an offer of suitable work.

The Office accepted that on November 13, 1992 appellant, then a 58-year-old radiology technician, sustained a lumbosacral strain and aggravation of degenerative disc disease.[1] He was followed for his back conditions by Dr. H. Jack Williams, a Board-certified orthopedic surgeon. In a September 2, 1993 medical progress note, Dr. Williams opined: "I believe [appellant's] condition is permanent and I do n[o]t think there is any hope for a remission to the point that he could get back to doing what he has always done. He is not going to be able to lift and certainly not going to be able to position patients, bend and handle equipment necessary for a radiology technician."[2] Dr. Williams noted that appellant's present conditions were in addition to his work-related injury in June 1990 and that he demonstrated structural narrowing of the

[1] The Office had previously accepted that on June 14, 1990 and again on December 1, 1991 appellant had sustained low back strains.

[2] The employing establishment noted that appellant had worked alone on his shift and had to deal with a variety of patients with physical and emotional conditions, assisting patients from stretchers and wheelchairs to x-ray tables and in some cases physically lifting patients who were unable to move themselves. Duties were noted to include lifting, bending, walking and standing for extended periods of time. Rotation through irregular tours of duty was also listed as a job requirement.

lumbosacral disc and other lumbar spine changes, including disc herniations at L2-3 and L3-4. He opined that appellant "should not return to work because of this work[-]related injury also."[3]

Appellant was referred for a second opinion evaluation to Dr. Judson C. McGowan, a Board-certified orthopedic surgeon, with a statement of accepted facts and questions to be answered. By report dated October 5, 1994, he reviewed appellant's history, noted that activities of daily living aggravated his pain and that he could sleep only three to four hours before his pain awakened him, performed a physical examination and diagnosed probable spinal stenosis, but noted that he could not rule out the possibility of a discogenic cause of his pain. Dr. McGowan recommended referral for a McKenzie protocol and noted that he was optimistic that appellant had the potential for significant improvement through a properly supervised McKenzie physical therapy program.

By letter dated November 14, 1994, the Office requested clarification. By report dated January 26, 1995, Dr. McGowan opined that the November 13, 1992 injury was the inciting event that activated the preexisting condition and that his pain was due to bony stenosis as well as some discogenic contribution. He stated:

> "I believe that the presence of spinal stenosis would make it difficult if not impossible for a patient to fulfill the duties of an x-ray technician. The only types of job that I think might be appropriate would be a sedentary job in which [appellant] would not lift or carry more than 10 pounds and would have the ability to sit or stand at his discretion. As to whether or not [he] could actually perform this task would best be determined by a work capacity evaluation which would derive some more objectivity as to [appellant's] ability to function."

The rehabilitation coordinator for the employing establishment requested that appellant's treating physician address whether suitable employment could be obtained for appellant.

By report dated August 29, 1996, Dr. Williams provided the following opinion:

> "Clinically and subjectively [appellant] is basically unchanged from his last evaluation three years ago. He has some difficulty sleeping at night and indicates that after being in a position for three or four hours at a time [he] usually gets up and moves around some before he can go back to sleep again. At the time of [appellant's] last examination on January 12, 1993, being familiar with the duties of an x-ray technician, I did n[o]t feel he could perform all the duties that were

[3] Dr. Williams testified at a deposition taken on March 1, 1994 that appellant had three eighths inch atrophy of his right calf, right radicular pain radiating to the foot and a lateral disc herniation at L2-3. He opined that on the basis of appellant's condition in 1992 to 1993 he felt it was not wise for appellant to continue to try to work gainfully at the employing establishment in his capacity as an x-ray technician. Dr. Williams opined that this condition would be permanent, that he was able to walk and could probably carry objects of 5 to 10 pounds at waist level and that he could handle his own personal hygiene, care and needs, but would have a fairly limited life from a recreational standpoint. He also noted that appellant's multi-level lumbar disc disease had been treated conservatively for years, and that he had been able to return to work up until mid-November 1992, when a myelogram proved a worsening of his symptoms to the point that appellant was no longer able to continue work.

required of him at that time. Many of the bending and reaching activities and patient lifting were probably not commensurate with his level of physical capabilities and within the limits of his pain tolerance in 1993 and that probably has n[o]t changed any, nor do I expect it to. I do think [appellant's] condition is permanent. He has significant degenerative arthritis involving not only the lumbar spine in several levels but the cervical spine as well. I do not think [appellant] would be able to kneel, repetitively bend, twist, reach or lift as was questioned in number one. His weight restriction would be that of most of the back pain patients which I treat, that is limited to weights of excess of 30 pounds. I am not sure how to answer the question about how many hours per day or times per hours that [appellant]could lift or bend. Certainly some activities are probably beneficial to those with arthritis, but they reach a point also that repetitions and increased weight and activity seem to worsen the symptoms of the condition. While there are no difficulties with the hands and arms per se, the constant sitting in one position might also cause some difficulty. I do n[o]t think his symptoms are likely to improve any with medical treatment and still do not believe that surgery would be a suitable option for him.… I am not able to completely answer beyond any degree of medical certainty all the questions which you raised in your letter and I sent this narrative in lieu of Form OWCP-5c."

An Office rehabilitation counselor noted that Dr. Williams' reports indicated that appellant was unable to resume his previous job, but he concluded that Dr. Williams' reports suggested that appellant had the potential to engage in sedentary work activity. The rehabilitation specialist further stated that Dr. McGowan's second opinion reported that appellant was capable of sedentary work activity. The rehabilitation counselor referred appellant for possible reemployment actions.

By letter dated October 2, 1996, the employing establishment offered appellant the position of diagnostic radiologist technician which it stated was based on the medical restrictions outlined by Dr. Williams.

By letter dated October 23, 1996, the Office advised appellant that it had found that the offered position was suitable to his work capabilities, that it remained available and that he had 30 days within which to accept the position or to provide reasons for his refusal. The Offfice also advised him of the provisions of 5 U.S.C. § 8106(c).

In an October 30, 1996 follow-up medical progress note, Dr. Williams stated:

"[Appellant] [c]ame back in after having received responses from the [employing establishment] indicating that his restrictions had been noted and that he fit into [the] category suitable for radiologic technician. There is also a job description accompanying it. I made copies of it for my review. The thing he feels he can [no]t do is to stand and walk for several hours up to three hours at a time. Of course it is difficult for me to answer those kinds of questions related to ambulatory activity with any degree of medical certainty and I explained that to him. It is much easier to place weight lifting restrictions and bending on someone

with chronic disc disease. Some walking activities are usually beneficial though he finds that being up for prolonged periods of time seem to make his back worse. I will review the chart, the medical literature and see if there are other factors that would help shed light on his particular case."

By letter dated November 5, 1996, appellant advised the Office that he was unable to perform the duties of a diagnostic radiologist technician as he was in constant pain from two herniated discs at L2-3 and L3-4, that if he attempted to stay on his feet for more than three to four hours at a time the pain became unbearable and that he was also unable to sit for any length of time as it also caused severe pain. He enclosed copies of Dr. Williams' reports, contending that it would not be in his best interest to try to work as a radiology technologist.

By letter dated December 9, 1996, the Office advised appellant that his reasons for refusal of the offered position were unacceptable and that he had 15 days within which to accept the position.

On January 16, 1997 the employing establishment reoffered appellant the position as diagnostic radiology technician. In reply appellant declined the position indicating that he was presently taking pain medication which would have to be increased if his lifestyle became more structured. He requested that he be reinstated to Office of Personnel Management (OPM) disability status.

On February 13, 1997 the Office advised the employing establishment that the offered position would have to be modified to be mostly sedentary with no lifting over 10 pounds, chest x-rays only with appointments.

By letter dated March 5, 1997, the Office advised appellant that the offered position had been found to be suitable to his condition and it advised that his desire to receive OPM benefits was not an acceptable reason for refusal.

In an undated letter, appellant responded that he had given several reasons for not accepting the position, including his other cardiac-related medical problems.

In support of his refusal of the offered position, appellant submitted a May 13, 1997 report from Dr. Glenn C. Armen, a Board-certified family practitioner, which discussed his cardiac status. Dr. Armen noted that appellant had ischemic heart disease, that he had undergone coronary artery bypass graphs in 1982 and coronary angioplasty in 1995, and that he had recently been diagnosed with a plaque in the artery of his eye which caused temporary partial blindness in that eye secondary to atherosclerotic peripheral vascular disease.[4] He noted that a Thallium stress test performed in April 1997 demonstrated abnormal Thallium perfusion suggestive of induced ischemia of the inferior wall of the left ventricle, hypertensive blood pressure changes and chest pain compatible with angina during the test. Dr. Armen further noted

[4] The Board notes that a subsequently diagnosed condition is to be considered in determining whether a position is suitable; *see* Federal (FECA) Procedure Manual, Part -- 2, Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(4) (December 1993) (if a condition which has arisen since the compensable injury which disables a claimant from the offered job, it is not suitable).

that appellant had continued high cholesterol despite diet and medication and opined that he was "at a relatively high risk for myocardial infarction."

By letter dated April 30, 1997, the Office advised appellant that his reasons for refusal of the job offer were found to be unacceptable because he had failed to provide current medical documentation to support his inability to perform the duties of the offered position and it gave him 15 days within which to accept the job offer, advising that otherwise 5 U.S.C. § 8106(c) would be invoked.

By decision dated June 18, 1997, the Office terminated appellant's monetary compensation entitlement finding that he refused an offer of suitable work.

By letter dated June 25, 1997, appellant requested an oral hearing. A hearing was held on February 26, 1998 at which appellant testified that Dr. Williams had told him that he would be unable to work.

Submitted in support of appellant's hearing testimony was a March 19, 1998 report from Dr. Williams which noted:

> "By my evidentiary deposition of March 1, 1994 I had certified under oath that [appellant's] condition of multilevel lumbar disc disease was a permanent condition which would probably get worse over time rather than better. A recent myelogram had proved worsening of his condition from his previous studies and his clinical symptoms had also worsened to the point that he was no longer able to continue work at that time. In my opinion, [appellant] has remained continuously and totally disabled since the time of that deposition of above date. A recent MRI [magnetic resonance imaging scan] done on February 22, 1998 has shown degeneration in essentially all of the lumbar intervertebral disc areas with moderate disc narrowing and bulging at L2-3 and protrusion of the L2-3 disc into the left paracentral area. This study reflects an increase in the prominence of the disc herniation from previous studies. It appeared at the time the deposition was given that although he had a longstanding back condition, he had always been able to work until the work-related injury which occurred in mid November 1992."

By decision dated May 12, 1998, the hearing representative affirmed the termination finding that "it was unclear how Dr. Williams can state that [appellant] has been totally disabled since 1992 when the record is replete with his own reports documenting that [appellant] was capable of working in 1996." The hearing representative concluded that the evidence of record supported that appellant was physically capable of returning to light-duty work.

Section 8106(c)(2) of the Federal Employees' Compensation Act states that a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or secured for him is not entitled to compensation.[5] The Office

[5] 5 U.S.C. § 8106(c)(2).

has authority under this section to terminate compensation for any partially disabled employee who refuses suitable work when it is offered. Before compensation can be terminated, however, the Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.[6] In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused by appellant was suitable.[7]

The Board finds that the Office failed to meet its burden of proof to establish that appellant had the physical capacity to perform the duties of the selected position.

Neither the reports of Drs. Williams nor McGowen establish that appellant was partially disabled and capable of working light duty eight hours per day. In 1993 Dr. Williams opined that appellant's condition was permanent, that no remission was expected and that appellant should not return to work. Since that time, no evidence was submitted to the record which supported any improvement in appellant's condition. In 1994 Dr. Williams testified that after November 1992 appellant was no longer able to continue work, that he had right leg atrophy, right radiculopathy and L2-3 lateral disc herniation. In 1996 he opined that appellant's condition was basically unchanged from three years earlier and that in 1993 he did not feel that appellant could perform the duties of a radiology technician. Although Dr. Williams noted that appellant could not kneel, bend, twist, reach or lift, these restrictions do not imply that appellant could perform every other activity. After stating that appellant could not lift, the fact that Dr. Williams gave a general weight lifting restriction for back pain patients, does not support that appellant is capable of lifting in the selected position. He did not answer the Office's questions regarding how many hours appellant could work or how many times per day he could perform certain activities and even noted that at some point, which was not specified, that such activities worsened appellant's symptoms, as well as constant sitting in one position. Dr. Williams admitted that he was unable to answer the Office's questions regarding appellant's capacity to perform some type of work and declined to complete a work capacity evaluation. He later admitted that he was unable to answer Office questions related to ambulatory activity with any degree of medical certainty. Therefore, the Board finds that Dr. Williams' reports do not support that appellant has a defined capacity to perform some sort of work. Subsequently, he clarified in his March 19, 1998 report that he felt that appellant had remained totally disabled since the time of his previous deposition. This does not support that appellant was capable of working eight hours per day in a partially sedentary, partially ambulatory position. Consequently, the Board finds that Dr. Williams' reports do not establish that appellant was partially disabled and was capable of returning to an eight-hour per day job.

Dr. McGowen opined that the presence of spinal stenosis, a condition which must be considered in determining suitable work in appellant's case, precluded a patient from fulfilling the duties of an x-ray technician. He stated that the only sedentary-type job that might be

[6] *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

[7] *Glen L. Sinclair*, 36 ECAB 664 (1985).

appropriate would be sedentary with the ability to stand or sit at will, but clearly noted that "As to whether or not [appellant] could actually perform this task would be best determined by a work capacity evaluation" which would provide objective answers in appellant's case. No such work capacity evaluation was ever accomplished. This statement plainly does not support that appellant could perform partially sedentary, partially ambulatory work eight hours per day.

The Board therefore finds that neither of these physicians' reports support that appellant could perform the duties of the selected position.

The Board notes that Dr. Armen identified the presence of a progressive atherosclerotic, ischemic heart disease which required postemployment injury coronary angioplasty in 1995[8] and of atherosclertic peripheral vascular disease which caused an arterial plaque of appellant's eye resulting in temporary partial blindness. He noted that 1997 stress testing revealed inferior left ventricular ischemia, hypertensive blood pressure changes and angina and he opined that appellant was at a relatively high risk for myocardial infarction. As these cardiovascular conditions were diagnosed post-injury, they also must be considered in determining whether appellant is capable of returning to some sort of work, which was not done in the instant case.[9]

As the evidence of record does not establish that appellant is capable of performing the duties as a radiology technician the Board finds that the Office failed to meet its burden of proof to establish that he was no longer totally disabled. The termination of appellant's monetary compensation benefits under 5 U.S.C. § 8106(c) will be reversed.

[8] The Board notes that appellant's pre-1992 ischemic heart disease was successfully treated with coronary artery bypass grafts in 1982 which allowed him to return to regular full duty from a cardiac standpoint.

[9] *See supra* note 4 and accompanying text.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated June 18 and May 12, 1998 and June 18, 1997 are hereby reversed.

Dated, Washington, D.C.
August 11, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member