U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID BUDZIK and U.S. POSTAL SERVICE,
POST OFFICE, Brooklyn, OH

Docket No. 00-1199; Submitted on the Record;
Issued April 11, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation for refusal to accept suitable work.

On March 9, 1998 appellant, then a 32-year-old letter carrier, was picking up a bucket of mail when he felt a sharp, shooting pain in his lower back.[1] He stopped working that day and returned to light-duty work on March 11, 1998.

In a March 24, 1998 report, Dr. Alejo Sryvalin, a Board-certified surgeon, stated that appellant had marked weakness and diminished sensation in the right leg when compared to the left leg. He diagnosed a herniated disc with radiculitis of the right leg. A May 28, 1998 magnetic resonance imaging (MRI) scan showed a mild impingement on the caudal aspect of the left L3 neural foramen by the disc and an osteophyte formation.

The Office accepted appellant's claim for aggravation of preexisting L3-4 compression fracture, aggravation of herniated nucleus pulposus and contusion of the left flank.

In a July 20, 1998 report, Dr. Dan Shamir, a physiatrist, stated that appellant had a remote history of L3 and L4 compression fractures and a recent injury to the low back with low back pain. He noted that the diagnosis of low back pain with radiculitis had been broached in recent years. Dr. Shamir found no focal neurological deficits in his examination of appellant and indicated that strength, sensation and reflexes were preserved. He concluded that appellant could perform light work, including lifting up to 10 pounds with occasional lifting up to 20 pounds, occasional bending, stooping, crouching, crawling, sitting, standing and walking for up to 6 hours in an 8-hour day with breaks every 20 to 30 minutes to change position.

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[1] Appellant had filed two prior claims for back injuries. On January 3, 1993 he developed back pain while delivering a heavy load of mail, including tax forms. On December 15, 1997 he slipped on icy steps and fell. He also had sustained an L3-4 compression fracture due to a jeep accident while in military service.

In an August 7, 1998 letter, the employing establishment offered appellant a light-duty position as a modified letter carrier. The employing establishment indicated that appellant would perform duties such as sorting mail into a modified case, handling a flat sorter machine and an optical scanning machine, and sweeping mail from the ledges of the machines. The employing establishment stated that the restrictions of the duties were intermittent standing and walking for comfort, lifting 10 pounds frequently and lifting 20 pounds occasionally. On August 8, 1998 appellant stopped working. On August 26, 1998 he refused the limited-duty position offered in the August 7, 1998 letter. On September 25, 1998 he filed a claim for recurrence of disability, effective August 8, 1998.

In an August 26, 1998 report, Dr. Shamir stated that he had reviewed the job offered to appellant and concluded that he could not perform the duties of flat sorter because the job would require twisting one to two hours a day and appellant could not twist. He commented that, ideally, appellant should be performing sedentary work due to a more restricted range of motion in the back. Dr. Shamir indicated that appellant should work straight ahead with no twisting, occasional bending, occasional stooping, lifting 10 pounds occasionally and 5 pounds frequently, and occasional overhead reaching.

In an October 8, 1998 letter, the employing establishment offered appellant a modified carrier position. The employing establishment indicated that appellant would answer customer inquiries, mark up mail, case mail without twisting and demonstrate correct casing techniques to coworker. It noted that mail would be dumped in front of appellant for casing. It also indicated that appellant would take mail to carriers on the street although he would not lift the mail out of the truck. It listed appellant's restrictions as no lifting, sitting and standing at will for his own comfort, no continuous lifting over 5 pounds and occasionally lifting over 10 pounds.

In an October 9, 1998 letter, the Office indicated that it found the job offer to be suitable for him. The Office informed appellant that he had 30 days to accept the position or provide an explanation of his reasons for refusing it. The Office stated that his reasons for refusing the position would be considered prior to a determination of whether his reasons for refusing the position were justified. The Office warned appellant that if he failed to accept the offered position and failed to demonstrate that his refusal was justified, his compensation would be terminated.

In an October 14, 1998 report, Dr. Shamir stated that he had reviewed the October 8, 1998 job offer and concluded that appellant could perform the duties of the position. He reported that he had gone over the job description with appellant and had informed appellant of his opinion. In a December 1, 1998 form, Dr. Shamir indicated that the offered position was suitable for appellant.

In a December 4, 1998 memorandum, a field nurse for the Office indicated that appellant had not responded to the job offer even though he was beyond the 30-day limit for response. She related that appellant was considering taking the job but wanted to be off work under the Family Medical Leave Act (FMLA).[2]

[2] 29 U.S.C. §§ 2601-2654.

In a December 23, 1998 memorandum, an Office claims examiner reported that appellant had stated in a telephone conversation that he had accepted the offered position on December 1, 1998 and had filed for family and medical leave beginning the same date. The claims examiner indicated that compensation would be paid up to the time of the acceptance of the job.

In a separate December 23, 1998 memorandum, a postal inspector reported that appellant had been observed performing activities which were inconsistent with his claim of total disability such as driving his motorcycle, pushing a heavy object in his house, mowing his lawn and bending and twisting while repairing his motorcycle. The inspector noted that appellant had accepted the offered position effective December 1, 1998 but had not reported for work. He indicated that appellant subsequently requested and was approved for leave under the FMLA to care for his mother. In his application for leave, appellant indicated that his mother had cancer and needed help around the house.

In a January 25, 1999 letter, the Office noted that appellant had accepted the offered position but had not reported for work. The Office indicated that the offered position was still available to appellant. The Office stated that the only justified reasons for refusing an offered job were a medical inability to perform the job, a withdrawal of the job offer or the performance of other work which reasonably represented his wage-earning capacity. The Office found that none of those reasons applied in appellant's case. The Office therefore gave appellant an additional 15 days to accept the position or face the termination of his compensation.

In a February 10, 1999 letter, an Office claims examiner noted that appellant had been given until February 9, 1999 to report to work. She related that a telephone call to appellant's house revealed that appellant's mother had died on February 8, 1999 and appellant was attending to affairs relating to this matter. The Office extended the time for him to report to work was to February 25, 1999.

In a March 10, 1999 decision, the Office terminated appellant's compensation for neglecting to report to work that had been found suitable by the Office.

In a March 16, 1999 letter, appellant's attorney requested a hearing before an Office hearing representative. At the September 22, 1999 hearing, appellant testified that he had needed additional time off work after his mother's death to handle his mother's affairs and help his father cope with her death. He stated that he had reapplied for leave under the FMLA in January 1999 on order by the employing establishment's management and the leave had been granted. Appellant indicated that he did not report to work on February 25, 1999 because he believed he was still under the FMLA. He stated that he was approved for disability retirement by the Office of Personnel Management because of his medical condition and because he would not receive suitable jobs from the employing establishment throughout his career at the employing establishment. Appellant indicated that the disability retirement was retroactive to August 8, 1998.

Appellant submitted at the hearing a December 10, 1998 decision from the Department of Veterans Affairs that granted appellant's request for individual unemployability because he was unable to secure or follow a substantially gainful employment as a result of service-connected

disabilities. The Department of Veterans Affairs concluded that appellant's low back disability rendered him unable to maintain gainful employment.

In an October 12, 1999 letter, an official at the employing establishment indicated that appellant applied for disability retirement in November 1998 and submitted medical documentation in support of his request in April 1999. She noted that appellant's request for disability retirement was approved retroactively in July 1999. The official stated that appellant requested leave under the FMLA in October 1999 and on December 1, 1999 for December only. She indicated that under the employing establishment's policy, documentation for leave under the FMLA was to be updated monthly. The official stated that appellant did not submit any documentation to support leave. She stated that there was no documentation that appellant was granted leave under the FMLA in January 1999. The official also noted that when appellant asked whether the offered position was temporary or permanent, he was informed that if his restrictions changed, his job would be changed to suit his new restrictions but he would have work at the employing establishment on a permanent basis, either in a limited-duty capacity or a permanent rehabilitation job offer. She commented that appellant's statement that he needed additional leave after his mother's death would not be covered by the FMLA since he would be required to reapply for leave and submit additional medical documentation to support his father's need for help.

In a December 29, 1999 decision, the Office hearing representative found that the Office properly terminated appellant's compensation for refusing to return to suitable work. He stated that the right to request and grant leave for reasons unrelated to appellant's compensation case was strictly an issue between appellant and the employing establishment. The hearing representative indicated that, once suitable work was offered, appellant's compensation would be terminated unless he returned to work. He stated that appellant had the right to request leave under the FMLA and did so. The hearing representative commented, however, that any benefit under the FMLA would be an administrative matter to be redressed with the employing establishment and would not form the basis for compensation under the Federal Employees' Compensation Act. He concluded, therefore, that there was no conflict between the FMLA and the Act. The hearing representative therefore affirmed the Office's March 10, 1999 decision.

The Board finds that the Office properly terminated appellant's compensation for refusal to accept suitable work.

Section 8106(c)(2) of the Act 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."[3] An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.[4]

The employing establishment offered appellant a position as a modified carrier with physical restrictions that followed the restrictions reported by Dr. Shamir in his August 26, 1998 report. Dr. Shamir stated in an October 14, 1998 report and a December 1, 1998 form report that

[3] 5 U.S.C. § 8106(c)(2).

[4] 20 C.F.R. § 10.124.

appellant could perform the duties of the modified carrier position. The medical evidence of record therefore shows that appellant could physically perform the duties of the offered position. The employing establishment noted that appellant submitted medical evidence in April 1999 in support of his request for disability retirement. However, no evidence was submitted to the Office in support of appellant's claim that he could not perform the duties of the position. The reports of Dr. Shamir support appellant's capacity to perform the duties of the selected position.

Appellant stated that he had been granted leave under the FMLA in January 1999. The employing establishment, however, indicated that appellant was required under its policies to provide documentation monthly in support of his continued request for leave under the FMLA. It reported that appellant had not submitted any documentation of his need for leave after December 1, 1998. Therefore, there is no evidence of record to show that appellant was covered by the provisions of the FMLA as of the time the Office terminated his compensation as of March 10, 1999.

Appellant submitted a decision by the Department of Veterans Affairs that found him unemployable due to his service-related disability. However, a finding of disability under one federal statute does not establish disability under the Act.[5] A finding by another agency that appellant was unemployable is insufficient by itself to show that appellant could not perform the duties of the position offered to him. Appellant must submit medical evidence to establish that he was physically unable to perform the duties of the offered position. As noted above, appellant has not submitted such evidence.

The decision of the Office of Workers' Compensation Programs dated December 29, 1999 is hereby affirmed.

Dated, Washington, DC
April 11, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

[5] *See Daniel Deparini*, 44 ECAB 657 (1993). The findings of the Department of Veterans Affairs are not determinative of appellant's capacity for work under the Act as the statutes have different standards of medical proof on the question of disability.