U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of AARON A. PLUMMER and U.S. POSTAL SERVICE,
POST OFFICE, Fennville, MI

Docket No. 00-1791; Submitted on the Record;
Issued April 17, 2001

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

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

The Office accepted appellant's claim for cervical, lumbar and sacral subluxations and L5-S1 disc herniation, which required surgery on October 25, 1994. At the time of his January 24, 1994 employment injury, appellant was a letter carrier. He has not worked since February 19, 1994.

On June 12, 1995 appellant's treating physician, Dr. Allan H. Russcher, a Board-certified pathologist with a specialty as a family practitioner, stated that appellant could work with a 15-pound lifting restriction and no strenuous bending and twisting.

In a disability note dated March 4, 1996, Dr. Bill McAllister stated that appellant underwent surgery for a herniated disc, which was exacerbated at work, and that appellant could perform light duty, subject to carrying fewer than 25 pounds at a time.

In a report dated October 7, 1997, a referral physician, Dr. Paul H. DeVries, a Board-certified orthopedic surgeon, considered appellant's history of injury, examined appellant, reviewed x-rays and noted a postoperative laminectomy on the right at L5-S1. He stated that appellant could work 9 hours a day subject to restrictions of no repetitive lifting, pushing and pulling of objects weighing more than 25 pounds.

By letter dated June 20, 1998, the employing establishment offered appellant a full-time job of modified clerk which involved, in part, general cleaning and office work and sorting letters, flats and packages. The physical requirements of the job were nonrepetitive carrying, pulling, lifting and pushing objects weighing up to 25 pounds. By letter dated July 17, 1998, the Office found that the job of modified clerk was suitable to appellant's work capabilities. The Office provided appellant 30 days from the date of the letter to either accept the position or provide an explanation for refusing it.

In a disability note dated July 24, 1998, Dr. Russcher stated that because of continued pain and sensory loss in his right foot, appellant should not work longer than 2 hours daily, lift more than 25 pounds or do any strenuous bending, lifting or twisting.

By letter dated October 19, 1998, the Office informed appellant that it had not yet received any evidence that justified appellant's refusal to accept the job offer. The Office gave him 15 days to accept the job offer. Appellant submitted an undated claim form, a 1993 W2 form and a progress note dated July 21, 1998 stating, in part, that he had low back pain and residual numbness from the October 1994 surgery.

By decision dated December 23, 1998, the Office denied appellant's claim, stating that the evidence of record established that appellant refused or neglected to work a suitable job.

By letter dated December 28, 1998, appellant requested an oral hearing, which was held on November 9, 1999. He submitted a progress note dated December 7, 1998 from Dr. Yoo (first name and certification status unknown) from the Edward Hines, Jr. Hospital which stated that appellant's pain in his back and in the right side of his foot continued. Dr. Yoo stated that appellant did not have a serious disability but should not work more than 2 hours a day and had a 25-pound work restriction.

At the hearing, appellant testified that, in the summer 1998, he continued to have problems with numbness and nerve pains in his right foot and pains in his hip. He stated that sitting or lying on anything soft made his symptoms worse. Appellant stated that he had difficulty performing housework or work in the yard and had to rest for about 30 to 45 minutes after an hour or two. He also described some of his medical treatment.

In a disability note dated February 1, 1999, Dr. Russcher stated that, due to appellant's back abnormalities, he should not lift more than 25 pounds and should not work more than 2 hours a day. In a disability note dated December 7, 1998, Dr. Yoo stated that appellant had previous successful treatment of lumbar herniated disc by surgical resection in October 1994. He stated that appellant must have work limitations including no lifting objects more than 25 pounds and working no longer than 2 hours per day. A progress note dated August 18, 1999 stated that appellant was treated for right ankle sprain. Another progress note dated January 24, 2000 from the Edward Hines, Jr., Hospital diagnosed lumbar radiculopathy and stated that appellant was treated by neurosurgery and for lumbar radiculopathy. The note stated that a computerized axial tomography (CAT) myelogram showed that appellant did not have any active compression and an electromyogram and nerve conduction study showed that appellant had an old right S1 radiculopathy. The note stated that appellant should not lift more 20 pounds and should not sit more than 2 hours without a break.

By decision dated February 23, 2000, the Office hearing representative affirmed the Office's December 23, 1998 decision.

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

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits by establishing that the accepted disability has ceased or

that it is no longer related to the employment.[1] Under section 8106(2) of Federal Employees' Compensation Act,[2] the Office may terminate compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.[3] The Board has recognized that section 8106(c) serves as a penalty provision as it may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment and, for this reason, will be narrowly construed.[4] 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 the medical evidence.[5]

In this case, in his June 12, 1995 report, appellant's treating physician, Dr. Russcher, stated that appellant could work, subject to a 15-pound lifting restriction. In his March 4, 1996 disability note, Dr. McAllister stated that appellant could perform light duty subject to carrying fewer than 25 pounds at a time. In his October 7, 1997 report, the referral physician, Dr. DeVries, opined that appellant could work 9 hours a day subject to restrictions of no repetitive lifting, pushing and pulling of objects weighing more than 25 pounds.

On June 20, 1998 the employing establishment offered appellant the full-time job of modified clerk which had physical requirements of nonrepetitive carrying, lifting and pushing objects weighing up to 25 pounds. By letters dated July 17 and October 19, 1998, the Office found the job to be suitable and gave appellant the appropriate time periods to respond. He refused to accept the job and submitted disability notes from Drs. Russcher and Yoo.

Both their notes are insufficient to establish that appellant could work only two hours a day because they do not provide any medical rationale for this work restriction.[6] Further, Dr. Russcher did not explain why he felt that appellant required a two-hour-a-day work restriction in his July 24, 1998 note but did not specify that restriction in his June 12, 1995 disability note. Moreover, the most recent progress note dated January 24, 2000 stated that appellant could not sit two hours without a break but did not limit appellant to working two hours a day.

In his October 7, 1997 report, the referral physician, Dr. DeVries, concluded that appellant could work full time subject to a 25-pound lifting restriction. His report is complete and well rationalized and thus constitutes the weight of the evidence. Therefore, his opinion justifies the Office's termination of benefits.

[1] *David W. Green*, 43 ECAB 883 (1992).

[2] 5 U.S.C. §§ 8101-8193.

[3] *Henry W. Sheperd, III*, 48 ECAB 382, 384-385 (1997); *Patrick A. Santucci*, 40 ECAB 151 (1988).

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

[5] *See John E. Lemker*, 45 ECAB 258 (1993); *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

[6] *See Jacquelyn L. Oliver*, 48 ECAB 232, 236 (1996).

The February 23, 2000 decision of the Office of Workers' Compensation is hereby affirmed.

Dated, Washington, DC
April 17, 2001

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member