U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES E. HUDSON and DEPARTMENT OF THE INTERIOR, BUREAU OF RECLAMATION, Sacramento, CA

Docket No. 01-858; Submitted on the Record;
Issued February 13, 2002

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective May 13, 1999 on the grounds that he refused an offer of suitable work.

The Office accepted appellant's claim for a low back strain. Since the November 27, 1989 employment injury, appellant worked intermittently but was placed on total disability in April 1990. In a report dated March 22, 1993, appellant's treating physician, Dr. Jagdish A. Patel, a Board-certified family practitioner, considered appellant's history of injury, performed a physical examination and reviewed a magnetic resonance imaging (MRI) scan. He diagnosed chronic low back syndrome with extensive osteoarthritis and degeneration with protrusion at L3-4 and L4-5. Dr. Patel stated that appellant's condition was related to his November 27, 1989 employment injury. He stated that appellant was permanently disabled from any kind of vocation because of his age, pain and limitations of movement. Dr. Patel stated that appellant was permanently precluded from heavy lifting and repetitious bending. In a work restriction evaluation dated May 20, 1993, he stated that appellant could work two hours a day if he rested "in between" and could lift up to 20 pounds. Dr. Patel stated that appellant should not bend, squat, twist or stand.

In a report dated November 1, 1995, a second opinion referral physician, Dr. James V. Roche, a Board-certified orthopedic surgeon, considered appellant's history of injury, performed a physical examination and reviewed the MRI scan and x-rays. He stated that appellant's lumbosacral sprain was "an appropriate diagnosis following" his November 27, 1989 employment injury, but his strain was superimposed on a well illustrated and imaged chronic progressive degenerative disc disease. Dr. Roche stated that the disc disease was "at such a stage that it aggravated the condition to the extent that it became symptomatic and to the degree that it prevented him from returning to his usual occupation." He opined that appellant could perform work with no significant lifting, which enabled him to frequently change his position and posture, *i.e*, sitting, standing and walking.

By letter dated June 25, 1997, Dr. Patel stated that, due to his constant pain, limitation of mobility and need for constant medications, appellant could not perform modified janitorial work. In a progress note dated March 4, 1998, he stated that appellant was permanently disabled.

By letter dated March 10, 1998, the employing establishment sent Dr. Patel a videotape showing appellant digging a pond in his backyard in April and May 1997. The video showed appellant building a waterwheel over a three-day period, pouring cement, lifting bags of concrete, nailing, sawing and getting on his knees and hands several times. In an interview with the investigator after viewing the videotape, the physician stated that he thought appellant was in pain even though he performed the activities in the film and that appellant told him he was in pain from performing them and could not get out of bed the next day.

By letter dated May 22, 1998, the employing establishment offered appellant a light-duty job of custodial worker. The physical requirements of the job were intermittent standing, occasional reaching, occasional lifting and carrying items weighing up to 15 pounds and no repetitive lifting over 10 pounds.

On September 28, 1998 Dr. Patel approved appellant's performing the job of custodial worker for a trial of 30 days. By letter dated June 8, 1998, the Office found that the job of custodial worker was suitable for appellant and gave appellant 30 days to accept the position or provide reasons for refusing it. By letter dated June 16, 1998, appellant refused the job offer, stating that it was temporary and the physical requirements exceeded his limitations.

In a state insurance form, Dr. Ronald T. Whitmore, a Board-certified family practitioner, stated that appellant had chronic back pain since the "1989 injury" and appellant was "in constant pain with episodes of waxing/wanes recently." He diagnosed chronic low back pain. Dr. Whitmore indicated that based on his examination dated October 9, 1998, appellant was permanently totally disabled and he recommended against appellant working full time. In an attending physician's supplemental report, Dr. Whitmore diagnosed chronic low back pain and degenerative disc disease, opined that appellant was permanently disabled and recommended "permanent and total disability." He checked the "yes" box that appellant's back condition was work related.

By letter dated November 9, 1998, the employing establishment offered appellant a permanent position of light-duty custodial worker. In an attached work capacity evaluation dated April 30, 1996, Dr. Roche stated that appellant could work four hours a day, with limited standing, repetitive bending, twisting and reaching and no lifting more than 20 pounds at a time. He stated that appellant should have the option of adopting any posture or position while at work as in sitting, standing and walking.

On November 10, 1998 appellant declined the offer for reasons "By DR."

By letter dated March 3, 1999, the Office gave appellant 30 days to accept the offer for the position of light-duty custodial worker or give reasons for declining it.

By letter dated March 14, 1999, appellant stated that he was permanently disabled and was unable to perform the job according to Drs. Patel and Whitmore.

By letter dated April 23, 1999, the Office stated that appellant's reasons for the refusing the job offer were not justified and that he had 15 days to accept the position without penalty and that, after 15 days, his benefits would be terminated.

By decision dated May 13, 1999, the Office terminated appellant's compensation benefits, stating that he failed to accept a suitable light-duty job offer.

Appellant requested an oral hearing before an Office hearing representative, which was held on March 28, 2000. At the hearing, he described the circumstances of the November 27, 1989 employment injury his medical treatment and stated that he last worked for employer on November 27, 1989. Appellant testified he was treated by Dr. Patel nine years and he told appellant he could not go back to work. Subsequent to the November 27, 1989 employment injury, appellant was diagnosed with diabetes, had high cholesterol, had heart attacks and underwent open-heart surgery in 1996. Appellant testified that he had bursitis in the shoulders, hypertension, high blood pressure and a thyroid problem but only the thyroid problem existed prior to the November 27, 1989 employment injury. Appellant stated that Dr. Patel encouraged him to "try" anything he could do around the house to identify his limitations and when he did yard work, it hurt his back. Appellant stated that, after he installed the fishpond, he had to lie down for the next three days due to the pain. Appellant further stated that he turned down the job offer for custodial worker because he did not think he could perform the work and the position was temporary. Appellant stated that he refused the four-hour custodial job because Dr. Whitmore told him he could not perform the job. Appellant stated that he moved from California to Arkansas on January 4, 1999. Appellant stated that he moved because he sold his house.

Appellant submitted additional medical evidence. In a report dated April 13, 2000, Dr. Whitmore stated that he reviewed his record on appellant whom he last saw on December 22, 1998, that he reviewed the proposed job description and he believed appellant was totally disabled, the same status appellant had for nine years.

In a report dated September 28, 1999, Dr. Young considered appellant's history of injury, performed a physical examination, reviewed an MRI scan and computerized axial tomography scan from 1990 and 1994, which showed severe disc disease in the lumbosacral region and disc protrusion at L3-4, L4-5 and L5-S1. He stated that any further attempts at rehabilitation and physical therapy would "probably be totally unrewarding." Dr. Young opined that "because of the severe limitation and pain provoked by normal back movement," he felt "strongly that [appellant] was unable to perform any type of work duties no matter what the modification level." He concluded that appellant was permanently, totally disabled and "shall remain so for the rest of his life." Dr. Young stated that appellant had developed hypertension and arteriosclerotic heart disease with coronary artery bypass graft in 1996, which complicated his rehabilitative program "even more." In an attending physician's report dated September 28, 1999, he diagnosed severe lumbosacral degenerative joint disc disease and stated that appellant was totally, permanently disabled. Dr. Young checked the "yes" box that appellant's back condition was related to the November 27, 1989 employment injury.

In a progress note dated November 3, 1999, Dr. Cappello diagnosed failed back syndrome. In a report dated December 9, 1999, she considered appellant's history of injury, performed a physical examination and reviewed x-rays and the MRI scan. Dr. Cappello stated

that the x-rays and MRI scan indicated that the presence of lumbar degenerative disc disease combined with physical findings of straight leg raising and loss of motion of the spine. She concluded that appellant was "disabled from any gainful activity due to his degenerative disease of the spine."

By decision dated June 19, 2000, the Office hearing representative affirmed the Office's May 13, 1999 decision, but found that the evidence appellant submitted after that decision consisting of Drs. Young, Cappello and Whitmore's reports stating that appellant was permanently, totally disabled required further development of the evidence. The Office hearing representative, therefore, remanded the case for appellant, with a statement of accepted facts and the medical evidence, to be referred to an appropriate medical specialist to determine if appellant had a continuing work-related low back condition and whether he was capable of performing the part-time, limited-duty custodial position.

In a report dated September 18, 2000, the impartial medical specialist, Dr. Joe P. Alberty, a Board-certified orthopedic surgeon, considered appellant's history of injury, performed a physical examination, reviewed x-rays and reviewed two MRI scans, one dated September 17, 1990 and one dated October 22, 1999. Dr. Alberty diagnosed lumbosacral sprain and thoracolumbar arthritis, post-traumatic with spurs T-11 and T-12 and L1. He stated:

> "[N]o objective evidence to say that [appellant]'s work-related strain has resolved but it is reasonable to assume that the sprain is not a permanent component and that much of his current symptoms are related to the post-traumatic thoracolumbar findings evidence on the x-rays from previous accidents.
>
> "We do think that this gentleman could perform a modified janitor job at four hours, the way it was described. We do not think that the video contributes significantly for my opinion in regard to that. I do not think that [appellant] is objectively capable of working at a higher level that the four[-]hour modified janitor job described."

By decision dated December 21, 2000, the Office terminated appellant's compensation effective May 13, 1999.

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation on the grounds that he refused an offer of suitable work.

Once the Office accepts a claim, it has the burden of justifying termination of modification of compensation benefits by establishing that the accepted disability has ceased or that it is no longer related to the employment.[1] This burden of proof is applicable when the Office terminates compensation under 5 U.S.C. § 8106(c) for refusal to accept suitable work. Under this section of the Federal Employees' Compensation Act, the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.[2] The Board has recognized that section 8106(c) serves

[1] *H. Adrian Osborne*, 48 ECAB 556 (1997); *David W. Green*, 43 ECAB 883 (1992).

[2] 5 U.S.C. § 8106(c)(2).

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.[3] 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.[4]

In this case, a conflict exists in the record between the referral physician, Dr. Roche, who opined that appellant could work four hours a day and the opinions of appellant's treating physicians, Drs. Whitmore and Patel, who opined that appellant was unable to work. In the June 19, 2000 decision, the Office hearing representative remanded the case for an impartial medical specialist to resolve the conflict in the evidence. In his September 18, 2000 report, the impartial medical specialist, Dr. Alberty, stated that there was no objective evidence that appellant's work-related strain had resolved but it was "reasonable to assume" that the sprain was not a permanent component and that much of appellant's current symptoms were related to the post-traumatic thoracolumbar findings on the x-rays from previous accidents. He concluded that appellant could work four hours a day. Dr. Alberty's opinion, however, is speculative and ambiguous since he stated that it was "reasonable to assume" that appellant's sprain was not permanent. The Board has held that a medical opinion which is speculative and equivocal is of little probative value.[5] Dr. Alberty's opinion is, therefore, insufficient to meet the Office's burden. Inasmuch as the conflict in the evidence remains unresolved, the Office has failed to meet its burden of proof to terminate benefits.

The December 21, 2000 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC
February 13, 2002

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[3] *See Susan L. Dunnigan*, 49 ECAB 267 (1998); *Stephen R. Lubin*, 43 ECAB 564 (1992).

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

[5] *See Wendell D. Harrell*, 49 ECAB 289-91 (1998).