U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MILTON S. McGOWAN and U.S. POSTAL SERVICE,
POST OFFICE, San Francisco, CA

Docket No. 02-318; Submitted on the Record;
Issued July 22, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective November 5, 2000 on the grounds that he neglected suitable work.

On November 14, 1996 appellant, then a 49-year-old letter carrier, filed a claim alleging that he sustained a psychiatric condition in the performance of duty after being attacked by dogs while delivering the mail.[1] The Office accepted the claim for post-traumatic stress disorder. The Office placed appellant on the periodic rolls and paid appropriate compensation benefits.

Appellant submitted numerous reports from Dr. Nicholas H. Nichols, appellant's treating psychologist. Dr. Nichols initially indicated that appellant was disabled for work.

In an August 21, 1998 attending physician's report, Dr. Nichols stated that appellant was motivated to work but his symptoms including, severe anxiety and severe depression, accounted for his absences and difficulty in returning to work regularly at this time. He stated that appellant should work no more than 8 hours a day and 40 hours a week.

By letter dated September 30, 1998, the Office referred appellant to Dr. Robert Hepps, a Board-certified psychiatrist for a second opinion medical evaluation.

In a November 16, 1998 report, Dr. Hepps noted appellant's history of injury and treatment. He concluded that appellant continued to suffer from residuals of his industrial injury and that he did not believe that appellant could ever return to his regular job as a letter carrier because he would have to face the prospect of encountering dogs as he delivered the mail. However, Dr. Hepps provided a reasoned opinion that appellant was capable of working eight

[1] The record reflects that appellant had several incidents involving being attacked by dogs including March 2, May 4 and December 9, 1989 and January 10, 1990. The Office reclassified the claims as occupational.

hours a day in a postal position where he would have no contact with dogs. The only work restriction given by him was that appellant not work in a position where he could encounter dogs.

In a March 11, 1999 report, Dr. Nichols opined that he never stated that appellant had a permanent restriction of avoiding contact with dogs. He stated that much of appellant's treatment has centered on helping him to feel less anxious and depressed so that he could get himself to work. Dr. Nichols indicated that once appellant arrived there, no restrictions were called for other than that he "spend no more than eight hours a day and forty hours a week on the job." Further, he recommended against the job change for appellant described in the U.S. Postal Service letter to him of October 16, 1998, primarily because such a change would not be a solution to his work problem. Dr. Nichols stated his problem was that appellant's extreme anxiety and depression so immobilized him that he could not get himself to go to work regardless of the specific nature of his duties. He opined that the resolution of this problem was not in a job change but in assisting appellant to mobilize himself to return to work. Dr. Nichols stated that this could primarily be accomplished through psychological treatment.

In work restriction evaluations dated February 2 and 26 and July 27, 1999, Dr. Nichols indicated that appellant could return to work eight hours a day. He indicated that the work should be limited to eight hours a day for forty hours a week. Dr. Nichols opined that there were no known restrictions on items one through 10 of the work restriction evaluation. Further, he explained that appellant's interpersonal relationships might be affected along with anxiety when going to work and interacting with others.

In a March 26, 1999 report, Dr. Nichols opined that there was no change in appellant's mental status. He noted that there was no evidence of other nonwork-related stressful events contributing to appellant's continuing disability. Dr. Nichols indicated that appellant's current disability was a continuation of the disorder caused by the four initial dog attacks and was not due to nonwork-related variables. He diagnosed post-traumatic stress disorder. Dr. Nichols stated that appellant had made some progress over time in feeling less anxious when he has to deal with dogs. However, he noted that appellant continues to have great difficulty in coping with life in general due to his still experiencing overwhelming and immobilizing feelings of anxiety and depression. Dr. Nichols stated that appellant was not yet able to deal with the normal requirements of daily living and he is unable to return to work because he dreads even the thought of doing so. He completed a Form CA-20 dated March 24, 1999.

By letter dated September 27, 1999, the Office determined that a conflict in medical opinion existed between Dr. Nichols and Dr. Hepps.[2] The Office referred appellant, the statement of accepted facts and the entire case record to Dr. Leon J. Epstein, a Board-certified psychiatrist, for an impartial medical evaluation to resolve the conflict in medical opinion.

In a November 8, 1999, psychological assessment report, Dr. Hooker, a clinical psychologist working with Dr. Epstein, determined that appellant had longstanding problems with self-esteem, interpersonal attachment and accurate perceptions of reality when his feelings

[2] The physician canceled a previously scheduled appointment with another physician.

were intense. He noted that while appellant clearly had psychological problems, he was not experiencing as much depression and distress as reported and the role of secondary gain factors must be taken into account in evaluating his self-report. Dr. Hooker diagnosed chronic depressive disorder or dysthymic disorder and prominent narcissistic and borderline personality traits. He opined that the possibility of a personality disorder needed to be considered.

In his report dated December 9, 1999, Dr. Epstein provided a detailed description of the relevant history, current examination findings, medical and psychiatric records and results of the psychological testing conducted by Dr. Hooker. He diagnosed post-traumatic stress disorder, dysthymic disorder, resolving. Dr. Epstein noted that during the examination, appellant reported significant depressive features, although at no point during the evaluation was there evidence of a melancholy facial expression, tears, or psychomotor retardation. In addition, Dr. Epstein noticed that Dr. Hooker reported that appellant responded to the MMPI-2 in a significantly exaggerated manner, but that the severe psychopathology noted on the MMPI-2 was not seen in the valid projective testing. Dr. Epstein opined that it was his opinion that appellant's depression was not disabling at the present time. He concurred with the treating psychologist that appellant could work a 40-hour week. Dr. Epstein noted appellant's preference for working out doors rather than indoors, but stated that preference was not based on a psychiatric disability. He indicated that it was his opinion that appellant had personality problems and that those personality problems will follow him whether he worked outside or inside. These problems, however, were not due to the injury on the job. Further, Dr. Epstein determined that appellant was dependent on his treatment of four days a week, but he proffered that it was highly improbable that treatment would change appellant or that he would behave differently if he does not have that treatment, except that he might choose to act out to demonstrate his need for it. He stated that he did not see appellant as needing vocational rehabilitation and his potential for reemployment would be based on motivational factors and not on an Axis I Disorder. Dr. Epstein concluded that it would be advisable to put appellant in a situation where he would not have to work with dogs and there was no reason why he could not be reemployed regularly with inside mail processing and directing activities.

On August 17, 2000 the employing establishment offered appellant a position as a modified carrier.[3] The duties of the position were: casing mail at the employing establishment, rearranging and relabeling letter carrier cases at the employing establishment to reflect route adjustments, changes in deliveries and the wear and tear of labels and using a postal vehicle to transfer mail between the San Rafael Main Office and the four employing establishments that fell under the San Rafael jurisdiction. The job offer specifically stated that the position would not involve exposure to dogs, as appellant would not be required to deliver mail to residences.

On August 24, 2000 the Office advised appellant that the modified letter carrier position had been found to be suitable to his capabilities and was currently available. Appellant was advised that he should accept the position or provide an explanation for refusing the position within 30 days. Finally, the Office informed him that if he failed to accept the offered position and failed to demonstrate that the failure was justified, his compensation would be terminated.

[3] Previous offers were made on October 16, 1998 and March 30, 1999.

On August 28, 2000 appellant refused the offered position, maintaining that he was unable to work due to his psychiatric condition. He also indicated that he did not want to learn or perform a new job, but felt he should only be required to return to work when he could perform the letter carrier job and route he had held at the time of his injury.

In a report dated August 30, 2000, Dr. Nichols stated that appellant's anxiety and depression had resulted in his having great difficulty and very limited success in performing the normal requirements of daily living. He opined that the proposed job offer, "while it may be helpful, does not fully address [appellant's] disability and is, therefore, unlikely to resolve the problem."

By letter dated September 18, 2000, appellant declined the offered position. He also enclosed a newspaper clipping on Rottweiler dogs.

By letter dated September 29, 2000, the Office informed appellant that his reasons for refusing the position were not acceptable and allowed an additional 15 days for him to accept the position. He was advised that no further reason for refusal would be considered.

By decision dated November 1, 2000, the Office terminated appellant's entitlement to monetary compensation benefits, effective November 5, 2000 on the basis that he had refused suitable work.

By letter dated December 28, 2000, appellant requested a hearing. Along with his request, he submitted a November 28, 2000 report from Dr. Nichols. In his report, he indicated that appellant's level of mental functioning was currently at a lower level than when he was psychiatrically evaluated approximately one year ago. Dr. Nichols indicated that appellant was immobilized by anxiety and depression and consequently was unable to perform the necessary requirements of daily life, such as getting himself to work. He stated that appellant was frightened of the possibility of losing his income and becoming homeless, but even this fear was not enough to overcome the feelings of immobilization which kept him from work. Dr. Nichols indicated that appellant's anxiety about going to work was so intense that it often led to suicidal ideation. He indicated that appellant was currently unable to work due to feelings of immobilization resulting from his anxiety and depression.

A hearing was held on May 24, 2001.

At the hearing, appellant submitted a May 21, 2001 report from Dr. Nichols, a March 12, 2001 report from Dr. Arthur A. Reiss, a notice of award from the Social Security Administration (SSA), letters informing him of medical examinations set up for him in connection with his application for social security disability benefits, a disability certificate from Dr. Nichols dated May 29, 1998, in which he wrote that appellant was unable to work on various dates in May 1998 and a record of earnings that had been provided by the SSA.

In his report dated May 21, 2001, Dr. Nichols diagnosed post-traumatic stress disorder and major depressive disorder, single episode. He repeated the contents of his previously expressed November 28, 2000 report.

In a report dated March 12, 2001, Dr. Reiss, a psychiatrist, indicated that appellant "has been unable to work at his job for years now, because of his mental/emotional problems. Dr. Reiss stated that appellant was a socially isolated, highly anxious and severely depressed man. He diagnosed major depressive disorder post-traumatic stress disorder and generalized anxiety disorder. Dr. Reiss also concluded that features that go with obsessive compulsive disorder and schizoid/dependent personality disorder were also present. He also listed the medications that had been prescribed for appellant; however, Dr. Reiss did not offer any opinion on appellant's return to work status.

In an August 15, 2001 decision, the hearing representative affirmed the Office's November 1, 2000 decision terminating monetary compensation benefits on the grounds that appellant refused an offer of suitable work.

The Board finds that the Office properly terminated appellant's compensation on the grounds that he neglected suitable work.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits.[4] This includes cases in which the Office terminates compensation under section 8106(c)(2) of the Federal Employees' Compensation Act for refusal to accept suitable work.

Section 8106(c)(2)[5] of the Act provides that a disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee is not entitled to compensation. Section 10.517(a)[6] of the Office's regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured for him or her has the burden to show that this refusal or failure to work was reasonable. After providing the two notices described in section 10.516,[7] the Office will terminate appellant's entitlement to further compensation under 5 U.S.C. § 8105, 8106 and 8107, as provided by 5 U.S.C. § 8106(c)(2). However, appellant remains entitled to medical benefits as provided by 5 U.S.C. § 8103 or

[4] *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

[5] 5 U.S.C. § 8106(c)(2).

[6] 20 C.F.R. § 10.517(a).

[7] 20 C.F.R. § 10.516.

justified. To justify termination, the Office must show that the work offered was suitable[8] and must inform appellant of the consequences of refusal to accept such employment.[9] According to Office procedures, certain explanations for refusing an offer of suitable work are considered acceptable.[10] Unacceptable reasons include appellant's preference for the area in which he resides, personal dislike of the position offered or the work hours scheduled, lack of promotion potential or job security.[11]

In this case, Dr. Nichols disagreed with the Office's second opinion specialist, Dr. Hepps, as to whether appellant was totally disabled due to his accepted emotional condition and whether he could return to some sort of work. Therefore, the Office properly found a conflict in medical evidence, which required a referral to an impartial medical specialist for resolution.

The Act, at 5 U.S.C. § 8123(a), in pertinent part, provides: "If there is a 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."

The Office referred appellant to Dr. Epstein for an impartial medical evaluation to resolve the conflict in opinion. He performed a thorough evaluation of appellant. Dr. Epstein provided a reasoned opinion that appellant was capable of working and that his only restriction for work was that he should not be exposed to dogs. When a case is referred to an impartial medical specialist for the purpose of resolving a conflict in medical opinion, the opinion of such specialist, if sufficiently well rationalized and based on a proper background, must be given special weight.[12] Dr. Epstein's opinion represented the weight of the medical evidence on the issue of appellant's ability to work and establishes that he was capable of working eight hours a day in a position that did not involve exposure to dogs.

Subsequent to the evaluation by Dr. Epstein, the employing establishment offered appellant a position as a modified letter carrier. The position did not involve any mail delivery to residences and would not have exposed him to the dogs. The position accommodated the work restriction given by Dr. Epstein. The Office reviewed the position and found it to be suitable for appellant. The Office advised him of that finding, gave him 30 days to either accept the position or provide reasons for refusing it and informed him of the penalty provision for refusing suitable work. When appellant refused the offered position, the Office considered his reasons and advised him that the reasons were not acceptable. The Office gave him a final 15

[8] *See Carl W. Putzier*, 37 ECAB 691 (1986); *Herbert R. Oldham*, 35 ECAB 339 (1983).

[9] *See Maggie L. Moore*, *supra* note 5. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(d)(1) (July 1997).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(1)-(5) (July 1997).

[11] *Arthur C. Reck*, 47 ECAB 339 (1996); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment*: *Determing Wage-Earning Capacity*, Chapter 2.814.5(c) (July 1997).

[12] *Kathryn Haggerty*, 45 ECAB 383, 389 (1994); *Jane B. Roanhaus*, 42 ECAB 288 (1990).

days to accept the offered position without penalty. Appellant refused to accept the offered position.

An employee who refuses or neglects to work after suitable work has been offered to him or her has the burden of showing that such refusal to work was justified.[13] In the present case, appellant has not shown that his refusal to work was justified. The weight of the medical evidence continues to support that appellant's psychiatric condition did not prevent him from performing the job he was offered in August 2000. The medical reports received from Drs. Nichols and Reiss subsequent to the evaluation by Dr. Epstein are insufficient to either overcome Dr. Epstein's opinion or create a new conflict in the medical evidence. Dr. Nichols merely repeated his previously expressed opinion, that appellant was unable to work due to his symptoms, which was part of the conflict in medical opinion for which appellant was referred to Dr. Epstein. Dr. Reiss wrote that appellant had been unable for years to work at the job he had held with the employing establishment, but he did not specifically address whether and how appellant's psychiatric condition prevented him from performing the limited-duty position he was offered. He did not provide any findings and rationale to support that appellant would have been unable to perform the limited-duty position during the time period it was offered and available to him.[14] Appellant's reasons for refusing the offer were that he should not be required to return to any job other than the job he had held at the time of his injury. However, an employee's dislike of the duties of an offered position, or his preference for other duties, is not an acceptable reason for refusing an offer of suitable work.[15] Furthermore, appellant submitted a newspaper clipping regarding dangerous dogs. However, the Board has held that newspaper clippings, medical texts and excepts from publications are of no evidentiary value in establishing a causal relationship between a claimed condition and an employee's federal employment as such materials are of general application and are not determinative of whether the specific condition claimed is related to the particular employment factors alleged by the employee.[16]

Appellant did not meet his burden. Thus, the Office properly found that he had refused an offer of suitable work and was not, consequently, entitled to further wage-loss compensation.

[13] 5 U.S.C. § 8106(c)(2).

[14] In order to establish causal relationship, a physician's report must present rationalized medical opinion evidence, based on a complete factual and medical background; *see Kathryn Haggerty*, *supra* note 12. Rationalized medical evidence is evidence which relates a work incident or factors of employment to a claimant's condition, with stated reasons of a physician; *see Gary L. Fowler*, 45 ECAB 365 (1994).

[15] *See supra* note 11 for acceptable reasons and *supra* note 12 for unacceptable reasons.

[16] *William C. Bush*, 40 ECAB 1064, 1075 (1989).

The August 15, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
July 22, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

Michael E. Groom
Alternate Member