U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LAWRENCE PEDRO, JR. and U.S. POSTAL SERVICE,
POST OFFICE, Hilo, HI

Docket No. 00-1232; Submitted on the Record;
Issued September 10, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation under 5 U.S.C. § 8106(c) based on his refusal to accept suitable employment.

On June 4, 1998 appellant, then a 50-year-old distribution postal clerk, filed a notice of occupational disease and claim for compensation (Form CA-2), alleging that he sustained pain in his hands, numbness in shoulder and arms, neck pain radiating into skull area, numbness in both arms and pain running from fingers to shoulders due to constant repetitive use of hands to hold and sort mail. By letter dated September 10, 1998, the Office accepted appellant's claim for bilateral wrist and forearm tendinitis. Subsequently, by letter dated December 4, 1998, the Office accepted the claim for carpal tunnel syndrome.

Appellant also has separate work-related injuries to his neck, back and knees. Due to these other injuries he was working in a permanent light-duty position as a rehabilitation distribution clerk at the time of his injury.

Appellant continued his treatment with Dr. K. Ravi Pillai, a neurologist, who had treated him for previous injuries. In a February 9, 1999 report, Dr. Pillai noted that appellant had severe carpal tunnel syndrome with significant progression since the last study September 24, 1998, cervical radiculopathy secondary to a large left posterolateral osteophyte and calcification of the disc with herniation, lumbosacral strain and lumbosacral radiculopathy secondary to disc bulges at L2-3, L3-4, L4-5 and L5-S1 and moderate bilateral neural foraminal stenosis was noted at the L4-5 and L5-S1 levels. He noted: "I doubt very much whether [appellant] will be capable of returning back to his original occupation as a postal clerk."

Appellant also sought treatment from Dr. Richard Lee-Ching, a Board-certified family practitioner. In a form completed by Dr. Lee-Ching on June 19, 1998 he indicated that appellant was "unable to work due to concomitant problems with neck, back and knees related to previous [industrial accident], in addition to current [industrial accident]." Dr. Lee-Ching stated that on

August 20, 1998 that until this case was accepted, appellant was unable to be sent back to light duty. In an attending physician's supplemental report, dated November 13, 1998, Dr. Lee-Ching noted that appellant was totally disabled from work. In a medical report dated February 5, 1999, Dr. Lee-Ching listed his assessment of appellant as follows: bilateral entrapment neuropathy, worse now that he has stopped therapy, emotional distress to workplace and anger related to workers' compensation process, cervical radiculopathy, lumbar radiculopathy, internal derangement of the knee. He further noted:

> "This is a very complicated case and I am not sure what we can do about it. Of some concern is the fact that the workplace is saying that he was okayed for 30 pounds lifting and carrying when in fact the request was only for approximately 20 pounds. I am not even sure that he can handle more than 5 to 10 pounds and 20 pounds may have been possible a month ago, but certainly nothing was discussed in terms of 30 pounds. This case is difficult to deal with at this time. However, we will continue treating as indicated and await resolution of his carpal tunnel syndromes."

By letter dated February 15, 1999, appellant was referred to Dr. Lee B. Silver, a Board-certified orthopedic surgeon, for a second opinion. In a work capacity evaluation, completed on March 19, 1999, Dr. Silver noted that appellant was limited in lifting to 4 hours of less than 25 pounds and was limited to 4 hours for repetitive movements of the wrists and elbows and operating a motor vehicle. In an opinion dated May 18, 1999, Dr. Silver noted that he examined appellant and reviewed appellant's medical record and concluded that appellant had bilateral lateral epicondylitis, bilateral carpal tunnel syndrome and diabetic peripheral neuropathy. He also opined that there was a "causal relationship between [appellant's] bilateral lateral epicondylitis and bilateral carpal tunnel syndrome and his employment including the noted injury dated June 4, 1998." He also noted that appellant's orthopedic condition was not yet medically stable and ratable. Dr. Silver believed that appellant was a candidate for surgical intervention with a carpal tunnel release. He opined that appellant remained temporarily partially disabled due to the work condition. Dr. Silver reviewed the description of rehabilitation distribution clerk and "was of the opinion that [appellant] is not capable of performing the duties as described. He should be restricted from repetitive movements of the wrists and elbows, as well as lifting of greater than 25 pounds." Dr. Silver reiterated: "The medical records do document persisting problems related to his bilateral lateral epicondylitis and bilateral carpal tunnel syndrome, which are work-related conditions."

In an attending physician supplemental report, dated June 1, 1999, Dr. Lee-Ching noted that appellant was totally disabled from usual work due to his work-related injury of June 4, 1998.

By letter dated June 10, 1999, the employing establishment offered appellant a limited-duty position involving answering telephones, filing, processing accountable and "UBBM mail", lobby monitor duties and assist in the general delivery section. The employing establishment stated that this job would fall within the restrictions set by Dr. Silver, *i.e.*, appellant would lift up to 25 pounds but not for more than 4 hours a day, would not have repetitive use of wrists and elbows for more than 4 hours a day, would not stoop, kneel or squat and would do minimal walking, standing as tolerated.

By letter dated June 16, 1999, appellant's wife responded, stating that until they "receive a copy of Dr. Silver's IME [impartial medical examiner] report and [appellant] is cleared by his [physicians], for [his] safety we will not be able to accept your offer." By letter dated August 18, 1999, the Office notified appellant that the position remained available and that he had 30 days from the date of this letter to accept the position or provide reasons for refusing it. By letter dated August 23, 1999, appellant declined the position, contending that he was still totally disabled and that his reason for refusing the job was justified. By letter dated October 6, 1999, the Office advised appellant that the weight of the medical evidence rested with the opinion of Dr. Silver and that appellant was given 15 more days to accept the position without penalty.

In a report dated October 13, 1999, Dr. Lee-Ching indicated that he opposed sending appellant back to work. Dr. Lee-Ching noted:

> "First of all, focusing only on his CTS to the exclusion of his other, work comp[ensation]-related injuries is inappropriate. He has coexisting injuries to his knee, his back and his neck that are [workers' compensation] related and will significantly impact his ability to adapt to his hand injuries. I know that this issue has been raised in the past.
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> "Second, although this has been documented by many physicians in the past, both private and government paid, your [employing establishment] is trying to send [appellant] to a job that will significantly impair his future functioning and impact his health. Given his orthopedic problems, he is unable to work and is disabled. We also have a psychiatrist who has stated that it is inappropriate emotionally to send him back to work at the [employing establishment] and I believe that you have notes to that effect.
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> "Third, I have never seen the IME by Dr. Silver and I would like to see this report prior to rebutting it."

Appellant responded in a letter dated October 21, 1999, wherein he reiterated his complaint that he has not been provided with a copy of Dr. Silver's report.

By decision dated November 9, 1999, the Office rejected appellant's claim for compensation, for the reason that he had refused suitable work under the provisions of the Federal Employees' Compensation Act.

The Board finds that the Office improperly terminated appellant's wage-loss compensation on the grounds that he refused an offer of suitable work.

Section 8106(c) of the Act provides that a partially disabled employee who: (1) refuses to seek suitable work; or (2) refuses or neglects to work after suitable work is offered is not entitled to compensation.[1] Under 5 U.S.C. § 8106(c)(2), the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to,

[1] 5 U.S.C. § 8106(c)(2).

procured by or secured for him.[2] However, to justify such termination, the Office must show that the work offered was suitable.[3] Once the Office establishes that the work offered was suitable, the burden of proof shifts to the employee who refuses to work to show that such refusal was justified.[4]

In this case, the Office terminated appellant's compensation benefits on the basis of the report of Dr. Silver.[5] The Board notes, however, that there is an unresolved conflict in the medical evidence between appellant's treating physician, Dr. Lee-Ching, and the second opinion physician, Dr. Silver. Dr. Lee-Ching opposed sending appellant back to work, noting that given appellant's orthopedic problems, he was unable to work and should be considered disabled. Dr. Silver, the physician to whom the Office referred appellant for a second opinion, opined that appellant was temporarily partially disabled due to his work condition and should be restricted from repetitive movements of the wrists and elbows, as well as lifting of greater than 25 pounds. Accordingly, there is a conflict between these opinions regarding the extent of appellant's disability.

Since the Office has not resolved the existing conflict in the medical evidence, it has failed to meet its burden of proof in terminating appellant's compensation benefits.

[2] *David P. Camacho*, 40 ECAB 267 (1988).

[3] *Id.*

[4] *Catherine G. Hammond*, 41 ECAB 375 (1990).

[5] Although the memorandum in support of the November 9, 1999 decision states, "The weight of the medical evidence still rests with the well-rationalized report of Board-[c]ertified [o]rthopedist Dr. Silver", a careful review of the decision reveals that this reference to Dr. Lee-Ching is a clerical error and that the benefits were terminated based on the opinion of the second opinion physician, Dr. Silver.

The November 9, 1999 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, DC
September 10, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member