U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DIMETRIUS F. BLACKWELL and U.S. POSTAL SERVICE, POST OFFICE, Newark, NJ

Docket No. 01-137; Submitted on the Record;
Issued September 20, 2002

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON, MICHAEL E. GROOM

The issues are: (1) whether appellant has established that he has greater than a 13 percent permanent impairment for loss of use of his right lower extremity, for which he received a schedule award; (2) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation under 5 U.S.C. § 8106(c) based on his refusal to accept suitable employment as offered by the employing establishment; and (3) whether the termination of appellant's compensation under 5 U.S.C. § 8106(c) serves as a bar to further compensation under section 8107 arising from the accepted employment injury.

On February 16, 1988 appellant, then a 39-year-old letter carrier, injured his right knee while crossing the street. He filed a claim for benefits on February 17, 1988, which the Office accepted for sprained medial collateral ligament of the right knee. The Office expanded its acceptance of the claim to include the condition of right meniscus tear and authorized arthroscopic surgery, which appellant underwent on October 25, 1991. The Office paid appropriate compensation for intermittent periods of disability. Appellant sustained recurrences of his work-related knee disability on September 26, 1991, August 13 and January 23, 1995 and underwent a second right knee arthroscopy, in addition to medical meniscectomy with abrasion chondroplasty, on December 4, 1996. He has not returned to work since January 23, 1995.

The Office referred appellant for an impairment evaluation with Dr. David J. Greifinger, a Board-certified orthopedic surgeon. In a report dated April 15, 1997, he noted that appellant had recurrent injuries, including a medial meniscus tear and had underwent two arthroscopic surgeries and a partial medial meniscectomy. He also noted degenerative arthritic changes of the right knee.

By decision dated August 15, 1997, the Office terminated appellant's compensation benefits on the grounds that he refused an offer of suitable work.

On December 8, 1999 appellant filed a Form CA-7, claim for a schedule award based on partial loss of use of his right leg.

In an impairment rating worksheet/report dated May 15, 2000, an Office medical adviser found that appellant had a 13 percent impairment of the right lower extremity. Relying on Dr. Greifinger's findings and conclusions, the Office medical adviser found that appellant had a 13 percent impairment rating resulting from his 1996 medial meniscectomy and chrondroplasty, pursuant to Table 64 at page 85 of the 4th edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, A.M.A., *Guides*, in addition to a 2 percent impairment rating due to his 1991 and 1996 partial medial meniscectomies, plus an additional 7 percent impairment for minimal cartilage space loss to the chondroplasty, based on Table 62 at page 83 of the A.M.A., *Guides*. Using the Combined Values Chart at pages 322–24 of the A.M.A., *Guides*, the office medical adviser calculated that appellant had a 13 percent impairment of the right lower extremity under the schedule.

On June 20, 2000 the Office granted appellant a schedule award for a 13 percent loss of use of the right lower extremity from April 15 through August 15, 1997.

By letter dated July 10, 2000, appellant's attorney requested reconsideration. He contended that the Office erred in denying appellant additional compensation based on his schedule award subsequent to August 15, 1997, the date of the Office's termination decision and also contested the amount of the award.

By decision dated August 14, 2000, the Office denied reconsideration.

In his appeal to the Board, appellant's attorney contends that he is entitled to an award greater than the 13 percent impairment of the right lower extremity granted by the Office in its June 20, 2000 decision. Appellant's attorney states that he was not aware that the Office's August 15, 1997 termination decision, based on his refusal to accept a suitable job offer, precluded him from additional compensation based on a schedule award subsequent to that date. He argues that there is nothing in the provisions of section 8106, which precludes such an award.[1] In addition, appellant's attorney contends that appellant is entitled to an award under the schedule greater than the 13 percent already awarded.

The Board finds that the case is not in posture for decision.

In this case, the Office, in its June 20, 2000 decision, found that appellant was entitled to a schedule award for a 13 percent loss of use of the right lower extremity. However, the total of impairment calculated by the Office is not supported by the medical evidence. In the instant case, the Office determined that appellant had a 13 percent permanent impairment of his right lower extremity by adopting the findings of the Office medical adviser, who determined the impairment rating by taking Dr. Greifinger's physical findings, which were contained in his April 15, 1997 report and then applying these findings to the applicable figures and tables of the

[1] Appellant's attorney also challenges the Office's August 15, 1997 termination decision, arguing that the job offer appellant refused was not suitable. The Board does not have jurisdiction over this decision, however, it was issued more than one year prior to September 5, 2000, the date appellant filed this appeal with the Board.

A.M.A., *Guides* to arrive at the total percentage of impairment in appellant's right lower extremity. The Office medical adviser applied Dr. Greifinger's April 15, 1997 findings regarding the total impairment resulting from his 1996 medial meniscectomy and chondroplasty pursuant to Table 64 at page 85 of the A.M.A., *Guides*, combined them with the two percent impairment derived from appellant's 1991 and 1996 partial medial meniscectomies, and added an additional seven percent impairment for minimal cartilage space loss to the chondroplasty, based on Table 62 at page 83 of the A.M.A., *Guides*. However, as presented, these impairments would not total 13 percent after combining under the charts, at page 322 of the A.M.A., *Guides*. The Office medical adviser indicated that the medical meniscectomy loss was a total of four percent, based on two partial meniscectomies. However, a 4 percent impairment combined with a 7 percent impairment results in a total 11 percent impairment under the Combined Values Chart. The Office decision, therefore, does not indicate how the total of 13 percent was derived. Accordingly, as the Office failed to adequately indicate how it calculated its impairment rating, the June 20, 2000 Office decision is set aside and the case remanded for the Office to demonstrate the basis of its impairment award.

The Board finds that the Office properly found that section 8106(c) of the Federal Employees' Compensation Act serves as a bar to further compensation for disability arising from the accepted February 16, 1988 employment injury.

Section 8106(c) 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 him is not entitled to compensation.[2] Further, the Office has promulgated federal regulations under this section of the Act concerning an employee's obligation to return to work or to seek work when available.

Section 10.124(c) provides:

> "Where an employee has been offered suitable employment (or reemployment) by the [employing establishment] (*i.e.*, employment or reemployment which the Office has found to be within the employee's educational and vocational capabilities, within any limitations and restrictions which preexisted the injury, and within the limitations and restrictions which resulted from the injury), or where an employee has been offered suitable employment as a result of job placement efforts made by or on behalf of the Office, the employee is obligated to return to such employment. An employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of showing that such refusal or failure to work was reasonable or justified and shall be provided with the opportunity to make such showing before a determination is made with respect to termination of entitlement to compensation as provided by 5 U.S.C. § 8106(c)(2) and paragraph (e) of this section."[3]

The Office's implementing regulations further provide, at subsection (e), as follows:

[2] 5 U.S.C. § 8106(c)(2).

[3] 20 C.F.R. § 10.124(c).

> "A disabled employee who, without showing sufficient reason or justification, refuses to seek suitable work or refuses or neglects to work after suitable work has been offered to, procured by or secured for the employee, is not entitled to further compensation for total disability, partial disability, or permanent impairment as provided by sections 8105, 8106 and 8107 of the Act. An employee shall be provided with the opportunity to make such showing of sufficient reason or justification before a determination is made with respect to termination of entitlement to compensation as provided by 5 U.S.C. § 8106(c)."[4]

In this case, the Office has properly exercised its authority as granted under the Act and implementing federal regulations.[5] The record demonstrates that following the acceptance of appellant's claim for a sprained medial collateral ligament of the right knee, right meniscus tear and authorized arthroscopic surgery, for which the Office paid appropriate compensation and medical benefits, for intermittent periods of disability. The Office terminated appellant's compensation by decision dated August 15, 1997, on the grounds that he refused an offer of suitable work; as this decision was issued more than one-year prior to the Office's most recent merit decision, the Board has no jurisdiction over this decision.

Section 8106(c) provides that an employee who refuses or neglects to work after suitable work is secured "is not entitled to compensation."[6] Further, section 10.124(e) of the Office's implementing regulations provides that an employee who refuses suitable work is not entitled to further compensation for total disability or permanent impairment.[7] With regard to schedule awards, the Board has held that monetary compensation payable to an employee under section 8107 are payments made from the Employees' Compensation Fund and are, therefore, subject to the penalty provision of section 8106(c).[8] The Board, therefore, finds that appellant's refusal to accept suitable work constitutes a bar to his receipt of a schedule award for any impairment, which may be related to the February 16, 1988 employment injury, following the August 15, 1997 termination decision. Applying the section 8106(c) penalty provision to the statute, as a whole, is in accordance with the rules of statutory construction set forth and consistent with prior Board precedent which has given effect to section 8132 and section 8106(b)(2) to the whole statute as enacted.

Although section 8106(c) may serve as a bar to compensation pursuant to appellant's claim for a schedule award for the period after the termination of compensation based on his refusal to accept a suitable offer of employment, it does not mean that appellant is entitled to no

[4] 20 C.F.R. § 10.124(e).

[5] It is well established that once the Office accepts a claim it has the burden of proof of justifying termination or modification of compensation benefits. This includes cases in which the Office terminates compensation entitlement under section 8106(c) for refusal to accept suitable employment. *See Shirley B. Livingston*, 42 ECAB 855 (1991).

[6] 5 U.S.C. § 8106(c).

[7] 20 C.F.R. § 10.124(e).

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

benefits at all under section 8107 for the period prior to the termination. Generally, the Office must first make a determination of maximum medical improvement and of the amount of impairment based on the medical evidence.[9] Following this, an employee is entitled to a schedule award only for that period which precedes the 8106 termination. In this case, Dr. Greifinger stated in his April 15, 1997 report that appellant had "achieved maximum medical benefit," however, the Office made no finding of maximum medical improvement based on this statement. The Office, therefore, has the obligation, upon return of the case record, to develop the claim under section 8107 in order to determine the date of maximum medical improvement and the length of the period to which appellant is entitled to a schedule award, prior to the Office's August 15, 1997 termination of compensation under section 8106.[10]

Accordingly, the case is remanded to the Office for a redetermination of appellant's impairment from his work-related right knee condition. On remand, the Office medical adviser should address the basis of his impairment rating and state how he calculated impairment under the applicable tables and standards of the A.M.A., *Guides.* The Office medical adviser should address the date of maximum medical improvement and the length of the period to which appellant is entitled to a schedule award, prior to the Office's August 15, 1997 termination decision. After such further development of the record as it deems necessary, the Office shall issue a *de novo* decision.

[9] *Id.*

[10] *Id.*

The Office's June 20, 2000 decision is, therefore, set aside and the case is remanded to the Office of Workers' Compensation Programs for further action consistent with this decision of the Board.

Dated, Washington, DC
September 20, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member