U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RUFUS JOHNSON and DEPARTMENT OF THE NAVY, NAVAL AIR STATION, Jacksonville, FL

Docket No. 02-2341; Submitted on the Record;
Issued May 7, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's monetary benefits on the grounds that he refused an offer of suitable work.

On July 14, 1972 appellant, then a 39-year-old aircraft cleaner, filed a claim for irritated fingernails, which he attributed to exposure to chemicals during the course of his federal employment. The Office accepted appellant's claim for oncyhomycosis and contact dermatitis of the hands and tinea pedis and clavi of the feet.[1] He retired from employment on August 3, 1973.[2]

By decision dated March 31, 1998, the Office terminated appellant's compensation effective July 21, 1996 on the grounds that he refused an offer of suitable work. In a decision dated April 9, 1999, a hearing representative set aside the Office's March 31, 1998 decision.

On March 12, 1999 appellant elected benefits under the Federal Employees' Compensation Act, retroactive to July 21, 1996, in lieu of benefits from the Office of Personnel Management. In a letter dated June 2, 1999, the Office informed appellant that it was placing him on the periodic rolls beginning July 1, 1999.

By letter dated March 20, 2000, the Office requested that Dr. William J. Namen, II, a podiatrist and appellant's attending physician, evaluate the extent of any permanent impairment of the feet.

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[1] The Office authorized multiple surgeries on appellant's feet.

[2] By decision dated October 30, 1986, the Office granted appellant a schedule award for a 1 percent permanent impairment of the right and left feet and a 19 percent impairment of the right and left hands.

In a report dated March 23, 2000, Dr. Namen stated:

> "It is my opinion that [appellant] will never reach a maximum medical improvement because of his severe skin disorder. He will only be able to ambulate a short distance at a time because of the tremendous amount [of] hyperkeratotic build up noted around his heels from the severe chemical burns and to the plantar aspect of the foot and around the digits. This creates a severely painful uncontrollable amount of hyperkeratotic tissue that only responds to debridement. [Appellant] will only be able to walk a short distance before the pain becomes uncontrollable. The measurements of active motion [are] impaired in dorsiflexion, plantar flexion, inversion and eversion of both feet and ankles."

Dr. Namen further stated:

> "I feel [appellant] is not suitable for employment at this time because of his chronic hyperkeratotic tissue. [He] will never be suitable for any type of light walking or standing. [Appellant] will never be able to push or pull, lift or carry any objects because of his foot pathology. [He] also will not be able to reach or twist as well as operate motor vehicles or [perform] repetitive movement with his feet. The only type of work that may be suitable [for him] in the future would be a work that is completely nonweight bearing."

In a work restriction evaluation dated March 28, 2000, Dr. Namen opined that appellant could not return to work. He found that appellant could walk, stand, reach, twist and operate a motor vehicle for less than one hour, could not push, pull, lift, squat or climb, but could sit and kneel for unlimited periods.

By letter dated June 2, 2000, the Office referred appellant for a second opinion evaluation on the issue of the extent of his injury-related disability and degree of permanent impairment.

In a report dated June 23, 2000, Dr. Steven Lancaster, a Board-certified orthopedic surgeon, discussed appellant's history of injury and listed findings on examination. He diagnosed oncyhomycosis and contact dermatitis of the upper extremities, oncyhomycosis, contact dermatitis and clavi of the lower extremities and "status post multiple foot procedures." Dr. Lancaster provided an impairment determination and opined:

> "Currently, [appellant] has reached maximum medical improvement at some point in the past and appears to have the ability to work in a sit-down position for eight hours a day, but can only walk for one hour, stand for one hour and reach for one hour. He can reach above his shoulders and twist for eight hours. [Appellant] can operate a motor vehicle for only one hour. There are limitations on pushing, pulling, lifting, squatting, kneeling and climbing to [zero] hours. He is not able to do manual labor but could pursue a sedentary job. He has knee problems, as well as a low back condition, that affect his walking and standing capacity as unrelated entities."

Dr. Lancaster completed a work restriction evaluation form consistent with the above-described limitations.

In a report dated June 28, 2000, Dr. Charles R. Snyder, a Board-certified dermatologist, reviewed the medical evidence of record and listed detailed findings on examination. He diagnosed a chronic Candida infection of the right ring fingernail, left thumbnail and left little fingernail, chronic tinea pedis and chronic paronychial of multiple fingernails and calluses of the palms. Dr. Snyder found that, of the accepted conditions, the tinea pedis had not resolved but questioned the onychomycosis diagnosis because of appellant's failure to respond to antifungal medication and the lack of a positive fungal scraping. He also did not find clavi of the feet. Dr. Snyder opined that appellant could not return to his regular employment due to residuals of his work injury. He found that appellant could work in a light or sedentary capacity for eight hours "as long as there is no exposure to chemicals or solvents." In an accompanying work restriction evaluation, Dr. Snyder found that appellant could sit, reach, twist, operate a motor vehicle and perform repetitive movements eight hours a day, walking and stand four hours a day, push, pull and lift four to five pounds three hours a day and squat, knee and climb three hours a day.

By letter dated September 26, 2000, the Office referred appellant for vocational rehabilitation.[3]

In a report dated April 12, 2001, Dr. Namen related:

> "I have been treating [appellant] since May 1997 for severely painful hammertoe, hallux valgus, porokeratoma, plantar flexed metatarsal and onychomycosis. [He] has had multiple distress and discomfort from his bone secondary from his severe chemical burn that he received in 1970 because of his severe pad atrophy, especially noted around his heel…. In my opinion, [appellant] is not a candidate [for] work that requires any standing or any walking secondary from his chemical burn. I even have concerns about the amount of walking he can do from his point of employment to his car."

On July 9, 2001 the employing establishment offered appellant the position of security clerk for eight hours a day.[4] The position required sitting or standing as needed up to eight hours and walking as needed up to one hour.[5]

On July 18, 2001 appellant declined the position of security clerk.

By letter dated October 12, 2001, the Office advised appellant that it had determined that the position of security clerk was suitable and currently available. The Office informed appellant that he had 30 days to either accept the position or to provide an explanation for refusing the

[3] In a decision dated September 28, 2000, the Office granted appellant a schedule award for an additional 17 percent impairment of the right and left feet.

[4] The Office determined that a prior job offer made by the employing establishment on February 15, 2001 was not suitable for appellant because it required walking up to two hours.

[5] A handwritten note on the report indicated that the position offered had no walking, that appellant could have a special parking place and that he could use his wheelchair from the car to the office. However, the notation is unsigned and there is no indication that it was an official modification of the offered position.

position and also informed him that any claimant that refuses an offer of suitable employment is not entitled to compensation.

Appellant submitted an office visit note dated August 28, 2001 from Dr. Namen, who indicated that he had clipped appellant's hyperkeratotic nails.

By letter dated January 8, 2002, the Office advised appellant that his reasons for refusing the offer were unacceptable and that he had 15 days to accept the offer of security clerk or have his compensation terminated.

In a decision dated January 29, 2002, the Office terminated appellant's compensation on the grounds that he refused an offer of suitable work. The Office found that the weight of the medical evidence established that appellant could perform the July 9, 2001 proffered position.

By letter received February 15, 2002, appellant requested reconsideration of his claim. In support of his request, he submitted a report dated February 13, 2002 from Dr. N. Fred Eaglstein, an osteopath, who indicated that he had reviewed the position of security clerk and found that appellant could not perform the duties of the position.

In a decision dated April 1, 2002, the Office denied modification of its prior decision.

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

Section 8106(c)(2) of the Act states that a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or secured for him or her is not entitled to compensation.[6] The Office has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects suitable work when it is offered. Before compensation can be terminated, however, the Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific requirements of the position.[7] To justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty position, the Office has the burden of showing that the work offered to and refused or neglected by appellant was suitable.[8]

In terminating appellant's compensation benefits, the Office relied upon the opinions of Dr. Lancaster, a Board-certified orthopedic surgeon and Dr. Snyder, a Board-certified neurologist, in finding the employing establishment's July 9, 2001 job offer suitable. In a report dated June 23, 2000, Dr. Lancaster opined that appellant could perform work for eight hours sitting, reaching above his shoulder and twisting but could walk, stand and operate a motor vehicle for only one hour. He further found that appellant could not push, pull, lift, squat, kneel

[6] 5 U.S.C. § 8106(c)(2).

[7] *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

[8] *Glen L.Sinclair*, 36 ECAB 664 (1985).

or climb. In a report dated June 28, 2000, Dr. Snyder found that appellant could sit, reach, twist, operate a motor vehicle and perform repetitive movements eight hours a day, walking and stand four hours a day, push, pull and lift four to five pounds three hours a day and squat, knee and climb three hours a day.

However, Dr. Namen, a podiatrist and appellant's attending physician, opined in a report dated March 23, 2000, that appellant was "not suitable for employment at this time because of his chronic hyperkeratotic tissue." In a work restriction evaluation dated March 28, 2000, he opined that appellant could not return to work. Dr. Namen listed limitations of walking, standing, reaching, twisting and operating a motor vehicle of less than one hour, no pushing, pulling, lifting, squatting or climbing and unlimited sitting and kneeling. In a report dated April 12, 2001, Dr. Namen opined that appellant was "not a candidate [for] work that requires any standing or any walking secondary from his chemical burn."

Accordingly, the record contains a conflict in medical opinion evidence between the Office referral physicians, Drs. Lancaster and Snyder and appellant's attending physician, Dr. Namen on the issue of whether appellant could resume employment that required walking for up to one hour a day.[9] Given this conflict in medical opinion, the Office has not met its burden of establishing that the position offered by the employing establishment was suitable.[10]

The Office, therefore, improperly terminated appellant's wage-loss compensation benefits.

[9] Where there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Office shall appoint a third physician who shall make an examination. 5 U.S.C. § 8123(a).

[10] Appellant submitted new evidence subsequent to the Office's April 1, 2002 decision; however, the Board has no jurisdiction to review this evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c).

The decisions of the Office of Workers' Compensation Programs dated April 1 and January 29, 2002 are reversed.

Dated, Washington, DC
May 7, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member