U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANTHONY P. SOUZA and U.S. POSTAL SERVICE,
POST OFFICE, Merrifield, Va.

Docket No. 97-318; Oral Argument Held February 10, 1998;
Issued April 1, 1998

Appearances: *Anthony P. Souza, pro se*; *Catherine P. Carter, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits; and (2) whether the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion.

On April 13, 1988 appellant sustained a low back sprain with subsequent recurrent lumbar disc herniation that required surgery. He returned to a four-hour workday and received appropriate wage-loss compensation for the remaining four hours per day. On September 10, 1992 he sustained a recurrence of disability for which he received appropriate compensation. Following further development by the Office, Dr. Joseph White, appellant's treating Board-certified orthopedic surgeon, submitted a January 6, 1994 work restriction evaluation in which he advised that appellant could work eight hours per day with restrictions. On March 24, 1995 the employing establishment offered appellant a job as a modified mail processor and submitted a copy of the position description to Dr. White who advised on March 28, 1995 that the position offered was appropriate and that commuting would not be a problem as the offered job was not during rush hour.[1] On April 15, 1995 appellant rejected the job offer, stating that his physician recommended that he needed a job closer to his residence. By letter dated May 12, 1995, the Office advised appellant that it found the job offer to be suitable. Appellant was further advised that the position was currently available and that he would have 30 days from the date of the letter to either accept the position or provide an explanation of the reasons for refusing it, following which a final decision would be issued by the Office. By letter dated August 9, 1995,

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[1] On March 27, 1995 Dr. White advised that the job offer was not in compliance with appellant's restriction but in his March 28, 1995 report, stated that his March 27, 1995 response had been in error.

the Office informed appellant that his reasons for refusing the job offer were insufficient, noting that he could accept the job offer within the next 15 days without penalty or his wage-loss compensation would be terminated.

In an August 11, 1995 report, Dr. White advised that appellant should not drive more than 30 to 40 minutes to work and that he should undergo an additional functional capacity evaluation which appellant underwent on September 25, 1995. Options provided by the evaluator were that appellant could begin to work four hours per day and increase to eight or undergo a work-hardening program or work part time and undergo work-hardening part time. Following an Office request for comments, in an October 23, 1995 report, Dr. White advised:

> "I have reviewed the functional capacity evaluation on [appellant] and I see that the evaluator felt that he could return to his job. I concur with [the evaluator's] observation that he should return to work initially at four hours per day and then gradually increase to an eight-hour workday. I feel that this can be started at any time. I would suggest that he work four hours a day for a period of two weeks and then six hours a day for another two weeks and then eight hours a day."

Dr. White submitted an October 30, 1995 treatment note in which he stated that he had "no problems with" appellant undergoing a work-hardening program "if this is something that he would like to pursue." In an addendum, the physician stated that he did not feel that appellant's commute to work would compromise appellant's status, concluding "I stand by my letter which was dictated."

By letter dated November 1, 1995, the Office informed the employing establishment of the Dr. White's recommendation and, by letter dated November 1, 1995, the employing establishment offered appellant a position from 2:00 to 6:00 p.m. initially, with the modification that there would be two-hour increases in his workday every two weeks. On November 3, 1995 appellant rejected the job offer, stating that he had a difference of opinion with Dr. White regarding his physical abilities. In a November 7, 1995 letter, the Office advised appellant that it found the job as modified to be suitable, that his reason for refusing the offer was not persuasive and that he could accept the offer within 15 days without penalty or his compensation would be terminated. By decision dated December 4, 1995, the Office terminated appellant's wage-loss compensation, effective December 10, 1995, on the grounds that he had refused suitable employment when it was offered to him.

On December 14, 1995 appellant requested a review of the written record and submitted additional medical evidence.

In a December 11, 1995 treatment note, Dr. White noted that the recommendations of the functional capacity evaluator included that appellant attend a work-hardening program and stated:

> "I concur with this. I think that [appellant] should have a work-hardening program for six weeks. This is to be done, not concomitantly with his work, but he is to remain off work until the completion of the six-week work-hardening program."

In a treatment note dated April 30, 1996, Dr. White advised that appellant could return to work, "as I have already stated" with or without a work-hardening program. Regarding the work-hardening program, the physician stated, "I feel that it would be in his best interest but I do not feel that it is imperative.

By decision dated May 28, 1996 and finalized May 29, 1996, the Office hearing representative affirmed the prior decision, finding that the offered job was suitable. The hearing request noted that Dr. White initially advised that appellant could return to modified duty and that, while he later recommended that appellant undergo a work-hardening program, Dr, White provided no explanation for changing his view that appellant was capable of performing the modified job.

On July 9, 1996 appellant requested reconsideration and submitted a June 24, 1996 treatment note in which Dr. White stated that, while he had recommended that appellant attend a work-hardening program, appellant was able to perform the sedentary job recommended in the functional capacity evaluation done on September 25, 1995.

By decision dated September 3, 1996, the Office denied appellant's request for review of the merits of the claim. In the attached memorandum, the Office found that Dr. White's June 24, 1996 report was repetitious and duplicative. The instant appeal follows.

The Board finds that the Office properly terminated appellant's wage-loss compensation on December 4, 1995.

Section 8106(c)(2) of the Federal Employees' Compensation Act[2] provides in pertinent part, "A partially disabled employee who ... refuses or neglects to work after suitable work is offered ... is not entitled to compensation."[3] To prevail under this provision, the Office must show that the work offered was suitable and must inform the employee of the consequences of refusal to accept such employment. An employee who refuses or neglects to work after suitable work has been offered has the burden of showing that such refusal to work was justified.[4]

The Board finds that the evidence of record establishes that appellant is capable of performing the duties of a modified mail processor. As early as January 1994, Dr. White, appellant's treating Board-certified orthopedic surgeon, advised that appellant could work eight hours per day with restriction. A job description for a modified mail processor was submitted to Dr. White who, in a March 28, 1995 report, advised that appellant could perform the duties of the modified position. Following a functional capacity evaluation done in September 1995, by report dated October 23, 1995, Dr. White again advised that appellant could return to modified duty for four hours per day with a gradual increase to an eight-hour workday. On November 1, 1995 the employing establishment submitted a new modified duty offer that conformed with Dr. White's restrictions. While appellant subsequently submitted a December 11, 1995

[2] 5 U.S.C. §§ 8101-8193.

[3] 5 U.S.C. § 8106(c)(2).

[4] *See Michael I. Schaffer*, 46 ECAB 845 (1995).

treatment note in which Dr. White recommended that he participate in a work-hardening program, the physician did not indicate that appellant would be unable to perform the modified mail processor position. Furthermore, in an April 30, 1996 treatment note, Dr. White advised that appellant could return to work. The medical evidence of record therefore establishes that appellant was capable of performing the offered position and thus the position offered to appellant was suitable work.

Given that the Office has shown that the limited-duty position offered to appellant was suitable based on his work restrictions, the burden shifts to appellant to show that his refusal to work in that position was justified.[5] In rejecting the March 24, 1997 job offer, appellant indicated that his physician recommended that he needed a job closer to home. This, however, is contradicted by the March 28, 1995 report of Dr. White who advised that commuting would not be a problem. While, in an August 11, 1995 report, Dr. White advised that appellant should not drive more than 30 to 40 minutes to work, there is no evidence in the record to indicate that appellant could not make arrangements for transportation to the job. In rejecting the November 1, 1995 offer, appellant merely stated that he had a difference of opinion with Dr. White regarding his physical capabilities. The medical evidence in this case establishes that appellant could perform the offered position. Accordingly, the Board finds that appellant has not provided an acceptable reason for refusal of a suitable position.[6]

Lastly, the record indicates that the Office properly followed the procedural requirements under section 8106 and gave appellant an opportunity to accept or provide reasons for declining the offered position.[7] Following the initial job offer, by letter dated May 12, 1995, the Office advised appellant that the modified position was suitable, that the position was currently available and that he had 30 days in which to accept the position or provide an explanation for refusing it. Appellant rejected the job offer and by letter dated August 9, 1995, the Office informed him that his reasons for refusing the job offer were not valid and that he would be allowed 15 days to accept the position or his compensation would be terminated. Again, following the November 1, 1995 job offer, which was rejected by appellant, the Office again informed appellant that it found the job as modified to be suitable and that he would be allowed 15 days to accept the position or his compensation would be terminated. There is, therefore, no procedural defect in this case and the Office properly terminated appellant's wage-loss compensation, effective December 10, 1995, on the grounds that he refused an offer of suitable work.[8]

The Board further finds that the Office did not abuse its discretion in denying merit review on September 3, 1996.

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[5] *See Henry P. Gilmore*, 46 ECAB 709 (1995).

[6] *See John E. Lemker*, 45 ECAB 258 (1993).

[7] *Id.*

[8] *See Fred L. Nelly*, 46 ECAB 142 (1994).

On July 9, 1996 appellant requested that the Office reconsider his claim and submitted a June 24, 1996 report from Dr. White who stated that, while he had recommended that appellant attend a work-hardening program, appellant was able to perform the sedentary job recommended in the functional capacity evaluation done on September 25, 1995. By decision dated September 3, 1996, the Office denied appellant's request, finding that Dr. White's June 24, 1996 report was essentially repetitious and duplicative.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[9] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.[10] When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[11] To be entitled to merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[12]

In this case, appellant did not show that the Office erroneously applied or interpreted a point of law and did not advance a point of law or fact not previously considered by the Office. While he submitted a report dated June 24, 1994 from Dr. White, as the physician merely repeated diagnoses and opinions contained in reports previously considered by the Office, the evidence submitted by appellant did not meet the requirements set forth at 20 C.F.R. § 10.138. The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.[13] The Board, therefore, finds that the Office properly denied appellant's application for reconsideration of his claim.

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[9] Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

[10] 20 C.F.R. §§ 10.138(b)(1) and (2).

[11] *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

[12] 20 C.F.R. § 10.138(b)(2).

[13] *See Daniel J. Perea*, 42 ECAB 214, 221 (1990).

The decisions of the Office of Workers' Compensation Programs dated September 3 and May 29, 1996 and December 4, 1995 are hereby affirmed.

Dated, Washington, D.C.
April 1, 1998

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member