U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT M. BELL and DEPARTMENT OF VETERANS AFFAIRS, VETERANS AFFAIRS MEDICAL CENTER, Alexandria, La.

Docket No. 95-2745; Submitted on the Record;
Issued February 25, 1998

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is 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.

On September 22, 1982 appellant, then a housekeeping aid, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that on September 6, 1982 he injured his back in the performance of duty. The Office accepted that appellant sustained lumbar muscle strain and nerve root compression at L4-5 and authorized a 1984 nerve root decompression at L4-5 on the left and a partial laminectomy. The Office paid appellant the appropriate compensation.

In a work restriction evaluation (OWCP-5) dated March 8, 1993, Dr. Thomas S. Whitecloud, III, a Board-certified orthopedic surgeon and appellant's attending physician, found that appellant could intermittently sit, walk, lift up to 20 pounds, bend, squat, climb, kneel, twist, and stand intermittently for 8 hours per day. Dr. Whitecloud indicated that appellant could perform sedentary work for eight hours per day. In an accompanying narrative report, Dr. Whitecloud stated that sedentary employment may be difficult for appellant due to his lack of education.

In a report dated March 9, 1993, Dr. C. D. Burga, an Office referral physician, related that appellant overexaggerated his symptoms and stated that he was "unable to ascertain as to whether there are any objective findings as of the date of this examination, because of [appellant's] exaggeration." He further stated that he had no evidence to support either total or partial disability or residuals of his employment injury.

On March 11, 1994 Dr. Whitecloud reviewed the position of light-duty housekeeping aid and found that appellant had the physical capabilities to perform the position with the following

limitations: 4 hours of walking, 4 hours of sitting, no bending or stooping, and carrying no more than 15 pounds.

In a clinic note dated May 23, 1994, Dr. Whitecloud related that appellant could work light-duty employment as a housekeeping aid for four hours per day. Dr. Whitecloud stated, "I feel he should attempt to do this type of activity and he will give it a try."

By letter dated June 14, 1994, the employing establishment offered appellant full-time employment as a limited-duty housekeeping aid.

By letter dated August 16, 1994, the Office requested that the employing establishment offer appellant the position of limited-duty housekeeping aid for four hours per day in accordance with his physician's recommendation.

On August 23, 1994 the employing establishment offered appellant the position of limited-duty housekeeping aid for four hours per day in accordance with the work limitations found by Dr. Whitecloud.

By letter dated August 23, 1994, the Office notified appellant that the position of modified housekeeping aid was suitable. The Office advised appellant that under 5 U.S.C. § 8106(c) an employee who refused or neglected to work after an offer of suitable work was not entitled to compensation. The Office informed appellant that he had 30 days to either accept the position or provide the reasons for the refusal.

By letter dated September 14, 1994, appellant, through his attorney, stated that he would not accept the position because he was disabled and unable to perform the duties of the position.

In a letter dated September 23, 1994, the Office advised appellant that the reason he provided for refusing the position was unacceptable and provided him 15 days to accept the offered position.

By decision dated October 11, 1994, the Office terminated appellant's compensation effective October 15, 1994 on the grounds that he had refused an offer of suitable employment.

By letter dated October 19, 1994, appellant requested a hearing before an Office hearing representative.

In a chart note dated December 16, 1994, Dr. Whitecloud noted appellant's continued complaints of back and leg pain and recommended a magnetic resonance imaging (MRI) study.

In a chart note dated February 10, 1995, Dr. Whitecloud noted that the MRI showed "no obvious abnormality." Dr. Whitecloud stated, "[Appellant] has not worked since 1984 and because of this I find it unlikely that he will be able to reenter the job market."

By decision dated May 8, 1995, the hearing representative affirmed the Office's October 11, 1994 decision.

The Board finds that the Office properly terminated appellant's compensation under 5 U.S.C. § 8106(c) based on his refusal to accept suitable employment.

Section 8106(c)(2) of the Federal Employees' Compensation 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.[1] 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.[2] 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.[3]

In the present case, appellant indicated that his reason for declining the housekeeping aid position offered by the employing establishment was his physical inability to perform the position. The determination of whether appellant is capable of performing the offered position is a medical question that must be resolved by medical evidence.[4] The Board finds that the probative medical evidence establishes that the position offered was within appellant's medical restrictions.

The employing establishment sent a job description for the modified housekeeping aid position to the attending physician, Dr. Whitecloud, for an opinion as to whether appellant was capable of performing the position and a description of his physical limitations. On March 11, 1994 Dr. Whitecloud reviewed the position of housekeeping aid and found that appellant had the physical capabilities to perform the position with listed limitations. In a clinic note dated May 23, 1994, Dr. Whitecloud related that appellant could work light-duty employment as a housekeeping aid for four hours per day. The employing establishment offered appellant a position as a light-duty housekeeping aid for four hours per day in accordance with Dr. Whitecloud's restrictions.

The record therefore contains probative medical evidence indicating that appellant was physically capable of performing the offered housekeeping aid position. Following the termination of his benefits, appellant submitted a chart note dated December 16, 1994, in which Dr. Whitecloud noted appellant's continued complaints of back and leg pain and recommended an MRI. The record further contains a chart note dated February 10, 1995, in which Dr. Whitecloud noted that the MRI showed "no obvious abnormality." Dr. Whitecloud stated, "[Appellant] has not worked since 1984 and because of this I find it unlikely that he will be able

[1] 5 U.S.C. § 8106(c)(2).

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

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

[4] *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

to reenter the job market." Dr. Whitecloud did not find that appellant does not have the physical ability to perform the offered position.

Accordingly, the Board finds that the medical evidence establishes that appellant was capable of performing the housekeeping aid position. It is, as noted above, the Office's burden to establish that the job offered was suitable, and the Office has met its burden in this case. Having been offered a suitable job, appellant must show that his refusal of the position was reasonable or justified. See 20 C.F.R. § 10.124(c). His stated reason that he was physically unable to perform the position is not, for the reasons discussed, supported by the medical evidence of record.

The decisions of the Office of Workers' Compensation Programs dated May 8, 1995 and October 11, 1994 are hereby affirmed.

Dated, Washington, D.C.

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member