U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN E. KRUSSOW and DEPARTMENT OF AGRICULTURE, FOREST SERVICE, Gresham, Oreg.

Docket No. 96-358; Submitted on the Record;
Issued July 28, 1998

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits on the grounds that appellant refused an offer of suitable work; and (2) whether the Office properly denied appellant's request for a hearing.

On February 9, 1962 appellant, then a 24-year-old surveying aid, filed a traumatic injury claim alleging that he sustained a back injury on December 15, 1961 when he slipped on steep icy terrain. Appellant did not stop work. On October 8, 1963, June 29, 1973 and September 15, 1977, appellant filed claims for recurrence of disability of his back problems causally related to his December 15, 1961 employment injury. The Office accepted that appellant sustained a chronic lumbar strain and degenerative disc disease, L4-5, L5-S1. Appellant continued to work until September 15, 1977 when he stopped work. Appellant was placed on the periodic rolls for temporary total disability effective April 27, 1978.

By letter dated August 28, 1991, the Office referred appellant to Dr. Robert A. Staver, a Board-certified orthopedic surgeon, for a second opinion on the degree of any disability remaining to his accepted employment injury.

In a report dated September 12, 1991, Dr. Staver, based upon a review of the medical evidence, physical examination, and history of the employment injury, opined that appellant was not capable of performing the offered position due to the physical demands listed of digging, leveling and climbing in construction site locations. Dr. Staver stated that appellant would be capable of performing work at a sedentary to light category with restrictions on lifting and carrying.

On June 1, 1992 the Office offered appellant the position of civil engineering technician with the physical requirements listed as "sedentary to light category with restrictions on lifting and carrying as defined by those categories. The work also involves light walking and occasional driving."

In a letter dated June 17, 1992, Dr. Staver stated:

> "I cannot advice (sic) you if he has the skills to perform the job described as far as his training, experience and educational skills are concerned, but from a stand point of physical requirements, you describe the work as being a level of activity in the sedentary to light category with restrictions on lifting and carrying. Also requiring light walking and occasional driving. It is my opinion that he would be able to perform those types of activities as mentioned in my dictation of September 12, 1991, when I stated that he would be capable of performing sedentary to light category."

By letter dated August 31, 1992, the Office forwarded Dr. Staver's opinion and a copy of description of the duties of the proposed job offered to appellant for his evaluation.

In a letter dated September 8, 1992, Dr. Francis P. Nash, appellant's attending physician, diagnosed "cervical neuro-radiculopathy involving the C6 and C7 outflow on the left due to foraminal stenosis at C6-7 and C7-D1." Dr. Nash opined that appellant was incapable of performing productive employment.

By letter dated September 25, 1992, the Office offered appellant the position of civil engineering technician which had been found to be within his physical limitations.

By letter dated December 30, 1992, the Office found a conflict in the medical opinion evidence and referred appellant to Dr. William D. Platt, a Board-certified neurologist, to resolve the conflict.

In a report dated January 20, 1993, Dr. Platt opined, based upon a physical examination, review of the medical record, statement of accepted facts, history of the employment injury, review of the requirements of the position offered, that appellant was capable of performing the position of civil engineering technician. Dr. Platt stated that appellant was capable of performing light to sedentary work and that the accepted condition of lumbar strain "would not be expected to cause or aggravate future degenerative disc disease in the lumbar spine." Dr. Platt noted the Office had accepted "progressive multi-level degenerative disc disease at L4-L5 and L5-S1" but that appellant's cervical degenerative disc disease had "no clear relationship" to his accepted December 15, 1961 employment injury.

In a letter dated April 16, 1993, the Office informed appellant that he had been offered the position of civil engineering technician on June 1, 1992 which was found to be suitable employment for him. The Office advised appellant that he had 30 days from the date of the letter to either accept the position or provide an adequate explanation for refusing the position.

In a memorandum of file dated August 26, 1993, the Office determined that a new conflict of medical opinion arose between Dr. Nash, appellant's attending physician, and Dr. Platt, the impartial medical examiner, on the issue of whether appellant's disability due to his accepted back condition was a result of his 1961 accepted employment injury.

By letter dated September 2, 1993, the Office referred appellant to Dr. Edwin A. Kayser, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence.

In a report dated September 29, 1993, Dr. Kayser opined, based upon a physical examination that "the question of his disability remains unclear." Dr. Kayser noted that Dr. Nash opined that appellant was totally disabled and that appellant "has enough osteoarthritis and degenerative disc disease that would preclude him from going back into doing heavy mountain type activities, with climbing, lifting and bending." Regarding appellant's disability, Dr. Kayser stated:

> "The real question is whether the injury in 1961 was the precipitating cause of all of this and I have to be very skeptical of that. I think most of this is probably congenital in origin."

In a report dated October 7, 1993, Dr. Kayser opined that appellant's disability is due from his severe, advanced degenerative arthritis of the lumbosacral spine which "most likely this is congenital." Regarding the cervical condition, Dr. Kayser opined that "there is not enough information to blame that to his injury," but attributed the cervical condition to normal aging and his cervical laminectomy in the mid 1980's.

By letter dated February 23, 1994, the Office requested Dr. Kayser to clarify his opinion concerning the nature and extent of appellant's disability. The Office enclosed a statement of accepted facts, appellant's date of injury job description and the position description for the offered position of civil engineering technician along with a list of questions to be answered.

By letter dated May 6, 1994, Dr. Kayser, in response to the Office's February 23, 1994 letter, opined that appellant was capable, based upon the job description and the objective physical examination, of performing the duties listed for the civil engineering technician. In response to a question as to whether appellant could perform the position of civil engineering technician, Dr. Kayser opined that "based on the objective job description and his objective physical examination" that appellant could perform the position. Regarding whether appellant's back problems are causally related to his employment injury, Dr. Kayser noted:

> "...I feel his basic underlying problem is a lumbar strain, and possibly even some injury to his disc. It has gone on to develop degenerative disc disease. I think this is probably a genetic condition, and not related to his injury, though there has to be some contribution from the injury."

In a report dated June 30, 1994, Dr. Nash, after a review of the offered position, opined that appellant was totally disabled and incapable of performing "productive employment, even at a sedentary level on a regular five days a week, eight hours per day." Dr. Nash bases his opinion due to appellant's "pathological conditions at the cervical and lumbar level, that is the neurological findings, the diagnosis of the existent abnormality at both the cervical and lumbar level."

By letter dated October 11, 1994, the Office informed appellant that the position of civil engineering technician had been found suitable to his work capabilities. The Office advised

appellant that he had 30 days form the date of the letter to either accept the position of provide an adequate explanation for refusing the position.

In a letter dated February 22, 1995, the Office informed appellant that his failure to notify the Office of his decision has been considered to be a rejection of the job offer of civil engineering technician. The Office advised appellant that a formal decision will be issued to terminate his entitlement to wage-loss compensation and that he had until March 10, 1995 to accept the position offered.

In a report dated April 10, 1995, Dr. Nash stated again that it was his opinion that appellant was totally disabled due to his employment injury and is incapable of productive employment.

By decision dated April 21, 1995, the Office terminated appellant's wage-loss compensation benefits on the grounds that he refused an offer of suitable employment. In the accompanying memorandum dated April 17, 1995, the Office noted that appellant was referred to Dr. Platt for an impartial medical examination to resolve the conflict in the medical opinion evidence between Dr. Nash, appellant's attending physician, and Dr. Staver, a second opinion physician. The Office noted appellant was notified that the offered position was suitable. Next, the Office noted that a new issue of residual disability resulted in appellant being examined by Dr. Kayser for an impartial medical examination. The Office noted that appellant's treating physician, Dr. Nash, opined that appellant was incapable of performing the position of civil engineering technician. The Office found that appellant refused an offer of suitable employment without good cause based upon the opinion of Dr. Kayser that appellant would be capable of performing the offered job. Appellant's wage-loss compensation benefits were terminated effective April 30, 1995.

In a letter dated May 5, 1995, appellant requested an oral hearing before an Office hearing representative.

By letters dated May 15 and 24, 1995, appellant, through counsel, requested a hearing before an Office hearing representative.

By letter decision dated August 28, 1995, the Office denied appellant's request for a hearing before an Office hearing representative for the reason that his injury of December 15, 1961 did not entitle him to a hearing as a matter of right. The Office stated that it had carefully considered appellant's request for a hearing and determined that the issue could be addressed through a request for reconsideration.

The Board finds that the Office properly terminated appellant's disability compensation on the grounds that he refused suitable employment.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits. This burden of proof is applicable if the Office terminates compensation under 5 U.S.C. § 8106(c) for refusal to accept suitable work. The Office did not meet its burden in the present case.

Section 8106(c)(2)[1] of the Federal Employees' Compensation Act provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee is not entitled to compensation. Section 10.124(e)[2] of the Office's regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured 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.[3] To justify termination, the Office must show that the work offered was suitable,[4] and must inform appellant of the consequences of refusal to accept such employment.[5] According to Office procedures, certain explanations for refusing an offer of suitable work are considered acceptable.[6]

In the present case, the Office initially found that there was a conflict in the medical opinion evidence between appellant's attending physician, Dr. Nash, and the Office referral physician, Dr. Staver on the issue of whether appellant continued to be totally disabled due to his December 15, 1961 employment injury. In order to resolve this conflict, the Office properly referred appellant, pursuant to section 8123(a) of the Act, to Dr. Platt, a Board-certified neurologist, for an impartial medical examination and an opinion on the matter.[7] Upon receipt of Dr. Platt's opinion, the Office determined that another conflict had arisen between the opinion of Dr. Platt, the Office physician, and Dr. Nash on the issue of whether appellant's back condition is due to his accepted employment injury. In order to resolve this second conflict, the Office properly referred appellant, pursuant to section 8123(a) of the Act, to Dr. Kayser, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the matter.[8] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[9]

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[1] 5 U.S.C. § 8106(c)(1).

[2] 20 C.F.R. § 10.124(c).

[3] *Maggie L. Moore*, 42 ECAB 484, 488 (1991); *reaff'd on recon.*, 43 ECAB 818 (1992).

[4] *See Carl W. Putzier*, 37 ECAB 691 (1986); *Herbert R. Oldham*, 35 ECAB 339 (1983).

[5] *See Maggie L. Moore, supra* note 3; *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(d)(1).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(1)-(5).

[7] Section 8123(a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician to who shall make an examination." 5 U.S.C. § 8123(a).

[8] *Id.*

[9] *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Kayser, the impartial medical specialist, selected to resolved the second conflict in the medical opinion evidence. The May 6, 1994, October 7 and September 23, 1993 reports of Dr. Kayser establish that appellant is capable of performing the position of civil engineering technician as it was sedentary work and within appellant's limitations. Dr. Kayser provided medical rationale for his opinion on why he felt appellant was capable of performing sedentary work and the relationship of his employment injury to his degenerative disc disease. For these reasons, the opinion of Dr. Kayser must be given special weight and the Office properly relied on it to terminate appellant's disability compensation effective April 30, 1995.

The Board further finds that the Office properly denied appellant's request for an oral argument hearing before an Office hearing representative.

It is well established that under the Act, a claimant is not entitled to a hearing except as specifically provided by Congress.[10] The 1966 amendments to the Act conferred a right to the hearing subject to limitations such as codified.[11] Section 16(b) of the 1966 statute provided that a right to a hearing "shall not apply with respect to any injury sustained before the date of enactment" which was July 1, 1966.[12] As appellant's injury occurred on February 9, 1962, before the enactment of the 1966 amendments, he is not entitled to a hearing as a matter of right.

Nonetheless, the Office retains the right to exercise its discretionary authority to grant a request for a hearing.[13] In this case, the Office exercise its discretion, reviewed the matter involved and determined that the issues could be addressed by the reconsideration process. Generally, an abuse of discretion is shown through manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.[14] There is no evidence of record in this case that the Office abused its discretion by denying appellant's request for a hearing before an Office hearing representative.

[10] *Rudolf Bermann*, 26 ECAB 354 (1975).

[11] Currently, 5 U.S.C. §§ 8124, 8149.

[12] 80 Stat. 257.

[13] *Herbert C. Holley*, 33 ECAB 140 (1981); *Rudolf Bermann*, *supra* note 10.

[14] *Daniel J. Perea*, 42 ECAB 214 (1990).

The decisions of the Office of Workers' Compensation Programs dated August 28 and April 21, 1995 are hereby affirmed.

Dated, Washington, D.C.
July 28, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member