U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RONALD BUSTER and DEPARTMENT OF VETERANS AFFAIRS, VA MEDICAL CENTER, North Little Rock, Ark.

Docket No. 95-2432; Submitted on the Record;
Issued June 5, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation on the grounds that he abandoned suitable work; and, (2) whether the Office properly determined that appellant received an overpayment of compensation.

On April 22, 1985 appellant, then a 37-year-old engineering technician, sustained an employment-related lumbosacral strain for which he received appropriate compensation. Following a complex procedural history,[1] by letter dated July 15, 1994, the Office proposed to

[1] On October 25, 1990, based on the reports of Drs. Larry B. Marti and Garth S. Russell, Board-certified orthopedic surgeons, the employing establishment offered appellant a modified engineering technician position for eight hours per day. By letter dated November 15, 1990, the Office found the job to be suitable. Based on a report from Dr. Larry Bader, an osteopathic physician, that appellant should work only four hours per day, on January 10, 1991 the employing establishment offered appellant the modified engineering technician position for four hours per day. On January 15, 1991 appellant declined the offer and, by decision dated January 30, 1991, the Office terminated appellant's wage-loss compensation on the grounds that he refused an offer of a suitable part-time modified position. Appellant then accepted the offered job and worked from February 19 to March 15, 1991. By decision dated March 14, 1991, the Office determined that appellant's employment as an engineering technician fairly and reasonably represented his wage-earning capacity. By letter dated May 15, 1991, the Office informed him of the consequences of abandoning employment, and, following his request, a hearing was held on September 24, 1991. By decision dated December 3, 1991, an Office hearing representative terminated appellant's compensation, effective March 15, 1991, for abandoning suitable employment. On March 4, 1992 appellant was removed from federal service. He appealed to the Board, and the Director filed a Motion to Remand, based on the Board's decision in *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.* 43 ECAB 818 (1992). By order dated September 25, 1992, the Board granted the Director's motion (Docket No. 92-878), and on October 20, 1992 the Office reinstated appellant's benefits. By decision dated January 21, 1993, the Office denied that appellant sustained a recurrence of disability beginning March 15, 1991. Appellant requested a hearing and submitted additional evidence In an April 7, 1994 decision, an Office hearing representative set aside the March 14, 1991 Office decision because appellant had not worked the 60 days required under Office procedures before determining his wage-earning capacity. He also set aside the January 21, 1993 decision and remanded the case to the Office for further proceedings.

terminate appellant's compensation on the grounds that he abandoned suitable work, and in an August 16, 1994 decision, appellant's compensation was terminated, effective March 15, 1991. By letter dated September 13, 1994, the Office advised appellant that it had made a preliminary determination that an overpayment in compensation had been created in the amount of $46,884.11, because he had continued to receive compensation after abandoning suitable work. The Office found appellant to be without fault and provided him with an overpayment questionnaire. Following appellant's request, a hearing was held on January 25, 1995. By decision dated March 24, 1995, an Office hearing representative found that appellant abandoned suitable work without good cause on March 15, 1991 and was, therefore, not entitled to wage-loss compensation after that time. The hearing representative further found that, as appellant continued to receive compensation after that date, an overpayment in compensation in the amount of $46,884.11 had occurred, that appellant was not at fault, and that recovery would defeat the purpose of the Federal Employees' Compensation Act. The instant appeal follows.

The Board finds that the Office properly terminated appellant's compensation on the grounds that he neglected suitable work.

Section 8106(c)(2) of the 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]

In the present case, by letter dated October 25, 1990 the employing establishment offered appellant a modified engineering technician job. Dr. Larry B. Marti, a Board-certified orthopedic surgeon, who provided a second opinion for the Office, submitted a May 29, 1990 report, in which he advised that appellant could work four to five hours per day with restrictions. By report dated October 22, 1990, Dr. Marti reviewed the modified job description and advised that appellant could carry out the job duties "without much difficulty." The position description was also submitted to appellant's treating Board-certified orthopedic surgeon, Dr. Garth S. Russell who, in an August 18, 1990 report, approved the job offer and advised that appellant could work eight hours a day. In a report dated November 14, 1990, Dr. Larry Bader, an osteopathic physician, who was an associate of Dr. Russell, advised that appellant should limit his work to

[2] 5 U.S.C. §§ 8101-8193.

[3] 5 U.S.C. § 8106(c)(2).

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

four hours per day and recommended a course of physical therapy.[5] Thus, the medical evidence submitted contemporaneous with the modified job offer dated January 10, 1991 and appellant's return to work from February 19 to March 15, 1991 would not preclude him from performing the offered position. Accordingly, the Board finds that the medical evidence at that time establishes that appellant was capable of performing the modified engineering technician position for four hours per day, and the Office properly found that the offered position was suitable.

In order to properly terminate appellant's compensation under 5 U.S.C. § 8106, the Office must provide appellant notice of its finding that an offered position is suitable and given appellant an opportunity to accept or provide reasons for declining the position.[6] The Office advised appellant by letter dated November 15, 1990 that it found the modified engineering technician position suitable and on July 15, 1994 provided appellant with notice that it proposed to terminate his compensation. There is no evidence of a procedural defect in this case. The record, therefore, establishes that appellant was offered a suitable position by the employing establishment, which he abandoned. Under 5 U.S.C. § 8106, appellant's compensation was properly terminated.

The Board further finds that, as Section 8106(c) provides that an employee who refuses or neglects to work after suitable work is secured "is not entitled to compensation,"[7] the termination of appellant's wage-loss compensation under section 8106(c) serves as a bar to further compensation arising from the accepted employment injury.[8]

Finally, as the Office properly terminated appellant's compensation, because he abandoned suitable employment and continued to receive compensation, the Office properly found that an overpayment in compensation was created. The record indicates that appellant received compensation in the amount of $46,884.11 during this period. In his March 24, 1995 decision, within a proper exercise of his discretion, the Office hearing representative determined that appellant was not at fault in creating an overpayment of compensation in the amount of $46,884.11 and waived repayment of the overpayment.

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[5] Additional relevant medical evidence includes a September 11, 1990 report, in which Dr. B.J. Myers, an osteopathic physician, advised that appellant had ruptured discs at L4-S1 and should not pursue a job of "strenuous effort." In a June 4, 1991 report, Dr. C. Courtney Whitlock, a neurosurgeon, advised that appellant could perform the limited duty job. In reports dated July 1 and October 8, 1991, Dr. James C. Bolin, an osteopathic physician, described appellant's pre-injury job duties and diagnosed bulging disc pathology. He advised that he could not perform his pre-injury job. By reports dated October 11, 1991, January 24 and July 27, 1992, Dr. David W. Dale, an osteopathic physician, advised that appellant was suffering from depression due to constant pain. He provided restrictions to appellant's physical activities and advised that could not "ever return to his job." In a February 13, 1993 report Dr. Andrew I. Myers, a family practitioner, advised that he was unable to work at a strenuous position, but could perform sedentary work. By report dated August 4, 1993, Dr. John W. Fraser advised that appellant was under his care for a herniated nucleus pulposus at L5-S1 and was scheduled for surgery in September. Also submitted were numerous reports of x-rays, computerized tomography and magnetic resonance imaging that contain conflicting diagnoses.

[6] *See Maggie L. Moore*, *supra* note 1.

[7] 5 U.S.C. § 8106(c).

[8] *See Stephen R. Lubin*, 43 ECAB 564.

The decisions of the Office of Workers' Compensation Programs dated March 24, 1995 and August 16, 1994 are hereby affirmed.

Dated, Washington, D.C.
June 5, 1998

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member