U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CECIL R. BRUMMETT and DEPARTMENT OF AGRICULTURE, FOREST SERVICE, WILLIAMETTE NATIONAL FOREST, Eugene, Oreg.

Docket No. 96-837; Submitted on the Record;
Issued June 3, 1998

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective February 9, 1992 on the basis that he refused an offer of suitable work.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits. This includes cases in which the Office terminates compensation under section 8106(c)(2) of the Federal Employees' Compensation Act[1] for refusal to accept suitable work.[2] Under section 8106(c)(2), the Office may terminate the compensation an employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee. The Board has recognized that section 8106(c) serves as a penalty provision as it may bar an employee's entitlement to compensation based on a refusal to accept suitable work, and for this reason this section will be narrowly construed.[3] The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by the medical evidence.[4]

The Board finds that the Office improperly terminated appellant's compensation.

The Office based its determination that appellant was physically able to perform the offered position of microfilm equipment operator on reports from his attending physician, Dr. David J. Abel, a Board-certified family practitioner. In a report dated June 11, 1991 on a

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[1] 5 U.S.C. § 8106(c)(2).

[2] *Shirley B. Livingston*, 42 ECAB 855 (1991).

[3] *Robert Dickerson*, 46 ECAB 1002 (1995).

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

Form OWCP-5, Dr. Abel indicated appellant could intermittently sit four hours and walk, lift, squat, bend or stand one hour per day. Dr. Abel indicated there were no cardiac, visual or hearing limitations, and that appellant could not work eight hours per day. In a report dated June 27, 1991 Dr. Abel stated that appellant was "unable to stay in one position for a very long period of time without debilitating pain."

The employing establishment proposed offering appellant a position as a microfilm equipment operator, the physical requirements of which were described as sedentary with minimal movement. In reply to an Office request to review the offered position and comment on appellant's ability to perform it, Dr. Abel stated in an October 10, 1991 report: "In response to your request, the job description was reviewed and in comparison with the Form OWCP-5, the work restriction evaluation form, filled out June 11, 1991, I feel that the patient would be able to perform this job on a part-time basis; that is related to our finding of his being able to sit for up to four hours a day intermittently."

While this evidence indicates that appellant could perform the duties of the offered position of microfilm equipment operator, the record also contains a later report from Dr. Abel indicating that appellant may not be physically able to perform this position. In this report, which is dated December 23, 1992, Dr. Abel stated:

> "The above-named patient presented with a history of increasing problems of muscle spasm in the neck and headaches that affect his vision with blurriness.
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> "The patient has had known migraine headaches and migraine variant processes since 1978. At that time the patient was seen in neurological consultation by Dr. Englander and also by Dr. Lewisohn of the University of Oregon. The patient's headaches seem to have increased following his disc surgery. This also is a cause of concern in the offered job of microfilm equipment operator. There is concern that this constant visual strain may aggravate his migraine condition.
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> "In review of his records, Mr. Brummett has mentioned headaches in his office visits of June 23, 1992 and February 4, 1992. In addition, on his physical exam[ination] of May 28, 1991, he mentioned he had headaches more than once a week and his vision itself, however, was checked at 20/20 bilaterally. I feel these visual symptoms and headaches indeed would interfere with his ability to work part time as a microfilm equipment operator."

The December 23, 1992 report from Dr. Abel casts serious doubt on appellant's ability to perform the duties of a microfilm equipment operator. Even though the condition -- migraine headaches -- that Dr. Abel indicated would interfere with appellant's ability to perform the offered position may well have arisen after appellant's February 26, 1971 employment injury and be unrelated to that injury, it nonetheless must be taken into account in determining whether

appellant can perform the duties of the position offered by the employing establishment.[5] In his October 10, 1991 response to the Office that appellant could perform the offered position, Dr. Abel stated that his comparison of the work tolerance limitations form he completed on June 11, 1991 to the requirements of the position of microfilm equipment operator showed that appellant could perform the position. The Office work tolerance limitations Form OWCP-5, however, does not readily lend itself to listing a limitation based on a condition such as migraine headaches. When Dr. Abel specifically addressed this condition of migraine headaches in his December 23, 1992 report, he stated that they "indeed would interfere with his ability to work part time as a microfilm equipment operator." Given that Dr. Abel was the doctor upon whom the Office relied to determine that appellant could perform the offered position, the December 23, 1992 report from Dr. Abel, which contradicts that determination, precludes the Office from meeting its burden of proof to terminate appellant's compensation.[6]

The decision of the Office of Workers' Compensation Programs dated September 26, 1995 is reversed.

Dated, Washington, D.C.
June 3, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-earning Capacity*, Chapter 2.814.4(b)(4) (December 1993).

[6] *See Carol J. Bernard*, 37 ECAB 471 (1986) (The Board found that it was improper to terminate the employee's compensation for refusal of suitable work without resolving conflicting medical evidence from the same physician as to whether the employee was totally or partially disabled.)