U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRED W. SIGMAN, JR. and U.S. POSTAL SERVICE,
POST OFFICE, Lancaster, Pa.

Docket No. 96-171; Submitted on the Record;
Issued May 13, 1998

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective May 10, 1993 on the grounds that he refused suitable work.

The Board has duly reviewed the case on appeal and finds that the Office properly terminated appellant's compensation benefits on the grounds that he refused suitable work.

Appellant filed a claim alleging that he injured his lower back in the performance of duty. The Office accepted appellant's claim for aggravation of disc herniation L4-5, L5-S1 and foraminal stenosis, bilateral. Appellant filed several claims for recurrence of disability which the Office accepted and entered appellant on the periodic rolls. By decision dated August 25, 1993, the Office found that appellant had refused suitable employment. Appellant requested an oral hearing on September 3, 1993 and by decision dated June 13, 1994, the hearing representative affirmed the Office's decision. Appellant requested reconsideration and the Office denied modification of the June 13, 1994 decision on April 24 and September 20, 1995.

It is well settled that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[1] As the Office in this case terminated appellant's compensation under 5 U.S.C. § 8106(c), the Office must establish that appellant refused an offer of suitable work. Section 8106(c) of the Federal Employees' Compensation Act[2] 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(c) of the applicable regulations[3] provides that an employee who refuses or

[1] *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[2] 5 U.S.C. § 8106(c)(2).

[3] 20 C.F.R. § 10.124(c).

neglects to work after suitable work has been offered or secured for him, 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. To justify termination of compensation, the office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[4]

The employing establishment provided appellant's attending physician, Dr. Bruce M. Silverstein, an osteopath, with a copy of a limited-duty job description and Dr. Silverstein indicated on April 12, 1993 that appellant could perform the duties of this position.[5] The employing establishment offered appellant the position and he accepted on May 4, 1993. The employing establishment scheduled appellant to return to work on May 10, 1993 and appellant failed to appear.

By letter dated June 15, 1993, the Office informed appellant that it found the light-duty position to be suitable and informed him of the penalty provisions of 5 U.S.C. § 8106(c) and allowed him 30 days to accept the position or offer his reasons for refusal. Appellant did not respond and by decision dated August 25, 1993, the Office found that appellant had refused an offer of suitable work and terminated his compensation benefits.

Following the termination of his compensation benefits for refusing suitable work, appellant submitted medical evidence in support of his contention that he was unable to perform the duties of the offered position. In a report dated July 9, 1993, Dr. Ira Stanley Porter, a Board-certified orthopedic surgeon, reviewed appellant's history of injury and diagnosed discogenic low back pain. On August 3, 1993 Dr. Porter noted appellant's continued complaints of pain and repeated his earlier diagnosis. He stated that appellant should be considered disabled. In a report dated September 10, 1993, Dr. Porter opined that appellant's current condition was causally related to his accepted employment injury. He stated that he had not developed an opinion as to appellant's work capacity or limitations. These reports are not sufficient to establish appellant's disability for work as Dr. Porter did not address appellant's work restrictions and did not provide medical rationale supporting his conclusion that appellant was disabled.

[4] *Arthur C. Reck*, 47 ECAB ___ (Docket No. 94-1072, issued December 4, 1995).

[5] The record indicates that Dr. Silverstein referred appellant to Dr. Randy A. Cohen for a period of functional capacity testing. On April 12, 1993 Dr. Cohen advised Dr. Silverstein that appellant was not totally disabled and recommended he returned to work in a sedentary or light-duty position, subject to specified work restrictions.

Appellant submitted reports from Dr. George M. Kent, a Board-certified orthopedic surgeon, and former Office referral physician who previously examined appellant in 1991. In a report dated November 14, 1994, Dr. Kent noted appellant's history of injury and stated:

> "It is my considered medical opinion within a reasonable degree of medical certainty that he would not have been able to manage this job in May 1992 if he was as bad as he was in September 1991 and he states that if anything he was progressively getting worse as the months have gone by and as of today he is even more disabled than he was in September of 1991."

On December 28, 1994 Dr. Kent repeated his earlier report and opined that appellant was totally disabled from September 1991. These reports are not sufficient to overcome the reports of Dr. Silverstein or to require further development on the part of the Office as Dr. Kent's opinion regarding appellant's degree of disability is speculative. He states that "if appellant had not improved since September 1991 he could not perform the duties of the position in May 1993." Dr. Kent relies on appellant's assertion that his condition had worsened rather than setting forth findings on physical examination which establish that appellant was not capable of performing light duty as of April 12, 1993, as found by Drs. Silverstein and Cohen.

Dr. Kent completed a report on June 21, 1995 and reviewed the medical reports of appellant's attending physicians regarding his ability to perform the duties of the offered position. Dr. Kent opined that appellant was totally disabled for even the very lightest-duty jobs. Dr. Kent reviewed appellant's functional capacity test and opined that this test did not satisfactorily demonstrate that appellant would be capable of returning to work as a distribution clerk with the employing establishment. This report is not sufficient to require further development on the part of the Office as Dr. Kent did not provide any medical reasoning explaining why he felt that the functional capacity test did not demonstrate appellant's ability to return to work and did not explain why appellant's accepted employment injury resulted in appellant's total disability for work.

The Office properly met its burden of proof to terminate appellant's compensation benefits for refusing suitable work and appellant has not submitted sufficient medical opinion evidence to establish that his refusal of the offered position was suitable.

The decisions of the Office of Workers' Compensation Programs dated September 20 and April 24, 1995 are hereby affirmed.

Dated, Washington, D.C.
May 13, 1998

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member