

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ALEX G. SAILLY and DEPARTMENT OF LABOR,  
EMPLOYMENT STANDARDS ADMINISTRATION, Chicago, Ill.

*Docket No. 97-580; Submitted on the Record;  
Issued November 20, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,  
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's monetary compensation benefits effective September 15, 1996 on the grounds that he refused suitable work.

The Office accepted that on February 21, 1980 appellant, then a 50-year-old rehabilitation counselor, slipped on a wet men's room floor and sustained low back strain and a bulging disc at L4-5. Thereafter he was placed on the periodic rolls for receipt of compensation and rehabilitation efforts were initiated.

After much rehabilitation intervention, appellant was referred to Dr. Alan R. Maurer, a Board-certified orthopedic surgeon, for a second opinion medical evaluation. By report dated February 23, 1995, Dr. Maurer reviewed appellant's history, noted his complaints of back pain, performed a physical examination, found an absent ankle jerk on the left and some difficulty ambulating on his heels and toes, but found an otherwise unremarkable examination. He noted that straight leg raising was negative bilaterally. Dr. Maurer diagnosed chronic mechanical low back pain and an old burned out type sciatica, and he opined that appellant did not need any particular medical treatment for his condition. He opined that appellant could be employed in an occupation that was relatively sedentary like an office job at a desk where he could stand up periodically. Dr. Maurer recommended that appellant avoid long driving, heavy lifting and manual labor. He completed an Office work capacity evaluation form recommending that appellant limit lifting and bending, that he should not lift over 25 pounds, but that he could work 8 hours per day.

The Office rehabilitation counselor determined that appellant was qualified for and could perform the physical requirements of the job of equal opportunity assistant which was a sedentary position that required no lifting over 10 pounds. The position of equal opportunity assistant with the employing establishment in Milwaukee, Wisconsin was formally offered to appellant on May 29, 1996 as being immediately available.

On June 19, 1996 appellant rejected the offered position claiming that he was not qualified for the position. He claimed that he did not type and did not use a computer, that he still had back pain both sitting and lying down, that he could not sit for eight hours, that he had to lie down every couple of hours and take pain medication, that he had arthritis in his hands and feet with pain and lack of strength, that he had numbness in the fingers of his left hand due to carpal tunnel problems, that he had difficulty ambulating and needed a cane, that his left leg was numb and his left knee gave out, that he had diabetes and pernicious anemia, that he had advanced chronic glaucoma, that he had gouty arthritis, that he was on multiple medications and that he had applied for but been refused the job of rehabilitation counselor in Jacksonville, Florida.

The employing establishment advised the Office that on appellant's SF-171 he had indicated that he could type 40 words per minute, and it noted that he would receive computer training.

By letter dated July 18, 1996, the Office advised appellant that his reasons for refusing the offered position were not acceptable, it advised that there was no medical evidence of record to indicate that he could not medically perform the job and it gave him 30 days within which to accept the position, or to provide medical documentation that he could not perform the job.

By response dated August 15, 1996, appellant claimed that he could not travel or sit or stand for any length of time. Appellant also submitted copies of two schedule awards he received for loss of use of his legs, copies of several prescriptions and records of a hospitalization for a small bowel obstruction. Appellant additionally submitted an August 15, 1996 note from Dr. Christina Babiak, a Board-certified family practitioner and appellant's treating physician, which stated "[appellant] is unable to work. Unable to sit for eight hours due to spinal stenosis -- is getting physical therapy evaluation."

Thereafter appellant submitted an August 29, 1996 report from Dr. Babiak which stated:

"[Appellant] is unable to sit at a desk job for eight hours due to arthritis and diabetic neuropathy. He is unable to type or write with pain and weakness of his hands. His knees are unstable and stiff with chondromalacia and osteoarthritis. Sitting is impossible for over an hour due to degenerative disc disease of the spine. [Appellant's] pain medication makes him drowsy and limits his driving. He is in physical therapy now to improve his mobility and endurance. I do not advise he move or attempt to work at this time."

By decision dated September 5, 1996, the Office terminated appellant's entitlement to monetary compensation effective September 15, 1996 finding that he refused an offer of suitable work. The Office found that Dr. Babiak provided no objective evidence that appellant was totally disabled for all work, and that she provided no rationale for her conclusions. The Office found that Dr. Maurer's report constituted the weight of the medical opinion evidence because he was a specialist in the field.

The Board, however, finds that this case is not in posture for decision.

The Federal Employees' Compensation Act, at 5 U.S.C. § 8123(a), in pertinent part, provides: "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 who shall make an examination."

In this case there is a conflict between Drs. Maurer and Babiak as to whether appellant can perform sedentary duty for eight hours per day.

Therefore, the case must be remanded for the preparation of a statement of accepted facts and the referral of appellant, together with the position description for the proposed employment, to an impartial medical examiner, for a rationalized medical opinion on appellant's physical working limitations, considering all of his medical problems, and an assessment of the appropriateness of the offered employment.

Consequently, the decision of the Office of Workers' Compensation Programs dated September 5, 1996 is hereby set aside and the case is remanded for further development in accordance with this decision and order of the Board.

Dated, Washington, D.C.  
November 20, 1998

Michael J. Walsh  
Chairman

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member