U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MAX H. YATES and U.S. POSTAL SERVICE,
POST OFFICE, Kaufman, Tex.

Docket No. 96-2207; Submitted on the Record;
Issued September 16, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether Office of Workers' Compensation Programs properly terminated appellant's compensation benefits under section 8106(c)(2) of the Federal Employees' Compensation Act for neglecting to work after suitable work had been secured for him.

On January 27, 1994 appellant, then a 43-year-old city carrier, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that he injured his foot on January 25, 1994 while walking. The Office accepted the claim for stress fracture of the right foot. Appellant received continuation of pay from January 27 through March 12, 1994. Appellant entered a leave-without-pay status on April 2, 1994 and claimed compensation. The Office approved the claim and paid disability compensation for the period beginning April 2, 1994. The Office issued a loss of wage-earning capacity decision based on appellant's modified five-hour work schedule. Appellant retired effective July 31, 1995.

Dr. Charles E. Graham, a treating Board-certified orthopedic surgeon, on a work restriction evaluation (Form OWCP-5) noted that appellant could only work five hours and that this was a permanent restriction. Dr. Graham also noted that appellant could perform intermittent sitting for five hours per day, two hours of intermittent standing, walking and lifting, one hour of intermittent bending, no squatting, climbing, kneeling or twisting. Dr. Graham also listed as a restriction that appellant should not be exposed to extreme changes in temperature.

In a report dated May 26, 1995, Dr. Bernie L. McCaskill, a Board-certified orthopedic surgeon, based upon a physical examination, review of the medical record, employment history and x-ray interpretation, noted that there was no objective evidence to support a stress fracture in appellant's right foot. Dr. McCaskill noted that appellant's stress fracture in his right foot had healed. Dr. McCaskill recommended that "every reasonable effort be made to find the patient full-time work which does not require repetitive standing or walking." Dr. McCaskill opined that due to appellant's lengthy service to the employing establishment, that "significant credence be given" to appellant's subjective complaints. Dr. McCaskill opined that he would "give

significant credence to the patient's complaints and perceived inability to walk with a mailbag for more than two hours per day." In an accompanying work capacity evaluation (Form OWCP-5c) Dr. McCaskill stated that appellant "should be limited to standing and walking for no more than two hours per day" and restricted appellant from any prolonged walking or standing activity.

By letter dated June 12, 1995, the employing establishment offered appellant the position of modified city carrier. The basic functions of the position were listed as carrying and delivering mail two hours per day, processing return to writer mail, miscellaneous custodial duties, within his physical restrictions, and other duties as assigned, within his physical restrictions. The employing establishment noted that the physical requirements of the position were based upon Dr. McCaskill's May 26, 1995 report which limited appellant's walking and standing to no more than two hours per day.

In a letter dated June 13, 1995, the Office advised appellant that the position of modified mail carrier was found to be suitable. Appellant was advised of the provision of 5 U.S.C. § 8106(c) and given 30 days to either accept the position of provide reasons for refusing the position.

In a second letter dated June 13, 1995, the Office enclosed a copy of the memorandum of conference drafted from their telephone conversation. The Office noted that appellant indicated that he was declining the job offer due to his approved Office of Personnel Management (OPM) retirement. Appellant stated that his last scheduled workday was June 30, 1995.

By report dated June 26, 1995, Dr. Charles E. Graham, a treating Board-certified orthopedic surgeon, opined that appellant had reached maximum medical improvement and that he has a 15 percent impairment to his foot due to the stress fractures, loss of motion in the phalangeal joints and the subtalar joints. Dr. Graham opined that appellant had an overall six percent impairment of the whole person. Dr. Graham stated that appellant's "metatarsals that were broken have become elevated slightly and this causes more pressure on the other metatarsals and consequently if he tries to get back on a walking route he is going to break the other metatarsals in a kind of domino fashion."

On July 15, 1995 appellant filed a claim for a schedule award.[1]

By decision dated July 24, 1995, the Office terminated appellant's compensation benefits on the basis that he refused an offer of suitable work.

By letter dated July 28, 1995, appellant requested an oral hearing by an Office hearing representative. In a subsequent letter dated December 7, 1995, appellant, through his union, requested a review of the written record by an Office hearing representative.

By decision dated February 22, 1996, the hearing representative reversed the Office's decision to terminate benefits and remanded the case to the Office. The hearing representative

[1] As the Office has not issued a final decision regarding appellant's entitlement to a schedule award, the Board has no jurisdiction to consider this issue. 20 C.F.R. § 501.2(c).

found that the Office had failed to follow the correct procedure in terminating appellant's compensation benefits.

By letter dated March 4, 1996, the Office noted that appellant had been offered the position of modified mail carrier which was found by the Office to be suitable to appellant's work capabilities and within his work limitations. The Office advised appellant that 5 U.S.C. § 8106 provided that any employee who refused or neglected to work after being offered suitable work was not entitled to compensation benefits. Appellant was advised that he had 30 days in which to accept the position or provide an explanation of his reasons for refusing it.

On March 23, 1996 appellant stated that he could not accept the position of modified mail carrier because the job was beyond the limitations noted by Dr. McCaskill, the second opinion physician. Appellant also stated that he could not accept the position as he had retired effective July 31, 1995 and was receiving retirement benefits from OPM.

By letter dated March 29, 1996, the Office advised appellant that it had received his letter refusing the job that he had been offered and noted that he had been notified previously by letter that the Office had found the position suitable. The Office stated that it considered the reasons given by appellant for refusing the position to be unacceptable and allotted appellant 15 days in which to accept the position.

In a decision dated April 15, 1996, the Office terminated appellant's compensation for wage loss under section 8106(c)(2) of the Act on the grounds that he had neglected to work after suitable work had been secured for him. The Office addressed the reasons given by appellant for his refusal to accept the offered position and found that his refusal was not justified.

The Board finds that the Office improperly terminated appellant's compensation benefits under 5 U.S.C. § 8106(c).

Section 8106(c) of the Act provides: "A partially disabled employee who -- (1) refuses to seek suitable work; or (2) refuses or neglects to work after suitable work is offered to, procured by, or secured for him; is not entitled to compensation."[2] Section 10.124(c) 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 a showing before a determination is made with respect to termination of entitlement to compensation.[3]

In the present case, appellant was working five hours per day from April 25, 1994. The employing establishment offered appellant a modified city carrier position in a letter dated June 12, 1995 in which appellant would work eight hours per day and appellant refused the position in a conference call on June 13, 1995. The employing establishment described the duties of the position as being in strict accordance with appellant's physical restrictions which consisted of no walking or standing for more than two hours per day.

[2] 5 U.S.C. § 8106(c).

[3] 20 C.F.R. § 10.124(c); *see also Catherine G. Hammond*, 41 ECAB 375 (1990).

Dr. McCaskill opined that appellant could not do any prolonged walking or standing. Dr. McCaskill also recommended that appellant not be given repetitive work and that credence should be given to appellant's perceived inability to walk with a mailbag for more than two hours per day. Dr. Graham, in his (Form OWCP-5) opined that appellant could only work five hours per day and that this was a permanent restriction. Dr. Graham also opined that appellant could perform two hours of intermittent standing, walking and lifting with no squatting, climbing, kneeling or twisting.

Although the above-noted medical evidence indicates that appellant could perform some type of light-duty work, it does not establish that he could perform the modified city carrier position which was offered to him. The Office referred appellant to Dr. McCaskill who completed a work restriction evaluation form. Dr. McCaskill, however, did not address the issue of whether appellant was capable of performing the modified city carrier position. For example, the description of the modified city carrier position indicates that the position would consist of carrying and delivering mail two hours per day, processing return to writer mail, miscellaneous custodial duties, within his work restrictions, and other duties as assigned, within his work restrictions. Furthermore, Dr. Graham, appellant's treating Board-certified orthopedic surgeon, indicated as a permanent restriction that appellant could only work five hours per day.

The Board notes that the duties and requirements of the modified city carrier position have not been adequately described by the employing establishment or clarified by the Office. When the employing establishment offered the modified city carrier position to appellant in a letter dated June 12, 1995, it merely noted that the position would be in accordance with appellant's work restrictions and then listed those restrictions, but it did not provide a description of the actual duties and requirements of the position besides noting that custodial duties and other assignments would be within appellant's physical limitations. According to Office procedure, a job offer must be in writing and contain a description of the duties to be performed and the specific physical requirements of the position.[4] However, the position does not contain a description of all the duties to be performed, particularly the custodial duties, and the specific physical requirements, beyond noting that they would be within appellant's restrictions.

For these reasons, the Office improperly invoked section 8106(c)(2) of the Act in finding the position of modified city carrier to be suitable and in terminating appellant's compensation for neglecting to work after a suitable work had been secured.

The decision of the Office of Workers' Compensation Programs dated April 15, 1996 is hereby reversed.

Dated, Washington, D.C.

[4] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity*, Chapter 2.814.4a (December 1993).

September 16, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member