U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH H. TSOURI and U.S. POSTAL SERVICE,
POST OFFICE, Cary, N.C.

Docket No. 98-912; Submitted on the Record;
Issued September 3, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs abused its discretion in terminating appellant's compensation under 5 U.S.C. § 8106(c) based on his refusal to accept suitable employment as offered by the employing establishment.

The Board has duly reviewed the case on appeal and finds that the Office met its burden to terminate appellant's compensation benefits.

On January 9, 1996 appellant, then a 70-year-old rural carrier, sustained an employment-related lumbosacral strain. He stopped work on May 30, 1996, filed a recurrence claim on June 4, 1996, and was placed on the periodic roll.[1] Following further development by the Office, appellant's treating Board-certified orthopedic surgeon, Dr. Stephen P. Montgomery, was provided a position description for a limited-duty distribution clerk position, which he approved on April 3, 1997. In a May 20, 1997 report, Dr. Michael D. Gwinn, a Board-certified physiatrist, advised that appellant could perform the offered position. On June 12, 1997 the employing establishment offered appellant the limited-duty position approved by Dr. Montgomery. He was to begin work on June 21, 1997. In a report dated July 24, 1997, an Israeli physician whose name is illegible advised that appellant could not work from June 22 to July 25, 1997. By decision dated August 6, 1997, the Office terminated appellant's wage-loss compensation on that day on the grounds that he declined an offer of suitable work. Appellant requested a review of the case on the written record, and on September 29, 1997 submitted additional medical evidence[2] including a July 30, 1997 treatment note from Dr. Gwinn who diagnosed lumbar degenerative disc disease with right nerve root irritation and advised that appellant should stay

[1] The record indicates that by letter dated May 22, 1996, the employing establishment proposed to terminate appellant, effective June 28, 1996.

[2] This evidence also includes unsigned medical reports dated July 6, 13 and 17, 1997 purporting to be translations from Hebrew.

off work until September 1, 1997 due to his back condition. In an August 26, 1997 treatment note, Dr. Gwinn noted mild abnormalities on electromyography that was suggestive but not diagnostic of right S1 nerve root irritation and advised that appellant was "not capable of returning to his regular work." In a decision dated January 8 and finalized January 9, 1998, an Office hearing representative affirmed the prior decision. The instant appeal follows.

Section 8106(c)(2) of the Federal Employees' Compensation Act[3] provides in pertinent part, "A partially disabled employee who ... refuses or neglects to work after suitable work is offered ... is not entitled to compensation."[4] 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.[5]

In the present case, the record reflects that on April 3, 1997, Dr. Montgomery approved the offered position, and on May 20, 1997 Dr. Gwinn advised that appellant could perform the job duties. The Board therefore finds that the medical evidence of record establishes that, at the time the job offer was made, appellant was capable of performing the modified position.[6]

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 give appellant an opportunity to accept or provide reasons for declining the position,[7] and the record in this case indicates that the Office properly followed the procedural requirements. By letter dated June 5, 1997, the Office advised appellant that a partially disabled employee who refused suitable work was not entitled to compensation, that the offered position had been found suitable, and allotted him 30 days to either accept or provide reasons for refusing the position. By letter dated June 4, 1997, appellant stated that he did not like the hours offered. By letter dated July 16, 1997, the Office advised appellant that the reason given for not accepting the job offer was unacceptable. He was given an additional 15 days in which to respond, and in a July 29, 1997 letter, responded that he could not desecrate the Sabbath. There is no evidence of a procedural defect in this case as the Office provided appellant with proper notice. The record, therefore, establishes that appellant was offered a suitable position by the employing establishment and such offer was refused. Under 5 U.S.C. § 8106 his compensation was properly terminated on August 6, 1997.

Given that the Office has shown that the limited-duty position offered to appellant was suitable based on his work restrictions at that time, the burden then shifted to appellant to show that his refusal to work in that position was justified.[8] Subsequent to the termination, appellant

[3] 5 U.S.C. §§ 8101-8193.

[4] 5 U.S.C. § 8106(c)(2).

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

[6] *See John E. Lemker*, 45 ECAB 258 (1993).

[7] *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*,43 ECAB 818 (1992).

[8] *See Henry P. Gilmore*, 46 ECAB 709 (1995).

submitted a July 24, 1997 report from an Israeli physician who indicated that he could not work from June 22 to July 25, 1997. This report, however, provides no explanation for this conclusion and, therefore, is not probative regarding appellant's ability to perform the offered position. Likewise, Dr. Gwinn's reports dated July 30 and August 26, 1997 provide no information regarding appellant's ability to perform the limited-duty position. As appellant presented no rationalized evidence supporting his refusal of the modified position, he failed to demonstrate that the termination of compensation on August 6, 1997 for refusal of suitable work was not justified.[9]

The decisions of the Office of Workers' Compensation Programs dated January 9, 1998 and August 6, 1997 are hereby affirmed.

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

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

[9] Regarding appellant's recurrence claim, the Board notes that section 8106(c) serves as a bar to receipt of further compensation under section 8107 of the Act for a disability arising from the accepted employment injury. 5 U.S.C. §§ 8106-8107; *see Merlind K. Cannon*, 46 ECAB 581 (1995).