U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES ALSTON and U.S. POSTAL SERVICE,
POST OFFICE, New York, N.Y.

Docket No. 98-34; Submitted on the Record;
Issued December 10, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective April 28, 1996, on the grounds that he refused an offer of suitable work.

On March 6, 1994 appellant, then a 50-year-old tractor trailer driver, injured his lower back while exiting his vehicle, aggravating a previous employment injury. He filed a claim for benefits based on a recurrence of his lower back disability, which the Office accepted for low back pain. Appellant was paid compensation by the Office for temporary total disability for appropriate periods and placed on the periodic rolls. He has not returned to work since the March 1994 work injury.

In a report dated March 8, 1994, Dr. Roman Sorin, a specialist in physical medicine and rehabilitation, indicated that he was currently treating appellant for continuous lower back pain caused by a herniated disc at L4-5. Dr. Sorin stated that appellant required continuous physical therapy.

In order to clarify appellant's current condition, the Office scheduled a second opinion examination for appellant with Dr. Arthur L. Eisenstein, a Board-certified orthopedic surgeon, for January 5, 1995. In a report issued on the date of examination, Dr. Eisenstein stated that appellant underwent a magnetic resonance imaging (MRI) scan on May 27, 1993 which indicated a posterior disc herniation at L4-5. He noted that appellant's neurological examination was within normal limits. Dr. Eisenstein stated that appellant's March 1994 work injury permanently aggravated a preexisting back condition and that he was unable to return to his regular duty at work. He stated that he anticipated that significant improvement in appellant's symptomatology would occur and that it was unlikely to resolve completely.

Dr. Eisenstein further stated:

> "At the present time, [appellant] cannot perform any of the following activities kneeling, standing, bending, twisting, reaching or lifting. Therefore, it is felt that [appellant] is totally disabled. There are no limitations of fine motor movement of the upper extremities, however. [Appellant] can perform repetitive movement of the wrist and elbow. However, because he cannot sit for prolonged periods of time, he is incapable of performing even sedentary occupation at the present time."

In a report dated June 6, 1995, Dr. Sorin stated that, during his June 1, 1995 examination of appellant, he was not able to sit or stand in one position for more than 20 or 30 minutes. He noted that appellant was always trying to achieve a comfortable position when he was sitting down, but was unable to sit straight. Dr. Sorin related that appellant complained of constant pain in his lower back and that this was the primary reason he was unable to recommend a return to work for more than two hours per day. He stated that he had recommended surgery, but that appellant consistently rejected this option. Dr. Sorin reiterated that appellant was totally disabled from performing his work duties.

In a work capacity evaluation dated June 1, 1995, Dr. Sorin indicated that with further therapy, appellant might eventually be able to return to work for less than two hours per day, but should be restricted to limited kneeling, standing, bending, twisting, reaching, lifting, pushing, pulling, prolonged walking and sitting in the same position. He advised that the date appellant was able to return to some form of employment would be determined by his course of therapy.

In a memorandum dated August 4, 1995, the Office invalidated Dr. Eisenstein's opinion, stating that it was equivocal and not rationalized.

The Office scheduled another second opinion examination for appellant with Dr. Milton Smith, a Board-certified pediatrician and a specialist in orthopedic surgery, for September 8, 1995. In a report issued on the date of examination, Dr. Smith stated that, based on his review of medical records and his examination, appellant had a moderate disability which was an aggravation of a preexisting condition. He advised that appellant was able to work light duty with no lifting, bending, twisting or standing for long periods. In addition, Dr. Smith completed a work restriction evaluation form on September 8, 1995, in which he indicated appellant was currently capable of working eight hours per day, with no bending, twisting or standing for prolonged periods and no limitations in the fine motor movements of the upper extremities. He restricted appellant from heavy lifting but indicated he could perform occasional lifting up to 15 pounds, in addition to repetitive motions of the wrist and elbow.

By letter dated March 1, 1996, the employing establishment offered appellant a limited-duty job as a dispatching clerk based on the restrictions outlined by Dr. Smith. Appellant rejected the offer on March 19, 1996, stating that he was medically unable to accept this position because he was permanently and totally disabled. In a letter dated March 13, 1996, appellant's attorney advised the employing establishment that appellant was medically unable to perform the offered job based on the recommendations of Drs. Sorin and Shlomo Piontkowski, a Board-certified orthopedic surgeon. Accompanying counsel's letter was a January 29, 1996

work restriction evaluation from Dr. Sorin, in which he restricted appellant from lifting, standing, squatting, climbing, kneeling and twisting, and permitted intermittent sitting for two hours and intermittent walking and standing for one hour. He also prohibited appellant from working an eight-hour day.

By letter dated March 19, 1996, the Office advised appellant that it had been informed by the employing establishment that he had refused its offer of suitable employment consistent with the physical limitations imposed by his injury. The Office indicated that the job remained open and that he had 30 days to either accept the job or provide a reasonable, acceptable explanation for refusing the offer. The Office stated that if appellant refused the job or failed to report to work within 30 days without reasonable cause, it would terminate his compensation pursuant to 5 U.S.C. § 8106(c)(2).[1]

By decision dated April 22, 1996, the Office, stating that Dr. Smith's opinion representing the weight of the opinion, found that appellant was not entitled to compensation benefits, effective April 28, 1996, on the grounds that he had refused to accept a suitable job offer.

By brief dated April 2, 1997 and received by the Office April 15, 1997, appellant's attorney requested reconsideration. Counsel contended there was a conflict in the medical evidence and that therefore the Office erred by basing its decision on the medical report submitted by the second opinion specialist instead of sending appellant to an impartial, referee medical specialist pursuant to section 8123(a). Accompanying the brief was a July 2, 1996 report from Dr. Sorin and October 10, 1995 and August 29, 1996 reports from Dr. Piontkowski.[2] In his report, Dr. Sorin stated that appellant's condition had not improved and was deteriorating. He advised that he had recently reevaluated appellant and performed an MRI scan on appellant dated June 21, 1996 that revealed diffused herniated L4-5 nucleus pulposus extending into the thecal sac and L5 nerve roots with further progression indicated. Dr. Sorin stated that appellant also underwent an electromyogram (EMG) on June 28, 1996 which revealed L4-5 radiculopathy. He opined that appellant's condition was permanent and progressive despite intensive physical therapy and he indicated the need for surgical intervention. Dr. Sorin concluded that appellant was totally disabled at the present time and should avoid prolonged standing, walking and sitting with absolutely no lifting, twisting, reaching, kneeling, pushing, pulling and bending.

In his October 10, 1995 report, Dr. Piontkowski reiterated the diagnosis of herniated disc at L4-5, and stated that appellant had signs compatible with lower back derangement and sciatica. He opined that appellant remained totally disabled from any kind of gainful employment. In his August 29, 1996 report, Dr. Piontkowski advised that appellant continued to have low back pain with radiation of pain to his lower extremities with spasms. He stated that on examination he found appellant to have severe restrictions in the lumbar region on lateral flexion and flexion extension and weakness with spasms and pain. Dr. Piontkowski opined that

[1] 5 U.S.C. § 8106(c)(2).

[2] Counsel also attached the January 5, 1995 report of Dr. Eisenstein, which, he contended, supported appellant's claim that he continued to suffer residual disability from his March 6, 1994 employment injury.

appellant definitely remained totally disabled from any type of work that would involve lifting, pushing, pulling, climbing stairs, bending or twisting and kneeling. He noted that appellant could sit for no longer than 1 hour at a time without having to get up and stretch, and did not think appellant could stand for more than approximately 30 to 45 minutes at a time without having to either sit or lie down. Dr. Piontkowski absolutely ruled out under any circumstances appellant being able to work an eight-hour job. He concluded that appellant continued to be totally disabled from his former employment and had reached maximum medical improvement, with conservative treatment. Dr. Piontkowski stated that he did not expect appellant to improve unless he received more aggressive treatment such as epidural injection or surgery.

By letter dated April 25, 1997, the Office advised appellant that it had determined a conflict existed in the medical evidence between the opinion of Dr. Sorin, appellant's treating physician, and the opinion of Dr. Eisenstein[3] as to whether appellant could perform the vehicle dispatcher job offered by the employing establishment, and referred appellant for a referee medical examination with Dr. Nate Bondi, a Board-certified orthopedic surgeon, pursuant to section 8123(a).[4]

In a report dated May 20, 1997, Dr. Bondi, after reviewing the statement of accepted facts and appellant's medical records, stated his findings on examination and concluded that appellant had absolutely no objective findings to substantiate persistent functional complaints. He advised that, although appellant had undergone diagnostic tests revealing certain abnormalities, his physical examination did not corroborate these radiological and electrical findings. Dr. Bondi concluded:

> "Based on physical examination, I believe that [appellant] can work a normal eight[-]hour day as to his previous employment; however, if the [employing establishment] feels that a restriction should be given to [appellant] based on the results of his studies, then his job duties should be adjusted to correspond with physical limitations. Under these circumstances, he can work an eight[-]hour day but with only intermittent bending, twisting and standing for short periods of time. I believe that [appellant] can lift up to 20 pounds on occasion."

By decision dated July 11, 1997, the Office found that, based on Dr. Bondi's referee medical opinion which represented the weight of the medical evidence, appellant was able to perform the suitable job of vehicle dispatcher offered to him by the employing establishment. The Office therefore denied appellant's request for reconsideration and affirmed the April 22, 1996 decision.

The Board finds that the Office properly terminated appellant's compensation benefits effective April 28, 1996, on the grounds that he refused an offer of suitable work.

---

[3] This reference to Dr. Eisenstein was evidently a misprint, as the Office had previously invalidated his opinion. The Office presumably was referring to Dr. Smith, on whose opinion it relied in its April 22, 1996 termination decision.

[4] 5 U.S.C. § 8123(a).

Under section 8106(c)(2) of the Federal Employees' Compensation Act[5] the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[6] 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,[7] 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.[8] To justify termination, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[9]

The initial question in this case is whether the Office properly determined that the position was suitable. The Board finds that the weight of the medical evidence establishes that the position was within appellant's physical limitations. Dr. Bondi, an orthopedic surgeon and the referee medical examiner found that appellant could work a normal eight-hour day at his previous employment so long as his job duties were adjusted, consistent with his physical restrictions; *e.g.,* intermittent bending, twisting, and standing for short periods of time and occasional lifting of up to 20 pounds. The Office properly found that the limited-duty position of vehicle dispatcher offered by the employing establishment was within these restrictions. The offered position therefore appears to be consistent with these restrictions.

A review of the above evidence indicates that there is substantial medical evidence to support a finding that the offered position was within appellant's physical limitations. The weight of the medical evidence, as represented by Dr. Bondi's referee medical opinion, establishes that the position offered was within appellant's physical limitations.

The Board has held that when there exists opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist to resolve the conflict of medical opinion, the opinion of such specialist, if sufficiently well rationalized and based upon a proper medical background must be given special weight.[10]

The determination of whether an employee is physically capable of performing the job is a medical question that must be resolved by medical evidence.[11] The weight of the medical evidence in this case establishes that appellant was capable of performing the position of mail

---

[5] 5 U.S.C. §§ 8101-8193.

[6] *Patrick A. Santucci*, 40 ECAB 151 (1988); *Donald M. Parker*, 39 ECAB 289 (1987).

[7] The Board notes that the Office was paying compensation based upon submission of Forms CA-8 following appellant's return to work, and as such, appellant maintained the burden of establishing entitlement to continuing disability which was related to the employment injury; *see Donald Leroy Ballard*, 43 ECAB 876 (1992).

[8] 20 C.F.R. § 10.124(c); *see also Catherine G. Hammond*, 41 ECAB 375 (1990).

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

[10] *James P. Robert,* 31 ECAB 1010 (1980).

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

processor. The Board finds that the Office properly found that Dr. Bondi's referee opinion was sufficiently probative, rationalized and based upon a proper factual background, and that it therefore constituted sufficient medical rationale to support the Office's April 28, 1996 decision terminating appellant's compensation. Although appellant's attorney contended that he was medically unable to perform the offered job based on the opinions of Drs. Sorin and Piontkowski, the weight of the medical evidence, as represented by Dr. Bondi's May 20, 1996 report and work capacity evaluation, indicates that the position offered was consistent with appellant's physical limitations. Thus, there was insufficient support for appellant's stated reasons in declining the job offer. Accordingly, the refusal of the job offer therefore cannot be deemed reasonable or justified, and the Office properly terminated appellant's compensation. Accordingly, the Board affirms the July 11, 1997 decision of the Office hearing representative, affirming the Office's April 22, 1996 termination decision.

Accordingly, the decision of the Office of Workers' Compensation Programs dated July 11, 1997 is affirmed.

Dated, Washington, D.C.
December 10, 1999

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member