U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CURTIS R. PINCKNEY and U.S. POSTAL SERVICE,
POST OFFICE, Washington, DC

Docket No. 98-307; Submitted on the Record;
Issued December 15, 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 monetary compensation entitlement under 5 U.S.C. § 8106(c)(2) on the grounds that he refused an offer of suitable work.

The Office accepted that on January 26, 1993 appellant sustained bilateral hip contusions, a right arm contusion, lumbar muscular strain and a herniated nucleus pulposus at C4-5 after he was pinned between an APC and a hamper. He received appropriate compensation benefits and on March 23, 1993 Dr. Eric G. Dawson, a Board-certified orthopedic surgeon, completed a Form CA-20 attending physician's report indicating that appellant was partially disabled beginning March 22, 1993 and was able to resume light work that date. Dr. Dawson remarked that appellant could attempt to return to work 8 hours per day, lifting up to 50 pounds but no greater on an intermittent basis.

By report dated April 20, 1993, Dr. Dawson and Dr. Hampton J. Jackson, a Board-certified orthopedic surgeon, opined that if appellant could perform lifting up to 10 pounds as well as intermittent lifting up to 20 pounds, it would be acceptable on a 4-hour per day basis. On June 18, 1993 Drs. Dawson and Jackson noted appellant's work restrictions as no bending, stooping, pulling, pushing or twisting and no lifting greater than 10 pounds. The physicians also indicated that appellant could not stand for more that 20 minutes per occasion, and was only able to work 4 hours per day. On December 17, 1993 Drs. Dawson and Jackson recommended vocational rehabilitation to help determine suitable employment. The above-mentioned work restrictions were reiterated by report date March 16, 1994. On April 15, 1994 Drs. Dawson and Jackson reiterated the work requirements of no continuous stooping or lifting greater than 10 pounds and no standing greater than 20 minutes.

By report dated August 26, 1994, Drs. Dawson and Jackson indicated that appellant had a lumbar disc rupture as well as nerve root impingement with intermittent exacerbations and noted that they were keeping him on sedentary duties only and the previously enumerated activity

restrictions.[1] On October 28, 1994 Drs. Dawson and Jackson opined that appellant could continue with only very semisedentary activities, and on November 30, 1994 they noted that appellant complained of lumbosacral disc injury with impingement and exacerbations that was likely to continue on a recurrent basis. Drs. Dawson and Jackson opined: "If [appellant] has worsening exacerbations we may have to consider a short rest from work and a possible short course of physical therapy. His activity modifications remain."

The Office determined that a second opinion examination was required and it referred appellant, together with a statement of accepted facts, relevant medical records and questions to be addressed, to Dr. Roger L. Raiford, a Board-certified orthopedic surgeon. By report dated October 21, 1994, Dr. Raiford noted equal and active deep tendon reflexes, no motor or sensory deficits, normal range of motion of the neck and both shoulders, the ability to bend to within six inches of touching his toes and negative straight leg raising. Dr. Raiford noted that magnetic resonance imaging revealed a small central disc herniation at C4-5, degeneration at C5-6 and narrowing at C6-7, and he diagnosed a small central C4-5 disc herniation with degenerative changes and chronic lumbosacral strain. Dr. Raiford opined that appellant could possibly perform some light duty and he recommended vocational rehabilitation. A Form OWCP-5 noted appellant's work restrictions of no lifting more than 10 pounds, no reaching, twisting or prolonged standing and standing or sitting for no more than 2 hours at a time. Dr. Raiford opined that appellant could work eight hours per day light duty.

By report dated January 6, 1995, Dr. Dawson noted appellant's "multiple cervical and lumbar disc and nerve injuries, that is radiculopathies," and opined: "We certainly do not recommend his returning to even light duties and in fact most likely he would be suitable for retirement." By report dated April 19, 1995, Dr. Dawson again noted appellant's "multiple cervical and lumbar disc and nerve injuries," and again opined that returning to light duties was not recommended, but retirement was. Dr. Dawson also recommended avoidance of twisting, bending, stooping, lifting, pushing and pulling, standing or even sitting for prolonged periods of time.

The Office determined that there now existed a conflict in medical opinion evidence between appellant's treating physicians and the second opinion examiner on whether appellant was totally disabled or could work light duty and for how many hours a day. The Office referred appellant, together with a statement of accepted facts, the complete case record and questions to be answered to Dr. David Dorin, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the question of whether appellant could work light duty.

By report dated March 23, 1995, Dr. Dorin reviewed appellant's history, performed a thorough physical examination, and found no abnormality of gait, good leg muscle strength, good range of neck motion, good upper extremity strength without evidence of atrophic changes, no tenderness of the paravertebral muscles, and good range of hip motion without pain or tenderness and without evidence of arthritis. Dr. Dorin noted that a magnetic resonance imaging

[1] The Board notes that a lumbar disc rupture with nerve root impingement was not an accepted condition causally related to appellant's employment but was a subsequently diagnosed problem, and that therefore this condition will not be considered with respect to determining suitability; *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reempoyment: Determining Wage-Earning Capacity*, Chapter 2.814(8)(a) regarding assessing suitability and (8)(d) regarding medical suitability.

scan revealed herniated discs at C5-6 and C6-7,[2] and concluded that "right shoulder, hips and lower back appear to be satisfactory on examination." Dr. Dorin opined that, although appellant could not return to his original work activities, he could do modified type work which does not require lifting more than five pounds and repetitive motion of his back and neck.

Thereafter on February 7, 1996 appellant was referred for vocational rehabilitation. However, by report dated February 28, 1996, Drs. Dawson and Jackson continued to insist that appellant "was obviously not cleared for any work. We do not anticipate his condition to significantly improve, and would be chronic in our estimation." At that time they diagnosed the additional conditions of lumbar disc rupture and lumbar nerve root impingement.

Upon initial vocational rehabilitation assessment the rehabilitation counselor noted that appellant vented feelings of anger and resentment and insisted that he was 100 percent disabled. Thereafter the rehabilitation counselor continued to note appellant's hostile attitude towards testing and reluctance to cooperate with rehabilitation efforts. Rehabilitation action reports noting obstruction were generated documenting that appellant did not appear at scheduled meetings and failed to carry out agreed upon actions. The rehabilitation counselor noted that appellant felt that he was retired from working.

By letter dated October 8, 1996, the Office advised appellant that if he did not cooperate with the rehabilitation counselor, action would be taken to reduce or terminate his compensation benefits. On October 4, 1996 appellant's vocational rehabilitation status was interrupted due to his refusal to cooperate.

By report dated December 13, 1996, Dr. Dawson noted appellant's inoperable lumbar disc rupture and neurological impingement of the L5 nerve root, and he opined that appellant was "to avoid twisting, stooping, bending or standing for greater than 20 minutes in his activities of daily living or any employment activities. He is directed not to stand for greater than 20 minutes or lift greater than 10 pounds per occasion on a regular basis."

Rehabilitation efforts were reinstituted and discussion of sedentary positions and occupations was begun.

On January 20, 1997 Dr. Dawson completed a Form OWCP-5 indicating that appellant could work 4 hours per day with no stooping, pulling or pushing, no lifting over 10 pounds on a regular basis or 20 pounds intermittently and no standing for more than 10 minutes or sitting for more than 30 minutes without a break.

By report dated January 31, 1997, the rehabilitation counselor closed appellant's vocational rehabilitation file on the recommendation of the rehabilitation specialist finding that appellant had an unrealistic attitude about the rehabilitation process. Sedentary jobs were identified which met appellant's medical restrictions, however a loss of wage-earning capacity determination was not done.

On May 30, 1997 the employing establishment offered appellant a reemployment position as a modified mailhandler, which was a sedentary position which required hand

[2] These were conditions also not accepted by the Office as being employment related, which occurred after the employment injury.

stamping oversize pieces of mail as well as facing and traying mail for processing. It was specified that this position did not require twisting, stooping, bending or pulling, did not involve standing for more than 10 minutes or sitting for more than 30 minutes without a break, did not require lifting more than 10 pounds continuously or 20 pounds intermittently and was for a 4 hour per day tour of duty. It advised that the job offer was effective June 7, 1997 and would remain open until accepted or ruled unsuitable.

By letter dated June 25, 1997, the Office advised appellant that it had determined that the modified position offered him was suitable to his partially disabled condition, according to the medical documentation of record, and that he had 30 days within which to accept the position or to provide reasons why he was not accepting it. It noted that if appellant failed to accept the position, any explanation or evidence which he provided would be considered prior to determining whether or not his reasons for refusing the job were justified. The Office also advised appellant of the consequences for refusal of a suitable position under 5 U.S.C. § 8106(c)(2).

On July 23, 1997 a form report from Dr. Dawson was completed, indicating that appellant was disabled due to lumbar disc rupture and lumbar nerve radiculopathy, and reiterating the previously articulated activity restrictions.

By letter dated July 25, 1997, the Office advised appellant that no answer to their June 25, 1997 letter had been received and it gave appellant until August 9, 1997 to notify the Office of his intent to accept or decline the offered position.

No response from appellant was forthcoming.

By decision dated August 21, 1997, the Office terminated appellant's entitlement to monetary compensation benefits finding that he had refused an offer of suitable work. The Office found that appellant had failed to respond to the offer of suitable work with any justified reasons for refusal, and that therefore he forfeited any entitlement to continuing wage-loss compensation. The Office also noted that the offered position was not only within the work restrictions specified by the impartial medical examiner but was within the restrictions specified by appellant's own treating physician, Dr. Dawson, as noted on his January 20, 1997 OWCP-5 form.

The Board finds that the Office improperly terminated appellant's compensation entitlement on the grounds that he refused suitable work.

Section 8106(c)(2) of the Federal Employees' Compensation Act states that a partially disabled employee who refuses to seek suitable work, or refuses or neglects to work after suitable work is offered to, procured by, or secured for him is not entitled to compensation.[3] The Office has authority under this section to terminate compensation for any partially disabled employee who refuses suitable work when it is offered. Before compensation can be terminated, however, the Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work, and has the burden of establishing that a position has been offered within the employee's work restrictions, setting

[3] 5 U.S.C. § 8106(c)(2).

forth the specific job requirements of the position.[4] In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused by appellant was suitable, and must inform appellant of the consequences of refusal to accept such employment.[5] Thereafter, an employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal 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 compensation entitlement.[6] The Office, however, did not meet its burden of proof in this case.

In the instant case, the initial question is whether the Office properly determined that the position of modified mailhandler was suitable. The Board finds that the offered position of modified mailhandler exceeded appellant's work restrictions as determined by the impartial medical examiner, Dr. Dorin. Dr. Raiford, the Office second opinion referral physician, indicated on October 21, 1994 that appellant could perform light duty 8 hours per day with no lifting more than 10 pounds, no reaching, twisting or prolonged standing, and with standing or sitting for no more than 2 hours at a time. The physical requirements of the offered sedentary position were within the work restrictions detailed by Dr. Raiford. Appellant's treating physicians, Drs. Dawson and Jackson, indicated as early as April 20, 1993 and reiterated multiple times in 1994 that appellant could work for 4 hours per day lifting up to 10 pounds, with intermittent lifting of up to 20 pounds, but with restricted bending, stooping, pushing, pulling and twisting. The physical requirements of the offered sedentary position were also within these work restrictions determined by appellant's treating physicians. However, in resolution of a conflict in medical opinion evidence between Drs. Raiford and Dawson and Jackson, the impartial medical examiner, Dr. Dorin, found that appellant could do modified type work which did not require lifting more than five pounds or repetitive motion of his back or neck. The physical requirements of the offered sedentary position were not within these work restrictions as detailed by Dr. Dorin, as the offered position required lifting of 10 pounds continuously and 20 pounds intermittently. As the impartial medical examiner's report constitutes the weight of the medical evidence of record on appellant's restrictions, the offered position of modified mailhandler does not conform to the requirements set forth by the weight of the medical evidence and hence is not suitable for appellant's partially disabled condition. Therefore, the Office improperly terminated appellant's compensation entitlement.

Furthermore, Drs. Dawson and Jackson insisted that appellant was not cleared for work and that they did not recommend his returning to light duties and, according to multiple form reports submitted prior to the Office's termination decision, they diagnosed the additional conditions of lumbar disc rupture and lumbar nerve radiculopathy. The Board notes that in determining whether an offered position is suitable, the Office must ascertain whether the medical reports of record document a condition which has arisen since the compensable injury, and whether this condition disables appellant from the offered job.[7] If this is the case, the

[4] *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

[5] *Glen L. Sinclair*, 36 ECAB 664 (1985); *see also Maggie L. Moore*, 42 ECAB 484 (1991) *reaff'd on recon.*, 43 ECAB 818 (1992).

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

[7] Federal (FECA) Procedure Manual, Part -2, Claims, *Reemployment: Determining Wage-Earning Capacity*,

offered job will be considered to be unsuitable, even if the subsequently-acquired condition is not work related. The Board finds no evidence in the record to support that the Office considered whether appellant's diagnosed lumbar disc rupture or lumbar nerve radiculopathy disabled him from the offered position of modified mailhandler.

Consequently, the Office improperly invoked 5 U.S.C. § 8106(c)(2) and terminated appellant's entitlement to monetary compensation benefits based upon his refusal of a position that exceeded his work restrictions as set forth by the weight of the medical evidence of record, and which may not have been suitable considering his post-injury diagnosed conditions of lumbar disc rupture and lumbar radiculopathy.

Accordingly, the decision of the Office of Workers' Compensation Programs dated August 21, 1997 is hereby reversed.

Dated, Washington, D.C.
December 15, 1999

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member

Chapter 2-814(b)(4)(December 1993).