U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES L. GUGLIELMO and U.S. POSTAL SERVICE,
POST OFFICE, Levittown, NY

Docket No. 98-540; Submitted on the Record;
Issued December 16, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

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 May 13, 1988 appellant, then a 58-year-old mailhandler, sustained an employment-related low back strain. He returned to light duty the following day and sustained a recurrence of disability on August 29, 1988. He returned to light duty on June 1, 1990, stopped work that day and has not returned. In December 1990 he refused a light-duty job offer and, following further development, was placed on the periodic rolls on January 15, 1992. The Office continued to develop the claim, and on August 18, 1997 referred appellant to Dr. Larry Rosenbaum for a second opinion evaluation. Finding that a conflict in the medical opinion existed between the opinions of Dr. Rosenbaum and Dr. Martin A. Lehman, appellant's treating physician, regarding whether appellant could return to work, on April 28, 1995, the Office referred him to Dr. Charles A. Pitman, an impartial medical examiner, to resolve the conflict.[1]

In a report dated May 19, 1995, Dr. Pitman advised that appellant could perform sedentary work with restrictions on his physical activity and submitted a work capacity evaluation dated June 5, 1995 in which he advised that appellant could work six hours per day with a lifting restriction of 10 pounds.

By letter dated July 5, 1995, the employing establishment offered appellant a limited-duty position as modified distribution clerk within the restrictions provided by Dr. Pitman. By

[1] All three physicians are Board-certified orthopedic surgeons. Both Dr. Rosenbaum and Dr. Pitman were provided with the medical record, a statement of accepted facts and a set of questions.

letter dated November 13, 1995, the Office advised appellant that it reviewed the job offer and found it medically suitable. Appellant was advised that if he refused the job without reasonable cause, his compensation benefits would be terminated. On December 5, 1995 appellant refused the offer, stating that it was based on the advice of his physician.

By letter dated December 15, 1995, the Office advised appellant that his reason for not accepting the job was insufficient and advised him to report to work within 15 days or his benefits would be terminated.

By decision dated January 11, 1996, the Office terminated appellant's wage-loss compensation, effective February 4, 1996, on the grounds that he declined an offer of suitable work. On January 9, 1997 appellant, through counsel, requested reconsideration and submitted additional evidence. By decision dated April 4, 1997, the Office denied modification of the January 11, 1996 decision. The instant appeal follows.[2]

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]

The record in this case reflects that the limited-duty distribution clerk position offered to appellant conformed to the restrictions provided by Dr. Pitman who advised that appellant could work six hours per day with restrictions. In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[6] Dr. Pitman provided such an opinion. The medical evidence of record thus establishes that, at the time the job offer was made, appellant was capable of performing the modified position.[7]

[2] The Board notes that subsequent to appellant's appeal to the Board on November 19, 1997, the Office issued a decision dated November 21, 1997 in which appellant's request for reconsideration was denied. The Board and the Office may not have concurrent jurisdiction over the same issue in the same case. *Douglas E. Billings*, 41 ECAB 880 (1990). As the November 21, 1997 decision was a denial of a request for reconsideration of the prior decision over which the Board has jurisdiction, the decision addressed the same issues that would be addressed by the Board on appeal. The November 21, 1997 decision therefore is null and void.

[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 Kathryn Haggerty*, 45 ECAB 383 (1994); *Edward E. Wright*, 43 ECAB 702 (1992).

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

Office procedures provide that acceptable reasons for refusing an offered job include withdrawal of the offer and medical evidence of inability to perform the position or to travel to the job. In the instant case, while appellant submitted numerous additional reports from Dr. Lehman, both before and after the January 11, 1996 decision, he merely reiterated his previous conclusion that had established the conflict in medical opinion. The Board, therefore, finds appellant's reasons for refusing the receptionist position unacceptable.

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,[8] and the record in this case indicates that the Office properly followed the procedural requirements. By letter dated November 13, 1995, the Office advised him 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 December 5, 1995, appellant stated that his current physical condition prevented him from employment, based on the opinion of Dr. Lehman. By letter dated December 15, 1995, the Office advised appellant that the reason given for not accepting the job offer was unacceptable, noting no additional medical evidence was submitted. He was given an additional 15 days in which to respond. There is no evidence of a procedural defect in this case as the Office provided appellant with proper notice. He was offered a suitable position by the employing establishment and such offer was refused. Thus, under 5 U.S.C. § 8106 his compensation was properly terminated, effective February 4, 1996.

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

The decision of the Office of Workers' Compensation Programs dated April 4, 1997 is hereby affirmed.

Dated, Washington, D.C.
December 16, 1999

George E. Rivers
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member