U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MAURICE A. BURNEY and U.S. POSTAL SERVICE,
POST OFFICE, Gulfport, Miss.

Docket No. 97-1068; Submitted on the Record;
Issued February 5, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation on the grounds that he refused an offer of suitable work and whether the Office properly denied appellant's request for an oral hearing.

On March 17, 1994 appellant, then a 25-year-old temporary carrier, filed a notice of traumatic injury following a motor vehicle accident in which appellant was thrown from his mail truck. The Office accepted the claim for a head contusion. Appellant was discharged from the hospital on March 22, 1994 and was released by his physician, Dr. Harry A. Danielson, a neurological surgeon, to return to work on May 2, 1994.

However, appellant did not return to work and was terminated on June 15, 1994 because he was at fault for the accident. Subsequently, the Office accepted the conditions of intracerebral hematomas and a seizure condition as resulting from the accident and paid appropriate compensation.

On April 28, 1995 the Office sent appellant to Dr. John McCloskey, Board-certified in neurological surgery, for a second opinion evaluation. Based on his report dated May 4, 1995, the Office conducted two telephone conferences with appellant and the employing establishment to determine whether light-duty work was available for appellant within the restrictions imposed by Dr. McCloskey.

A December 7, 1995 memorandum to the record indicated that the employing establishment offered the job of temporary manual distribution clerk, whose duties were within the lifting limitations set by Dr. McCloskey. Appellant asked why the position was only temporary and was told that his previous job had been a temporary one-year appointment. Appellant stated that Dr. Danielson had not released him for work. The claims examiner explained that Dr. Danielson had not responded to the Office's request that he comment on Dr. McCloskey's report and limitations.

The claims examiner also explained that appellant would receive a memorandum of the conference containing the job offer, which was available December 23, 1995, and a letter advising appellant that he had 30 days to accept the offer and stating the consequences if he refused the offer. She added that appellant could take the job offer to Dr. Danielson for his comments if he wished.

On December 7, 1995 the Office sent appellant a letter as stated in the telephone conference. A December 7, 1995 note from Dr. Danielson stated that he "definitely" wanted to review appellant's job description before he returned to work.

A January 26, 1996 memorandum of a telephone call from appellant indicated that he had reported for duty and was sent for physical screening, but that the health unit needed a form from the employing establishment, which was not yet received. Appellant added that he could not report for work without the physical examination.

An Office memorandum of a telephone call from the employing establishment indicated that appellant had failed to report for a preemployment physical scheduled for January 18, 1996. On February 13, 1996 the Office terminated appellant's compensation on the grounds that he had refused an offer of suitable work. The Office noted that appellant had not contacted the Office or his employer to accept the job or to explain why he could not return to work.

On February 26, 1996 appellant wrote to the Office, stating that he had accepted the offer, that he had reported to the employing establishment's clinic on January 12, 1996 but had been told he needed more paperwork, that he had tried to obtain the necessary forms but his telephone calls were not returned, that the job was available on February 9, 1996 and the employing establishment told him he would be contacted, and that no one had called him about the job since. Appellant added that the lack of communication was done intentionally so the employing establishment had a way of showing that he had refused the job offer. Appellant submitted a document accepting the "rehabilitation position" on February 9, 1996.

On March 19, 1996 the Office informed appellant that the employing establishment had reviewed his letter and disputed his statements because it had no paperwork showing appellant had accepted the job and no record of appellant attending the January 18, 1996 examination or attempting to contact the employing establishment.

On December 10, 1996 appellant requested reconsideration and reiterated the statements in his February 26, 1996 letter. Appellant added that he wanted to make a career with the employing establishment. On January 15, 1997 the Office denied appellant's request on the grounds that the evidence submitted in support of reconsideration was irrelevant and immaterial and therefore insufficient to warrant review of the prior decision.

On January 18, 1997 appellant requested an oral hearing, which was denied on March 12, 1997 on the grounds that appellant had previously requested reconsideration.

The Board finds that the Office properly denied appellant's request for an oral hearing.

The Federal Employees' Compensation Act[1] is unequivocal that a claimant not satisfied with a decision of the Office has a right, upon a timely request, to a hearing before a representative of the Office.[2] The statutory right to a hearing pursuant to section 8124(b)(1) follows an initial decision of the Office.[3] Because subsection (b)(1) is unequivocal on the time limitation for requesting a hearing, a claimant is not entitled to such hearing as a matter of right unless his or her request is made within the requisite 30 days.[4]

The Office's procedures implementing this section of the Act are found in Chapter 2.1601 of the Federal (FECA) Procedure Manual. The manual provides for a preliminary review of a case by an Office hearing representative to determine whether the hearing request is timely and, if not, whether a discretionary hearing should be granted; if the Office declines to grant a discretionary hearing, the claimant will be advised of the reasons.[5] The Board has held that the only limitation on the Office's authority is reasonableness,[6] and that abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from known facts.[7]

In this case, appellant requested an oral hearing on January 18, 1997 following the January 15, 1997 denial of his request for reconsideration of the February 13, 1996 decision terminating his compensation. Attached to that decision was a statement outlining appellant's options regarding his appeal rights. The statement is clear that appellant may choose a hearing, reconsideration, or Board review. Equally clear is the following sentence: "A request for a hearing must be made before any request for reconsideration...." Inasmuch as appellant had requested reconsideration of the February 13, 1996 decision, he is not now entitled to an oral hearing.

Nonetheless, the Office has the discretion to grant a hearing, and must exercise that discretion.[8] Here, the Office informed appellant in its March 12, 1997 decision that it had considered the timeliness matter in relation to the issue involved and denied appellant's hearing request on the basis that additional evidence on the issue of whether appellant refused an offer of suitable work could be fully considered through a request for reconsideration.

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[1] 5 U.S.C. §§ 8101-8193 (1974).

[2] 5 U.S.C. § 8124(b); *Joe Brewer*, 48 ECAB ___ (Docket No. 95-603, issued March 21, 1997); *Coral Falcon*, 43 ECAB 915, 917 (1992)

[3] *Eileen A. Nelson*, 46 ECAB 377, 379 (1994); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.10(b) (July 1993).

[4] W*illiam F. Osborne*, 46 ECAB 198, 202 (1994).

[5] *Belinda J. Lewis*, 43 ECAB 552, 558 (1992); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4.b.(3) (October 1992).

[6] *Wanda L. Campbell*, 44 ECAB 633, 640 (1993).

[7] *Wilson L. Clow*, 44 ECAB 157, 175 (1992).

[8] *Frederick D. Richardson*, 45 ECAB 454, 465 (1994).

In this case, nothing in the record indicates that the Office committed any act in denying appellant's hearing request which could be found to be an abuse of discretion. Further, appellant was advised that he could request reconsideration and submit evidence in support of his assertions that he did not refuse the job offer. Finally, appellant has offered no explanation for the untimely request or any argument to justify further discretionary review by the Office.[9] Thus, the Board finds that the Office properly denied appellant's request for a hearing.

The Board also finds that the Office properly terminated appellant's compensation because he refused an offer of suitable work.

Once the Office accepts a claim it has the burden of proving that the employee's disability has ceased or lessened before it may terminate or modify compensation benefits.[10] Section 8106(c)(2) of the Act[11] provides that the Office may terminate the compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[12] The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.[13]

The implementing regulation[14] provides that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee 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 entitlement to compensation is terminated.[15] To justify termination, the Office must show that the work offered was suitable and that the claimant was informed of the consequences of his refusal to accept such employment.[16]

[9] *Cf. Brian R. Leonard*, 43 ECAB 255, 258 (1992) (finding that the Office abused its discretion by failing to consider appellant's explanation regarding the untimely filing of his hearing request).

[10] *Karen L. Mayewski*, 45 ECAB 219, 221 (1993); *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

[11] 5 U.S.C. § 8106(c)(2).

[12] *Camillo R. DeArcangelis*, 42 ECAB 941, 943 (1991).

[13] *Stephen R. Lubin*, 43 ECAB 564, 573 (1992).

[14] 20 C.F.R. § 10.124(c).

[15] *John E. Lemker*, 45 ECAB 258, 263 (1993).

[16] *Maggie L. Moore*, 42 ECAB 484, 487 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

Office procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.[17] Unacceptable reasons include relocation for personal desire or financial gain, lack of promotion potential or job security.[18] Further, if a claimant does not respond within 30 days to a notice of proposed termination, the Office will then proceed to terminate compensation.[19]

In this case, appellant was informed of the duties and requirements of the distribution clerk position on December 7, 1995 by both letter and telephone conference. He was permitted 30 days to respond to the offer. The record contains no written response from him during that time. Not until January 26, 1996 did he call the Office and state that he had reported for a physical examination but needed more paperwork for the health unit. The employing establishment later stated that he had failed to report for a physical on January 18, 1996.

Only after his compensation was terminated did appellant inform the Office that he had accepted the job offer, that he had reported to the health clinic on January 12, 1996 and that he had asked the employing establishment to let him know when the necessary paperwork had been processed. The employing establishment stated that there was no record that appellant had accepted the job offer, attended the January 18, 1996 examination or attempted to contact the agency. The Board finds that appellant's explanation for not accepting the offer of suitable work is neither reasonable nor justifiable.[20]

The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by medical evidence.[21] Here, Dr. McCloskey examined appellant on May 4, 1995 and stated that while appellant had "some postconcussion symptoms," he was "very functional" and able to drive, go to school and exercise. Dr. McCloskey completed an OCWP-5 form on May 31, 1995, limiting appellant's lifting to 35 pounds, proscribing climbing, heights, and working around dangerous machinery, but otherwise permitting appellant to work eight hours a day.

In line with these restrictions the Office determined that the offered position was suitable—the lifting requirements were under 30 pounds and the work did not require climbing or involve heights or dangerous machinery. Further, Dr. McCloskey approved the position. While Dr. Danielson stated that he wanted to review the position description, appellant

[17] *C.W. Hopkins*, 47 ECAB 725 (1996); *see Patsy R. Tatum*, 44 ECAB 490, 495 (1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5 (May 1996).

[18] *Arthur C. Reck*, 47 ECAB 339 (1996).

[19] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.8.a. (March 1997).

[20] *See Henry W. Shepherd, III*, 48 ECAB ___ (finding that appellant's compensation was properly terminated after the Office found his reasons for refusing suitable work unacceptable).

[21] *Marilyn D. Polk*, 44 ECAB 673, 680 (1993).

submitted no opinion from him on the suitability of the job. Therefore, the Board finds that appellant had no medical reason for refusing to accept the offer.[22]

Finally, appellant's accusation that the employing establishment would have hired him back just so he could be terminated again is not supported by any evidence in the record. To the contrary, the employing establishment required several months to decide on the availability of a suitable position for appellant, as shown by the August 10, 1995 memorandum of a telephone conference in which appellant participated, and several memoranda of telephone calls indicating that upper management and other agency locations were consulted.

The March 12 and January 15, 1997 and February 13, 1996 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
February 5, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

[22] *See Edward P. Carroll*, 44 ECAB 331, 341 (1992) (finding that appellant's assertion of inability to work is not reasonable grounds for refusing suitable work absent supporting medical evidence).