U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES M. CAMERON and U.S. POSTAL SERVICE,
POST OFFICE, Woburn, Mass.

Docket No. 97-719; Submitted on the Record;
Issued March 29, 1999

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits on the grounds that he refused an offer of suitable work.

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

Appellant filed a claim on October 20, 1988 alleging that he injured his knee in the performance of duty. The Office accepted appellant's claim for torn medial meniscus, arthroscopy and aggravation of degenerative disc disease. The Office entered appellant on the periodic rolls on December 15, 1989. The Office found that the employing establishment offered appellant suitable employment on August 24, 1995 and allowed appellant 30 days to respond. Appellant submitted additional evidence which the Office developed and then allowed appellant an additional 15 days to accepted the position. Appellant declined the position. By decision dated December 26, 1995, the Office terminated appellant's compensation benefits effective January 7, 1996 on the grounds that he refused an offer of suitable work. Appellant requested an oral hearing and by decision dated September 5, 1996, the hearing representative affirmed the Office's December 26, 1995 decision.

It is well settled that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[1] As the Office in this case terminated appellant's compensation under 5 U.S.C. § 8106(c), the Office must establish that appellant refused an offer of suitable work. Section 8106(c) of the Federal Employees' Compensation Act[2] provides that a partially disabled employee who refuses or neglects to work after suitable

[1] *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[2] 5 U.S.C. § 8106(c)(2).

work is offered to, procured by, or secured for the employee is not entitled to compensation. Section 10.124(c) of the applicable regulations[3] provides that an employee who refuses or neglects to work after suitable work has been offered or secure 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 showing before a determination is made with respect to termination of entitlement to compensation. To justify termination of compensation, the office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[4]

In this case, appellant's attending physician, Dr. Scott Masterson, a physician Board-certified in physical medicine and rehabilitation, and Dr. Roger Benoit, a Board-certified orthopedic surgeon, provided a series of reports noting that appellant was totally disabled due to his accepted conditions and recommending that he was capable of performing on computer data processing work at his home.

The Office referred appellant for a second opinion examination by Dr. George Hazel, a Board-certified orthopedic surgeon. In a report dated August 7, 1994, Dr. Hazel noted appellant's history of injury and medical history and concluded that appellant was disabled due to his right knee and lower back conditions. He noted that appellant had part-time employment as a disc jockey and that in this position he could sit, stand and move at will. Dr. Hazel concluded that if the employing establishment could provide appellant with a position with a similar activity level, then appellant could return to work.

The employing establishment constructed a light-duty position. Dr. Hazel reviewed this position and concluded that if the physical requirements of the position were the same as a disc jockey then appellant should be able to perform the duties. The Office requested a supplemental report from Dr. Hazel in which he stated that appellant could have a trial of work for four hours a day with the option to sit, stand and move at will. That he would not be required to maintain one position for more than 30 minutes, that he should be provided with a couch to rest and that appellant should not lift over 10 pounds.

Dr. Masterson submitted a report dated September 13, 1995 in which he stated that appellant could not lift or carry while standing due to his use of crutches, that his sitting tolerance was 15 minutes and that his driving time was limited.

The Office properly found that there was a conflict of medical opinion evidence between appellant's attending physician, Dr. Masterson, who concluded that appellant could not perform the duties of the offered position, and the second opinion physician, Dr. Hazel, who found that appellant was capable of performing the duties of the offered position. Section 8123(a) of the Act,[5] provides, "If there is disagreement between the physician making the examination for the

[3] 20 C.F.R. § 10.124(c).

[4] *Arthur C. Reck*, 47 ECAB 339 (1995).

[5] 5 U.S.C. §§ 8101-8193, 8123(a).

United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

The Office properly referred appellant to Dr. Gary Francke, a Board-certified orthopedic surgeon, for an impartial medical examination. In his report dated November 14, 1995, Dr. Francke noted reviewing the medical records and the statement of accepted facts. He responded to the questions posed by the Office and concluded that appellant continued to experience medical residuals of his accepted knee injury. However, Dr. Francke found that appellant did not have continuing medical residuals related to the accepted aggravation of his back condition. He further stated that appellant was capable of performing the offered limited-duty position.

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] In this case, Dr. Francke's report lacks the necessary medical rationale to be accorded special weight. Dr. Francke did not include any physical findings in support of his conclusions that appellant was capable of performing the offered position. He did not offer any reasoning in support of his opinion and merely stated the conclusion that appellant was capable of performing the duties of the position. Furthermore, Dr. Francke opined that appellant did not have any objective findings supporting that he continued to experience medical residuals of the accepted aggravation of his back condition. In support of this opinion, Dr. Francke stated that objective medical evidence in November 1995 would not establish this manner one way or another and did not cite to any physical findings in support of his conclusion.

As Dr. Francke's report lacked the necessary physical findings and medical rationale to be accorded the weight of the medical evidence, there remains an unresolved conflict of medical opinion evidence in the record and the Office failed to meet its burden of proof to terminate appellant's compensation benefits.

[6] *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

The decisions of the Office of Workers' Compensation Programs dated September 5, 1996 and December 26, 1995 are hereby reversed.

Dated, Washington, D.C.
March 29, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member