U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VINCENT A. PIETRANIELLO and U.S. POSTAL SERVICE,
POST OFFICE, New York, NY

Docket No. 98-981; Submitted on the Record;
Issued November 22, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) 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; (2) whether the Office abused its discretion by refusing to reopen appellant's claim for consideration of the merits; and (3) whether the of Branch of Hearings and Review properly denied appellant's request for an oral hearing on the grounds that he had previously requested reconsideration.

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

Appellant filed a claim alleging that on November 18, 1987 he injured his left knee and ankle in the performance of duty. The Office accepted appellant's claim for torn left medial meniscus on December 14, 1987. The Office also authorized surgery and entered appellant on the periodic rolls. By letter dated April 22, 1996, the Office informed appellant that the employing establishment had a suitable position and allowed appellant 30 days to accept the position or offer his reasons for refusal. Appellant did not respond and by decision dated May 29, 1996, the Office terminated appellant's compensation benefits finding that he refused an offer of suitable work.

Appellant requested a review of the written record on November 25, 1996. The Branch of Hearings and Review denied this request as untimely on December 26, 1996. Appellant requested reconsideration on January 9, 1997. The Office reviewed appellant's claim on the merits and denied modification of its prior decision on April 3, 1997. Appellant requested reconsideration on April 15 and August 18, 1997. The Office refused to reopen appellant's claim for review of the merits on July 17 and September 29, 1997, respectively. Appellant requested an oral hearing on November 10, 1997. The Branch of Hearings and Review denied this request on January 7, 1998 as appellant had previously requested reconsideration.

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 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]

Appellant's attending physician did not submit additional medical evidence after 1993. The Office second opinion physician, Dr. Richard Nottingham, a Board-certified orthopedic surgeon, completed a report on October 23, 1995. Dr. Nottingham reviewed the statement of accepted facts and performed a physical examination. He found that appellant had reached maximum medical improvement. Dr. Nottingham stated that appellant could not perform his full duties as a vehicle maintenance analyst. He stated that appellant could work eight hours a day with unlimited standing, walking and sitting. However, Dr. Nottingham restricted appellant's squatting and climbing. He completed a work restriction evaluation and indicated that appellant could not kneel, bend or squat.

The employing establishment developed a limited-duty position of modified administrative clerk which entailed no bending, kneeling, squatting or climbing. The Office properly found that this position conformed with the physical limitations found by Dr. Nottingham.

The Office informed appellant that it found the position to be suitable and included a copy of the position description in its April 22, 1996 letter mailed to appellant at 151-28 28 Avenue, Flushing, NY 11354.[5]

The employing establishment informed the Office on May 24, 1996 that a certified letter contained the limited-duty job offer and addressed to appellant at 31-11 150 Place, Flushing, NY

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

[2] 5 U.S.C. § 8106(c)(2).

[3] 20 C.F.R. § 10.124(c).

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

[5] The record reflects numerous address changes in the New York area. In an undated letter, received March 6, 1996, appellant advised the Office of his new address at 151-28 28 Ave., Flushing, NY 11354, the address to which the April 22, 1996 notice letter was sent. Appellant noted this address change was effective March 10, 1996.

11354, had been returned unclaimed. The employing establishment noted that a letter sent regular mail to the same address had not been returned.

Appellant did not respond within 30 days and by decision dated May 29, 1996, the Office terminated appellant's compensation benefits as he refused an offer of suitable work. The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits as he refused an offer of suitable work.

Following the Office's May 29, 1996 decision, appellant requested reconsideration on January 7, 1997 and submitted additional evidence. In a letter received by the Office on June 3, 1996, appellant stated that he had fallen and injured himself and that he required surgery as a result of this fall. Appellant submitted a report dated May 6, 1996 from Dr. Baruch Toledano, a Board-certified orthopedic surgeon, diagnosed right elbow fracture dislocation and right scaphoid fracture. He stated that appellant fell off a truck on October 29, 1995, that appellant had undergone two surgeries and had loss of range of motion of his elbow and wrist. Dr. Baruch did not address appellant's ability to perform the light-duty position.

Appellant noted that he received the April 22, 1996 letter on May 17, 1996. He stated that the employing establishment had sent a letter to the wrong address. Appellant listed his correct address as 151-28 28 Avenue, Flushing, NY.

On June 25, 1996 the Office received a note from appellant stating that he could return to regular duty on August 5, 1996. In a note received June 26, 1996, Dr. Rajendra P. Gupta, a Board-certified internist, stated that appellant was doing well and could return to duty as a vehicle maintenance analyst on August 5, 1996. Dr. Gupta did not address appellant's ability to perform the limited-duty position.

Appellant alleged that he did not receive the job offer until after the 30-day limitation in the April 22, 1996 letter due to his change of address. The Office properly found that appellant had previously stated that he received the April 22, 1996 letter, which contained the job offer and that appellant failed to accept the position or medical evidence in support of his allegation that he could not perform the duties of the position.

The Board further finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits on July 17 and September 29, 1997.

Appellant requested reconsideration on April 15, 1997. He alleged that he had not received the limited-duty position from the employing establishment as it was mailed to the wrong address. Appellant alleged that he had informed the Office that he was not refusing the position, but that he required additional surgery. Appellant stated that he returned to full duty on June 24, 1996. Appellant submitted a substantially similar reconsideration request on August 18, 1997.

Section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not

previously considered by the Office.[6] Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without review the merits of the claim.[7]

In support of his reconsideration requests, appellant argued that he had not received the limited-duty job offer from the employing establishment and that he timely responded to the Office's April 22, 1996 letter. The Board notes that appellant had previously made these allegations before the Office at the time of its April 3, 1997 merit decision. As the Office had previously considered appellant's allegations, these allegations are not sufficient to require the Office to reopen appellant's claim for review of the merits. Material which is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening a case.[8]

The Board further finds that the Branch of Hearings and Review did not abuse its discretion by denying appellant's request for an oral hearing.

Appellant requested an oral hearing on November 10, 1997. By decision dated January 7, 1998, the Branch of Hearings and Review denied appellant's request as he had previously requested reconsideration by the Office and as the issue in his case could be addressed through the reconsideration process.

Section 8124(b)(1) of the Act[9] provides as follows:

> "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."

Under this provision of the Act, an appellant is entitled to a timely requested hearing under section 8124(b) only before the Office has reviewed his claim under section 8128(a).[10]

As the Office reviewed appellant's claim through the reconsideration process under section 8128 of the Act, appellant was not entitled to a hearing as a matter of right. The Office, however, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and the Office must exercise this discretionary authority in deciding whether to grant a hearing.

---

[6] 20 C.F.R. § 10.138(b)(1).

[7] 20 C.F.R. § 10.138(b)(2).

[8] *See Kenneth R. Mroczkowski*, 40 ECAB 855, 858 (1989); *Marta Z. DeGuzman*, 35 ECAB 309 (1983); *Katherine A. Williamson*, 33 ECAB 1696, 1705 (1982).

[9] 5 U.S.C. §§ 8101-8193, 8124(b)(1).

[10] *Joseph F. McHale*, 45 ECAB 669, 676 (1994).

In this case, the Office exercised its discretionary authority and concluded that appellant could submit additional evidence in support of his claim through the reconsideration process. The Board finds that the Office properly exercised its discretionary authority and did not abuse its discretion by denying appellant's request for an oral hearing.

The decisions of the Office of Workers' Compensation Programs dated January 7, 1998 and September 29, July 17 and April 3, 1997 are hereby affirmed.

Dated, Washington, D.C.
November 22, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member