

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BUFORD K. HACKNEY and DEPARTMENT OF LABOR,
MINE SAFETY & HEALTH ADMINISTRATION, Pikeville, KY

*Docket No. 98-1105; Submitted on the Record;
Issued November 22, 1999*

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation for refusal to accept suitable work.

On March 4, 1993 appellant, then a 52-year-old mine safety inspector, was riding in a personnel carrier in a mine when the carrier hit a pothole, causing the carrier to bounce and strike appellant in the lower back. In a March 6, 1993 report, Dr. Dinkar R. Patel, an internist, indicated that a computerized tomography scan of the lumbar region of the spine showed significant degenerative changes at L5-S1 with a bulging disc and disc herniation and a bulging disc at L4-5 with a small central disc herniation. Appellant stopped working on March 8, 1993 and returned to work on June 22, 1993. The Office accepted appellant's claim for lumbar strain and aggravation of lumbar disc disease. Appellant received continuation of pay for the period March 8 through April 21, 1993 and temporary total disability compensation for the period April 22 through June 21, 1993. On March 2, 1994 appellant filed a claim for recurrence of disability. He indicated that he was stooped over walking on February 25, 1994 when his left leg "quit working" and he felt a sharp pain in his back at the site of the original injury. Appellant stopped working on February 28, 1994. On April 27, 1994 he underwent surgery for a left L5 partial hemilaminectomy and discectomy. The Office accepted appellant's claim for a recurrence of disability and began payment of temporary total disability compensation.

In a July 20, 1995 letter, the employing establishment submitted to Dr. Patel a description of appellant's job and requested a report on his ability to work, stating that he would be offered a position a physician found that he could perform the duties of the position. The employing establishment noted that appellant's disability retirement had been approved but he would not have to accept retirement. In an August 29, 1995 report, Dr. Patel stated that appellant should avoid prolonged or frequent stooping or bending. He indicated that appellant could stand or walk for one hour at a time and may stand or walk for up to six hours a day. Dr. Patel commented that appellant should avoid driving for more than 1 hour at a time without getting out to stretch and walk for 10 minutes. He stated that prolonged sitting for periods in excess of 45

minutes without stretching or walking should be avoided. Dr. Patel limited appellant to lifting objects up to 25 pounds frequently and 35 pounds occasionally.

In a May 9, 1996 letter, the employing establishment sent Dr. Patel a description of a position of a mine safety and health specialist and requested his opinion on whether appellant could perform the duties of the position. The employing establishment stated that appellant would not be required to lift more than 25 pounds and would not perform duties requiring excessive bending or stooping. The employing establishment indicated that the position would be sedentary but appellant was free to move about the office as necessary to perform his work. In a May 13, 1996 response, Dr. Patel stated that appellant could not drive more than a half hour and could not lift more than 10 pounds.

In a June 19, 1996 letter, the employing establishment offered appellant the position of mine safety and health specialist. The employing establishment indicated that, as the position was more than a half hour from his home, the Office would provide relocation expenses. The employing establishment noted that the lifting requirement had been adjusted to comply with a restriction of no lifting over 10 pounds. In a June 28, 1996 response, appellant indicated that he would not take the position, but would retire.

In a July 2, 1996 letter, the Office informed appellant that it had reviewed the position offered to him and found it to be reasonable. The Office indicated appellant had 30 days to accept the position or provide his reasons for refusing the position. The Office stated that if appellant refused the position, his reasons for doing so would be considered prior to any final decision determining whether his reasons for declining the position were justified. The Office warned appellant that refusal to accept suitable work would result in termination of compensation.

In a July 15, 1996 letter, appellant stated that his physician had not released him to work. He submitted a July 9, 1996 report from Dr. Patel who stated that appellant remained disabled for work. Appellant commented that he could barely get around and, at times, had difficulty in standing.

The Office referred appellant, together with the statement of accepted facts and the case record, to Dr. Yogesh Chand, a Board-certified orthopedic surgeon, for an examination and second opinion on appellant's ability to work. In an August 23, 1996 report, Dr. Chand stated appellant complained of residual pain in his left leg radiating into the lateral aspect of his foot. He commented that appellant was unable to stand or walk or sit for extended periods because of back pain. Dr. Chand also noted that appellant complained of bladder and bowel difficulties. He diagnosed advanced degenerative joint disease of the L5-S1 level and moderate degenerative joint disease at the L4-5 level. Dr. Chand stated appellant was unable to pursue moderately heavy work. He indicated appellant should not lift more than 15 pounds and could not perform a job that required continuous sitting, standing or walking for more than 1 hour at a time. Dr. Chand reported that appellant should avoid bending, stooping, crawling and squatting activities and noted that he could not use his legs for repetitive motions.

In an October 16, 1996 form report, Dr. Patel indicated that appellant should limit kneeling, bending, stooping and lifting. He restricted appellant to carrying or lifting more than 10 pounds. Dr. Patel concluded appellant could work one to two hours a day.

In an October 11, 1996 letter, the Office requested a supplemental report from Dr. Chand on whether appellant could perform the duties of the offered position. In a February 28, 1997 response, he stated, "There was no active denial of bending and stooping and crawling and squatting and kneeling activities by [appellant] by [this] job description. If this is so it would be my opinion that [appellant] is capable of returning to the job description that you describe to me in your letter of [October 11, 1996]."

The Office referred appellant, together with the statement of accepted facts and the case record, to Dr. Jeffrey McConnell, a Board-certified orthopedic surgeon, for another examination and second opinion. In an April 3, 1997 report, Dr. McConnell diagnosed chronic, nonspecific, lower back pain, degenerated L5-S1 intervertebral disc, protrusion of the L3-4 disc to the left, degenerative lumbar spondylosis, status post L5-S1 discectomy and diabetes mellitus with secondary peripheral neuropathy. He commented that most of appellant's current symptoms were subjective. Dr. McConnell indicated that appellant had chronic lower back pain due to the lumbar spondylosis. He noted that appellant had peripheral neuropathy which was manifested by numbness in both feet. Dr. McConnell concluded that appellant's changes in the lumbar spine were not the likely cause of his numbness. He related that appellant was able to sit for at least 25 minutes in the examination without visible signs of discomfort. Dr. McConnell stated appellant's subjective symptoms did not completely correlate with objective findings. He noted appellant showed nonphysiologic findings in strength testing in the left leg and had break away weakness of multiple muscle groups, affected by different nerve roots. Dr. McConnell commented that the latter finding was not consistent with peripheral neuropathy or with ongoing S1 radiculopathy. He stated that he had reviewed the job description of the offered position and concluded that appellant could perform the duties of the position eight hours a day. Dr. McConnell referred appellant for an electromyogram (EMG). In an April 18, 1997 report, Dr. Roland R. More concluded that the EMG showed evidence of a generalized peripheral neuropathy compatible with appellant's history of diabetes. He reported there was no evidence for a left lumbosacral radiculopathy.

In a June 27, 1997 letter, the Office again offered appellant the position of mine safety and health specialist. The Office confirmed that the position remained open within the employing establishment. The Office indicated that it would determine whether the job offer was reasonable based on his physical limitation and any other reasons appellant gave for declining it. The Office warned appellant that his compensation might be terminated if he declined a reasonable offer or failed to make a response but noted that the position would remain open until it had made a final determination of the continuation of compensation benefits.

In a July 21, 1997 letter, appellant again declined the offered position on the grounds that his physicians would not release him to work. He submitted a July 16, 1997 report from Dr. Vinodchandra Modi, a Board-certified internist, who stated that appellant had obstructive lung disease, insulin-dependent diabetes and low back pain radiating into the legs. Dr. Modi noted appellant had shortness of breath on exertion and at rest with coughing at night and in the

morning. He commented appellant had severe back pain, radiating down both legs with marked stiffness. Dr. Modi reported epidural injections had not given much help. He indicated appellant had marked tiredness and weakness as well as increased blood sugars. Dr. Modi noted appellant had chest pain, more on exertion, which radiated into his neck and left arm with tingling and numbness. He reported appellant took nitroglycerin pills for the chest pain. Dr. Modi recommended that appellant should not bend, squat, crawl, lift or carry any weights, or push or pull. He stated appellant should avoid extreme heights, temperature changes or handling machinery and should not be exposed to coal dust, fumes and noxious gases. Dr. Modi concluded appellant was totally disabled for any and all work. In a July 18, 1997 report, Dr. Patel stated appellant had continued backache with radiation of pain to both legs. He noted appellant had absent ankle and knee jerks on both sides. Dr. Patel indicated appellant could not bend or stoop. He concluded appellant was disabled for work.

In an August 5, 1997 letter, the Office gave appellant 30 days to accept the offered position or give his reasons for declining it. It stated that any reasons he gave for declining the position would be considered before a final decision was issued. In an August 14, 1997 letter, appellant again stated that he was unable to perform the position offered to him and resubmitted the reports of Drs. Patel and Modi. In a September 12, 1997 letter, the Office found appellant's reasons for refusing the job to be unacceptable and gave him 15 days to accept the position or face termination of his compensation. In an October 6, 1997 decision, the Office terminated appellant's compensation effective November 8, 1997 for refusal to accept suitable work.

The Board finds that the Office did not properly terminate appellant's compensation for refusal to accept suitable work due to a conflict in the medical evidence.

Section 8106(c) of the Federal Employees' Compensation Act states: "A partially disabled employee who: (1) refuses to seek suitable work; or (2) refuses or neglects to work after suitable work is offered to, procured by, or secured for him, is not entitled to compensation."¹ 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 justified.²

Dr. Patel gave conflicting reports on appellant's ability to work, initially stating that he could perform light-duty positions. However, he subsequently increased his limitations on appellant's ability to lift and perform other duties until he concluded appellant was totally disabled for work. Dr. Chand indicated that appellant could not sit, walk or stand for prolonged periods but could lift up to 15 pounds. However, he gave an equivocal, conditioned affirmative response on the question of whether appellant could perform the offered position. The reports of these physicians therefore have reduced probative value and are insufficient to establish whether appellant could perform the offered position.

Dr. McConnell stated, on the basis of his examination, that appellant's objective findings did not support his subjective symptoms. He indicated that the pain in appellant's legs were not

¹ 5 U.S.C. § 8106(c).

² 20 C.F.R. § 10.124.

due to his lumbar condition but were related to his peripheral neuropathy associated with his diabetes. Dr. McConnell concluded appellant was able to perform the duties of the offered position eight hours a day. Dr. Modi, however, indicated that appellant had severe obstructive pulmonary disease, chest pain radiating into the left arm and lower back pain radiating into the legs. He reported that appellant could not perform any lifting. Dr. Modi concluded that appellant was totally disabled for work. His report therefore directly conflicts with Dr. McConnell. As there exists a conflict in the medical evidence, the Office did not meet its burden of establishing that the job offered to appellant was suitable.³

The decision of the Office of Workers' Compensation Programs, dated October 6, 1997, is hereby reversed

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

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

³ See 5 U.S.C. § 8123(a).