U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ARCHIE JENKINS and DEPARTMENT OF THE ARMY, PINE BLUFF ARSENAL, Pine Bluff, AR

Docket No. 98-1385; Submitted on the Record;
Issued November 19, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS, WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation on the grounds that he refused an offer of suitable work; (2) whether the Office properly refused to reopen appellant's case for merit review in its December 29, 1997 decision.

In the present case, the Office accepted that appellant sustained fractured ribs, a right shoulder contusion and postlumbar laminectomy syndrome in the performance of duty on March 14, 1989. By letter dated October 25, 1995, the Office advised appellant that it found the employing establishment's job offer of motor vehicle operator to be suitable and appellant had 30 days to either accept the position or provide written explanation for refusing the offer.

In a decision dated December 20, 1995, the Office terminated appellant's compensation effective January 6, 1996, on the grounds that he had refused an offer of suitable work. By decisions dated December 5, 1996, and July 23, 1997, the Office denied modification of its suitable work determination. By decision dated December 29, 1997, the Office found that appellant's request for reconsideration was insufficient to warrant merit review of the claim.

The Board has reviewed the record and finds that the Office did not properly terminate appellant's compensation for refusing an offer of suitable work.

5 U.S.C. § 8106(c) provides in pertinent part, "A partially disabled employee who … (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation." It is the Office's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.[1] To justify such a termination, the Office must show that the work offered was suitable.[2] An employee who refuses or neglects to work

[1] *Henry P. Gilmore*, 46 ECAB 709 (1995).

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

after suitable work has been offered to him has the burden of showing that such refusal to work was justified.[3]

With respect to the procedural requirements of termination under section 8106(c), the Board has held that the Office must inform appellant of the consequences of refusal to accept suitable work and allow appellant an opportunity to provide reasons for refusing the offered position.[4] If appellant presents reasons for refusing the offered position, the Office must inform the employee if it finds the reasons inadequate to justify the refusal of the offered position and afford appellant a final opportunity to accept the position.[5]

The Board finds that the determination of suitability in this case is not supported by probative medical evidence. The Office relied on a second opinion physician, Dr. Banks Blackwell, an orthopedic surgeon, but the reports he provided are of limited probative value to the issue presented. In a report dated March 20, 1995, Dr. Blackwell stated that appellant had limitation of motion in the lumbar spine due to ligamentous stiffness and arthrodesis. He did not provide specific physical restrictions and the work capacity evaluation (OWCP-5c) he completed referred to his narrative report without providing additional information. In a brief supplemental report dated March 28, 1995, Dr. Blackwell stated that he believed appellant "is capable of returning to sedentary work within the limitations as described by the Department of Labor." It is not clear what limitations he is referring to in this report. By letter dated May 2, 1995, the Office requested that Dr. Blackwell explain whether appellant could work "8 hours a day in a sedentary position as defined by the Department of Transportation [sic]."[6] He responded in a May 3, 1995 letter that he had been provided with "written physical demands from the Department of Labor for sedentary work and I believe his medical situation conforms to those limitations." The Board is unable to find in the record a copy of the written physical demands reviewed by Dr. Blackwell. He did not provide specific physical restrictions for appellant, nor did he review the actual job duties for the offered position. Moreover, the record indicates that the Office received a November 8, 1995 report from an attending physician, Dr. H Austin Grimes, an orthopedic surgeon, who stated that motor vehicle operator was not an activity that he would recommend for appellant, noting that appellant was still having back and neck problems. It is well established under the Office's procedures that unless the medical evidence is "clear and unequivocal," the

[3] *Catherine G. Hammond*, 41 ECAB 375, 385 (1990); 20 C.F.R. § 10.124(c).

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

[5] *Id.*

[6] Apparently the Office meant to identify the *Dictionary of Occupational Titles*.

Office should seek medical advice from an appropriate physician as to the medical suitability of an offered position.[7] The medical evidence in this case was not clear and unequivocal.

Accordingly, the Board finds that the medical evidence of record was not sufficient to establish that the position of motor vehicle operator was suitable.

The Board also finds that there was a procedural error in the termination of benefits in this case. When the Office issued its October 25, 1995 letter advising appellant that it found the offered position to be suitable, the record indicates that the Office had already received, on October 19, 1995, a form letter indicating that appellant was declining the job offer based on the advice of Dr. Grimes. This letter was apparently sent to the employing establishment in response to their job offer, but it was forwarded to the Office and received on October 19, 1995. In addition, on November 15, 1995, the Office received the November 8, 1995 report from Dr. Grimes discussed above. Therefore, the record establishes that prior to the expiration of the 30-day period provided in the October 25, 1995 letter, the Office had received both a written notice that appellant was declining the job offer, a reason provided and relevant medical evidence. Under these circumstances, the procedures set forth in *Maggie L. Moore* clearly require that the Office consider the reasons offered, make a finding as to whether those reasons are acceptable and if not, allow appellant an opportunity to accept the position before benefits are terminated.[8] The Office failed to properly follow its procedures in this case.

For the above reasons, the Board finds that the Office improperly terminated appellant's benefits under 5 U.S.C. § 8106 (c)(2). In view of the Board's findings with respect to the termination of benefits, the issues relevant to the December 29, 1997 decision refusing merit review will not be addressed.

[7] *See Annette Quimby*, 49 ECAB __ (Docket No. 97-317, issued January 30, 1998); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.8(d) (December 1995).

[8] *Supra* note 4; *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.5(d) (July 1997).

The decisions of the Office of Workers' Compensation Programs dated December 29 and July 23, 1997 are reversed.

Dated, Washington, D.C.
November 19, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member