U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

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In the Matter of RAYMOND M. HUNT and DEPARTMENT OF THE ARMY, PERSONNEL OFFICE, Fort Knox, KY

*Docket No. 97-1087; Submitted on the Record;*
*Issued October 19, 1999*

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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 benefits on the grounds that he refused an offer of suitable work.

On February 4, 1992 appellant, then a 46-year-old housing clerk, sustained injury to his low back when he fell over an electrical cord.[1] His claim was accepted by the Office for lumbar strain and aggravation of a herniated disc at L4-5. Appellant was paid appropriate compensation benefits for his intermittent disability from work.

Appellant was treated by Dr. Richard T. Holt, a Board-certified orthopedic surgeon, who performed surgery on April 12, 1993 for a right iliac crest bone graft, anterior lumbar discectomies at L4-5 and L5-S1; anterior lumbar fusion at L4-5 and L5-S1 and reconstruction of the right anterior iliac crest. Surgery was authorized by the Office.

Following surgery, appellant was referred to vocational rehabilitation and underwent a functional capacity evaluation on November 4, 1993. In a November 12, 1993 report, Dr. S.P. Auerbach, a rehabilitation specialist, forwarded the functional capacity test results to the Office. He noted that, on testing, appellant appeared to qualify for sedentary work but his back complaints made it questionable whether he could return to work. Dr. Auerbach stated:

> "There could be some sense in trying to help this patient by allowing him to return to work on a transitional basis. That is, try him two hours a day for a few weeks and then three hours a day and see whether you can get him back to work that way. If you can[no]t get him back to work that way by the time he is a year

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[1] The record indicates that appellant had prior employment-related injuries: August 25, 1988, accepted for lumbar sprain; December 6, 1988, accepted for lumbar sprain; April 5, 1989, accepted for lumbar sprain; and March 29, 1991, accepted for back strain. Preexisting conditions included spina bifida occulta and degenerative disease of the lumbosacral spine.

postop[erative], then one has to wonder whether the surgery has been successful and if he needs other treatment or if he is at maximal medical improvement....”

In a report dated December 6, 1993, Dr. W. David Weston, a rehabilitation specialist, noted that appellant continued to experience tenderness over the sacroiliac joints and lower lumbar area. Dr. Weston advised that it was premature for appellant to go back to work and recommended additional outpatient physical therapy. In a December 23, 1993 report, Dr. Holt advised that he had reviewed Dr. Weston’s report and appellant’s functional capacity evaluation. He indicated that appellant could perform sedentary work for a few hours a day, subject to specified restrictions.

By letter dated February 23, 1994, the employing establishment advised that it had prepared a limited-duty position as a housing counselor based on the report of appellant’s functional capacity evaluation and the report of Dr. Auerbach. The work was described as sedentary work, starting at two hours a day. The record indicates that appellant declined the job offer, stating he was in too much pain.

In an April 19, 1994 letter, the Office requested Dr. Holt to complete an undated work capacity evaluation and review the February 23, 1994 job offer. Dr. Holt was requested to advise whether appellant was capable of performing the duties of the job offer.

In a May 25, 1994 response, Dr. Holt stated that he agreed with Dr. Auerbach’s evaluation and that appellant had organic problems secondary to his low back condition with his status post spinal fusion and arachnoiditis. Dr. Holt stated that appellant exhibited a function overlay and would benefit from psychological treatment.[2] He indicated that his 1993 restrictions still applied.

By letter dated August 5, 1994, the Office referred appellant to Dr. Martin G. Schiller, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated September 27, 1994, Dr. Schiller reviewed appellant’s history of injury and medical treatment. He noted x-rays he obtained revealed appellant had L4-5 retrolisthesis and two steffy plates, one on either side of the spine with three screws on the right and two on the left. Dr. Schiller noted that appellant had an anterior bone graft at the L4-5 interspace which did not appear to be solidly uniting L4 to L5. He concluded that, from x-ray examination, he could not say that appellant had a solid spine fusion. He related his findings on physical examination, noting positive straight leg raising. Dr. Schiller concluded that appellant had a failed result from his spinal fusion and stated it was impossible to know if appellant’s complaint of pain was related to the surgery, which could be irritating the nerve roots, or some other problem short of exploratory surgery. He stated there was an organic basis for appellant’s problems on top of a functional overlay. With regard to appellant’s capacity for work, Dr. Schiller stated:

[2] The record indicates that Dr. Holt referred appellant for psychiatric evaluation by Dr. Michael Sadler, a clinical psychologist. In an April 11, 1994 report, Dr. Sadler diagnosed major depression, single episode, with moderate alcohol abuse which he stated was “an outgrowth of his injury and resultant pain and disability.” He recommended counseling and antidepressant medication.

> "This patient can return to work doing a light-duty sit down job. I have no idea whether he could sit for four hours or not, or whether he would be willing to do so. The patient is not at maximum medical improvement, and I think he will probably end up with another operation on his lumbar spine."

By letter dated August 19, 1995, the Office referred appellant to Dr. Stanley W. Collis, a Board-certified orthopedic surgeon, for an updated examination and opinion on appellant's residuals. In a report dated September 5, 1995, Dr. Collis reviewed appellant's history of injury and medical treatment. He stated his findings on physical examination, noting positive straight leg raising and pain with flexion and extension, and noted that x-rays revealed a spinal fusion at L4-5 and L5-S1 with two plates and six screws. Dr. Collis noted some degenerative arthritis at L4-5 and L5-S1. He stated that appellant had back pain post spinal fusion and did not think appellant was capable of doing any manual-type work or work requiring bending, lifting, or even prolonged standing or walking. Dr. Collis opined that appellant had not reached maximum medical improvement from surgery and noted that appellant would still have difficulty performing manual labor. He indicated that the incidents at work had temporarily aggravated appellant's back condition or caused permanent disability. He opined that appellant's surgery was not necessitated by his work-related injuries. Dr. Collis completed a work restriction evaluation form in which he indicated appellant could work four hours a day and should be restricted from lifting or bending for 12 months.

By letter dated September 29, 1995, the Office requested Dr. Collis to clarify his medical opinion as to whether appellant's lumbar strain had resolved and whether the temporary aggravation of the L4-5 herniated disc had ceased. In an October 9, 1995 response, Dr. Collis stated that appellant's complaints and physical examination were not indicative of any herniated disc or neurological deficit at L4-5. He stated that if appellant had a herniated disc, the symptoms had ceased. Dr. Collis added that he did not believe appellant's symptoms or medical problems were due to the accepted lumbar strain and that appellant's pain was due to the spinal fusion and degenerative disc lesions at L4-5 and L5-S1 which were developmental and not work related. Dr. Collis indicated that he could not state when appellant's past back strains had resolved. With regard to appellant's work capacity, he stated: "I think the patient probably can return to work eight hours a day" under the restrictions he had previously set out by April 1996.

By letter dated September 30, 1995, the Office requested Dr. Holt to review the report of Dr. Collis and advise whether he concurred with his opinion and whether appellant had the ability to perform the job of a housing counselor. In a November 22, 1995 response, Dr. Holt stated:

> "I am unable to determine if [appellant] can perform the job as described in your letter. I have discussed this with [appellant] and he feels he [i]s unable to. Not having seen the process involved and only having your description, and only performing a guesstimate of his functional capacity, I would defer to a specialist in functional capacity evaluations...."

By letter dated January 24, 1996, the employing establishment offered appellant the position of modified housing counselor based on the evaluation and physical restrictions of

Dr. Collis. The employing establishment noted that appellant would start work at limited duty four hours a day and gradually increase his hours to full-time work by April 1996.

By letter dated January 25, 1996, the Office advised appellant that it had reviewed the limited-duty position of housing counselor and found the job offer suitable to his physical capabilities. Appellant was advised that he had 30 days to accept the position or provide reasons for refusing it. In the event of his refusal, appellant was advised of the provisions of 5 U.S.C. § 8106(c)(2) could result in the termination of his compensation for refusal of suitable work.

On January 29, 1996 appellant declined the job offer, stating that he was unable to perform the work due to continued back pain.

By letter dated February 26, 1996, the Office advised appellant that it had reviewed his reasons for refusing the housing counselor position and found them unacceptable. Appellant was advised that he had 15 days to accept the job offer or his compensation would be terminated. Appellant did not respond.

By decision dated March 13, 1996, the Office terminated appellant's wage-loss benefits find that he had refused an offer of suitable work.

In a June 14, 1996 letter, appellant's attorney requested reconsideration and submitted the May 7, 1996 report of Dr. Daniel A. Duran, an orthopedic surgeon.[3] Dr. Duran examined appellant on May 7, 1996 and reviewed his history of medical treatment. Dr. Duran noted that appellant had not had a good response to surgery, having symptoms which correlated with arachnoiditis, an inflammation of the nerves. He described appellant's back pain of such severity that it rendered him disabled for work. He reviewed diagnostic testing of appellant's low back and opined that appellant's disc herniations at L4-5 and L5-S1 were due to his April 5, 1989 employment injury, which had aggravated appellant's degenerative disease. Dr. Duran stated that, while the mechanical stabilization of the spine appeared to have held, the bone grafts were questionable and appellant had developed chronic pain.

In a report dated August 20, 1996, Dr. Holt stated that appellant had degenerative changes in his low back with his previous spine surgery and a probable degree of arachnoiditis based on his symptoms.

By decision dated October 30, 1996, the Office denied modification of the March 13, 1996 termination decision.

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. Under section 8106(c)(2) of the Federal Employees' Compensation Act, 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

[3] The record indicates that Dr. Duran had referred appellant to Dr. Holt in 1992.

employee.[4] The Office's implementing federal regulations provide that "[a]n 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 showing before a determination is made with respect to termination of entitlement to compensation."[5] To justify termination, the Office must show that the work offered was suitable and must inform the employee of the consequences of refusal to accept such employment.[6]

In the present case, the Office accepted that appellant sustained lumbar strain injuries at work, the most recent on February 4, 1992, and an aggravation of herniated nucleus pulposes at L4-5 for which it authorized surgery by Dr. Holt on April 12, 1993. In order to establish that appellant refused suitable work, however, the Office must initially establish that the job offered to the employee was suitable in terms of his accepted condition and physical restrictions. The Board finds that the medical evidence in the present case does not establish that the limited-duty housing counselor position offered appellant was within his physical restrictions.

In preparing the position of modified housing counselor, the employing establishment indicated that it relied upon the evaluation and physical restrictions set by Dr. Collis. The Board notes that, in his September 5, 1995 report, Dr. Collis was of the opinion that appellant had not reached maximum medical improvement from the April 12, 1993 spinal fusion surgery. He indicated, however, that appellant could work for four hours a day subject to a total restriction on any lifting and bending for 12 months. In supplemental reports, Dr. Collis stated that he could not say when appellant's lumbar strain condition had resolved and attributed appellant's back symptoms to the spinal fusion and degenerative disc lesions at L4-5 and L5-S1, which he opined were developmental and not employment related. His opinion is not well rationalized as the Office has accepted that appellant sustained an aggravation of a herniated disc at L4-5 for which it authorized surgery on April 12, 1993. Dr. Collis failed to acknowledge this as an accepted condition or otherwise explain the basis for his conclusion that appellant's herniated disc at L4-5 was not employment related or contributed to by his employment injuries.

Dr. Holt, appellant's attending physician, indicated that following surgery appellant had developed arachnoiditis, an inflammatory condition, and a functional overlay due to surgery. In turn, Dr. Sadler, a clinical psychologist to whom appellant was referred by Dr. Holt, diagnosed major depression which he related to appellant's employment injury and resulting back pain. The Office's procedures provide that, in making a preliminary assessment of the offered position, if the medical reports of record document a condition which has arisen since the compensable injury and this condition disables the claimant from the offered job, the job will be considered unsuitable even if the subsequently acquired condition is not work related.[7] These

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[4] 5 U.S.C. § 8106(c)(2).

[5] 20 C.F.R. § 10.124(c).

[6] *See Barbara R. Bryant*, 47 ECAB 715 (1996); *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(4) (December 1993).

aspects of the claim were not developed by the Office prior to the termination of appellant's benefits. Moreover, the reports of Dr. Schiller, an Office referral physician, and Dr. Duran, appellant's physician, indicated that appellant did not have a good response to surgery. Dr. Schiller noted an unstable spinal fusion and addressed appellant's functional overlay, which he attributed to a failed result from the spinal fusion surgery. Dr. Duran also diagnosed arachnoiditis, stating that appellant's pain symptoms correlated with inflammation of the nerves following his surgery. He opined that appellant's employment injuries had aggravated his degenerative disc disease and that surgery had resulted in chronic pain.

Based upon a review of the medical evidence of record, the Board finds that the reports of Dr. Collis, as noted, are insufficient to establish that the modified housing counselor position constitutes suitable work. For this reason, the Board will reverse the termination of appellant's compensation benefits.

The October 30 and March 13, 1996 decisions of the Office of Workers' Compensation Programs are hereby reversed.

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

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member