U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PHILLIP KELLEY and U.S. POSTAL SERVICE,
POST OFFICE, Newark, DE

Docket No. 99-298; Submitted on the Record;
Issued October 22, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

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

The Office accepted that appellant's April 26, 1990 motor vehicle accident resulted in a herniated nucleus pulposus of the cervical spine and authorized surgery for this condition. On July 1, 1992 an anterior diskectomy and excision of osteophytes followed by interbody fusion at the C5-6 and C6-7 levels was performed. Appellant last worked on November 26, 1991 and the Office began paying him compensation for temporary total disability on November 29, 1991.

The Office determined that a conflict of medical opinion existed between appellant's attending physician, Dr. Ken Smith, a Board-certified neurosurgeon, who concluded that appellant could not return to work as a letter carrier and could not work eight hours a day, and the Office's referral physician, Dr. Richard W. Duncan, a Board-certified orthopedic surgeon, who concluded that appellant could return to work as a letter carrier with no restrictions. To resolve this conflict of medical opinion, the Office referred appellant, the case record and a statement of accepted facts, to Dr. Patrick J. Riggins, a Board-certified orthopedic surgeon. In a report dated January 24, 1996, Dr. Riggins set forth appellant's history, complaints and findings on physical examination; the doctor also reviewed the findings of appellant's July 19, 1993 magnetic resonance imaging (MRI) and described the findings of x-rays of the cervical spine taken on the day of Dr. Riggins' examination of appellant. Dr. Riggins concluded:

> "I do feel that his condition is cause related to the accident that he sustained on April 26, 1990. Prior to the accident, he had no symptoms; but subsequent to that, he did develop symptoms that required medical intervention with subsequent surgical intervention to relieve his symptoms. He still has some mild persistent neck pain and aggravation of symptoms into the arm both by history and physical findings. I would recommend that he should have specific work restrictions, that he should do no repetitive overhead lifting, no excess twisting or bending of his

neck, nothing heavy should be carried on his shoulders. Using data from the functional capacity examination[1] [FCE] and description of his job requirements, I do not feel he would be able to perform as a mail carrier that required him to carry 75-pound bags of mail on his shoulder (and occasionally more). Driving a vehicle may also aggravate his neck symptoms with repeated twisting or turning of the neck while driving. Using data from the FCE, I think he could lift and carry around ten to 15 pounds on an infrequent basis. I do feel he could work six to eight hours per day with these specific restrictions, but he may need breaks every two to three hours to help relieve stress on the neck, etc. I do feel his restrictions are permanent. He does suffer from some obesity and some degenerative changes of his spine and hypertension which are not work related but may affect his ability to perform tasks."

The employing establishment offered appellant a position as a rehabilitation modified distribution clerk on March 21, 1996. The duties were listed as "sorting zone II scheme, nixie, box section, cage, business reply," and the physical requirements were listed as standing, sitting, or reaching one to eight hours; walking one to four hours; lifting less than ten pounds, pushing or pulling one to two hours; no carrying or climbing; and bending or twisting two to four hours, with no bending or twisting of the neck. On May 14, 1996 the Office advised appellant that it had found the offered position to be suitable and allotted appellant 30 days to accept the offer or provide a reason for refusing it. Appellant did not accept this offer and the Office, by decision dated July 31, 1996, found that appellant was not entitled to compensation after August 18, 1996 on the basis that he had refused or neglected suitable employment. This decision was affirmed by an Office hearing representative in a decision dated February 9, 1998. By decision dated July 21, 1998, the Office found that the additional evidence appellant submitted with a request for reconsideration was not sufficient to warrant modification of its prior decision.

Under section 8106(c)(2) of the Federal Employees' Compensation Act, the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[2] To justify termination of compensation, the Office must establish that the work offered was suitable.[3]

The Board finds that the Office properly terminated appellant's compensation for refusal of suitable work.

There was a conflict of medical opinion between appellant's physician and the Office's referral physician on the question of whether appellant continued to be disabled to perform the duties of the position of letter carrier that he held when he was injured. To resolve this conflict of

[1] The functional capacity examination was done on April 12, 1994 by Dr. John M. Marshall.

[2] 5 U.S.C. § 8106(c)(2) provides in pertinent part: "A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered to, procured by, or secured for him; is not entitled to compensation."

[3] *David P. Camacho*, 40 ECAB 267 (1988).

medical opinion, the Office, pursuant to section 8123(a) of the Act,[4] referred appellant, the case record and a statement of accepted facts to Dr. Riggins, a Board-certified orthopedic surgeon. Dr. Riggins concluded that appellant's condition was related to his employment injury, but that he could perform work within limitations specified by the doctor. 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.[5] Dr. Riggins' January 24, 1996 report meets these requirements and therefore, constitutes the weight of the medical evidence regarding appellant's ability to work.

Subsequent to the Office's termination of his compensation, appellant submitted June 3, 1996 and July 16, 1997 reports from Dr. Smith concluding that appellant could not perform any meaningful work. However, as these reports are those of the physician on one side of the conflict resolved by the impartial medical specialist Dr. Riggins, they are insufficient to overcome the special weight accorded Dr. Riggins' report or to create a new conflict with the impartial medical specialist's report.[6] Appellant also submitted a report dated April 8, 1998 from Dr. Paul C. Peterson, a neurosurgeon, who is an associate of Dr. Smith. Dr. Peterson concluded, "The patient has made multiple attempts to return to work without success and due to the deconditioning and residual symptomatology despite conservative therapy, it is unlikely that the patient could return to gainful employment at this time." This report is not sufficient to outweigh or to create a conflict with the report of Dr. Riggins, the impartial medical specialist, in part because it is based on an inaccurate history of "multiple attempts to return to work without success." The record reflects no attempts to return to work after November 26, 1991.

The position offered to appellant by the employing establishment – rehabilitation modified distribution clerk – was within the work tolerance limitations set forth by Dr. Riggins. The Office followed its procedures[7] by determining that the offered position was suitable and by advising appellant that his compensation would be terminated if he did not accept the offered position or provide acceptable reasons for not accepting it. Appellant's contention that he was not physically able to perform the offered position has been addressed: the weight of the medical evidence establishes that he could perform the position. Appellant's other reason for not accepting the offered position was that he had moved to Tennessee and the offered position was in Delaware, where he was working at the time of his employment injury. The Board has held, however, that a preference for a current place of residence based on financial and quality-of-life concerns is not an acceptable reason for declining an offered position.[8]

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[4] 5 U.S.C. § 8123(a) states in pertinent part "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

[5] *James P. Roberts*, 31 ECAB 1010 (1980).

[6] *Dorothy Sidwell*, 41 ECAB 857 (1990).

[7] These procedures are set forth in Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814 (December 1993).

[8] *Carl N. Curts*, 45 ECAB 374 (1994).

The decisions of the Office of Workers' Compensation Programs dated July 21, 1998 and February 9, 1998 are affirmed.

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

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member