U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DENNIS G. MERRILL and U.S. POSTAL SERVICE, POST OFFICE, Syracuse, NY

Docket No. 97-24; Submitted on the Record; Issued September 16, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM, BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective March 21, 1995, on the grounds that he refused an offer of suitable work.

On December 15, 1989 appellant, a 40-year-old mail processor, filed a claim for benefits alleging that he experienced continued pain in his right shoulder due to the constant use of his right shoulder on a daily basis. Appellant alleged that he first became aware that this condition was caused or aggravated by his employment on December 8, 1989.[1]

By decision dated August 17, 1990, the Office denied appellant's claim for compensation, finding that he failed to submit medical evidence sufficient to establish that his claimed shoulder condition was caused or aggravated by factors of employment. By letter dated September 12, 1990, appellant requested reconsideration. By decision dated December 12, 1990, the Office vacated the August 17, 1990 decision and accepted appellant's claim for cervical strain and right acromioclavicular joint strain. Appellant returned to limited duty, with restrictions placed on him due to his accepted employment injury on January 25, 1991. Appellant intermittently missed work for various periods, for which he received appropriate disability compensation based on loss of wages, until December 6, 1991, when he stopped working. He began receiving continuing compensation for temporary total disability, effective December 6, 1991.

In a report dated March 22, 1993, Dr. Thomas D. Masten, a Board-certified family practitioner, indicated that appellant's conditions had improved but noted that certain ranges of motion reproduced pain. Dr. Masten stated that appellant still had significant acromioclavicular joint pain at both right and left and indicated that appellant had chronic neck, shoulder and elbow pain. In a report dated May 10, 1993, he stated that appellant had been suffering from persistent

[1] The employing establishment placed appellant on light duty because of his complaints of shoulder pain.

neck, shoulder and elbow pain since December 1991, which had not substantially improved since that time and he referred appellant to Dr. Walter H. Short, a Board-certified orthopedic surgeon, to determine whether surgery was warranted. Dr. Short indicated in a work restriction evaluation form dated October 7, 1993 that appellant was temporarily totally disabled.[2]

The Office scheduled a second opinion examination for appellant with Dr. Matthew D. Tomaiuoli, a Board-certified orthopedic surgeon, for October 14, 1993. In a report dated October 18, 1993, Dr. Tomaiuoli stated that appellant's back problems were due to the mail cage causing a twisting of his back superimposed on his prior lumbar laminectomy, the acromioclavicular arthritis was due to overuse of the right shoulder and the ulnar nerve entrapment in the cubital tunnel was due to the repetitious use of his arms in reaching and bending his elbows. He advised that he was unable to predict when appellant would be able to perform his duties and that once a proposed ulnar nerve surgery was performed and he was allowed time to recover, he would be capable of performing limited duties. Dr. Tomaiuoli completed a work restriction evaluation form on October 14, 1993, however, in which he indicated that appellant was currently capable of working four hours per day, with intermittent sitting, walking, kneeling and standing for two hours per day, intermittent bending and squatting for one hour per day, with no lifting, climbing or twisting.

The Office determined that a conflict existed in the medical evidence between the opinion of Dr. Masten, appellant's treating physician, and the opinion of Dr. Tomaiuoli as to appellant's disability for work and referred appellant for a referee medical examination with Dr. Abdul Razaq, a Board-certified orthopedic surgeon, pursuant to section 8123(a).[3]

Dr. Razaq's examination of appellant took place on May 13, 1994 and he issued a report on the date of the examination. Dr. Razaq, after reviewing the statement of accepted facts and appellant's medical records, stated his findings on examination and concluded that appellant had a moderate partial disability which did not require additional physical therapy. He advised that appellant could return to light duty, in which he did not have to sit for extended periods of time and would be allowed to stand, walk and stretch out. Dr. Razaq advised that appellant should be able to do a job that did not require repeated bending, lifting, climbing, kneeling and squatting to reduce the stress on his lumbar spine, although he noted that degenerative changes involving the lower lumbar spine would not be related to his current workman's compensation case.

In a work capacity evaluation form dated May 23, 1994, Dr. Razaq indicated that appellant could work an 8-hour day provided he was restricted from prolonged sitting, repeated bending and lifting in excess of 10 to 15 pounds, sitting for 1 to 2 hours without a break. He also restricted appellant from performing activities which entailed repetitive motion of the wrist and elbow, which he advised would aggravate his pain and swelling.

[2] In a follow-up report dated November 22, 1993, Dr. Short stated that appellant's symptoms were unchanged, and advised that he was unable to work at that time due to the combination of his back injury and upper extremity symptoms.

[3] 5 U.S.C. § 8123(a).

By letter dated October 19, 1994, the employing establishment offered appellant a limited-duty job as a mail processor based on the restrictions outlined by Dr. Razaq.

By letter dated September 30, 1994, the employing establishment asked appellant's treating physician, Dr. Masten, to review the restrictions of the limited-duty job and indicate whether appellant was capable of working eight hours per day at this job. In a letter dated October 12, 1994, he responded to the employing establishment's letter by stating that Dr. Masten had not seen appellant since October 1993 and that he would refer the letter to Dr. Short who had been treating appellant since that time. By letter dated October 21, 1994, Dr. Short opined that appellant would be unable to perform the duties of the recommended position because of his chronic back and neck pain.

In a report dated November 3, 1994, Dr. Masten reiterated that appellant continued to experience ongoing problems. He related that appellant had been offered a light-duty job by the employing establishment, but that he had claimed this was the same job which initially caused his neck and shoulder problems. Dr. Masten stated that he would not recommend that appellant return to the same activities which previously worsened his pain.

In a note dated December 14, 1994, the Office indicated that appellant had refused a job offer from the employing establishment, which it found suitable based on the restrictions outlined by Dr. Razaq, the referee medical examiner. By letter dated January 19, 1995, the Office advised appellant that it had been informed by the employing establishment that he had refused its offer of suitable employment consistent with the physical limitations imposed by his injury and within his commuting area. The Office indicated that the job remained open and that he had 30 days to either accept the job or provide a reasonable, acceptable explanation for refusing the offer. The Office stated that if appellant refused the job or failed to report to work within 30 days without reasonable cause, it would terminate his compensation pursuant to 5 U.S.C. § 8106(c)(2).[4]

In a letter to the Office dated January 23, 1995, appellant requested an extension of time in which to submit additional medical evidence in support of his claim. He stated that he was unable to comply with the 30-day deadline because he could not schedule an appointment with Dr. Masten until at least February 28, 1995. By letter to the Office dated January 30, 1995, appellant stated his reasons for not accepting the employing establishment's limited-duty job offer. Appellant asserted that he went to the job site to determine whether he was capable of performing the job, but claimed that when he was apprised of its duties, he concluded, it was the same job which caused his current work-related conditions and that it required repetitive motion of the wrists, elbows and shoulders, contrary to the restrictions outlined by Drs. Masten and Short.

Appellant subsequently submitted a February 2, 1995 report from Dr. Masten, which reiterated appellant's complaint that the limited-duty job offered by the employing establishment required repetitive motion activity he had prescribed in his earlier reports. Dr. Masten advised that he considered appellant temporarily totally disabled until he could ascertain whether he

[4] 5 U.S.C. § 8106(c)(2).

could improve through physical therapy and thereafter undergo a functional capacity examination in order to locate an appropriate type of job.

By letter dated March 7, 1995, the Office advised appellant that it had received the information he had sent in response to its January 19, 1995 notice of proposed termination, including his letters and Dr. Masten's latest medical report, and informed him that the limited job offered to him by the employing establishment had already been evaluated and found to be suitable. The Office stated that the evidence appellant submitted was not sufficient to change its earlier determination that it conformed with his medical limitations and advised that it would terminate his compensation within 15 days if he refused the job assignment or failed to report to work. Appellant did not report to work within 15 days.

By decision dated April 20, 1995, the Office found that appellant was not entitled to compensation for wage loss claimed after March 22, 1995 on the grounds that he had refused to accept a suitable job offer pursuant to 5 U.S.C. § 8106(c)(2).

In a letter received by the Office on May 4, 1995, appellant requested reconsideration. In support of his request, appellant submitted a March 20, 1995 functional capacity evaluation test. The test recommended that appellant be reassigned to a different or modified job within the employing establishment that was matched up with his light physical demand level. Appellant also submitted a May 15, 1995 report from Dr. William R. Rogers, Board-certified in internal medicine and preventive medicine, who stated that he had reviewed the functional capacity test and appellant's medical records and that he considered the job offered by the Office to be appropriate. Dr. Rogers added, however, that he prefered a more specific job offer which ensured that the activities did not exceed the occasional, frequent and constant material handling activities outlined in the functional capacity evaluation.

By decision dated July 20, 1995, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence such that it was sufficient to require the Office to review its prior decision.

By letter dated April 19, 1996, appellant's attorney requested reconsideration. Counsel noted that appellant had returned to work with the employing establishment on June 8, 1995 but claimed that this was a different job position which the employing establishment had located after its physicians and appellant's physicians had reviewed the results of the functional capacity evaluation test. In addition, appellant's attorney contended that there was no actual conflict in medical evidence between the opinions of Drs. Masten and Tomaiuoli and that, therefore, Dr. Razaq's opinion should not be accorded the special weight of a referee examiner. In support of his request, appellant submitted August 29, 1995 and January 19, 1996 reports from Dr. Masten, a March 13, 1996 report from Dr. Short, plus treatment notes from Dr. Short. Appellant also resubmitted the March 20, 1995 functional capacity evaluation test.

By decision dated June 3, 1996, the Office found that the evidence appellant submitted was not sufficient to warrant modification of its previous decision.

The Board finds that the Office properly terminated appellant's compensation effective March 22, 1995 on the grounds that he refused an offer of suitable work.

Under section 8106(c)(2) of the Federal Employees' Compensation Act[5] 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.[6] Section 10.124(c) of the Office's regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured has the burden of showing that such refusal or failure to work was reasonable or justified,[7] and shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.[8] To justify termination, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[9]

The initial question in this case, is whether the Office properly determined that the position was suitable. The Board finds that the weight of the medical evidence establishes that the position was within appellant's physical limitations. Dr. Razaq, an orthopedic surgeon and the referee medical examiner, found that appellant could return to light-duty work at eight hours per day, as long as he did not have to sit for extended periods of time and could be allowed to stand, walk and stretch out. He restricted appellant from repeated bending, climbing, kneeling, squatting, lifting in excess of 10 to 15 pounds and sitting for 1 to 2 hours without a break. Dr. Razaq also restricted appellant from performing activities which entailed repetitive motion of the wrist and elbow, which, he indicated, would aggravate his pain and swelling. The Office properly found that the limited-duty position of mail processor offered by the employing establishment was within these restrictions. There is no indication, other than appellant's unsupported assertions, that the offered position would be outside the limitations imposed by Drs. Razaq or Masten. The offered position, therefore, appears to be consistent with these restrictions.

A review of the above evidence indicates that there is substantial medical evidence to support a finding that the offered position was within appellant's physical limitations. Although Dr. Tomaiuoli, the second opinion physician, had indicated in October 1993 that appellant was not capable of working eight hours, the weight of the subsequent medical evidence, as represented by Dr. Razaq, establishes that the position offered was within appellant's physical limitations.

In rejecting the offer by the employing establishment, appellant cited a February 1991 report from Dr. Masten, his treating physician. He stated that the employing establishment's job offer was not suitable for appellant and indicated that the duties of the job; *e.g.*, reaching for and grasping envelopes, sorting mail, sweeping mailboxes and moving them to trays, with pushing

[5] 5 U.S.C. §§ 8101-8193.

[6] *Patrick A. Santucci*, 40 ECAB 151 (1988); *Donald M. Parker*, 39 ECAB 289 (1987).

[7] The Board notes that the Office was paying compensation based upon submission of Forms CA-8 following appellant's return to work, and as such, appellant maintained the burden of establishing entitlement to continuing disability which was related to the employment injury; *see Donald Leroy Ballard*, 43 ECAB 876 (1992).

[8] 20 C.F.R. § 10.124(c); *see also Catherine G. Hammond*, 41 ECAB 375 (1990).

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

and pulling, entailed repetitive motion activities which exceeded appellant's physical limitations. There is no basis for this opinion, however, other than appellant's uncorroborated statement to this effect. In addition, the probative value of this report is limited in that Dr. Masten does not provide any supporting detail or rationale for his statement. A conclusory statement without supporting rationale is of little probative value.[10]

The determination of whether an employee is physically capable of performing the job is a medical question that must be resolved by medical evidence.[11] The weight of the medical evidence in this case, establishes that appellant was capable of performing the position of mail processor. The Board finds that Dr. Razaq's referee opinion was sufficiently probative, rationalized and based upon a proper factual background and that it, therefore, constituted sufficient medical rationale to support the Office's April 20, 1995 decision terminating appellant's compensation. The weight of the medical evidence, as represented by Dr. Razaq's May 13, 1994 report and May 23, 1994 work evaluation, indicates that the position offered was consistent with appellant's physical limitations and there is no support for appellant's stated reasons in declining the job offer. The refusal of the job offer, therefore, cannot be deemed reasonable or justified and the Office properly terminated appellant's compensation. The Board, therefore, affirms the Office's June 3, 1996 decision, affirming its April 20, 1995 termination decision.

The decision of the Office of Workers' Compensation Programs dated June 3, 1996 is affirmed.

Dated, Washington, D.C.
September 16, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

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[10] *Marilyn D. Polk*, 44 ECAB 673 (1993). The reports from Dr. Short, in which he stated that appellant was unable to return to work are similarly of little probative value without further explanation.

[11] *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).