

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES T. JOHNSON and U.S. POSTAL SERVICE,
POST OFFICE, Chicago, IL

*Docket No. 99-276; Submitted on the Record;
Issued September 24, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

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

The Office accepted appellant's claim for a cervical strain, a mild cerebral concussion, contusion of the scalp and post-traumatic headache syndrome. Appellant sustained the original injury on May 28, 1986 when a 40-pound steel shelf struck him on the head. Appellant worked intermittently but stopped working on August 8, 1986 and has not worked since that date. Appellant received temporary total disability benefits.

In a report dated March 14, 1994, Dr. George J. Urban, appellant's treating physician, stated that he had been treating appellant for post-traumatic paroxysmal hemicrania since 1986. He described appellant's symptoms of episodes of chronic, severe headaches which render appellant nonfunctional. Dr. Urban stated that the episodes were frequent, occurring almost daily and were accompanied by dizziness, numbness in fingers, ear "popping," tinnitus, neck pain, light and noise hypersensitivity and occasional vomiting. He stated that appellant had reached maximum improvement and that a "work trial of part time may be ascertained." Dr. Urban stated that certain preconditions should be guaranteed stating that the location of the job should be at a downtown facility, if possible, to shorten the length of travel time to a minimum and should be accessible by the regular public transportation system. He also stated that appellant might need to administer injections to himself for pain control and a first aid station would enable him to administer the injection as well as receive possible medical intervention. Dr. Urban stated that appellant should limit his activities to lifting a maximum of 15 pounds and avoid bright lights and excessive noise and fumes to prevent precipitation of the headaches. In a follow-up letter dated July 28, 1994, he reiterated appellant's restrictions and stated that appellant should be no further than 15 to 30 minutes from his home in order to use injectable medications, if necessary, if a first aid station is not available.

The Office referred appellant to Dr. Hilliard E. Slavick, a Board-certified neurologist and psychiatrist, for a second opinion. In his report dated September 8, 1995, Dr. Slavick considered appellant's history of injury, performed a physical examination and noted the results of a cervical magnetic resonance imaging (MRI) scan and an MRI of the brain performed on August 13, 1990 which were normal. He stated that appellant had multiple subjective complaints and no objective neurological findings. Dr. Slavick stated:

“He appears depressed and I feel that his headaches are purely subjective and that he suffers from significant depression causing depressive equivalent headaches. He may be also suffering from rebound headaches related to the multiple medications he is receiving. I feel the use of narcotics included in his drug regimen should be avoided in someone with a history of depression and possible tendency to overuse and abuse.”

Dr. Slavick stated that appellant was able to perform the job of modified mailhandler. He stated:

“Despite his claims of travel causing headaches, I feel that this is not based on objective evidence and is purely subjective on his part. I would not restrict him based upon his ability to travel. I feel he could travel from his home to O'Hare airport for work.”

He suggested that appellant see an addiction specialist in order to “try to streamline his medications and reduce the narcotics he is receiving.” Dr. Slavick stated that appellant had no physical restrictions.

In an undated letter, the employing establishment offered appellant the job of a modified mailhandler working four hours a day in the afternoons five days a week at the “O56t Belt, AMF, O'Hare.” The effective date of the offer was January 8, 1994. The physical requirements of the job were that appellant would not have to lift more than 10 pounds, could stand and walk occasionally and would not have to sit more than 30 to 40 minutes per hour. The job description also stated that appellant would work indoors and have no exposure to extreme temperatures or exposure to high levels of noise. The work included separating flats and throwing printed matter with a 20-pound weight limitation into tubs. The job description stated that appellant could sit at the O56 belt to accommodate standing restrictions. On December 14, 1993 appellant accepted the job offer but did not report for work on the assigned work date of January 10, 1994.

By letter dated February 17, 1994, the Office informed appellant that the job offer of modified mailhandler was suitable, available and within appellant's work capabilities. The Office noted that appellant had accepted the job offer but had not reported to work and gave appellant 30 days to either report to work or provide an explanation for not returning to work.

By letter dated April 25, 1996, the employing establishment stated that it was awaiting the Office's suitability decision on the job offer and requested a copy of medical documentation submitted since January 8, 1994 justifying the Office's continuation of workers' compensation benefits.

By letter dated May 30, 1996, the Office reiterated the contents of its February 17, 1994 letter stating that the position of modified mailhandler was available and suitable to appellant's work capabilities. The Office gave appellant 30 days to respond.

By letter dated June 14, 1996, appellant's attorney stated that appellant was being hospitalized the first week of July 1996 and requested that no determination be made on his ability to work pending a determination of his physical capabilities after the hospitalization.

By letter dated June 19, 1996, appellant stated that he did not refuse to work for the employing establishment but he was hospitalized in 1994 and 1995 to accommodate the change in medication he would require to work four hours a day and he and his doctor so informed the Office. Appellant stated that he requested a position at an installation closer to his home as he was unable to drive long distances and required that someone accompany him in the vehicle. He stated that he was willing to work but felt he was being denied the opportunity to try.

By letter dated July 15, 1996, the Office stated that appellant's refusal to accept the job offer was found to be unjustified and appellant had 15 days to accept the job offer or his compensation would be terminated.

Appellant submitted a report from Dr. Renee Silverman, a psychologist, dated September 9, 1996. In her report Dr. Silverman stated that appellant continued to struggle with constant pain due to migraines and described problems he was having with his family.

Appellant also submitted a hospital record from July 1 to July 5, 1996 documenting medical treatment he received for his headaches.

By decision dated October 16, 1996, the Office terminated appellant's compensation on the grounds that appellant refused suitable work.

By letter dated November 12, 1996, appellant requested an oral hearing before an Office hearing representative which was held on July 2, 1997 and submitted additional evidence. Appellant submitted reports from Dr. Susan D. Lis, a Board-certified physiatrist, dated January 23 and February 20, 1997, describing the results of physical therapy she had authorized. In her January 23, 1997 report, she considered appellant's history of injury, performed a physical examination and diagnosed status post headaches from work-related injury. She also stated that appellant had decrease of strength in the hip flexors bilaterally as well as decrease of strength in both upper extremities. Dr. Lis recommended a work hardening program and a functional capacity evaluation but did not think appellant could return to his usual job. In her February 20, 1997 report, she stated that appellant was a "bit stronger" and stated that appellant would "most likely" be at a sedentary level although it was not yet determined.

In a report dated November 18, 1996, Dr. Urban summarized appellant's medical treatment since his last visit and noted that he was continuing to treat appellant for coexisting migraines without aura and tension-type headaches. He reiterated that appellant could work four hours per day at the main postal office downtown and that appellant required somebody to drive him to and from work due to his headaches and the multiple medications he used to alleviate and

control the pain. Dr. Urban stated that the downtown location was more convenient and appellant would spend less time traveling.

Progress notes dated from October 26, 1995 through November 11, 1996 document further medical treatment of appellant's condition.

At the hearing, appellant testified that he has been taking medication since 1986 for his headaches. He also testified that when he travels he gets dizzy or sick and then has to take medication which limits him. Appellant testified that after he received the notice to return to work, he contacted people at the employing establishment and told them about his restrictions which the people said they were unaware of. He also stated that they agreed to work with him to transfer him to a facility downtown which would be "a lot" closer than O'Hare Airport. Appellant testified that he was unable to tolerate loud noises and therefore could not take the elevated train and someone would have to escort him and he has been escorted whenever he has gone out since 1986. He stated that the downtown location to work "would be a lot easier to get to." Appellant testified that the employing establishment never got back to him about whether it could meet his restrictions and that was why appellant did not return to work. He also testified that he still gets dizzy, has severe headaches, sometimes is off balance, his vision blurs, extreme temperatures bother him and he functions better in the early evening.

By decision dated October 9, 1997, the Office hearing representative affirmed the Office's October 16, 1996 decision.

The Board finds that the Office improperly terminated appellant's compensation for refusal to accept suitable work.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits by establishing that the accepted disability has ceased or that it is no longer related to the employment.¹ Under section 8106 (2) of Federal Employees' Compensation Act,² the Office may terminate compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.³ The Board has recognized that section 8106(c) serves as a penalty provision as it may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment and, for this reason, will be narrowly construed.⁴ The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by the medical evidence.⁵

¹ *David W. Green*, 43 ECAB 883 (1992).

² 5 U.S.C. §§ 8101-8193.

³ *Patrick A. Santucci*, 40 ECAB 151 (1988).

⁴ *Stephen R. Lubin*, 43 ECAB 564 (1992).

⁵ *See John E. Lemker*, 45 ECAB 258 (1993); *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

In the present case, a conflict exists between appellant's treating physician, Dr. Urban and the second opinion physician, Dr. Slavick as to whether appellant could perform the job of modified mailhandler which the employing establishment offered him. The job description stated that appellant would not have to lift more than 15 pounds, appellant's standing restrictions would be accommodated and appellant would be required to work four hours a day at O'Hare Airport. In his reports dated March 14 and July 28, 1994, and November 18, 1996, Dr. Urban consistently opined that appellant continued to suffer from migraine headaches and associated symptoms and therefore could only work four hours a day with restrictions and must avoid lifting more than 15 pounds. In his July 28, 1994 report, he emphasized that appellant should not have a commute longer than 15 to 30 minutes, meaning he should work downtown and not at O'Hare Airport and that appellant must have a person accompany him to and from work due to his headaches and the multiple medications he used. Dr. Lis' reports dated January 23 and February 20, 1997 corroborate Dr. Urban's opinion in that Dr. Lis also diagnosed status post headaches due to the May 28, 1996 employment injury and opined that appellant could not return to his usual work. The medical documentation from the hospitals dated July 1 through July 5, 1996 and October 26, 1995 through November 11, 1996 documented that appellant continued to suffer from and receive treatment for severe headaches. Appellant's testimony at the hearing indicated that he continued to suffer the same symptoms of severe headaches, dizziness and difficulty balancing that he had since the May 28, 1986 employment injury.

In his September 8, 1995 report, Dr. Slavick, the second opinion physician, opined that appellant's complaints were subjective and there were no neurological findings. He opined that appellant could return to work without restrictions. Dr. Slavick also opined that appellant had no transportation restriction. He opined that appellant suffered from significant depression causing depressive equivalent headaches. The Board has held that the Office, may not terminate compensation without establishing that the disabling condition has ceased or that it is no longer related to the employment. The Office's burden of proof includes the necessity of furnishing rationalized medical evidence based on a proper factual and medical background.⁶ In this case, the Office accepted appellant's claim for post-traumatic headache syndrome in 1986 and Dr. Slavick provided no rationale explanation as to why, if appellant has continued to suffer the same symptoms of severe headaches and dizziness since his injury, the condition is no longer work related. Dr. Slavick further did not explain the basis for his impression that appellant was depressed and provided no rationale explanation as to how appellant's depression was causing his headaches.

As the burden is on the Office to justify the termination of benefits and the opinion of Dr. Slavick on which the Office relied in terminating appellant's compensation benefits is not well rationalized and conflicts with the opinion of appellant's treating physician, the Office has not met its burden of proof to terminate benefits.

⁶ *Larry Warner*, 43 ECAB 1027 (1992); *see Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

The decision of the Office of Workers' Compensation Programs dated October 9, 1997 is hereby reversed.

Dated, Washington, D.C.
September 24, 1999

George E. Rivers
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member