

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of STEPHEN M. HAKE and DEPARTMENT OF DEFENSE,
DEFENSE LOGISTICS AGENCY, Mechanicsburg, PA

*Docket No. 98-1833; Submitted on the Record;
Issued August 2, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective April 28, 1997 on the grounds that he refused an offer of suitable work.

On June 22, 1987 appellant, then a 34-year-old packer, sustained injury when he pulled a muscle and ligament in his left arm while moving a box. The Office accepted the claim for a strain of the left lateral epicondyle. Appellant retired on disability on November 30, 1990. On January 26, 1993 appellant underwent surgery for a release of the left lateral condyle extensor origin from its epicondyle radial head and a transposition of the left ulnar nerve at the medial elbow to a subcutaneous tunnel. On July 23, 1993 the Office awarded appellant compensation for total temporary disability beginning January 26, 1993. On August 31, 1993 appellant elected to receive benefits under the Federal Employees' Compensation Act.

On June 18, 1996 Dr. Bruce Goodman, a second opinion physician and a Board-certified orthopedic surgeon, recorded appellant's history of injury and the treatment that he received. He noted that appellant had multiple medical conditions; including a hearing loss, multiple arthroscopies of both knees, surgery of the right shoulder and a ruptured disc in his back. Nevertheless, Dr. Goodman confined his remarks to appellant's employment-related injury to his left elbow. He stated that the left elbow condition precluded appellant from using his left upper extremity in a repetitive or forceful fashion. Dr. Goodman stated that appellant would have difficulty using his left hand in any activity requiring repetition, strength or dexterity. He indicated that appellant should avoid noxious stimuli to the left hand, such as changes in temperature, due to its lack of sensitivity. Dr. Goodman also indicated that appellant was unable to grip more than five pounds and unable to work around electromagnetic impulses due to his cochlear implant. He stated that appellant was unable to work in a stressful situation and that he remained affected by pain in his left shoulder and elbow.

On October 10, 1996 Dr. Dow E. Brophy, appellant's treating physician and a Board-certified family practitioner, indicated that appellant had multiple physical problems. He indicated that appellant had work-related weakness and pain in his left upper extremity. Dr. Brophy stated that following appellant's June 22, 1987 injury he underwent a transposition of the ulnar nerve across the medial aspect of the left elbow and release at the lateral epicondyle. He stated, however, that the surgery failed to provide relief from deep aching in the elbow and numbness of the fourth and fifth fingers. Dr. Brophy noted that nerve conduction studies showed persistent neuropathy in the left ulnar nerve. He opined that appellant had permanent nerve damage, which limited his ability to grip anything with the left hand. Dr. Brophy also stated that appellant could not tolerate repeated movements of the left elbow. He opined that appellant should avoid jobs requiring the use of his left arm due to its unpredictable strength. Dr. Brophy also concluded that appellant had sensorineural hearing loss, which was essentially a complete loss of hearing. He noted that appellant had a right cochlear implant in August 1989 which required him to avoid electromagnetic waves. For this reason, he indicated that appellant should avoid any job that required hearing. Dr. Brophy also stated that appellant's cardiac problems, angina and coronary stenosis required him to avoid lifting anything significant. He further stated that appellant suffered from some residual weakness in his right upper extremity due to a repaired torn rotator cuff. In addition, Dr. Brophy stated that appellant should avoid frequent bending or utilization of his lower back due to a herniated disc at L4-5, which was being conservatively treated. He concluded that appellant needed a job in which he did not use either arm or his lower back, did not stress his heart, did not encounter electromagnetic radiation and did not frequently utilize his left arm.

Appellant's rehabilitation counselor subsequently prepared a job description of a supply clerk for tote shipments. The job was classified as largely sedentary. It involved entering shipment identification information into a computer. Items would arrive adjacent to the employee in mail bin-sized totes on an electric conveyor belt. The employee secured the tote by raising a metal stop using a foot pedal. The totes contained between one and three items, each with a packing slip attached in an envelope. The employee removed the packing slip from their envelopes and entered data off the packing slip, using a marker-sized scanner about 80 percent of the time. He then returned the packing slip to the envelope. The employee was not required to remove the items from the tote, but occasionally had to turn the item over to remove the packing slip. In addition, the employee occasionally nudged the tote along the conveyor belt, either manually or with a long-handled pole. The employee performed the duties sitting or standing and walking was unnecessary. Hand usage consisted of simple grasping of relatively small, lightweight items and finer manipulative activity to enter data. The employee used one or two hands. The foot pedal was operated with the right foot and employees reached into the tote with the right hand. The employee used either hand to operate the scanner and any finger or fingers to enter data. The employee occasionally rotated an item in the tote to reach the packing slip. Employees worked at their own pace. Reaching occurred below the shoulder and twisting was unnecessary. Grip strength was generally incidental and light grip strength was only occasionally required. Bending was also precluded and lifting was unnecessary.

On December 31, 1996 Dr. Brophy approved the job description. He commented, however, that appellant, "should be treated as though he [i]s completely deaf. Concern exists over conveyor noise and hearing should be aggressively protected."

On January 22, 1997 the rehabilitation counselor wrote a letter to Dr. Brophy noting that the work station environment was not excessively noisy, but that employees could utilize ear protection devices. The rehabilitation counselor indicated that the job could be performed without hearing. He noted that appellant could protect himself from damaging noise by adjusting the squelch button and sensitivity apparatus on his implant or appellant could turn off his hearing device. The rehabilitation counselor stated that appellant could wear a vibrating device to warn him of plant dangers. He also noted that either an antistatic computer screen or a grounding mat could protect appellant from electrostatic discharge.

On February 12, 1997 the employing establishment offered appellant the position of a supply clerk. The physical demands of the position were listed as some walking, standing and carrying of light items. The position was a second shift position and was to start on March 3, 1997.

On February 25, 1997 appellant's representative indicated that appellant was not in a position to either accept or reject the job offer. He requested that the employing establishment outline the hours appellant would be required to work and the physical requirements of the position.

On February 28, 1997 Dr. Brophy indicated that appellant could not return to work on March 3, 1997 because he would not have sufficient leave accumulated at that time to enable him to take off from work to have his hearing condition treated. Furthermore, he indicated that the second shift position would exacerbate appellant's stress by reducing the time he spent with his children.

On March 3, 1997 the employing establishment wrote stating that appellant had verbally informed it that he desired to return to the Office of Personnel Management's (OPM) disability rolls. The employing establishment indicated that it informed appellant that he must make such a decision in writing.

By letter dated March 7, 1997, the Office advised appellant that the position of supply clerk suitable to his physical limitations, was still available, that it would consider any further reasons for refusal and that if he did not accept the position within the next 30 days, a decision would be issued and entitlement to benefits would be terminated under 5 U.S.C. § 8106(c) if he failed to adequately justify why he refused the job offer.

On March 14, 1997 the employing establishment indicated that the rehabilitation counselor provided appellant with a job description and that Dr. Brophy approved it. The employing establishment also stated that appellant requested disability retirement on March 3, 1997 and was informed that he needed to make the request in writing.

On March 19, 1997 appellant's representative indicated that, pursuant to Dr. Brophy's February 28, 1997 report, the supply clerk job offered was not suitable.

By letter dated April 11, 1997, the Office rejected the argument presented by appellant's representative for appellant's refusal of the job offer. The Office informed appellant that he had

15 days to accept the position offered and no further reason for refusal of the offer would be considered.

By letter received April 24, 1997 appellant elected benefits from OPM. In a letter received April 25, 1997, appellant's representative stated that appellant was electing to receive his OPM benefit instead of the Act benefit. He stated that he wanted to confirm that appellant would not be penalized for failing to accept suitable employment and be precluded from filing a schedule award.

By decision dated April 28, 1997, the Office terminated appellant's compensation effective that same date on the grounds that he refused on offer of suitable employment. The decision stated that he remained entitled to medical expenses for treatment of his employment-related conditions.

On April 30, 1997 appellant's representative requested a hearing.

In support, appellant's representative submitted a September 12, 1997 report from Dr. Brophy. He stated that appellant was disabled from work due to multiple problems, specifically his hearing and other difficulties. Dr. Brophy stated that appellant's sensorineural hearing loss required him to use a nuclear cochlear implant and avoid loud noises. He stated that appellant had severe, unresolved difficulties with his left ulnar nerve, which precluded lifting or repetitive work. Dr. Brophy noted degenerative disc disease of the spine resulting in pinched back nerves. He also stated that coronary atherosclerosis was present and required a surgical approach. Finally, Dr. Brophy further stated that stress from appellant's medical, financial and marital difficulties required treatment.

A hearing was held on December 9, 1997. Appellant testified that he was totally deaf in both ears and that he had cochlea implant on his right side that enabled him to hear. Appellant also indicated that he had a back problem. Appellant stated that he would be unable to perform the supply clerk offered job with one arm. He stated that he would have difficulty interacting with coworkers due to his hearing loss unless they directly faced him. Appellant stated that background noises drowned out voices. He further stated that he worried about walking into moving equipment. Appellant stated that he had a heart attack and had ongoing heart problems. He noted arthritis in both knees and his back. Appellant stated that he had surgeries on both knees and that he was involved in an automobile accident that injured his back. He stated that his left elbow felt "like novocaine." He stated that his left hand lacked strength and that he would have problems lifting with his left arm. Appellant indicated that he only used two fingers on his left hand. He stated that he was currently receiving OPM retirement disability benefits. Appellant stated that he could not do the supply clerk job because it involved repetitive lifting. He also explained that his back problems prevented him from doing the job. Appellant's representative then urged that appellant's election to receive OPM benefits prior to the Office's April 28, 1997 decision should have precluded the Office from terminating benefits for his failure to accept suitable employment. Finally, he indicated that the reports of Drs. Brophy and Goodman established that appellant was unable to perform the duties of the supply clerk.

On December 22, 1997 Dr. Brophy noted that appellant had a recurrent injury to the discs in his back and that he ruptured a disc in his back causing pain. He again noted that the supply

clerk job offered would only allow appellant to interact with his children for eight hours per week and that appellant had a delicate psychiatric status. Dr. Brophy indicated that he agreed with Dr. Goodman's prior assessment that appellant's multiple health problems could preclude gainful employment. He also stated that he agreed with Dr. Goodman's conclusion that appellant's left elbow and arm were essentially useless.

By decision dated February 28, 1997, the Office hearing representative affirmed the Office's April 28, 1997 decision terminating appellant's compensation based on his refusal to accept suitable employment.

The Board finds that the Office met its burden to terminate appellant's compensation benefits effective April 28, 1997.

Section 8106(c)(2) of the Act¹ provides in pertinent part, "A partially disabled employee who ... refuses or neglects to work after suitable work is offered ... is not entitled to compensation."² To prevail under this provision, the Office must show that the work offered was suitable and must inform the employee of the consequences of refusal to accept such employment. An employee who refuses or neglects to work after suitable work has been offered has the burden of showing that such refusal to work was justified.³ The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.⁴

The implementing regulation⁵ provides that an 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 a showing before entitlement to compensation is terminated.⁶ To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.⁷

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 medical evidence.⁸ In assessing medical evidence, the number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors that comprise the evaluation of

¹ 5 U.S.C. §§ 8101-8193.

² 5 U.S.C. § 8106(c)(2).

³ See *Michael I. Schaffer*, 46 ECAB 845 (1995).

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

⁵ 20 C.F.R. § 10.124(c).

⁶ See *John E. Lemker*, 45 ECAB 258 (1993).

⁷ *Maggie L. Moore*, 42 ECAB 484 (1991), *aff'd on recon.*, 43 ECAB 818 (1992).

⁸ See *Marilyn D. Polk*, 44 ECAB 673 (1993).

medical evidence include the opportunity for and the thoroughness of physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.⁹

In this case, Dr. Brophy, appellant's treating physician and a Board-certified family practitioner, provided the only medical opinion evidence addressing whether appellant could perform the offered position of a supply clerk, tote shipments.¹⁰ On December 31, 1996 he reviewed the job description for the position offered and stated that appellant could perform the duties described for a supply clerk, tote shipments. He indicated, however, that appellant "should be treated as though he [i]s completely deaf. Concern exists over conveyor noise and hearing should be aggressively protected." Dr. Brophy's concerns were addressed by the rehabilitation counselor on January 22, 1997. The counselor noted that the supply clerk position required no hearing, that appellant's hearing could be protected and that appellant's cochlear implant could be protected from electrostatic discharge by an antistatic computer screen or a grounding mat. Inasmuch as the counselor's contentions were not disputed by appellant, Dr. Brophy's December 31, 1997 report established that appellant was capable of performing the duties of a supply clerk, tote shipments.

Dr. Brophy subsequently submitted reports on February 28, September 12 and December 22, 1997 indicating that he felt appellant was unable to meet the requirements of the supply clerk job offered. Dr. Brophy's objections on February 28, 1997 involved appellant's lack of having accumulated annual or sick leave to have his hearing loss treated and the stress he would feel because he would not see his children while working. Neither reason is relevant to determining whether appellant could physically perform the limited duties of a supply clerk, tote shipments. On September 12, 1997 Dr. Brophy simply stated that appellant was disabled from work and listed his numerous physical problems. This report also failed to specifically address that appellant was disabled from performing the duties of the supply clerk position offered and does not establish that appellant was not capable of performing those duties. Finally, on December 22, 1997 Dr. Brophy noted appellant's back problems; the stress appellant would endure while working and not seeing his children; and Dr. Goodman's prior conclusions that appellant's multiple problems could preclude employment and that his left upper extremity was essentially useless. This report also did not specifically address whether appellant could perform the duties of the supply clerk position or even note that Dr. Brophy was then aware that the supply clerk position did not require appellant to use his left arm. Accordingly, Dr. Brophy's December 31, 1996 report, specifically addressing and finding that appellant was capable of performing the duties of supply clerk, tote shipments, remains the weight of the medical evidence. The Office, therefore, properly terminated appellant's compensation benefits upon his

⁹ See *Connie Johns*, 44 ECAB 560 (1993).

¹⁰ Dr. Goodman, a Board-certified orthopedic surgeon, provided a June 18, 1996 report addressing only appellant's left elbow condition. Because the job description for a supply clerk, tote shipments was not prepared until after his report, Dr. Goodman did not address whether appellant was capable of performing the duties of the position.

refusal to accept suitable employment after informing him of the consequences of his refusal of that employment.¹¹

The decision of the Office of Workers' Compensation Programs dated February 28, 1997 is affirmed.

Dated, Washington, D.C.
August 2, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member

¹¹ Contrary to the assertion of appellant's representative, the Office properly issued its decision terminating compensation on the basis that appellant refused suitable employment following appellant's election to receive OPM benefits; *see Stephen R. Lubin*, 43 ECAB 564 (1992).