U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HARREL L. KRAMER and U.S. POSTAL SERVICE,
POST OFFICE, Carlinville, IL

Docket No. 97-2335; Submitted on the Record;
Issued January 10, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's claim for compensation for the period of September 10, 1993 to October 16, 1996 on the grounds that he refused an offer of suitable work; and (2) whether the Office properly terminated appellant's wage-loss compensation.

On July 29, 1993 appellant, then a 38-year-old mail carrier, filed a notice of occupational disease and claim for compensation alleging that he developed a foot condition in the performance of duty.[1] Appellant noted on his CA-2 form, that he first realized his foot condition was caused or aggravated by his employment on January 12, 1993.[2] The Office eventually accepted the claim for permanent aggravation of cavovarus deformity and calcaneal varus deformity of the left foot on November 29, 1995. Appellant stopped work on January 19, 1993. He received compensation for the period June 29 through September 9, 1993.

Appellant was initially treated by Dr. Thomas Sexton, a Board-certified podiatrist, for a stress fracture of the calcareous, confirmed by a bone scan. He underwent surgery on April 6, 1993 for plantar fasiotomy, tenolysis of the peroneal longus and brevis tendons. He also had surgery on July 30, 1993, consisting of split peroneous brevis ankle stabilization.

Dr. Sexton referred appellant to Dr. David W. Kinscherff, a Board-certified podiatrist, for a consultative evaluation. In an October 22, 1993 report, Dr. Kinscherff noted that appellant had severely twisted his ankle at work on January 12, 1993, during which time appellant probably ruptured his anterior talor fibular ligament, a common inversion sprain injury.

---

[1] Appellant filed a traumatic injury claim on January 9, 1991, alleging that he injured his neck, head, right, shoulder, ribs, hip and throat when he slipped on ice and fell in the performance of duty on January 7, 1991. The claim was accepted for right trapezius muscle strain.

[2] Appellant also filed a traumatic injury claim for twisting his ankle on January 12, 1993 which was denied.

In a duty status report dated August 26, 1993, Dr. Kinscherff opined that appellant was capable of performing light-duty work with restrictions that he not walk, stand, push, pull or do anything that required weight-bearing on his lower extremity for two months. He further stated that appellant could return to full duty with no restrictions on November 1, 1993.

By letter dated September 1, 1993, the employing establishment offered appellant a limited-duty position. Although appellant accepted the job he failed to report to work.

Appellant subsequently advised the employing establishment that he was unable to drive to work due to his foot condition and that he needed a handicap ramp installed so he could get into the building on his work site. The employing establishment built a ramp and directed appellant to report to work on October 14, 1993. Appellant next called the employing establishment on October 12, 1993 and stated that he could not return to work because he was under undue stress.

By letters dated November 17 and 23, 1993, appellant informed the Office that he was unable to return to work because of symptoms related to post-traumatic stress caused by his prior military service. Appellant stated that, since he had been unable to get compensation for wage loss and medical bills, he was experiencing increased stress symptoms. Appellant blamed his stress on the disparate treatment he received from his supervisor with respect to his claim for compensation. He also alleged that he feared a physical confrontation with his supervisor if he went back to work because he was not able to control his aggression when under stress.

In a report dated November 17, 1993, Dr. Gregory L. Laws, a Board-certified internist, noted that he treated appellant in January 1993 for ankle problems and that he had most recently treated appellant from October 24 to November 11, 1993 for severe anxiety attacks.

The Office referred appellant for a second opinion evaluation with Dr. Randall Rogalsky on December 9, 1993. In a report, which was date-stamped as received by the Office on January 6, 1994, Dr. Rogalsky discussed appellant's work injury and symptoms. He diagnosed left lateral ankle laxity of unknown origin. Dr. Rogalsky concluded that appellant was able to work eight hours a day with restrictions that he walk, lift, bend, squat, kneel and stand no more than two hours a day.

The Office next referred appellant for a second opinion evaluation with Dr. Kyu S. Cho on August 1, 1995. The Office requested that Dr. Cho address whether appellant's left foot and ankle condition were causally related to conditions of his employment or a work injury of January 12, 1993. In reports dated August 21 and October 25, 1995, Dr. Cho noted appellant's complaints of recurrent giving away and ankle inversions beginning in 1991. After reporting x-ray and physical findings, Dr. Cho diagnosed severe cavovarus deformity of both feet, severe hindfoot varus deformity with calcaneal varus deformity on both heels, and multiple metatarsalgia of the left foot secondary to loss of transverse metatarsal arch. He opined that a combination of factors including obesity, significant walking in his job, and an inadequately aligned heel, combined to aggravate appellant's symptoms related to his preexisting foot condition. Dr. Cho further opined that appellant was totally disabled from his prior duties as a mail carrier which required extensive walking.

In a decision dated January 25, 1994, the Office denied appellant's claim for compensation. An Office hearing representative, however, vacated the Office's decision on June 22, 1995, and remanded the case for further medical development. On November 29, 1995 the Office advised appellant that his claim was accepted for a permanent aggravation of a preexisting foot condition.

The employing establishment referred appellant for a fitness-for-duty evaluation performed by Dr. James M. Daniel on August 13, 1996. In a report dated August 26, 1996, Dr. Daniels indicated that appellant should not return to work until he had spoken to someone in the Employee Assistance Program to alleviate his concerns about returning to work for the employing establishment.

The employing establishment subsequently offered appellant a limited-duty position as a modified carrier technician on October 3, 1996. Appellant accepted the job and returned to work on October 21, 1996.

In a CA-8 form dated October 25, 1996, appellant filed a claim for continuing compensation for the period January 21, 1993 to October 20, 1996.

By letter dated November 14, 1996, the Office requested that appellant submit evidence to show why he failed to report work on September 3, 1993 in the position of a modified carrier as that job was previously accepted by appellant and considered by the Office to be suitable work. The Office notified appellant that failure to respond would result in a denial of his compensation claim for the period September 10, 1993 to October 20, 1996.

In response, appellant submitted a statement date-stamped as received by the Office on November 25, 1996. Appellant stated that he failed to report to the September 1993 job as he was fearful of aggression against his supervisor. He also alleged that he was disabled from work due to symptoms of stress, anxiety and depression related to a preexisting post-traumatic stress disorder.[3]

Appellant further submitted medical records from the St. Louis Medical Center indicating that he was treated for increased symptoms of panic attacks on October 24, 1993. In a November 17, 1993 report, Dr. Laws advised that appellant was treated for panic attacks between October 29 and November 12, 1993.

In a decision dated April 9, 1997, the Office denied appellant's claim for compensation for the period September 10, 1993 to October 16, 1996 on the grounds that appellant refused an offer of suitable work issued to him on September 8, 1993.

In another decision also rendered by the Office on April 9, 1997, the position of modified carrier technician was deemed to fairly and reasonably represent appellant's wage-earning

[3] Appellant submitted copies of a November 20, 1993 rating decision and a December 30, 1993 letter issued by the Department of Veterans Affairs which indicated that appellant was considered to be 50 percent disabled due to a nervous condition. He further submitted correspondence he received from the employing establishment with respect to the job offer and the ramp appellant had requested be built to give him access to the work site.

capacity. The Office, therefore, reduced appellant's wage-loss compensation pursuant to 5 U.S.C. § 8115.

Appellant requested reconsideration on May 1, 1997.

In a decision dated June 18, 1997, the Office denied appellant's request for reconsideration, finding that the evidence submitted by appellant in support of that request was insufficient to warrant merit review.

The Board finds that the Office improperly denied appellant's claim for compensation for the period September 10, 1993 to October 16, 1996 on the grounds that he refused an offer of suitable work.[4]

Once the Office accepts a claim it has the burden of proving that the employees' disability has ceased or lessened before it may terminate or modify compensation benefits.[5] Section 8106(c)(2) of the Federal Employee's Compensation Act[6] provides that the Office may terminate compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.[7] The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.[8]

The implementing regulation 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.[9] 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.[10]

In the instant case, the Office accepted that excessive walking in the performance of duty caused appellant to sustain a permanent aggravation of his preexisting foot deformity. After two surgeries, appellant was approved for a return to work in a limited-duty position by his treating physician and such a limited-duty position was offered to appellant by the employing establishment on September 1, 1993. Although appellant accepted the offered job, he did not report to work as directed. He later contacted the employing establishment alleging that he

[4] The Office has not issued a final decision as to whether appellant was entitled to compensation for wage loss from January 12 to June 28, 1993. Appellant received compensation from June 29 to September 9, 1993 as previously noted.

[5] *Karen L. Mayewski*, 45 ECAB 219 (1993); *Bettye F. Wade*, 37 ECAB 556 (1986).

[6] 5 U.S.C. §§ 8101-8193; 5 U.S.C. § 8106(c)(2).

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

[8] *Stephen R. Lubin*, 43 ECAB 564 (1992).

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

[10] *Maggie L. Moore*, 42 ECAB 484 (1991), *petition on recon. granted*, 43 ECAB 818 (1992).

suffered from an emotional condition and was unable to work. When appellant subsequently sought compensation for wage loss for the period September 10, 1993 to October 16, 1996, the Office denied the CA-8 claim and effectively terminated his compensation, noting that appellant refused an offer of suitable work issued to him on September 1, 1993.

The Board finds that the Office erred in finding that appellant refused an offer of suitable work as appellant specifically provided reasons why he was unable to report to his job which were not addressed by the Office until the April 9, 1997 decision denying his claim for compensation. Contrary to the Office's findings in this case, once the Office accepted appellant's claim, the Office was required to comply with Office procedures for modifying or terminating appellant's compensation. The Office was required to notify appellant that his reasons for refusing the offered job were found unacceptable and thereafter provide him with an additional 15 days to accept or reject the position.[11] Because appellant has not been afforded the procedural safeguards to which he is entitled, the Office erred in denying his compensation based on a finding that he refused an offer of suitable work.

The Board, also finds that the Office erred in finding that appellant had a zero percent loss of wage-earning capacity on or after October 10, 1990.

While wages actually earned are generally the best measure of a wage-earning capacity, this is only true if the evidence shows that the actual wages fairly and reasonably represent a claimant's wage-earning capacity. The Board has held that actual earnings do not fairly and reasonably represent a claimant's wage-earning capacity where the actual earnings are derived from a makeshift position designed for appellant's particular needs. Office procedures specifically direct a claims examiner to consider factors such as part-time, sporadic, seasonal or temporary work, when determining whether the position fairly and reasonably represents a claimant's wage-earning capacity.[12]

The Office terminated appellant's wage-loss compensation effective October 10, 1990 based on a determination that appellant returned to work for the employing establishment on October 10, 1990 in a modified carrier technician position and had no loss of wage-earning capacity. The Office, however, did not note in its June 18, 1997 decision, the wages received by appellant in the position he held at the time of injury for comparison with the actual wages appellant received in the modified position. Moreover, the Office did not address whether the modified position was a temporary or makeshift position. Consequently, the Office's determination to terminate appellant's wage-loss compensation effective October 10, 1990 based on a finding of zero percent loss of wage-earning capacity is in error.

[11] *Id.*

[12] *William D. Emory*, 47 ECAB 365 (1996).

The decisions of the Office of Workers' Compensation Programs dated June 18 and April 9, 1997 are hereby reversed.

Dated, Washington, D.C.
January 10, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member