U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ALFRED R. ANDERSON and U.S. POSTAL SERVICE,
POST OFFICE, Houston, TX

*Docket No. 98-531; Submitted on the Record;*
*Issued January 14, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
DAVID S. GERSON

The issues are whether appellant was disabled from July 28 to August 5, 1997 for 34.48 hours and from October 16 through October 22, 1997 and on October 27, 1997 for 41.33 hours.

This case is on appeal for the second time.[1] The Office of Workers' Compensation Programs accepted appellant's claim for a lumbosacral sprain and a herniated nucleus pulposus at L4-L5. On the first appeal, the Board reviewed an August 4, 1993 decision, by which the Office found that the weight of the medical evidence showed that appellant was capable of performing the light-duty position offered by the employing establishment and that appellant's leaving the position after one day constituted an abandonment of suitable work, for which the Office terminated compensation. The Board found, however, that the Office improperly terminated appellant's compensation benefits because it did not give appellant prior notification of its intent to terminate benefits and did not give appellant an opportunity to respond. The Board, therefore, reversed the Office's August 4, 1993 decision.

Appellant returned to work as a modified carrier in September 1996 working six hours a day.

The attending physician's reports, Forms CA-20a, dated December 16 and December 19, 1996 of Dr. Rawle Andrews, a specialist in family practice and occupational medicine and appellant's treating physician, suggests that he had placed appellant on a six-hour a day work schedule since June 2, 1993.

By letter dated September 24, 1996, Dr. Andrews stated that appellant told him that he was frequently assigned tasks which required bending and that this was contrary to their stipulation that appellant's job requirements would require occasional or infrequent bending. He

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[1] Docket No. 94-110 (issued November 3, 1995). The facts and history surrounding the prior appeal are set forth in the initial decision and are hereby incorporated by reference.

stated that such activity greatly exacerbated and worsened appellant's condition, causing him to obtain frequent evaluations and parenteral treatment.

By decision dated December 31, 1996, the Office adjusted appellant's wage-earning capacity to reflect his actual earnings as a limited-duty postal distributor, noting that his employment was effective on November 9, 1996.

On August 5, 1997 appellant filed a claim for continuing compensation on account of disability, Form CA-8, from July 28 through August 5, 1997. Appellant's supervisor stated that appellant was on the periodic rolls for two hours per day and that appellant wanted to be compensated for 34.48 hours but he should not be compensated for other than the two hours lost.

In a report dated September 8, 1997, Dr. Bernard Z. Albina, a Board-certified orthopedic surgeon and a second opinion physician, opined that appellant could perform light duty 8 hours a day and required work restrictions including avoiding repeated stopping, bending and lifting in excess of 10 pounds. He stated that appellant did not require physical therapy. In a work capacity evaluation dated September 8, 1997, Dr. Albina reiterated appellant's restrictions and stated that appellant could lift up to 10 pounds of weight 30 times an hour.

In a report dated September 10, 1997, Dr. Albina considered appellant's history of injury, performed a physical examination and reviewed numerous diagnostic tests, the most recent ones being a magnetic resonance imaging scan and x-rays in March 1996. He diagnosed chronic herniated lumbar disc at L4-L5 with residual symptoms of stiffness and limitation of motion in the back. He stated that appellant could perform light duty eight hours a day.

By letter dated September 30, 1997, Dr. Andrews stated that he disagreed with Dr. Albina's opinion that appellant could work eight hours a day. He stated that appellant had previously attempted to work eight hours a day and failed. Appellant then tried to work six hours a day and even then frequently missed work due to his back pain. Dr. Andrews stated that the managers and supervisors under whom appellant worked generally ignored the stipulated restrictions and assigned appellant duties that were clearly restricted in his report. He concluded that appellant should only work six hours a day and should undergo biweekly physical therapy and a therapeutic exercise program.

On September 22, 1997 the Office informed appellant that to document his claim, he must submit evidence from a physician documenting his time lost from work.

By decision dated October 7, 1997, the Office denied appellant's claim, stating that the evidence of record failed to establish that appellant was disabled for work from July 28 to August 5, 1997 for 34.48 hours.

On October 8, 1997 the employing establishment offered appellant the position of modified carrier, effective October 11, 1997. The hours of the job were 8 hours a day with restrictions of avoiding repeated bending, stooping and bending and no lifting more than 10 pounds more than 30 times an hour. Appellant accepted the offer on October 8, 1997.

On November 3, 1997 appellant filed a claim for disability, Form CA-8, for the time period from October 16 through 22, 1997 and on October 27, 1997. Appellant's supervisor stated that appellant requested compensation for 41.33 hours, that he had been released to work eight hours a day and he was not entitled to compensation.

In an attending physician's report dated November 3, 1997, Dr. Andrews noted that he examined appellant on October 16 and 27, 1997 and that appellant had moderately severe lower back pain with moderate reduction in range of motion with "2-3+" tenderness. He checked the "No" box that appellant was not disabled and stated that appellant should perform light-duty work six hours a day.

By letter dated November 13, 1997, the Office informed appellant that he had 10 days to submit medical evidence documenting his lost time from work.

By letter dated November 18, 1997, appellant stated that he "was forced" to accept the eight-hour position else face termination of his benefits and that he worked eight hours per day beginning on October 14, 1997. Appellant stated that he aggravated his back during his employment, missed work from October 16 to 22, 1997 and worked eight hours on October 23, 1997 but on October 24, 1997, after working 6.5 hours, his back started hurting and he had spasms in the middle of his back down to his upper thighs. He saw his doctor who put him back on six hours a day.

By decision dated November 25, 1997, the Office denied the claim, stating that the medical evidence of record failed to establish disability for work on or after October 16, 1997.

The Board finds that the Office properly determined that appellant was not entitled to disability compensation from July 28 through August 5, 1997 for the number of hours he missed above his two hours a day disability compensation.

Since the Office was paying appellant compensation based upon the ongoing submission of documentation that he was disabled following his July 28, 1990 employment injury, appellant maintained the burden of establishing entitlement to disability compensation which was related to the employment injury.[2] The first claim for compensation appellant submitted was on August 5, 1997 for time lost from work for 34.48 hours from July 28 through August 5, 1997. Appellant's supervisor indicated that at that time, appellant was on the periodic rolls for two hours a day. Appellant, however, did not submit any medical evidence to show that he was totally disabled during this time period. In his September 30, 1997 report, Dr. Andrews stated that appellant should work six hours a day but did not state that appellant was unable to work at all from August 5 through July 28, 1997. Although on September 22, 1997 the Office provided appellant with the opportunity to present medical evidence to support his claim, appellant was not responsive to this request. The Office, therefore, properly determined that appellant was not entitled to disability compensation for the period from August 5 through July 28, 1997.

[2] *Donald Leroy Ballard*, 43 ECAB 876, 882 (1992).

The Board finds that the case is not in posture for decision regarding appellant's second claim for disability from the period from October 16 through 22, 1997 and on October 27, 1997.

Appellant submitted his second claim for disability on November 3, 1997 for the period from October 16 through October 22, 1997 and on October 27, 1997 for 41.33 hours. Appellant's supervisor indicated that at that time, appellant had been released to return to work for eight hours a day.

Appellant did not submit any medical evidence showing that he was unable to work at all during this time period. In the attending physician's report dated November 3, 1997, Dr. Andrews noted that he examined appellant on October 16 and 27, 1997, checked the "No" box that appellant was not disabled and stated that appellant could perform light duty six hours a day. He stated that appellant had moderately severe lower back pain with moderate reduction in range of motion with 2 to 3+ tenderness. In his September 30, 1997 report, Dr. Andrews stated that appellant's managers and supervisors were assigning him work which exceeded his light-duty restrictions. In his September 10, 1997 report, Dr. Albina, the second opinion physician, opined that appellant could work eight hours a day. A conflict in the medical evidence therefore, exists between Dr. Andrews' and Dr. Albina's opinions as to whether appellant was partially disabled, *i.e.*, whether appellant could work more than six hours a day. Dr. Andrews' attending physician's reports dated December 16 and December 19, 1996 indicate that he recommended that appellant work six hours a day since June 2, 1993. The Office's October 7, 1997 decision stated that appellant was on the periodic rolls for two hours a day as of that date. In his September 10, 1997, Dr. Albina diagnosed chronic herniated lumbar disc at L4-L5 and residual symptoms of stiffness and limitation of motion in the back. Although Dr. Albina advised that appellant could perform light-duty work eight hours a day, he did not provide any explanation as to why appellant could at that time begin working a full day. He did not indicate that there was any change in appellant's condition. Dr. Albina's opinion, therefore, is not well rationalized. The Board finds that the conflict between Dr. Andrews and Dr. Albina's opinions as to the hours of day appellant could work necessitates referral to an impartial medical specialist in order to resolve the conflict.[3]

Upon remand of the case, the Office should refer appellant with a statement of accepted facts and his medical records to an impartial medical specialist for an examination and an evaluation to resolve the conflict in the medical opinion as to whether appellant was able to perform eight hours a day light duty as of October 16, 1997.

[3] *See* 5 U.S.C. § 8123(a) which provides: "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." *See also Albert O. Gonzales*, 46 ECAB 684, 692 (1995).

The decision of the Office of Workers' Compensation Programs dated October 7, 1997 is hereby affirmed. The decision of the Office dated November 25, 1997 is hereby set aside and the case is remanded for further action consistent with this decision.

Dated, Washington, D.C.
January 14, 2000

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member