U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JODY WYCHE and DEPARTMENT OF STATE, BUREAU OF DIPLOMATIC SECURITY, Rosslyn, VA

Docket No. 98-1065; Submitted on the Record;
Issued July 5, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective December 10, 1995 on the grounds that appellant refused suitable work pursuant to 5 U.S.C. § 8106(c); and (2) whether the Office abused its discretion in refusing to reopen appellant's claim for further review of the merits of his claim under 5 U.S.C. § 8128(a).

On December 3, 1993 appellant, then a 39-year-old special agent, filed a claim for an occupational disease (Form CA-2) alleging that he first realized that his avascular necrosis of the left hip was caused or aggravated by his employment on May 1, 1991. Appellant stopped work on November 3, 1993.

By letter dated January 10, 1994, the Office accepted appellant's claim for aggravation of preexisting aseptic necrosis and degenerative arthritis of the left hip.

By letter dated January 18, 1995, the Office referred appellant along with a statement of accepted facts, medical records and a list of specific questions to Dr. Bahman Sadr, a Board-certified orthopedic surgeon, for a second opinion examination. By letter of the same date, the Office advised Dr. Sadr of the referral.

Dr. Sadr submitted a February 1, 1995 medical report finding that appellant had osteoarthritis of the left hip, that he was disabled from performing his usual and regular job, but that appellant could perform sedentary work. By letter dated April 25 1995, the Office advised him to provide clarification regarding appellant's disability. In response, Dr. Sadr submitted a May 5, 1995 supplemental medical report finding that appellant did not have any work-related disability and that appellant could perform sedentary work with restrictions.

On April 11, 1995 the employing establishment advised the Office that a job was available within appellant's physical capabilities.

On October 13, 1995 Dr. Montague Blundon, III an orthopedic surgeon and appellant's treating physician, indicated that he had reviewed the position description for a personnel security specialist and found that such job was within appellant's ability.

In an October 19, 1995 letter, the Office advised appellant that the personnel security specialist position was suitable for his work capabilities. The Office also advised appellant that Dr. Blundon had reviewed the job duties of the offered position and determined that he was capable of performing such duties. The Office further advised appellant that he had 30 days in which to accept the offered position or to provide an explanation of the reasons for refusing the job along with relevant medical reports supportive of the refusal. The Office then advised appellant of the penalties for refusing an offer of suitable work under section 8106 of the Federal Employees' Compensation Act.

On October 31, 1995 the employing establishment offered appellant the position of personnel security specialist. By letter dated November 7, 1995, appellant rejected the employing establishment's job offer stating that he was totally disabled and that his hip required repair or replacement surgery based on Dr. Blundon's recommendation.

By letter dated November 9, 1995, the Office advised appellant that his reason for refusing the offered position of personnel security specialist was not suitable. The Office then advised appellant that he had to accept the offered position within 15 days. The Office again advised appellant about the penalties for refusing an offer of suitable work under section 8106 of the Act.

In response, appellant submitted a November 18, 1995 letter indicating that his condition prevented him from returning to work based on an examination with Dr. Blundon. Appellant's response letter was accompanied by medical evidence.

By decision dated November 24, 1995, the Office terminated appellant's compensation effective December 10, 1995 on the grounds that appellant refused suitable work without justified cause. In an accompanying memorandum, the Office found that appellant failed to submit rationalized medical evidence establishing that he was unable to perform the duties of the offered position. In a December 10, 1995 letter, appellant requested a review of the written record by an Office representative accompanied by factual and medical evidence.

By decision dated April 15, 1996, the hearing representative affirmed the Office's decision. In a June 24, 1996 letter, appellant requested reconsideration of the Office's decision accompanied by medical evidence.

In a November 21, 1996 telephone memorandum, the Office advised appellant that his request for total hip arthroplasty had been denied. The Office also advised appellant that it would issue a formal decision on this matter.[1]

By decision dated May 12, 1997, the Office denied appellant's request for modification based on a merit review of the claim. In an accompanying memorandum, the Office found that the offered position of personnel security specialist was suitable when the offer was originally made to appellant. By letter dated November 25, 1997, appellant requested reconsideration of the Office's decision accompanied by factual and medical evidence.

By decision dated December 18, 1997, the Office denied appellant's request for reconsideration without a merit review of the claim on the grounds that the evidence submitted was immaterial, repetitious and cumulative in nature and thus, insufficient to warrant review of the prior decision.[2]

The Board finds that the Office properly terminated appellant's compensation effective December 10, 1995 on the grounds that appellant refused suitable work pursuant to 5 U.S.C. § 8106(c).

It is well settled that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[3] This includes cases in which the Office terminates 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 under section 8106(c)(2).[4] 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.[5] 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.[6]

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[1] In a November 25, 1996 letter, appellant requested that the Office consider certain points regarding his request for total hip arthroplasty. In several letters appellant requested that the Office advise him when its decision regarding his request for surgery would be issued. The record does not contain a formal decision issued by the Office regarding its denial of appellant's request for hip replacement surgery. As the Office has not issued a final decision on this issue, the Board will not address this issue on appeal. 20 C.F.R. § 501.2(c).

[2] The Board notes that subsequent to the Office's December 18, 1997 decision, the Office received additional medical evidence. The Board, however, cannot consider evidence that was not before the Office at the time of the final decision. *See* 20 C.F.R. § 501.2(c)(1).

[3] *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[4] *Patrick A. Santucci*, 40 ECAB 151 (1988); *Donald M. Parker*, 39 ECAB 289 (1987); *Herman L. Anderson*, 36 ECAB 235 (1984).

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

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

Section 10.124(e)[7] 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 and shall be provided with the opportunity to make such 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,[9] and must inform appellant of the consequences of refusal to accept such employment.[10] According to Office procedures, certain explanations for refusing an offer of suitable work are considered acceptable.[11] In the present case, the Office has properly exercised its authority as granted under the Act and implementing federal regulations.

In this case, Dr. Sadr, a Board-certified orthopedic surgeon and second opinion physician, opined that appellant did not have any work-related disability and that he could perform sedentary work. The employing establishment identified the personnel security specialist position and advised appellant of the offered position on October 31, 1995. With respect to the procedural requirements for termination under section 8106(c), the Office advised appellant, by letter dated October 19, 1995, that the personnel security specialist position was found to be suitable and that appellant had 30 days to either accept the offer or provide reasons for refusing the offer. Following receipt of a November 7, 1995 letter, the Office advised appellant, by letter dated November 9, 1995, that the reason for refusing the job offer was unacceptable and that appellant had 15 days to either accept the job offer or compensation would be terminated. The Board, therefore, finds that the Office properly followed the procedural requirements for termination under section 8106(c) of the Act.

In terminating appellant's compensation, the Office relied on the February 1, 1995 medical report of Dr. Sadr. In this report, he provided appellant's job duties, a history of appellant's medical treatment and complaints and his findings on physical and objective examination. Dr. Sadr opined that appellant had developed osteoarthritis of the left hip which had been slowly progressive with increasing pain over the past 13 years. He further opined that appellant was disabled and unable to perform his usual and regular job, but that he saw no reason why appellant could not return to a sedentary occupation in due course. Dr. Sadr disagreed with the diagnosis of avascular necrosis of the left femoral head rendered by Dr. Blundon, an orthopedic surgeon and appellant's treating physician. Dr. Sadr stated that upon review of the x-rays, he saw no evidence of femoral head collapse and believed that a component of a vascular necrosis did not exist. He indicated a poor prognosis and appellant's work restrictions. Dr. Sadr concluded that a total hip replacement at some time in the future would hopefully reduce appellant's pain, but that it would not enable him to resume his former activity. He further

[7] 20 C.F.R. § 10.124(e).

[8] *Maggie L. Moore*, 42 ECAB 484, 488 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[9] *See Carl W. Putzier*, 37 ECAB 691 (1986); *Herbert R. Oldham*, 35 ECAB 339 (1983).

[10] *See Maggie L. Moore*, *supra* note 8; *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(d)(1).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(1)-(5).

concluded that a total hip replacement should be delayed as long as possible, preferably until appellant was past the age of 50 years old.

In response to the Office's April 25, 1995 request for clarification, Dr. Sadr submitted a May 5, 1995 supplemental medical report finding that appellant did not have any work-related disability, that appellant did not require total hip replacement at that time and that appellant could perform sedentary work with restrictions.

Further, the Office found that Dr. Sadr's opinion was supported by Dr. Blundon, who opined that appellant could perform the duties of a personnel security specialist based on his review of a description of this position. Subsequent to the Office's November 24, 1995 decision to terminate his compensation, appellant submitted Dr. Blundon's June 11, 1996 medical report indicated that appellant needed hip surgery due to a November 3, 1993 injury and that appellant was unable to perform sedentary work due to severe pain and tenderness radiating through his hip and because he was unable to sit for eight hours a day. Dr. Blundon opined that appellant was unable to work as a security officer at that time and even after hip surgery. He noted that appellant was in severe pain which interfered with his concentration and his ability to move through the work environment and to communicate with other workers. The Office's procedures provide that termination of compensation under section 8106(c) of the Act should not be modified even if appellant's medical condition later deteriorates and he or she claims a recurrence of total disability.[12] Although Dr. Blundon opined that appellant's condition had deteriorated to the point where he was unable to perform sedentary work at that time, it is insufficient to establish that appellant could not perform the offered position. Further, Dr. Blundon's report does not specifically address whether appellant could perform the personnel security specialist position at the time it was offered to appellant by the employing establishment.

Inasmuch as the medical opinion of Dr. Sadr that appellant could perform the duties of the offered position, which was supported by Dr. Blundon is rationalized and based on an accurate factual and medical background, it is sufficient to establish that appellant was able to perform the personnel security specialist position at the time it was offered and that the position constituted an offer of suitable work. Therefore, the Office met its burden of proof in terminating appellant's compensation effective December 10, 1995 on the grounds that appellant refused suitable work under section 8106(c) of the Act.

The Board further finds that the Office did not abuse its discretion in refusing to reopen appellant's claim for further review of the merits of his claim under 5 U.S.C. § 8128(a).

The Office has issued regulations regarding its review of decisions under section 8128(a) of the Act. Section 10.138(b)(1) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law, or (2) advancing a point of law or a fact not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(d)(1).

Office.[13] Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without review of the merits of the claim.[14]

In his November 25, 1997 request for reconsideration, appellant argued that the employing establishment failed to offer reasonable accommodations in his previous position as a special agent, thus violating the Rehabilitation Act of 1973, to follow procedures of the Injury Compensation for Federal Employees handbook, to follow procedures set forth in sections 10.124(b) and 10.123 in the federal regulations and to establish work restrictions that allowed for the offer of the position. Appellant further argued that the Office failed to follow the regulations in section 10.124(b) and procedures in part 2.0814.5(a)(3), (4)(a), to recognize that his reconsideration request was a claim for a recurrence of disability and to establish work restrictions that allowed for the offer of the position. Lastly, appellant argued that there was a conflict in the work restrictions form on file with the Office and the job offered. Appellant's contentions fail to establish that the offered position of personnel security specialist was unsuitable and that the Office committed error in terminating his compensation on the grounds that he refused such work. As previously discussed, the Office properly followed the procedural requirements for termination under section 8106(c) of the Act.

The medical evidence submitted by appellant in support of his request for reconsideration fails to establish that the Office abused its discretion in refusing to reopen his claim for a merit review. Appellant submitted Dr. Blundon's June 4, 1997 letter revealing a misunderstanding about his prior opinion that appellant could perform the offered position. In this letter, Dr. Blundon stated:

> "[I]f you review my enclosed note from October 26, 1995 you will note that the surgery for the total hip arthroplasty was proposed. We were told over the [tele]phone that the surgery would be approved if the [appellant] was returned to the light-duty status.
>
> "Specifically the light duty was approved with the understanding that the surgery would be done first and, of course, if the surgery was successful, then the [appellant] would be able to return to work.
>
> "[Appellant] needed the operation in order to be treated for his accident of November 3, 1993 and the surgical treatment was necessary in order for him to return to light-duty work."

Although Dr. Blundon now stated that appellant could not perform the duties of the offered position unless he had successful hip surgery, he did not address why he had earlier approved the position without conditions at the time it was offered to him by the employing establishment. Therefore, it is insufficient to establish that the position offered to appellant by the employing establishment was unsuitable.

[13] 20 C.F.R. § 10.138(b)(1).

[14] 20 C.F.R. § 10.138(b)(2).

The duplicate November 16, 1995 treatment notes from Dr. Blundon, appellant's November 7, 1995 rejection of the offered position of personnel security specialist, the Office's October 6, 1995 letter, to Dr. Blundon regarding the offered position, the reports from a vocational rehabilitation counselor dated March 24 and May 11, 1995 regarding the suitability of the offered position, and copies of a report of telephone call regarding conversations between appellant and the Office are insufficient to warrant a merit review of the record. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[15]

Appellant submitted Dr. Blundon's March 15, 1995 work capacity evaluation for musculoskeletal conditions (Form OWCP-5c) which provided that he was totally disabled. Dr. Blundon's Form OWCP-5c, however, fails to address the relevant issue in this case whether appellant could perform the duties of the personnel security specialist offered by the employing establishment.

Appellant has failed to show that the Office erroneously applied or interpreted a point of law, to advance a point of law or fact not previously considered by the Office or to submit relevant and pertinent evidence not previously considered by the Office. Therefore, the Board finds that the Office was not required to review the merits of appellant's claim.[16]

[15] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

[16] *Nora Favors*, 43 ECAB 403 (1992).

The December 12 and May 12, 1997 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.
July 5, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member