U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RODERICK L. HAWKINS and DEPARTMENT OF THE NAVY, NAVAL SHIPYARD, Norfolk, VA

Docket No. 98-2096; Submitted on the Record;
Issued July 26, 2000

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits, effective July 20, 1997, on the grounds that he refused an offer of suitable work.

On October 28, 1991 appellant, then a 45-year-old pipefitter, injured his right lower leg when he fell over a log at the worksite. He filed a claim for benefits on November 25, 1991, which the Office accepted for laceration of the right lower leg and chronic infection of the right leg. Appellant returned to work in a part-time, light-duty capacity on May 26, 1992. He subsequently missed work for intermittent periods, for which the Office paid him appropriate compensation. Appellant received a disability separation from the employing establishment on October 15, 1993.

On October 5, 1993 appellant filed a Form CA-2 claim for benefits, alleging that he sustained a recurrence of disability which was caused or aggravated by his October 28, 1991 employment injury. The Office accepted this claim, placed him on the periodic rolls on March 2, 1994 and paid continuing compensation for total disability.

In a report dated October 31, 1995, Dr. Sidney W. Tiesenga, a Board-certified orthopedic surgeon, stated that appellant was not currently disabled from all work as a result of his 1991 injury. He stated that appellant was only partially disabled, as indicated by a June 1993 work status report. Dr. Tiesenga also submitted an October 31, 1995 work capacity evaluation form in which he outlined restrictions for a return to work. He stated that appellant should perform limited lifting of 20 to 50 pounds for only 2 hours, intermittently, 4 hours of walking, 1 hour of stair climbing, no ladder climbing, no kneeling, no repeated stooping and no climbing. Dr. Tiesenga found that appellant had no restrictions involving the upper extremities and indicated that appellant could work an eight-hour day with the above restrictions. He concluded that appellant reached maximum medical improvement on June 29, 1993.

By letter dated February 28, 1996, the Office referred appellant to a vocational rehabilitation counselor.

In a report dated September 26, 1996, the vocational counselor stated that she and appellant met with a representative of Diversified Industrial Concepts, a federal contractor, who informed appellant that Diversified Industrial Concepts had modified/accommodated job openings and had appropriate work within his restrictions. The vocational counselor stated, however, that appellant indicated he was not interested in working and had expressed a specific disinterest in working outside the federal system.

In an October 7, 1996 letter to appellant's vocational counselor, Diversified Industrial Concepts advised that it had offered appellant a light-duty janitorial position, modified as needed, to appellant. The letter indicated that appellant had declined the position, stating that he was not interested in returning to work.

Diversified Industrial Concepts submitted a job analysis dated November 12, 1996, in which it described the job duties of the modified janitor position. These included dusting, dust mopping, trash removal, cleaning restrooms and servicing restrooms; appellant would be required to use a dust mop, sponges and a dust cloth. The report indicated that appellant would be required to do two hours of sitting, three hours of standing and three hours of walking, with the lifting requirement modified as needed. The job involved no kneeling, climbing, overhead reaching, crawling or working at heights and required modified pushing, pulling and bending at the waist. In a report dated October 15, 1996, the vocational rehabilitation counselor advised that the position was within appellant's work restrictions, but stated that appellant had refused the job offer.

In a final status report dated November 18, 1996, the vocational counselor stated that appellant refused the job and was completely uninterested in working. She concluded that appellant had blatantly refused to work with an employer who was willing to accommodate any and all restrictions.

By letter dated November 27, 1996, the Office advised appellant that a suitable position was available and that pursuant to section 8106(c)(2), it had been informed by the employing establishment that he had refused its offer of suitable employment consistent with the physical limitations imposed by his injury. The Office indicated that the job remained open and that he had 30 days to either accept the job or provide a reasonable, acceptable explanation for refusing the offer. The Office stated that if appellant refused the job or failed to report to work within 30 days without reasonable cause, it would terminate his compensation pursuant to 5 U.S.C. § 8106(c)(2).[1]

By letter dated January 7, 1997, the Office requested an updated medical report from his treating physician, Dr. Joseph P. Barreca, a Board-certified surgeon, regarding the current condition of his work-related right leg injury.

[1] 5 U.S.C. § 8106(c)(2).

In a report dated January 6, 1997, Dr. Tiesenga, appellant's treating physician in separate claims for a work-related left knee injury and for a schedule award based on the left knee injury, stated that he had attached an updated work status report which contained both his own work restrictions from the left knee injury and work restrictions from the right knee injury from Dr. Barreca. The form is signed by Dr. Barreca, who apparently reviewed and approved its findings and conclusions and listed the following restrictions: no moderate lifting or carrying; *i.e.*, from 20 to 50 pounds, no kneeling, no stair climbing, no ladder climbing, no stooping, no more than 3 hours per day of walking and limited, sedentary lifting and carrying not exceeding 10 to 20 pounds for 2 to 4 hours per day.

By letter dated February 5, 1997 to appellant's congressional representative, the Office afforded appellant a 30-day extension to submit medical evidence supporting his contention that he was not capable of working in the position.

In a memorandum dated March 20, 1997, an aide from the office of appellant's congressional representative advised the Office in a telephone call that appellant had resolved to submit additional evidence from Vocational Coastal, Inc. The only additional evidence appellant submitted was an unsigned treatment note dated February 25, 1997.

By letter dated March 23, 1997, the Office advised appellant that it had been informed by Diversified Industrial Concepts in a letter dated March 21, 1997 that the janitorial position remained open. The Office further advised appellant that he had 15 days in which to accept the position or it would terminate his compensation. Appellant did not respond to this letter within 15 days.

By decision dated June 26, 1997, the Office found that appellant was not entitled to compensation benefits, effective July 20, 1997, on the grounds that he had refused to accept a suitable job offer.

By letter dated July 28, 1997, appellant requested reconsideration.

By decision dated February 18, 1998, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence such that it was sufficient to require the Office to review its prior decision.

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits on the grounds that he refused an offer of suitable work.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits. Under section 8106(c)(2) of the Federal Employees' Compensation Act[2] the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[3] Section 10.124(c) of the Office's regulations provides that an employee who refuses or neglects

[2] 5 U.S.C. §§ 8101-8193.

[3] *Patrick A. Santucci*, 40 ECAB 151 (1988); *Donald M. Parker*, 39 ECAB 289 (1987).

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 a showing before a determination is made with respect to termination of entitlement to compensation.[4] To justify termination, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[5] This burden of proof is applicable if the Office terminates compensation under 5 U.S.C. § 8106(c) for refusal to accept suitable work. The Office did not meet its burden in the present case.

The initial question in this case is whether the Office properly determined that the position was suitable. 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] A review of the medical evidence in the present case indicates that there is not sufficient medical evidence to support a finding that the offered position was within appellant's physical limitations. Dr. Tiesenga found in his October 31, 1995 work capacity evaluation that appellant could work an 8-hour day with limited restrictions on lifting of 20 to 50 pounds for only 2 hours, intermittently, 4 hours of walking, 1 hour of stair climbing, no ladder climbing, no kneeling, no repeated stooping and no climbing. Based on these restrictions, the vocational rehabilitation counselor located a modified, eight-hour job as a janitor which was specifically tailored to these restrictions and was subject to further modifications, as needed. The Office found that the position of modified janitorial worker offered by the employing establishment was within these restrictions. However, Dr. Tiesenga submitted an additional work limitations form and report in January 1997, signed and approved by Dr. Barrecca, his treating physician, which contained greater restrictions due to Dr. Tiesenga's inclusion of the effects of a left knee condition, unrelated to appellant's employment.[7] These included light lifting or carrying for only 2 to 4 hours per day, not exceeding 10 to 20 pounds, only 3 hours of walking and no stair climbing. Once appellant submitted this additional medical evidence indicating he had greater physical restrictions than those upon which the modified janitor job was based, the offered position was no longer suitable. The Office is required to include those conditions, regardless of etiology, which existed prior to the job offer.[8] Therefore, as the Office did not include the additional restrictions stemming from appellant's nonwork-related left leg condition in the modified janitor position, this raised the issue of whether the duties of the position exceeded the restrictions imposed by Drs. Tiesenga and Barrecca. The Office, however, did not attempt to have the employing establishment tailor the duties of the job to conform with these additional restrictions. As it is the Office's burden of

[4] 20 C.F.R. § 10.124(c); *see also Catherine G. Hammond*, 41 ECAB 375 (1990).

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

[6] *Robert Dickinson*, 46 ECAB 1002 (1995).

[7] In his January 6, 1997 report, Dr. Tiesenga stated that appellant had sustained a nonwork-related anterior cruciate ligament tear and resultant degenerative joint disease of his left knee.

[8] *See* 20 C.F.R. § 10.124(c).

proof to establish that appellant refused a suitable position, the Office did not meet its burden of proof in this case to terminate appellant's compensation benefits pursuant to 5 U.S.C. § 8106.[9]

The decision of the Office of Workers' Compensation Programs dated June 26, 1997 is hereby reversed.

Dated, Washington, D.C.
July 26, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

[9] *Barbara R. Bryant*, 47 ECAB 715 (1996).