U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONALD E. HENRY and DEPARTMENT OF LABOR, MINE SAFETY & HEALTH ADMINISTRATION, Barbourville, KY

Docket No. 99-473; Oral Argument Held November 16, 1999; Issued July 5, 2000

Appearances: *Ronnie Irvin*, for appellant; *Sheldon G. Turley, Jr., Esq.*, for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON, A. PETER KANJORSKI

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

On April 23, 1992 appellant, then a 55-year-old coal mine inspector, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that he injured his back while getting riding a scoop and was thrown up in the air when the vehicle hit a hole.[1] The Office accepted the claim on October 23, 1992 for a herniated disc at L5-S1 and placed him on the automatic rolls for temporary disability.

On July 17, 1992 appellant filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that his coal workers' pneumoconiosis was due to his employment as a coal mine inspector.[2] The Office issued a 10 percent permanent impairment for each lung for a total of 20 percent.

In a letter dated March 27, 1996, Dr. Joseph L. Zerga[3] diagnosed a small HNP centrally and to the right at L5-S1 and opined that appellant was totally disabled from working. Dr. Zerga noted that appellant was restricted in his daily life form any bending, stooping and lifting more than 20 pounds at a time.

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[1] This was assigned claim number A11-116937.

[2] This was assigned claim number A11-120553 and was combined with appellant's claim A11-120011 for which he was awarded a schedule award for pneumoconiosis. The Office noted that both claims had the same date of injury when the claims were combined.

[3] An attending physician Board-certified in geriatric psychiatry, neurology and psychiatry.

In a work restriction form (OWCP-5c) dated April 8, 1996, Dr. Zerga indicated appellant could work 2 hours per day provided there was no bending, sitting or crawling, that he could stand and no lifting over 20 pounds.

On April 23, 1996 the Office referred appellant, together with a statement of accepted facts, medical records and list of questions, to Dr. Joseph H. Rapier, Jr.[4] for a second opinion as to whether appellant was capable of returning to work or remained totally disabled due to his accepted employment injury.

In a report and work restriction form dated May 9, 1996, Dr. Rapier indicated that appellant was capable of work 4 hours per day provided appellant was able to limit bending, lifting, twisting, kneeling, crawling, climbing and the time spent in a standing position and walking as well as not lifting more than 10 pounds.

On July 2, 1996 the Office referred appellant to Dr. William E. Kennedy,[5] together with a statement of accepted facts, medical records, and questions to be answered, to resolve the conflict between Drs. Rapier and Zerga on appellant's work tolerance limitations.

In a report dated July 17, 1996, Dr. Kennedy opined that appellant was totally and permanently disabled.

By letter dated August 21, 1996, the Office requested that Dr. Kennedy review the position description of the employing establishment specialist and advise whether appellant was capable of performing this job from a physical standpoint as well as the number of hours appellant could perform the job.

In a letter dated September 4, 1996, Dr. Kennedy reviewed the proposed job requirements and opined that appellant was physically capable of performing the position.

On December 2, 1996 the Office sent Dr. Kennedy a letter asking how many hours appellant could perform the position of mine safety and health specialist.

Dr. Kennedy returned the form indicating that appellant could work eight hours in the offered position of mine safety and health specialist.

On January 8, 1997 the Office referred appellant, together with a statement of accepted facts, medical records, position description and questions to be resolved, to Dr. Mitchell Wicker, Jr.[6] for a second opinion as to whether appellant was capable of performing the position of mine safety and health specialist for eight hours per day from a pulmonary standpoint.

On January 31, 1997 the employing establishment offered appellant the position of mine health and safety inspector in Birmingham, Alabama. Appellant was advised that the Office

[4] A second opinion Board-certified orthopedic surgeon.

[5] A Board-certified orthopedic surgeon.

[6] A Board-certified internist.

would pay relocation expenses. The employing establishment informed appellant that he had 15 days to decline or accept the position.

In a response received by the Office on February 20, 1997,[7] appellant declined the position on the basis that he could not drive seven hours one way to Birmingham and that this was an illegal transfer.

On February 25, 1997 the Office informed appellant that he had 30 days to either accept the offered position or provide reasons for refusing the position. The Office warned appellant of the consequences of refusing a suitable job without adequate justification.

In letter dated March 19, 1997 and received by the Office on April 1, 1997, appellant indicated that he was unable to accept the position as it was outside his commuting area, his wife's illness prevented him from moving, his age, he cannot sell his house and cannot move, his health has gotten worse and he is totally disabled by social security standards.

By letter dated April 1, 1997, the Office advised appellant that the reasons he provided for refusing the position were unacceptable and informed him that he had an additional 15 days to accept the position. The Office informed appellant that if a response was not received within 15 days that a final decision would be issued.

By letter dated April 3, 1997, the Office advised appellant that there was no medical evidence to support his contention that his wife was ill and gave him until April 21, 1997 to accept the position. The Office also informed appellant that no further reasons for refusing the position would be considered.

By letter dated April 17, 1997, appellant responded to the Office's letter and submitted various evidence including a letter from his wife's physician. In a letter dated March 11, 1997, Dr. Elias Dalloul indicated that it was "medically necessary" that appellant stay at home with his wife to assist her with her medical condition. Dr. Dalloul stated that appellant's wife had several debilitating medical conditions which required care from her husband.

By letter dated April 21, 1997, the Office determined that a conflict in the medical evidence existed regarding appellant's ability to work eight hours per day and informed appellant that he would be referred for another independent medical examination to resolve the conflict. The Office also advised appellant that the reasons he provided for refusing the position were found to be invalid.

On April 30, 1997 the Office referred appellant to Dr. Jeffrey R. McConnell[8] to resolve the conflict between Dr. Rapier and Dr. Kennedy on appellant's ability to work eight hours per day.

[7] Appellant signed the form and dated it February 26, 1996.

[8] A Board-certified orthopedic surgeon.

In a report dated May 19, 1997, Dr. Wicker opined that appellant was capable of working eight hours per day in the position offered by the employing establishment.

In a report dated May 22, 1997, Dr. McConnell opined that appellant was physically capable of working eight hours per day in the position of mine safety and health specialist.

On July 14, 1997 the employing establishment again offered appellant the position of mine health and safety specialist which it noted was found to meet the restrictions noted by Drs. Kennedy, Wicker and McConnell.

By letter dated August 7, 1997, the Office advised appellant that the position of mine safety and health specialist had been found to be suitable and that he had 30 days to either accept the position or provide reasons for refusing the job offer. Appellant was also informed of the penalty provision of section 8106(c)(2) for refusing an offer of suitable employment.

On August 21, 1997 appellant declined the position for reasons previously stated and advised that a class-action suit had been filed with the Equal Employment Opportunity Commission.

By letter dated September 12, 1997, the Office advised appellant that his reasons for refusing the position were found unacceptable and informed him that he had 15 days to accept the position.

On October 21, 1997 the Office terminated appellant's compensation effective November 8, 1997 on the grounds that appellant had refused an offer of suitable work.

In a letter dated November 10, 1997, appellant, through his representative, requested a hearing before an Office hearing representative.

In a letter dated December 10, 1997, appellant's representative submitted a December 1, 1997 report from Dr. James Templin. In his report, Dr. Templin, based upon a physical examination and review of the position description, opined that appellant was totally disabled and listed various physical restrictions. Regarding the position description, Dr. Templin noted, "[w]hile I have been provided a copy of the specific job duties, the description provided by [appellant] of the work of a mine safety and health specialist would be inconsistent an incompatible with his current medical connection."

On May 27, 1998 a hearing was held at which appellant was represented, allowed to submit evidence and testified.

By decision dated October 9, 1998, the hearing representative affirmed the termination on the grounds that appellant had refused an offer of suitable work.

The Board finds that the Office properly terminated 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. 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 met its burden in the present case.

Under section 8106(c)(2) of the Federal Employees' Compensations Act (FECA),[9] the Office may terminate the 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.[10] Section 10.124(c) of the Code of Federal Regulations[11] 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 showing before a determination is made with respect to termination of entitlement to compensation.[12] To justify termination of compensation, the Office must show that the work offered was suitable[13] and must inform appellant of the consequences of refusal to accept such employment.[14]

Office procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.[15] Unacceptable reasons include relocation for personal desire or financial gain, lack of promotion potential or job security.[16]

In the instant case, appellant filed a claim on April 23, 1992 which the Office accepted for a herniated disc at L5-S1 and on July 17, 1992 he filed an occupational disease which the Office accepted for coal workers' pneumoconiosis. On **, the Office referred appellant to Dr. Rapier for a second opinion on whether appellant was still totally disabled. Dr. Rapier, in his May 9, 1996 report indicated that appellant was capable of working four hours per day within certain physical restrictions.

To resolve a conflict in the medical opinion evidence between Dr. Zerga, who opined that appellant was totally disabled from any work, and Dr. Rapier, who opined that appellant was capable of performing four hours of work within certain physical restrictions, the Office referred appellant to Dr. Kennedy. In a report dated July 17, 1996, Dr. Kennedy opined that appellant

[9] 5 U.S.C. § 8106(c)(2).

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

[11] 20 C.F.R. § 10.124(c).

[12] *Camillo R. DeArcangelis, supra* note 10; *see* 20 C.F.R. § 10.124(e).

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

[14] *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon*., 43 ECAB 818 (1992); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity,* Chapter 2.813.11(c) (December 1991).

[15] *C.W. Hopkins*, 47 ECAB 725 (1996); *see Patsy R. Tatum*, 44 ECAB 490, 495 (1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5 (July 1997).

[16] *Arthur C. Reck*, 47 ECAB 339 (1996).

was totally and permanently disabled. However, on August 21, 1996, the Office requested that Dr. Kennedy review the position description of mine safety and health specialist to determine whether it was within appellant's physical capabilities. On September 4, 1996 Dr. Kennedy determined that appellant was capable of performing the position of mine safety and health specialist. In response to an Office inquiry, Dr. Kennedy indicated that appellant was capable of working eight hours per day in the offered position.

The Board finds that the evidence of record establishes that appellant was capable of performing the position of mine safety and health specialist based upon the opinion by Dr. Kennedy, the impartial medical examiner, supported by the opinions of Drs. Wicker and McConnell. The Office's procedure manual indicates that, once a claimant has been informed that the Office finds the job offered is suitable and that compensation will be terminated if the job offer is not accepted, there are some acceptable reasons for refusing to accept an offer of suitable employment.

In support of his refusal, appellant contended that selling his house and relocating would cause him a financial hardship. The Board has held that financial advantage derived from remaining in a different location will not justify a refusal of an offer of suitable work.[17] Furthermore, appellant was advised that he would be entitled to reasonable relocation expenses to assist him.

Appellant also argues that, since the Social Security Administration has determined that he is totally disabled, the Office erred in determining that he was capable of performing the position offered by the employing establishment. The Board has held that entitlement to benefits under the Social Security Act does not establish entitlement to benefits under the Federal Employees' Compensation Act. In determining whether an employee is disabled under the Federal Employees' Compensation Act, the findings of the Social Security Administration are not determinative of disability under the Federal Employees' Compensation Act. The Social Security Act and the Federal Employees' Compensation Act have different standards of medical proof on the question of disability. Therefore, disability under one statute does not establish disability under the other statute. Furthermore, under the Federal Employees' Compensation Act, for a disability determination, appellant's injury or occupational disease must be shown to be causally related to an accepted injury or compensable factors of federal employment. Under the Social Security Act, conditions which are not employment related may be taken into consideration in rendering a disability determination.[18] Appellant has also submitted a March 11, 1997 letter from Dr. Dalloul, who opined that appellant's wife was ill and appellant was required to take care of her. The Office's notes that the procedure manual provides examples of acceptable reasons for refusing a position. One such acceptable reason is when the medical condition of a family member contraindicates relocating.[19] The medical evidence of record only indicates in very vague and general terms that appellant's wife is ill. There was no

[17] *See Richaed S. Gumper*, 43 ECAB 811 (1992).

[18] *Daniel Deparini*, 44 ECAB 657 (1993).

[19] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(b)(3) (July 1996)

medical opinion of record that appellant's wife was so ill that appellant's relocation should be precluded. A spouse's ill health is not in and of itself justification for refusal of suitable work.

The Board thus finds that the Office properly terminated appellant's compensation benefits based upon his refusal to accept a suitable position.

The decision of the Office of Workers' Compensation Programs is affirmed as to the termination of compensation benefits.[20]

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

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

[20] George E. Rivers, member, who concurred and participated in preparation of the decision, retired from the Board effective June 2, 2000.