U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of EARNEST M. SCHWERTFEGER and DEPARTMENT OF THE NAVY, NAVAL MEDICAL CENTER, San Diego, CA

*Docket No. 99-214; Submitted on the Record;*
*Issued June 1, 2000*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective October 11, 1997 on the grounds that he refused an offer of suitable work.

On April 16, 1996 appellant, a 50-year-old medical clerk, filed a claim for benefits, alleging that he was experiencing pain, numbness and a tingling sensation in his hands and wrists due to factors of his federal employment, and that he became aware that this condition was caused or aggravated by his employment on March 25, 1996. The Office accepted the claim for bilateral carpal tunnel syndrome. Appellant stopped working on March 26, 1996, and has not returned to gainful employment since that date; the Office paid appellant compensation for temporary total disability as of March 26, 1996 and continuing, and placed him on the periodic rolls.

Appellant was referred to Dr. Jack D. Schim, Board-certified in psychiatry and neurology, for neurological testing by his treating physician, Dr. Joel M. Heiser, a Board-certified orthopedic surgeon. In a report dated May 1, 1996, Dr. Schim had appellant undergo motor and sensory nerve conduction studies, and found no sign of underlying polyneuropathy or left ulnar neuropathy. In a report dated November 15, 1996, Dr. Schim had appellant undergo another nerve conduction study and an electromyogram (EMG). Based on these tests, Dr. Schim found no evidence of underlying polyneuropathy, left ulnar neuropathy, left brachial plexopathy or left cervical radiculopathy.

Dr. Heiser, who performed both carpal tunnel release surgeries on appellant, submitted a January 2, 1997 report in which he noted a wide range of complaints regarding both upper extremities. He opined that appellant's reaction to both surgeries was unusual, and stated:

> "I performed an open carpal tunnel release on the right, which clearly decompressed the median nerve, yet he still has so many symptoms in his right

upper extremity, including his forearm and wrist. I have difficulty explaining his residual symptoms in his right upper extremity. With regard to the endoscopic carpal tunnel release on the left, it is possible that he has some residual median nerve compression, but his symptoms are rather unusual for just median nerve compression. He complains of some numbness in the dorsal aspect of the left forearm that certainly is not in the median nerve distribution. The diffuse nature of his complaints goes against this simple diagnosis."

Dr. Heiser restricted appellant from activities requiring repeated wrist flexion/extension and repetitive, forceful gripping and grasping. He concluded that appellant should have a second opinion to ascertain whether another surgeon believed that he required additional treatment.

In order to clarify appellant's current condition, the Office referred him for second opinion examinations with Dr. Paul M. Milling, a Board-certified orthopedic surgeon, and Dr. Robert S. Warren, Board-certified in psychiatry and neurology.

In a report dated February 11, 1997, Dr. Milling recommended against appellant undergoing further surgery on his wrists, stating that his first two operations really did not help him and that a subsequent procedure probably would not be helpful. Dr. Milling added that on examination appellant exhibited findings of cogwheel weakness of the upper extremities, which he considered evidence of malingering. He further opined that appellant's symptoms far outweighed any objective findings, and stated that there was a large amount of supertentorial overlay. He further stated that appellant could return to work on modified duty, without having to type more than one hour per day, as he doubted that appellant could ever return to full duty. In a work capacity evaluation dated February 26, 1997, Dr. Milling opined that appellant could work an eight-hour day, and should be restricted from typing more than one hour per day and performing repetitive motions of either hand or elbow.

Dr. Warren examined appellant on February 19, 1997. After reviewing the statement of accepted facts and appellant's medical records, Dr. Warren stated findings on examination and concluded:

"If appellant were to wish to return to modified work or if his physician were to wish to do so, I would have no argument with him returning to a work situation in which he has limited exposure to hand intensive activities. I would suggest that he not be doing hand intensive activities which would include typing, pulling heavy files, forced grasping and pinching more than two hours per half day, and that should be noncontinual activity such that he should perhaps be doing it for 15 to 30 minutes at a time and then be doing other nonintensive hand activities in between. As long as he is being followed along by his surgeon, who has a very good feeling for this case, then I think it would be appropriate that this be done if [appellant] wished to postpone further surgery and monitor his clinical course."

Dr. Warren also restricted appellant from keyboard activities, pulling heavy charts, intensive handwriting and similar activities that would be sufficiently repetitive as to cause a progression of his carpal tunnel condition.

In a March 27, 1997 report, Dr. Heiser stated that, based on his examination, he had difficulty explaining the nature of appellant's subjective complaints and had recommended that he seek a second opinion. Dr. Heiser advised that appellant showed no objective signs that he had carpal tunnel syndrome. He noted that nerve conduction studies and an EMG taken by Dr. Schim on May 1, 1996 showed no evidence of polyneuropathy or ulnar neuropathy, and that an additional EMG taken by Dr. Schim on November 15, 1996 showed no evidence of left brachial plexopathy or left cervical radiculopathy although the left side was bothering him. Dr. Heiser concluded that there were no objective signs of any radiculopathy to explain all of his symptoms. He also submitted a letter to the Office, dated March 27, 1997, in which he stated that he was withdrawing as appellant's treating physician and had referred appellant to his primary physician for workup of his complaints, as he did not consider them work related.

Appellant submitted an April 25, 1997 report from Dr. Jeffrey H. Oppenheimer, a Board-certified neurosurgeon, who stated that, in addition to appellant's continuing complaints of wrist and arm pain, he had also been complaining of a four- to five-month history of neck pain, and that these symptoms were unchanged by either of the carpal tunnel procedures. Dr. Oppenheimer advised that appellant could be experiencing "double crush syndrome," which would explain the symptoms of radiating pain down the arms and also involvement on a subjective basis of the C8 dermatome bilaterally. He noted Dr. Milling's opinion that appellant was malingering for the secondary gain of obtaining compensation while avoiding work, and stated that this opinion should be tested by having appellant undergo an MRI scan of the cervical spine.

Appellant was referred to Dr. Joseph M. Mann, a Board-certified orthopedic surgeon, who examined appellant on May 14, 1997 for an evaluation of both upper extremities and submitted a report dated July 2, 1997. Dr. Mann expressed concern regarding appellant's subjective complaints and opined that there was no objective evidence to support them. He further advised that appellant failed to cooperate with his testing during the examination. Dr. Mann concluded that he found no factors other than employment factors that could have contributed to the development of bilateral carpal tunnel syndrome and its associated disability, although he stated that, due to the slight possibility that he could have an element of cervical radiculaopathy, he recommended that appellant be referred to undergo a cervical MRI by a surgeon with expertise in spinal problems. He reiterated the earlier opinions that appellant be restricted from constant, repetitive use of both upper extremities, *i.e.*, seven to eight hours of such activity.

By letter dated August 14, 1997, the employing establishment offered appellant a limited-duty job as a modified medical clerk based on the restrictions outlined by Drs. Heiser, Milling, Warren and Mann.

By letter dated August 22, 1997, the Office advised appellant that it had been informed by the employing establishment that it had tendered an offer of suitable employment consistent with the physical limitations imposed by his injury. The Office stated that the job had been selected for him based on the work restrictions given by his former treating physician, Dr. Heiser, the two second opinion physicians who examined him in 1997, Drs. Milling and Warren, and the latest report regarding his carpal tunnel condition from Dr. Mann, dated July 2,

1997. The Office specifically considered the physical requirements of the job, and determined that they were within the specific work restrictions imposed, collectively, by these four physicians. The Office stated appellant's work restrictions: ability to type up to 1 hour in an 8-hour workday; ability to do intermittent lifting of 10 to 20 pounds up to 4 hours per day; no intensive handwriting; no repetitive wrist flexion or extension and ability to push and pull files, ability to force grasp, grip and pinch for up to 2½ hours per day on an intermittent basis, not to exceed 15 to 30 minutes per day. The Office then listed the specific job duties entailed by the modified medical clerk position: meeting patients when they arrived for their appointments, checking their names off the appointment list, pulling forms, verifying information, pulling medical files and setting them on the counter for the nurses, and giving instructions for the patients. The Office noted that the position no longer required a qualified typist, as it once did, and that the only typing entailed by the job was limited to entering the first letter of the patient's last name and the last four digits of the social security number, or occasionally changing the address or name of a new physician. The Office further noted that the only handwriting required by the job was writing the patient's name, social security number, and time and date of the appointments which were not previously scheduled.

The Office concluded that, in light of the work requirements entailed by the employing establishment's job offer, appellant's physical restrictions would not preclude him from performing the offered position. 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]

Appellant rejected the offer on August 21, 1997. He checked the box indicating that he declined the position, and wrote a handwritten note on the form stating, "due to recurring medical difficulties I must decline this offer. Furthermore, I do n[o]t believe I [wi]ll ever be able to perform in the position or other clerical positions again."

By letter dated August 27, 1997, the Office advised appellant that he had 15 days to accept the job offer, and that if he did not accept the offer within that time it would terminate his compensation pursuant to 5 U.S.C. § 8106(c)(2).[2]

By decision dated October 9, 1997, the Office found that appellant was not entitled to compensation benefits, effective October 11, 1997, on the grounds that he had refused to accept a suitable job offer.

By letter dated March 12, 1998, appellant requested a hearing before an Office hearing representative. By handwritten letter dated March 13, 1998, appellant requested reconsideration of the Office's October 11, 1997 termination decision. In support of his claim, appellant submitted a December 16, 1997 report from Dr. John Seelig, a Board-certified neurosurgeon.

[1] 5 U.S.C. § 8106(c)(2).

[2] 5 U.S.C. § 8106(c)(2).

Appellant requested medical care for an alleged cervical spine condition, based on the results of an MRI he underwent on December 3, 1997, in tandem with Dr. Seelig's December 16, 1997 report, which supported his contention that the claimed cervical condition is work related. In conclusion, appellant alleged that the employing establishment's job offer was not suitable and his refusal therefore justified because Drs. Warren and Milling failed to take into consideration his continued complaints with his hands and neck, and because the job was located at the obstetrician/gynocologist clinic, which was the busiest section of the workplace.

In his December 16, 1997 report, Dr. Seelig stated that he had examined appellant for cervical and thoracic pains, in addition to bilateral arm pain and parasthesia. He related that appellant stated he had sustained a work-related cervical spine injury on February 8, 1996; appellant asserted that because he had performed repetitive motions all day long, he developed neck, arm, hand and finger pains and weakness, and claimed that he gained no improvement from his surgeries. Dr. Seelig further stated:

> "Diagnostically, a December 3, 1997 MRI study of the cervical spine was completed and reportedly showed advanced severe multi-level spondylosis causing stenosis from C2 through C7.
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> "Presently, he states his pain was equally divided between the posterior cervical and thoracic region as well as both shoulders, arms, and hands. He has numbness and tingling involving both arms and hands, anteriorly and posteriorly. His symptoms are daily and have intensified. He describes the pain as severe causing significant disabilities with any activity aggravating his pain including: standing, walking, sitting, driving, lying down [at night], bending, lifting, arising from a chair, housework, coughing and sneezing. He has noted weakness of his extremities and has had to limit the distance he walks because of his pain. He has noted change with urination in his bowel movement from loose to constipated. He also states that he had a motor vehicle accident in 1985 in which he injured his neck although it has not bothered him since … [the] most recent incident."

Dr. Seelig further diagnosed multiple level cervical spondylosis, C3-4, C4-5 and C6-7 disc protrusions, central canal and bilateral foraminal stenosis C3 through C7, and cervical radiculopathies. He concluded that appellant was temporarily totally disabled for 12 weeks.

In addition, appellant claimed compensation for a work-related lumbar spine condition. Appellant contended that Dr. Mark C. O'Brien, an osteopath, stated in a July 30, 1997 report that lumbar radiculopathy was due to factors of his federal employment.[3] In support of this contention, appellant submitted a December 16, 1997 report from Dr. Theodore Georgis, a Board-certified orthopedic surgeon, who diagnosed large herniated discs at L2-3 and L4-5 with bilateral lumbar radiculopathy. Dr. Georgis advised that his current condition and need for treatment was a direct result of a 1994 employment injury, to which his lumbar was causally related, and opined that appellant was totally disabled.

[3] This report is not contained in the instant record. The only report from Dr. O'Brien was dated May 25, 1996, which made no reference to a lumbar spine condition.

Appellant subsequently submitted a March 17, 1998 report from Dr. Seelig, who stated that appellant "certainly" had a C8 radiculopathy at the present time, although he admitted that this was caused by the 1985 car accident. Dr. Seelig advised that the cervical condition was aggravated by appellant's years of working as a medical clerk in a very busy clinic. He opined that appellant had disc disease, predominant at C5-6, and that this area would significantly contribute to the median nerve pathways as they go from the cervical spine through the cervical roots, the brachial plexus and into the peripheral nerves, especially the median nerve. Dr. Seelig reiterated that appellant's carpal tunnel syndrome was caused by accumulated trauma.

By decision dated April 15, 1998, the Office denied appellant's request for a hearing because it was not made within 30 days and he was not as a matter of right entitled to a hearing. The Office stated that appellant's request was further denied on the grounds that the issue in the case could be equally well addressed by requesting reconsideration from the district office and submitting evidence not previously considered which could establish that an injury was sustained as alleged. The Office assigned appellant's case to the district office for reconsideration on April 30, 1998.

Appellant subsequently submitted a May 13, 1998 report from Dr. Seelig in which he stated:

> "[Appellant] has had difficulty with his carpal tunnel disease but the question is whether he has cervical dis[c] disease as well. [Appellant] has been noted to have no improvement following his carpal tunnel release and [appellant] still appears to have carpal tunnel syndrome. I recommended we repeat the patient's EMG and then proceed with possibly a second opinion regarding further treatment of his carpal tunnel disease. I think [appellant] definitely has some overlying cervical radiculopathy as well. At this point in time, the patient will return to my office following his EMG and I hope that we will be able to clarify for you his condition as it appears to be getting progressively worse with regard to his symptoms. [Appellant] remains temporarily totally disabled."

By decision dated June 27, 1998, the Office affirmed the previous decision terminating benefits based on appellant's refusal to accept suitable work, and also found that he failed to submit sufficient medical evidence establishing that the claimed cervical condition was caused or aggravated by factors of his federal employment.

The Board has duly reviewed the case record and concludes 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[4] the Office may terminate the compensation of an employee who refuses or

[4] 5 U.S.C. §§ 8101-8193.

neglects to work after suitable work is offered to, procured by, or secured for the employee.[5] Section 10.124(c) 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 a showing before a determination is made with respect to termination of entitlement to compensation.[6] 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.[7] 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. In this regard, the Office reviewed the employing establishment's offer to appellant of a modified medical clerk, reviewed the medical evidence of record which indicated that appellant should avoid repetitive work, and found the position suitable to appellant's restrictions. The Office stated that Drs. Heiser, Warren, Milling and Mann found that appellant could work a normal 8-hour day consistent with his physical restrictions; *e.g.*, ability to type up to 1 hour in an 8-hour workday; ability to do intermittent lifting of 10 to 20 pounds up to 4 hours per day; no intensive handwriting; no repetitive wrist flexion or extension and ability to push and pull files, ability to force grasp, grip and pinch for up to 2½ hours per day on an intermittent basis, not to exceed 15 to 30 minutes per day. The Office then compared these restrictions with the physical requirements entailed by the position modified medical clerk offered by the employing establishment and found that the job was within these restrictions. Prior to this determination, however, appellant submitted probative medical evidence from two physicians, Drs. Oppenheimer and Mann, who noted appellant's complaints of significant cervical pain and recommended that he undergo an MRI scan to determine whether there was an objective basis for these complaints. 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.[8] The Office, however, did not authorize appellant to have the MRI test recommended by these physicians, and found that the modified medical clerk position was within the physical restrictions resulting from his bilateral carpal tunnel condition without considering whether he also had restrictions stemming from a cervical condition. Thus, the Office neglected to consider medical evidence submitted by appellant which pertained to his ability to perform the offered position prior to finding that the job was suitable.

Subsequent to the Office's October 9, 1997 termination decision, appellant finally underwent an MRI on December 3, 1997. This MRI study was reviewed by Dr. Seelig, a Board-certified neurologist, who opined in his December 16, 1997 and May 13, 1998 reports that the MRI "showed advanced severe multi-level spondylosis causing stenosis from C2 through C7."

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

[6] 20 C.F.R. § 10.124(c); *see also Catherine G. Hammond*, 41 ECAB 375 (1990).

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

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

Dr. Seelig noted that appellant displayed "pain causing significant disabilities with any activity aggravating his pain including: standing, walking, sitting, driving, lying down [at night], bending, lifting, arising from a chair, housework, and coughing and sneezing." In addition, Dr. Seelig -- basing his opinion, again, on the MRI test which was recommended by two physicians prior to the Office's finding that the job offer was suitable -- diagnosed multiple level cervical spondylosis, C3-4, C4-5 and C6-7 disc protrusions, central canal and bilateral foraminal stenosis C3 through C7 and cervical radiculopathies.

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits pursuant to 5 U.S.C. § 8106. A review of the above evidence indicates that there is not substantial medical evidence to support a finding that the offered position was within appellant's physical limitations. Although the Office properly noted that four physicians of record indicated that the offered job was within the physical restrictions related to his accepted bilateral carpal tunnel condition, the Office failed to further develop medical evidence which indicated that appellant should undergo MRI testing and suggested that appellant had a cervical condition which could further restrict him from performing the offered position. Moreover, the MRI tests subsequently taken by appellant were reviewed by a Board-certified neurosurgeon, who diagnosed a significant cervical condition which entailed additional physical limitations.[9] As it is the Office's burden of proof to establish that appellant refused a suitable position, the Office did not meet its burden of proof in this case.[10]

[9] The Board finds that the Office properly found that appellant failed to establish entitlement to compensation based on a work-related lumbar or cervical condition. Appellant did not submit any medical evidence or file a claim pertaining to a lumbar condition prior to the Office's October 9, 1997 termination decision, and the Office never accepted a claim based on a lumbar or cervical condition. If appellant wishes to obtain compensation based on either of these conditions, he must file a claim with the Office and submit medical evidence sufficient to establish entitlement to such compensation.

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

The decision of the Office of Workers' Compensation Programs dated October 9, 1997 is therefore reversed.

Dated, Washington, D.C.
June 1, 2000

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member