U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD R. PRESLEY and DEPARTMENT OF THE NAVY, NAVAL PUBLIC WORKS CENTER, San Diego, CA

Docket No. 97-530; Oral Argument Held November 17, 1999; Issued March 6, 2000

Appearances: *Linda L. Harper*, for appellant; *Miriam D. Ozur, Esq.,* for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits pursuant to 5 U.S.C. § 8106(2) on the grounds that he refused suitable work.

On August 28, 1985 appellant, then a 33-year-old truck driver, filed a notice of traumatic injury, alleging that he injured his neck, middle and lower back, left knee and right wrist on that same date, when he slipped and fell in the course of his federal employment.

On November 5, 1985 the Office accepted appellant's claim for multiple contusions, a lumbar and cervical strain and a left wrist contusion. Appellant subsequently received compensation for total temporary disability. Appellant later underwent surgery, consisting of a L4-S1 fusion with excision of the L5-S1 disc, which the Office did not authorize.

On September 29, 1992 Dr. Mary Lou Bullen, appellant's treating physician and a Board-certified internist, diagnosed a herniated disc L5-S1; status postoperative with bone graft and chronic low back pain. She did not explain whether this condition resulted from appellant's employment injury.

On December 15, 1993 Dr. Stephen P. Abelow, a Board-certified orthopedic surgeon, provided a second opinion pursuant to the Office's request. Dr. Abelow reviewed appellant's history and the medical evidence and conducted a physical examination. He opined that appellant's present back condition resulted from unauthorized surgeries, rather than the August 28, 1985 employment injury.

On March 24, 1994 Dr. Paul Randels, an attending physician and a Board-certified orthopedic surgeon, indicated that, due to his employment injury, appellant had a small disc herniation at L5-S1 which failed to respond to conservative treatment. Consequently, Dr. Randels performed a laminectomy, removal of the L5-S1 disc and spine fusion. He stated that appellant remained physically incapacitated and he opined that this disability resulted from his employment injury.

By decision dated April 12, 1994, the Office terminated appellant's compensation on the basis that appellant was no longer disabled or suffered residuals from the August 28, 1985 injury.

Appellant subsequently requested a hearing. Prior to the hearing, appellant submitted an April 13, 1995 opinion from Dr. Richard A. Nolan, a Board-certified orthopedic surgeon, who reviewed all the medical evidence of record and performed a complete physical examination. He opined that appellant had a disabling condition of the lumbosacral spine, which was caused by the August 1985 employment injury. Dr. Nolan further stated that the surgery performed was necessary and that it was related to the August 1985 injury.

By decision dated August 9, 1995, the Office hearing representative found that a conflict now existed between the opinion of Dr. Nolan, finding appellant disabled due to his August 1985 employment injury and the contrary opinion of Dr. Abelow. Consequently, the hearing representative partially vacated the Office's previous decision and remanded the case for an impartial medical examination.

On October 10, 1995 the Office referred appellant, along with a statement of accepted facts, to Dr. Louis P. Valli, a Board-certified orthopedic surgeon, to provide a referee examination. On October 24, 1995 Dr. Valli provided a comprehensive opinion. He reviewed appellant's history, the x-rays and the medical opinions of record. Dr. Valli also conducted a complete physical examination. He diagnosed low back strain, postop L4-5 and 5-S1 discectomy and posterior lateral fusions, repeat L4-5 and 5-S1 discectomies and posterior lateral L4-5 and 5-S1 fusions, and resolved left knee strain, right wrist strain and neck strain. Dr. Valli opined that the surgery performed by Dr. Randels was not necessary. He determined that appellant was partially disabled due to his employment injury and that he could perform sedentary work, four hours per day.

On January 11, 1996 Dr. Valli opined that appellant's work-related disability allowed him to work 6 hours per day with no bending, squatting, climbing, kneeling and twisting. He further stated that appellant could not lift over 10 pounds.

On March 21, 1996 the employing establishment offered appellant a job within the restrictions outlined by Dr. Valli in his January 11, 1996 report.

On March 27, 1996 the Office allowed appellant 30 days to either accept the position or provide an explanation for refusing it. The Office informed appellant that if he refused the limited-duty job offer he would not be entitled to compensation pursuant to 5 U.S.C. § 8106(2).

On April 10, 1996 appellant declined the job offer. Appellant submitted a decision from the Social Security Administration indicating that he was found disabled from work.

On April 12, 1996 Dr. Nolan submitted a report diagnosing lumbar radicular symptoms and cervical spine symptoms. He also noted that appellant suffered from stress and that appellant recently underwent angioplasty. In this regard, Dr. Nolan indicated that appellant had a stent inserted due to chest pain and that he was currently taking multiple cardiac medications. On May 10, 1996 Dr. Nolan again treated appellant for lumbar and cervical spine problems. He stated that appellant needed counseling for depression and anxiety. On June 12, 1996 Dr. Nolan again treated appellant for lumbar and cervical spine problems. He indicated that the lumbar spine problem needed to be reassessed for treatment that may decrease leg pain, but that the cervical spine problem was under control.

On August 7, 1996 the Office informed appellant that he appeared capable of performing the limited-duty job offered. The Office noted that the decision of the Social Security Administration had no bearing on this case and that it requested information on appellant's treatment for a heart condition. Appellant was given 30 days to submit evidence from a well-rationalized opinion from a cardiologist addressing his ability to work.

Appellant subsequently submitted a report from Dr. Reginald I. Low, a Board-certified cardiologist, who indicated that he performed a percutaneous transluminal coronary angioplasty and coronary stent placement. His postoperative diagnosis was that appellant had less than a five percent stenosis of the left anterior descending coronary artery. In his discharge summary, Dr. Low indicated that appellant had no recurrent symptoms. His discharge diagnosis was unstable angina pectoris, a 95 percent stenosis in the proximal left anterior descending coronary artery, successful percutaneous transluminal coronary angioplasty with successful coronary stenting of the left anterior descending coronary artery resulting with less than a 5 percent residual stenosis, hypertension, history of cigarette smoking and status post lumbar laminectomy and chronic back pain.

By decision dated September 20, 1996, the Office terminated appellant's claim effective September 15, 1996 because the evidence of file established that he refused suitable employment.

The Board finds that the Office improperly terminated appellant's compensation benefits pursuant to 5 U.S.C. § 8106(2) on the grounds that he refused suitable work.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[1] This burden of proof is applicable if the Office terminates compensation pursuant to 5 U.S.C. § 8106(c) for refusal to accept suitable work.

Under section 8106(c)(2) of the Federal Employees' Compensation Act,[2] the Office may terminate the compensation of a partially disabled employee who refuses or neglects to work

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[1] *Frederick Justiniano*, 45 ECAB 491 (1994).

[2] 5 U.S.C. § 8106(2).

after suitable work is offered to, procured by, or secured for the employee.[3] Section 10.124(c) of the Code of Federal Regulations[4] 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.[5] To justify termination of compensation, the Office must show that the work offered was suitable[6] and must inform appellant of the consequences of refusal to accept such employment.[7]

In this case, the Office based its determination of medical suitability on the opinion Dr. Valli, a Board-certified orthopedic surgeon, selected to provide an impartial medical examination pursuant to section 8123 of the Act.[8] Dr. Valli, however, did not have the opportunity to consider whether appellant's subsequently acquired heart condition precluded him from performing the physical requirements of the limited-duty position. In this regard, both Dr. Nolan, appellant's treating physician and a Board-certified orthopedic surgeon and Dr. Low, a Board-certified cardiologist, provided medical reports establishing that appellant had a significant cardiac condition. These probative, but not determinative reports, suggest that appellant may not be able to perform the duties of the limited-duty position offered. It is well established that in assessing the suitability of a position, the Office must consider conditions arising after the compensable injury, even if they are not work related.[9] Because the opinions of Drs. Nolan and Low cast sufficient doubt on whether appellant could perform the limited-duty job offered, the Office should have obtained, on its own, a supplemental report clarifying the impact of appellant's cardiac condition on his ability to perform the limited-duty position.[10]

Moreover, the Office also erred in relying on the opinion of Dr. Valli to find that his accepted employment injuries did not preclude appellant from performing the duties of the limited position offered because the physician offered a contradictory opinion regarding appellant's physical capabilities. In this regard, Dr. Valli indicated in his October 10, 1995

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

[4] 20 C.F.R. § 10.124(c).

[5] *Camillo R. DeArcangelis*, *supra* note 3; *see* 20 C.F.R. § 10.124(e).

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

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

[8] 5 U.S.C. § 8128 *et seq*.

[9] *Robert S. Dickerson*, 46 ECAB 1002 (1995); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity, C*hapter 2.814.4(b)(4) (December 1993) ("If medical reports in file document a condition which has arisen since the compensable injury, and this condition disables the claimant from the offered job, the job will be considered unsuitable (even if the subsequently acquired condition is not work related).")

[10] As note above, it is the Office's burden to justify the termination of modification of compensation benefits. *See Frederick Justiniano*, *supra* note 1.

report that appellant could work four hours per day in a sedentary position, but he stated in his January 11, 1996 work capacity evaluation that appellant could work six hours per day.

Accordingly, the medical evidence of record is not sufficient to establish that the offered position was medically suitable in this case. It is the Office's burden of proof to establish suitability and the Board finds that it has not met its burden.

The decision of the Office of Workers' Compensation Programs dated September 20, 1996 is reversed.

Dated, Washington, D.C.
March 6, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member