U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SIDNEY WELLS and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Cleveland, OH

Docket No. 98-1884; Submitted on the Record;
Issued March 28, 2000

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation for refusal to accept suitable work.

On November 7, 1991 appellant, then a 49-year-old laundry worker, filed a claim for lower back pain and a dislocated disc, which he related to lifting, loading and unloading linen and pushing linen carts. He stopped work on October 23, 1991. In a February 24, 1992 letter, the Office accepted appellant's claim for a lumbosacral strain. The Office paid compensation for intermittent periods of disability. A March 5, 1992 magnetic resonance imaging (MRI) showed a large right paramedian and central herniation of the L4-5 disc. In an April 7, 1994 letter, the Office accepted appellant's claim for a herniated L4-5 disc. Appellant underwent surgery on April 25, 1994 for a laminectomy and discectomy of the L4-5 disc. He did not return to work thereafter. The Office began payment of temporary total disability compensation effective June 12, 1994.

In an April 9, 1997 letter, the employing establishment offered appellant a position as a security clerk/dispatcher. In an April 15, 1997 letter, the Office informed appellant that it had reviewed the position and found it to be suitable for appellant. The Office indicated appellant had 30 days to accept the position or present a written explanation of his reasons for refusing it. The Office stated that any reasons submitted would be considered prior to determining whether appellant's reasons for refusing the job were justified. The Office advised appellant that if he failed to accept the offered position and failed to demonstrate that his failure was justified, his compensation would be terminated. The Office received an April 14, 1997 response in which appellant refused the offered position. In a May 19, 1997 letter, the Office informed appellant that it found his reasons for refusing the position were not justified. The Office gave appellant 15 days to either accept the position or face the termination of his compensation. In a June 16, 1997 decision, the Office terminated appellant's compensation for refusing to accept suitable employment. Appellant requested a hearing before an Office hearing representative which was

conducted on February 26, 1998. In a May 7, 1998 decision, the Office hearing representative affirmed the Office's June 16, 1997 decision.

The Board finds that the Office improperly terminated appellant's compensation for refusal to accept suitable employment.

Section 8106(c)(2) of the Federal Employees' Compensation Act states: "a partially disabled employee who: (1) refused to seek suitable work; or (2) refuses or neglects to work after suitable work is offered is not entitled to compensation."[1] An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.[2]

Subsequent to appellant's April 25, 1994 surgery, Dr. Stephen Wiener, a Board-certified radiologist, indicated that an October 17, 1994 MRI showed findings consistent with a new disc herniation at L4-5. In a March 3, 1995 report, Dr. Laurence H. Bilfield, a Board-certified orthopedic surgeon, indicated that if appellant returned to his normal work, his condition would become worse. He continued appellant on physical therapy. In a March 7, 1995 note, Dr. Bilfield indicated that appellant either needed prolonged rehabilitation with job retraining or repeat surgery.

The Office referred appellant to Dr. Daniel M. Dorfman, a Board-certified physiatrist, for an examination and second opinion. In a March 6, 1995 report, Dr. Dorfman stated that appellant had recurrent disc herniation at L4-5. He noted appellant exhibited right L5-S1 radiculopathy and left S1 radiculopathy consistent with the level of disc herniation and diagnostic testing. Dr. Dorfman indicated that appellant had not recovered sufficiently to allow him to return to his former position. He concluded that appellant was not capable of working in any capacity. Dr. Dorfman noted that appellant also had insulin-dependent diabetes. He reported that appellant could sit or stand for 15 to 20 minutes at a time for a total of 2 hours in an 8-hour day. Dr. Dorfman indicated that appellant could lift nor more than 10 pounds and should not try to perform any lifting below the waist or above his shoulders. He stated that appellant should not perform any sustained walking, twisting, climbing, or stooping and was unable to crawl. Dr. Dorfman recommended that appellant not participate in vocational rehabilitation until after he had undergone surgery. He stated that appellant would need vocational rehabilitation after surgery because he would not be able to return to his former position at the employing establishment. In an August 28, 1995 report, Dr. Bilfield indicated that appellant did not want surgery.

In a February 29, 1996 report, Dr. Jerald S. Brodkey, a Board-certified neurosurgeon, indicated that appellant, in examination, had a considerable amount of pain. He noted that appellant had bilaterally weak dorsiflexors and diminished pin sensation over the top of both feet. Dr. Brodkey found that the loss of sensation was predominately in the L5 nerve distribution. He related that deep tendon reflexes were minimally obtainable at the right knee

[1] 5 U.S.C. § 8106(c)(2).

[2] 20 C.F.R. § 10.124.

and probably absent at the left knee and left ankle, even with reinforcement. Dr. Brodkey noted that appellant was a diabetic. He stated that appellant continued to suffer from the residuals of his ruptured L4-5 disc. Dr. Brodkey indicated that appellant was not capable of performing the type of work he performed at the time of the employment injury and was not capable of performing any work due to his pain and the ruptured disc. He recommended that appellant undergo surgery and then be placed in an extensive rehabilitation program to get him back into physical shape. Dr. Brodkey stated that appellant probably would not be able to return to a job requiring heavy lifting but could be retrained for some other job.

In a July 24, 1996 report, Dr. Adrian G. Krudy, a Board-certified radiologist, indicated that an MRI showed disc space narrowing at L4-5 with degeneration of the L3-4 and 5 discs, mild-to-moderate disc herniation and protrusion at L4-5 extending into the left L4-5 neural foramen, mild disc bulge with possible herniation of the L3-4 disc and probable mild epidural fibrosis at the L4 level. In several office notes, Dr. Bilfield indicated that appellant wanted to postpone any surgery.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Daniel J. Mazanec, a Board-certified rheumatologist, for an examination. In a March 4, 1997 report, Dr. Mazanec stated that appellant's findings were consistent with a lumbar radiculopathy in an L5-S1 distribution on the right and S1 on the left. He commented that the nature of the symptoms were suggestive of a component of central lumbar stenosis possibly related to disc herniation and degenerative change. Dr. Mazanec indicated that further physical therapy or other nonoperative treatments were unlikely to reduce appellant's symptoms. He stated that improvement from a second operation was problematic. Dr. Mazanec noted appellant's symptoms were chronic and did not improve after the first operation. He concluded that a second operation was unlikely to return appellant to his former position. Dr. Mazanec indicated that appellant's diabetes was a problem in assessing the relative contributions of this condition and the spinal problem to his current symptoms and the likelihood that he would benefit from surgery. He stated that if appellant elected not to pursue surgery, his physical limitation included limited lifting to 15 pounds and walking less than 5 minutes. Dr. Mazanec indicated that appellant could perform a sedentary position and would be a good candidate for vocational rehabilitation.

The employing establishment offered appellant a position as security clerk/dispatcher, indicating that the physical requirements of the job were within appellant's work limitations. It noted that the job was sedentary with most duties accomplished while sitting. It indicated that there would be more mental stress than physical stress as appellant would have to make split second decisions when an alarm went off, radio communication was made or a telephone rang. The employing establishment stated that appellant could sit or stand at will to accommodate his need for personal comfort. It indicated that no lifting over 15 pounds was required. The employing establishment commented that appellant would be trained on the job, which mostly required receiving information, calls or alarms, relaying that data, directing responses and maintaining records in a log sheet. It stated that the position offered posed no threat of danger to appellant as entry was through a secured access and, if someone needed to be detained, he or she would be restrained first and taken to a room behind the dispatcher.

Appellant refused the position, citing his severe low back pain and uncontrolled diabetes. Of the medical evidence of record, Drs. Bilfield, Dorfman and Brodkey indicated that appellant would be unable to work or undergo vocational rehabilitation until he had surgery on his back. Only Dr. Mazanec concluded that appellant would be able to work or undergo vocational rehabilitation without surgery. He noted that appellant had diabetes but did not discuss what effect diabetes would have on appellant's ability to perform the duties of a security clerk/dispatcher. The Office did not explain why Dr. Mazanec's report was more probative or was a more accurate depiction of appellant's ability to work than the other reports of record. The evidence of record reflects a conflict of medical opinion pertaining to appellant's capacity for work.[3] The Office, therefore, has failed to meet its burden of proof in establishing, through the medical evidence of record, that the job of security clerk/dispatcher was suitable for appellant. There is no showing that the report of Dr. Mazanec is entitled to greater probative value than the other medical reports.

The decisions of the Office of Workers' Compensation Programs, dated May 7, 1998 and June 16, 1997, are hereby reversed.

Dated, Washington, D.C.
March 28, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[3] *See* 5 U.S.C. § 8123(a); *Lawrence C. Parr*, 48 ECAB 445 (1997).