U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALBERT DELEON and DEPARTMENT OF THE AIR FORCE, RANDOLPH AIR FORCE BASE, TX

Docket No. 98-2440; Submitted on the Record;
Issued March 9, 2000

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 effective March 13, 1996 on the grounds that he refused an offer of suitable work.

On February 19, 1975 appellant, then a 52-year-old planning technician, filed a notice of traumatic injury, alleging that he injured his back on February 18, 1975 in the course of his federal employment. On April 30, 1975 the Office accepted his claim for a lumbosacral strain and a herniated nucleus pulposus. Appellant subsequently received compensation for total temporary disability.

On May 10, 1995 Dr. Martin R. Haig, a Board-certified orthopedic surgeon and appellant's treating physician, reviewed appellant's history and performed a physical examination. He also interpreted x-rays of appellant's lumbar spine as showing large spurs on all vertebra, narrowing of disc space between L5 and S1 and a large amount of bone, indicating that an L4 to S1 fusion had been performed. Dr. Haig diagnosed right sciatica probably due to spinal stenosis. He indicated that appellant's conditions were work related and that appellant's status was worsening, with low back pain and constant sciatica. Dr. Haig stated that appellant was unable to work because he could not get around, had constant pain, showed x-ray evidence of a very poor back with spur formation, and was age 73. He stated, however, that appellant could perform light-duty jobs involving sitting 100 percent of the time, answering the telephone, moving about very little and not lifting over 5 pounds.

On May 23, 1995 the Office requested additional information from Dr. Haig. On May 26, 1995 he completed a work capacity evaluation stating that appellant could do no kneeling, bending, twisting, or lifting over five pounds. Dr. Haig stated that appellant could sit, but that he could walk only one hour per day. He stated that within these limitations, appellant could work eight hours per day. Dr. Haig indicated that these restrictions were permanent.

On January 5, 1996 the employing establishment offered appellant a full-time, limited-duty position as a supply clerk within the restrictions described by Dr. Haig in his May 26, 1995 work capacity evaluation.

In a letter dated January 9, 1996, the Office advised appellant that he had 30 days to either accept the position or provide an explanation of the reasons for refusing the offer.

On January 16, 1996 appellant declined the limited-duty job offer on the basis that he was unable to meet the physical requirements of the job.

In a letter dated February 12, 1996, the Office indicated that it had considered the reasons offered by appellant for declining the job offer and found them unacceptable. It, therefore, gave appellant 15 days to accept the position.

By decision dated March 13, 1996, the Office terminated appellant's compensation because appellant refused to work after suitable work was offered pursuant to 5 U.S.C. § 8106(2).

On March 26, 1996 Dr. Haig noted that appellant had painful scars in his back, that his reflexes were sluggish and that he had pain in his legs. He stated that appellant was quite upset that his compensation was discontinued and restated his previous opinion that appellant could perform the lightest type of occupation.

On April 8, 1996 Dr. Forney W. Fleming, a Board-certified orthopedic surgeon, stated that appellant was totally disabled and unable to perform any type of work activities, including light duty. He noted appellant's history of injury and complaints of pain. Dr. Fleming performed a physical examination and reviewed x-rays. He diagnosed spinal stenosis, degenerative arthritis of the lumbar spine and failed back syndrome. Dr. Fleming stated that appellant could not handle a sit down job because it would aggravate his back.

On April 9, 1996 appellant's representative requested an oral hearing.

On April 22, 1996 Dr. Lynn E. Foret, a Board-certified orthopedic surgeon, indicated that he treated appellant for spinal stenosis and chronic lower back problems. He noted appellant's history of job injuries and stated that appellant had stated that his stenosis had worsened over the past six to seven years. Dr. Foret indicated that appellant was experiencing right-sided sciatica due to his spinal stenosis. He stated that sitting caused significant nerve root irritation and that for most people sitting was worse than standing or lifting. Dr. Foret stated that appellant could not lift heavy items or sit for long periods of time. He opined that appellant was totally disabled because of his failed lower back, chronic sciatica and the increasing severity of his spinal stenosis. Dr. Foret stated that appellant was unable to do light sedentary work, as well as any lifting, bending, stooping or climbing.

On November 12, 1996 appellant changed his request for an oral hearing to a review of the written record.

By decision dated February 11, 1997, the Office hearing representative affirmed the Office's March 13, 1996 decision terminating appellant's compensation because he refused an offer of suitable work.

On February 24, 1997 Dr. Haig stated that he "personally read the description of the job assigned to [appellant], which states he will be sitting in a chair sometimes walking and standing. [Appellant] has to lie down every hour or so to rest his back because of pain down his legs. It is not feasible for him to go to work." Dr. Haig also stated that appellant was unable to drive to work due to his low back pain. He concluded that appellant was disabled from any occupation of any type.

On March 4, 1997 appellant requested reconsideration.

By decision dated September 17, 1997, the Office reviewed the merits of the case and denied modification because the evidence submitted in support of the application was not sufficient to warrant modification of its prior decision. In an accompanying memorandum, the Office noted that Dr. Haig failed to state in his May 10, 1995 report that appellant was required to lie down every hour or so to rest his back. It further noted that, Dr. Haig did not mention driving restrictions in his May 10, 1995 report. The Office noted that the limited-duty job offer was within the restrictions of Dr. Haig's May 10, 1995 report. It stated that in his subsequent reports, Dr. Haig failed to provide a medical explanation explaining why appellant could not perform a job offered based on his earlier restrictions. It further stated that, he did not explain why sitting would not suffice for lying down or explain why appellant could not take a carpool or public transportation to work.

On October 20, 1997 Dr. Haig stated that appellant was unable to do any gainful employment due to back pain. He stated that anybody that could not stand for more than a short period of time and anybody who must lie down could not possibly perform the limited-duty position offered. Dr. Haig stated that sitting down clearly was not the same as lying down due to the weight placed on the trunk while seated. He also stated that appellant's low back problem precluded carpools or public transportation.

On October 28, 1997 appellant requested reconsideration.

By decision dated February 24, 1998, the Office reviewed the merits of the case and denied modification because the evidence submitted in support of the application was not sufficient to warrant modification of its prior decision. In an accompanying memorandum, the Office stated simply that Dr. Haig's new medical opinion could not be accepted at this point.

The Office did not meet its burden to terminate appellant's compensation benefits.

Section 8106(c)(2) of the Federal Employees' Compensation Act[1] provides in pertinent part, "A partially disabled employee who ... refuses or neglects to work after suitable work is offered ... is not entitled to compensation."[2] To prevail under this provision, the Office must

[1] 5 U.S.C. §§ 8101-8193.

[2] 5 U.S.C. § 8106(c)(2).

show that the work offered was suitable and must inform the employee of the consequences of refusal to accept such employment. An employee who refuses or neglects to work after suitable work has been offered has the burden of showing that such refusal to work was justified.[3] The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.[4]

The implementing regulation[5] 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 a showing before entitlement to compensation is terminated.[6] To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of her refusal to accept such employment.[7]

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 medical evidence.[8] In assessing medical evidence, the number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for and the thoroughness of physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[9]

In the present case, the limited-duty position offered by the employing establishment required no kneeling, bending, twisting or lifting over five pounds. It also required appellant to work eight hours per day, to sit during that time and to limit walking to one hour per day. Three physicians of record, Drs. Fleming, Foret and Haig, offered opinions regarding appellant's ability to perform the duties of this position. Dr. Fleming performed a physical examination on April 8, 1996 and concluded that appellant was totally disabled from all work, including any seated job which would aggravate his back. Dr. Foret provided a report dated April 22, 1996 in which he found that appellant was unable to perform even light sedentary work. The Office procedure manual provides that if appellant's decision to refuse an offer of employment is based upon the advice of a treating physician, the claims examiner should clarify appellant's ability to work by providing the attending physician with copies of medical reports supporting ability to

[3] *See Michael I. Schaffer*, 46 ECAB 845 (1995).

[4] *See Stephen R. Lubin*, 43 ECAB 564 (1992).

[5] 20 C.F.R. § 10.124(c).

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

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

[8] *See Marilyn D. Polk*, 44 ECAB 673 (1993).

[9] *See Connie Johns*, 44 ECAB 560 (1993).

perform light duty and a copy of the position description.[10] The Office did not take this action in this case. The Office, however, relied on the May 10 and May 23, 1995 reports of Dr. Haig to find that appellant could perform the limited-duty position offered. Although Dr. Haig's reports dated May 10 and May 23, 1995 did support a finding that appellant could perform the limited-duty position offered, the record reflects that he also had not reviewed a position description at that time. He subsequently issued reports on February 24 and October 20, 1997 concluding that appellant could not perform the limited-duty position. In the latter reports, Dr. Haig explained that he read the job description and that appellant's frequent requirement of lying down to relieve his back problems and his inability to commute to work precluded him from performing the duties. Accordingly, all the physicians of record rendering recent opinions concerning appellant's ability to perform the limited-duty position offered agree that appellant is unable to meet the physical requirements of the limited-duty job offer. Consequently, because all the medical opinion evidence establishes that appellant is unable to perform the duties listed in the limited-duty job offer, the Office did not meet its burden of proof to terminate appellant's compensation.

The decisions of the Office of Workers' Compensation Programs dated February 24, 1998 and September 17, 1997 are reversed.

Dated, Washington, D.C.
March 9, 2000

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(4) (July 1977).