U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAUL GRAHAM and U.S. POSTAL SERVICE,
POST OFFICE, Merrifield, VA

Docket No. 99-2074; Submitted on the Record;
Issued March 23, 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 effective February 2, 1997 on the grounds that he refused an offer of suitable work.

On October 27, 1995 appellant, then a 48-year-old mailhandler, filed a claim, alleging that he injured his lower back on October 13, 1995 while at work. Appellant worked in his position approximately 11 months prior to the injury. The Office accepted the claim for lumbar strain on December 27, 1995 and began paying compensation.

Appellant came under the care of Dr. Kim S. Yang, a neurologist, who, in a report dated January 5, 1996, diagnosed chronic low back pain caused or aggravated by his employment activity. She scheduled appellant for a functional capacity evaluation and opined that he was totally disabled from November 4, 1995 until the present. In another report dated February 22, 1996, Dr. Yang noted that, when appellant injured himself in October 1995, he had been working only light duty for six hours per day because of a previous injury sustained in September 1994.[1] She diagnosed chronic low back pain with a history of degenerative disc disease. Appellant continued under the care of Dr. Yang, who did not release him to return to work. She further noted that appellant failed to complete a work hardening program.

On January 19, 1996 appellant was examined by Dr. Drago Smokyina, an orthopedic surgeon, who noted a history of back injury due to lifting 100-pound bags of mail in June 1994. Dr. Smokyina diagnosed degenerative disc disease, possible herniated lumbar disc, peripheral neuropathy in both legs and concluded that appellant was not capable of working his full-time regular job as a mailhandler. He noted that appellant was capable of light lifting of no more than 15 pounds and light carrying under 50 pounds.

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[1] The record indicates that appellant has also filed claims for alleged injuries sustained on September 22 and July 1, 1994 and April 5, 1993 all involving the low back. The record also contains some reports of diagnostic testing in 1994. Case records for these other claims are not before the Board.

On April 9, 1996 the Office referred appellant for a second opinion to Dr. Ali Ganjei, a Board-certified physiatrist. On April 24, 1996 Dr. Ganjei examined appellant and found no objective evidence of permanent impairment or disability. He found no objective reason why appellant would be prevented from returning to light-duty work as long as he would avoid prolonged sitting, repetitive bending, stooping, or lifting more than 25 pounds.

Dr. Yang continued submitting reports indicating that appellant remained totally disabled due in part to his work-related condition.

On May 20, 1996 the employing establishment offered appellant a limited-duty job offer as a modified mailhandler to start on May 25, 1996. Appellant was expected to work on a forklift for two hours per day, four hours on quality control for dispatches and two hours per day on a power ox. Physical restrictions noted: lifting no more than 25 pounds; no prolonged sitting; no repetitive kneeling, bending or stooping; and twisting intermittently. The schedule for the position was listed as May 25 through August 23, 1996. The employing establishment noted that the offer would remain open and available until the Office made a decision on suitability. On May 29, 1996 appellant declined the limited-duty job offer.

On June 15, 1996 in an OWCP report 5c, after reviewing the limited-duty offer, Dr. Ganjei indicated that the modified mailhandler position was in compliance with appellant's physical restrictions. He advised against appellant lifting more than 25 pounds and recommended that he avoid prolonged sitting, repetitive bending, twisting, stooping or kneeling.

On June 17, 1996 in an OWCP report 5c, Dr. Yang indicated that the modified mailhandler position should be modified since appellant had problems with weakness, numbness and pain. She stated that appellant was unable to return to work and would be undergoing further evaluation at Walter Reed Hospital.

The Office found a conflict in the medical opinion evidence between Drs. Yang and Ganjei regarding appellant's ability to return to work. By letter dated August 15, 1996, the Office referred appellant, together with a statement of accepted facts, a list of specific questions, a description of the offered position and medical records, to Dr. Joseph D. Linehan, a Board-certified orthopedic surgeon, for an impartial medical evaluation. By letter of the same date, the Office advised Dr. Linehan of the referral.[2]

In a report dated September 9, 1996, Dr. Linehan noted appellant's history and reported findings on examination. He noted that appellant had inconsistencies in straight leg raising with the test being positive at 30 degrees on the right in the supine position but negative in the sitting position. Dr. Linehan further diagnosed degenerative lumbar spondylosis not caused by the accident of October 13, 1995, but rather due to age. He noted no physical impairment or residuals from the accepted work injury and indicated that the positive physical findings were most likely related to a peripheral neuropathy unrelated to the October 13, 1995 accident. After

[2] The Office initially referred appellant to another physician to resolve the medical conflict. However, this physician was associated with appellant's physician. The Office canceled the appointment and referred appellant to Dr. Linehan. This was proper under the circumstances presented; *see Daniel A Davis*, 39 ECAB 151, 163 (1987) (Office must assure that the person designated as the independent medical examiner has no prior association with any other physician who has examined claimant).

reviewing the limited-duty job offer, Dr. Linehan concluded that the modified limited-duty position was entirely appropriate for appellant.

By letter dated September 23, 1996, the Office informed appellant that, based on the report of Dr. Linehan, the impartial medical examiner, the weight of the medical evidence established that the light-duty position offered to him constituted suitable employment. The Office informed appellant that he had 30 days in which to contact the employing establishment regarding the enclosed job offer. The Office further explained that if appellant did not accept the position or provide an explanation for refusing it, the Office would issue a final decision terminating compensation and he would not be entitled to any further compensation for wage loss or schedule award.

On October 11, 1996 appellant, through his counsel, responded, contending that the Office had erred in relying on Dr. Linehan's opinion inasmuch as the physician had erroneously reported that Dr. Yang had never performed an electromyogram (EMG). Appellant further disputed the Office's determination that the modified mailhandler position was light-duty work, noting that the Postal Service called it "limited duty."

In a letter dated November 8, 1996, the employment establishment contested appellant's assertions regarding the requirements of the limited-job duty offer. It explained in detail the requirements of the modified mailhandler position and generally indicated that these requirements were within appellant's restrictions.

By letter dated November 12, 1996, the Office responded to appellant's contentions and found that they were insufficient to justify the refusal of the offered position. The Office addressed appellant's assertion that Dr. Linehan's report should have been rejected because he stated that an EMG had never been performed. Although Dr. Yang performed an EMG on October 27, 1994, one year prior to the October 1995 injury, which demonstrated peripheral motor sensory polyneuropathy, appellant was unable to complete the study.[3] The Office found that Dr. Linehan's opinion constituted the weight of the evidence. The Office further determined that the limited-duty position constituted a valid job offer both medically and otherwise and instructed appellant that he had 15 days in which to accept the job offer or compensation payments would be terminated under 5 U.S.C. § 8106(c).

By decision dated January 23, 1997, the Office terminated appellant's compensation effective December 7, 1996, based on his refusal to accept a suitable job as a modified mailhandler. By letter dated March 13, 1997, the Office notified appellant that the compensation order was amended to reflect a termination date effective February 2, 1997.

Following the termination of his compensation, appellant submitted additional reports from Dr. Yang indicating that appellant remained disabled with diagnoses of degenerative disc disease and chronic low back pain, peripheral neuropathy and a history of idiopathic transverse myelitis for which he received Veterans Affairs disability 30 years earlier.

[3] The date of the EMG was October 27, 1994. Dr. Yang indicated that the distal sensory response could not be obtained and she noted that clinical correlation was strongly indicated. She also noted that further studies were declined by the patient.

On February 15, 1997 appellant, through counsel, requested an oral hearing before a hearing representative. Appellant's counsel subsequently changed the request to a request for a review of the written record.

On July 2, 1998 appellant submitted a September 22, 1997 report from Dr. Roy R. Goodman, a Board-certified neurologist and psychiatrist, who stated that appellant told him he was "70 percent service connected … for transverse myelitis." Dr. Goodman diagnosed transverse myelitis, degenerative lumbar disc disease and peroneal palsy on the right, with foot drop and opined that appellant was unemployable at this time, noting that the incapacity appeared to be permanent. He added that appellant's transverse myelitis was a major and highly significant factor in his disability.

By decision dated May 14, 1999, the Office hearing representative affirmed the Office's decision to terminate compensation. The hearing representative found that two Board-certified orthopedic surgeons had opined that the job offered to appellant was within his residual functional capacity. The hearing representative further determined that appellant had been properly apprised of the penalty provisions of section 8106(c) and was given two opportunities to accept the position but declined to do so. Regarding the recently submitted medical opinion of Dr. Goodman, the hearing representative found no evidence that appellant was totally disabled at the time benefits were terminated.

The Board finds that the Office properly terminated appellant's compensation under 5 U.S.C. § 8106(c)(2).

It is well settled that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[4] This includes cases in which the Office terminates 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 under section 8106(c)(2).[5] The Board has recognized that section 8106(c) serves as a penalty provision as it may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment and, for this reason, will be narrowly construed.[6] The issue 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.[7]

Section 10.124(e)[8] 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 of failure to work was reasonable or justified and shall be provided with an opportunity to make such a showing before a determination is made with respect to termination

[4] *Mohammed Yunis,* 42 ECAB 325, 334 (1991).

[5] *Patrick A. Santucci,* 40 ECAB 151 (1988); *Donald M. Parker,* 39 ECAB 289 (1987); *Herman L. Anderson,* 36 ECAB 235 (1984).

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

[7] *See John E. Lemker,* 45 ECAB 258 (1993); *Camillo R. DeArcangelis,* 42 ECAB 941 (1991).

[8] 20 C.F.R. § 10.124(e).

of entitlement to compensation.[9] To justify termination, the Office must show that the work offered was suitable,[10] and must inform appellant of the consequences of the refusal to accept such employment.[11] According to the Office procedures, certain explanations for refusing an offer of suitable work are considered acceptable.[12]

Section 8123(a) of the Federal Employees' Compensation Act provides that if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[13] In situations where there are opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[14]

In this case, the Office found a conflict in the medical opinion evidence between Dr. Yang, appellant's treating physician, and Dr. Ganjei, a second opinion physician, concerning appellant's ability to perform the duties of the modified mailhandler position that was offered to appellant by the employing establishment. The Office properly referred appellant to Dr. Linehan for an impartial medical evaluation pursuant to section 8123(a) of the Act.

In terminating appellant's compensation, the Office properly relied on Dr. Linehan's September 9, 1996 medical report. In this medical report, Dr. Linehan indicated a history of appellant's October 1995 employment injury and medical treatment and a review of medical records. He further indicated that the positive physical findings were most likely related to a peripheral neuropathy and were in no way related to the October 1995 employment injury. Dr. Linehan stated that he had reviewed a description of the modified mailhandler position and that the duties of this position were within appellant's medical restrictions.

While appellant contends that the modified mailhandler position was not suitable work because it did not involve light-duty work, the Board finds that the weight of the medical evidence establishes that appellant is capable of performing the duties of the modified mailhandler position. After reviewing the job description of the position offered by the employing establishment, Dr. Linehan provided a rationalized opinion, based on a complete medical and factual background, concluding that appellant could perform the duties of a modified mailhandler. He determined that there was no permanent physical impairment or residuals from his October 13, 1995 injury and considered that the position was entirely

[9] *Maggie L. Moore*, 42 ECAB 484, 488 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

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

[11] *See Maggie L. Moore*, *supra* note 7; *see also* Federal (FECA) Procedural Manual, Part 2 -- Claims, Reemployment: *Determining Wage-Earning Capacity*, Chapter 2.814.5(d)(1) (July 1997).

[12] FECA Procedural Manual at Chapter 2.814.5(a)(1)-(5) (July 1997).

[13] 5 U.S.C. § 8123(a); *see also Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

[14] *See Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

appropriate for appellant. As the independent medical examiner's opinion is entitled to special weight, the Office properly terminated appellant's compensation.

Following the termination of his compensation for refusing suitable work, appellant submitted a September 22, 1997 medical opinion from Dr. Goodman, who opined that he was "unemployable at this time." However, as properly noted by the hearing representative, this evidence did not address whether appellant could perform the offered position when his benefits were terminated. Instead, he stated that appellant could not work as of September 22, 1997, the date of his examination. As the Office is not required to reinstate compensation merely because appellant subsequently submitted new evidence,[15] and as Dr. Goodman did not address appellant's ability to perform the offered position at the time benefits were terminated, the Board finds that Dr. Goodman's report was insufficient to create a new conflict in the medical evidence or to overcome the weight of Dr. Linehan's report. Consequently, the Office properly terminated compensation as it found that appellant's reasons for refusing suitable work were not justified.

The May 14, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.
March 23, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[15] *Cheryl D. Hedlum*, 47 ECAB 215 (1995); *Virginia Davis-Blanks*, 44 ECAB 389 (1993).