U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THOMAS GALYAS and DEPARTMENT OF VETERANS AFFAIRS, PROVIDENCE VETERANS HOSPITAL, Providence, RI

Docket No. 99-2511; Submitted on the Record;
Issued March 1, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective March 2, 1997, based upon his refusal of suitable work.

The Office accepted appellant's claim for a ruptured disc and lumbar disc surgery at L4-5 resulting from a February 18, 1976 employment injury. Appellant stopped work on September 10, 1981 due to a recurrence of disability and was placed on the periodic rolls. In a work restriction evaluation dated May 1, 1995, Dr. Peter A. Pizzarello, a Board-certified orthopedic surgeon, stated that appellant was capable of limited-duty work four hours a day. The employing establishment terminated appellant's employment on June 25, 1976.

By letter dated August 21, 1996, the employing establishment offered appellant the position of program clerk which was part time, four hours a day and required intermittent lifting under ten pounds. The job was located in Providence, Rhode Island.

By letter dated August 25, 1995, Dr. Pizzarello told appellant that "a warmer climate would certainly be advantageous to you for your back and its ramifications to you medically." He stated that he was "happy" that appellant was relocating.

By letter dated September 16, 1996, appellant declined the job offer, stating that he had moved from Rhode Island to Florida in October 1995 because of his doctor's recommendation that he relocate to a warmer climate because of his disability.

By letter dated October 2, 1996, the Office stated that the position of program clerk was available and within appellant's restrictions, that the recommendation of his physician to move to a warmer climate was not sufficient to substantiate refusal of the offered job and he had 30 days from the date of the letter to either accept the position or provide an explanation of the reasons for refusing it.

By letter dated October 17, 1996, Dr. Pizzarello stated that he saw appellant on September 26, 1996 and that appellant's symptomatology was better at times but he continued to have back and leg pain. He stated that "[c]ertainly the warm climate is better for his back condition" and he would allow appellant selected light duty without excessive bending, lifting, stooping, pushing, pulling and no repetitive weights in excess of 10 to 15 pounds.

By letter dated October 22, 1996, appellant reiterated that he moved to Florida for his health based on his doctor's recommendation and the climate was "more conducive" to his condition and he planned on remaining indefinitely. He expressed willingness to work with a rehabilitation counselor in Florida.

By letter dated January 13, 1997, the Office stated that appellant's reasons for refusing the job were unacceptable and noted that the employing establishment agreed to pay all reasonable relocation expenses.[1] The Office provided appellant with 15 days to accept the job or else his benefits would be terminated.

In a telephone conference dated February 21, 1997 between appellant and the Office, appellant reiterated that he was not going to take the job.

By decision dated February 24, 1997, the Office terminated appellant's compensation benefits, effective March 2, 1997 based on his refusal to accept a suitable job offer by the employing establishment.

On March 3, 1997 appellant requested an oral hearing before an Office hearing representative which was held on November 4, 1997. He testified that he was a "little better" than he was in Rhode Island, that he was "able to get around more" and did not have to use his cane as much. Appellant's wife also testified that she felt that he had improved in Florida.

Appellant submitted reports from his treating physician, Dr. Joseph C. Flynn, a Board-certified orthopedic surgeon, in Florida dated December 11, 1996 and January 22, 1997. In his December 11, 1996 report, he considered appellant's history of injury, performed a physical examination and reviewed x-rays. Dr. Flynn diagnosed significant degenerative disc disease L4-5 "likely" with severe neuroforaminal stenosis "likely worse on the right than left." In his January 22, 1997 report, he reviewed a magnetic resonance imaging (MRI) scan which showed neuroforaminal stenosis at L4-5 and L5-S1, far worse on the left than the right at L4-5. Dr. Flynn also found that there was almost complete collapse of the neuroforamen causing major right and left-sided L5 nerve root compression. He stated:

> "[Appellant's] difficulty is that he has been mandated to return to work as of Monday, January 27, 1997 in Rhode Island. I think that his current condition renders him having so much difficulty that [i]s not able to make that travel plan and ... not able to return to work at present."

[1] *See* 20 C.F.R. § 10.123(f); *Arthur C. Reck*, 47 ECAB 339 (1996).

By decision dated February 9, 1998, the Office hearing representative affirmed the Office's February 24, 1997 decision.

By letter dated March 17, 1999, appellant requested reconsideration of the decision and submitted a deposition from Dr. Flynn dated January 28, 1999 and reports from him including one dated August 20, 1997 in which Dr. Flynn opined that appellant was totally disabled due to his spinal condition. In his deposition, he deposed that, when he first saw appellant on December 11, 1996, he believed that appellant "probably" would not be working because he had two back surgeries, a severe back injury and very significant degenerative arthritis in his lower lumbar spine. Dr. Flynn opined that appellant's 1976 work-related injury was a major contributing factor in his present impairment. He explained that, in his January 22, 1997 report, he opined that appellant could not work because of the results of the MRI scan, appellant's having severe back and leg pain and difficulty walking, sitting and standing. Dr. Flynn opined that it was reasonable for appellant to move to Florida and refuse the job offer in light of his medical condition and that he could worsen his back if he was involved in any physical activity. He stated that "[c]ertainly, it [is] well known that colder weather will tend to make arthritic areas more painful and that being in a warmer climate may be beneficial for some people."

By decision dated March 17, 1999, the Office denied appellant's request for modification.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits by establishing that the accepted disability has ceased or that it is no longer related to the employment.[2] Under section 8106 (2) of Federal Employees' Compensation Act,[3] the Office may terminate compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[4] 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.[5] 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.[6]

An offer of employment is not suitable if the position is not available within appellant's commuting area. However, a claimant's move away from the area in which the employing establishment is located is an unacceptable reason for his refusal to accept an offered position if the claimant is still on the agency's rolls.[7] When an employee is no longer on the employing

[2] *David W. Green*, 43 ECAB 883 (1992).

[3] 5 U.S.C. §§ 8101-8193.

[4] *Henry W. Sheperd, III*, 48 ECAB 382 (1997); *Patrick A. Santucci*, 40 ECAB 151 (1988).

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

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

[7] *Arquelio Pacheco*, 40 ECAB 277, 279 (1988).

establishment's rolls he may receive payment or reimbursement of reasonable moving expenses from the compensation fund.[8]

In the present case, appellant stated that he relocated to Florida based on his doctor's recommendation that the climate there would be better for his back condition. The relevant evidence appellant submitted to support his contention is Dr. Pizzarello's August 25, 1995 letter stating that the warmer climate in Florida would certainly be "advantageous" for his back. His October 17, 1996 letter also stated that the warm climate was "certainly" better for appellant's back condition and that appellant required light duty without excessive bending, lifting, stooping, pushing pulling and no repetitive weights in excess of 10 to 15 pounds. At his deposition, Dr. Flynn opined that, given the results of the MRI scan and the severe back and leg pain appellant was experiencing, it was reasonable for appellant to refuse the employing establishment's job offer in light of his medical condition and that he could worsen his back if he was involved in any physical activity. He opined that being in a warmer climate might be beneficial for some people with arthritis. In Dr. Flynn's January 27, 1997 report, he stated that appellant's difficult back condition rendered him unable to make a travel plan or to work.

None of the medical evidence appellant submitted, however, contains sufficient medical rationale explaining why he was unable to work in Rhode Island due to his back condition. Dr. Pizzarello's opinion that a warmer climate is advantageous for appellant and better for him does not constitute an adequate explanation as to why appellant was disabled from returning to work in Rhode Island. Further, Dr. Flynn's opinion does not contain adequate medical rationale explaining why appellant was unable to work in Rhode Island. He stated that the warmer climate might be better for people with arthritic conditions and opined that appellant was unable to work or relocate because of his physical condition. However, at the time the employing establishment offered appellant the job of program clerk on October 2, 1996, Dr. Pizzarello had indicated that appellant could perform light work involving no lifting over 10 pounds 4 hours a day. He reiterated these restrictions on October 17, 1996. Appellant did not dispute the restrictions that were placed on him but merely stated his desire to remain in Florida due to the warmer weather.[9] Dr. Flynn's opinion that appellant's back condition rendered him unable to make travel plans was not sufficiently explained to establish that appellant's return to Rhode Island was contraindicated.[10] Appellant therefore has failed to establish his claim.[11] His general desire to remain in the area he had relocated is not a sufficient reason for refusing the offered position.

[8] 20 C.F.R. § 10.123(f).

[9] *See Arthur C. Reck, supra* note 1.

[10] *See Edward P. Carroll*, 44 ECAB 331, 342 (1992).

[11] *Arquelio Pachecoi*, *supra* note 7.

The decision of the Office of Workers' Compensation Programs dated March 17, 1999 is hereby affirmed.

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

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member