U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALFREDO MATA and U.S. POSTAL SERVICE,
OAKLAND MAIN POST OFFICE, Oakland, CA

Docket No. 98-1269; Submitted on the Record;
Issued May 19, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

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

On January 12, 1988 appellant, then a 37-year-old letter carrier, slipped on a soap spill in the employing establishment's bathroom and fell. He claimed that he sustained injuries to the wrist, head and back.[1] In a January 13, 1988 report, Dr. Richard J. Sandell, a Board-certified orthopedic surgeon, diagnosed cerebral concussion and strains of the low back, neck, right wrist and left ankle. In a January 21, 1988 report, Dr. Kenneth S. Zelinger, a Board-certified neurologist, diagnosed mild cerebral concussion and post-traumatic headaches. Appellant received continuation of pay from January 13 through February 26, 1988. The Office accepted appellant's claim for contusions of the head and back and sprains of the neck and right wrist and began payment of temporary total disability compensation effective February 27, 1988. Appellant returned to work, four hours a day, casing mail. The Office paid compensation for the hours appellant did not work.

In an April 7, 1992 report, Dr. Sandell indicated that appellant had work restrictions of a permanent limitation to working 4 hours a day, no lifting over 20 pounds, no bending and no stooping. In a June 1, 1992 letter, the employing establishment offered appellant a position in which he would unbundle letters and place the letters in trays and distribute flats from u-carts into distribution cases. The employing establishment indicated that that position would be for 4 hours a day and would not require lifting over 20 pounds or bending or stooping. Appellant refused to sign the job offer. The employing establishment instructed appellant to report to work by June 8, 1992 or provide documentation on his inability to work. In a June 8, 1992 report,

[1] Appellant had sustained a previous back injury on October 8, 1985 when he tripped on a sprinkler head while delivering mail. The Office accepted appellant's claim for lumbosacral strain and subluxation of L2-4 and L5. In a January 26, 1987 decision, the Office terminated compensation. In an August 21, 1987 decision, an Office hearing representative affirmed the Office's decision.

Dr. Sandell revised the restrictions to working four hours a day, no lifting over five pounds and no repeated bending or stooping. In a June 9, 1992 letter, the employing establishment offered appellant the same position it had offered previously but revised it to indicate that appellant would not perform any lifting over five pounds.

On June 23, 1992 appellant filed a claim for compensation effective June 1 through June 9, 1992. He stated that two supervisors humiliated him, pressing him to changing job assignments to a position not consistent with his doctor's orders. Appellant also cited poor working conditions. He claimed that he had mental and emotional stress and strain and increased back pain.

Appellant stopped working on June 10, 1992 and filed claims for continuing total disability. In an August 13, 1992 report, Dr. Sandell indicated that, in an April 27, 1992 examination, appellant complained of significant stress on the job, which he associated with the pain from the lower back. He noted that he had examined appellant four times since then and reported that appellant's back condition had not improved but worsened. Dr. Sandell related that appellant gave a history of an incident in early June when he was instructed to perform lifting, which he felt he could not perform and was not cleared by any physician to perform. He stated that appellant complained of lower back pain with radiation down the left leg with numbness and tingling. Dr. Sandell noted that examination showed no objective neurologic examination.

Dr. Sandell referred appellant for a magnetic resonance imaging (MRI) scan. In an August 19, 1992 report, Dr. Mark Goldsmith, a Board-certified radiologist, stated that the MRI scan showed a moderate L4-5 disc protrusion just to the left of the midline, which appeared to have developed since a prior November 1, 1988 MRI scan. He also reported that appellant had a minimal L5-S1 disc bulge, which did not impinge on the thecal sac or nerve roots. In a September 8, 1992 report, Dr. Sandell reviewed the MRI scan and stated that appellant had developed a disc pathology at L4-5, which would keep appellant from returning to work. He commented that if appellant's pain improved, he might subsequently be allowed to return to work on a limited basis.

In a note received by the Office on October 26, 1992, appellant indicated that his mailing address had changed from Hayward, California to Newman, California.

In an October 6, 1992 report, Dr. Sandell indicated that appellant, in a September 25, 1992 examination, reported increased back pain with numbness and tingling in the bottom of his left foot and pain radiating from his low back. Dr. Sandell noted that on examination appellant had weakness of the left extensor hallucis longis muscle but no motor loss or sensory loss that could be detected. He reported, however, that appellant was unable to work due to a herniated L4-5 disc. In a December 1, 1992 report, Dr. Sandell indicated appellant had decreased sensation to pinprick in the L5 nerve root distribution. He diagnosed a herniated L4-5 disc. Dr. Sandell stated appellant remained injured due to the residuals of the January 12, 1988 employment injury as well as a June 9, 1992 incident, when he was requited to lift a 50-pound object despite his medical restrictions. He concluded that appellant's condition was related to both injuries, in that the 1988 employment injury caused the condition and the 1992 injury aggravated it. Dr. Sandell commented that he could not tell if the aggravation was temporary or permanent but anticipated that there would be some permanent residual disability. He concluded

that appellant was partially disabled, four hours a day prior to June 9, 1992 and totally disabled after June 9, 1992. The Office began payment of temporary total disability, effective September 26, 1992.

The Office referred appellant to Dr. Kuldeep S. Sidhu, a Board-certified orthopedic surgeon, together with a statement of accepted facts and the case record, for an examination and second opinion. In a January 21, 1993 report, Dr. Sidhu diagnosed herniated nucleus pulposus at L4-5 and stress-related depression. He stated appellant's condition was directly caused by the January 12, 1988 employment injury and was aggravated by the June 9, 1992 injury.[2] Dr. Sidhu stated appellant was not totally disabled and could return to modified work. He noted appellant lived 80 miles from the employing establishment and felt that he could not work because of the driving. Dr. Sidhu commented that appellant's reason could not be considered a disability. He indicated appellant could return to modified work for 8 hours a day where he did not have to perform repeated bending or lifting over 25 pounds. Dr. Sidhu indicated that appellant could sit or stand alternately.

In a May 17, 1993 report, Dr. Sandell indicated that he had reviewed Dr. Sidhu's report. He noted Dr. Sidhu's comment that appellant could not be considered disabled because of his 80-mile drive to work. Dr. Sandell stated that the long drive would be a factor in appellant's return to work. He recommended that appellant obtain a job closer to his home so he would not have to spend a long time sitting in a car.

In a July 6, 1993 report, Dr. Michael B. Krinsky, a Board-certified orthopedic surgeon, diagnosed a herniated lumbar disc with bulging to the left side. He indicated that on examination appellant had weakness of toe extensor and plantar flexion on the left side and a depressed ankle reflex on the left. Dr. Krinsky recommended that appellant be placed on a 4-hour workday with no lifting over 15 pounds. He stated that appellant should be placed in a position within 20 miles of his home. In a November 11, 1993 report, Dr. Sandell indicated that he had reviewed Dr. Krinsky's report and concurred in his recommendations for appellant's work restrictions. He reported appellant had a diminished left ankle reflex and decreased sensation in the L5 and S1 distribution in the left foot and calf. Dr. Sandell stated that appellant should not drive more than 20 miles because prolonged sitting would aggravate his back condition.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Mohinder S. Nijjar, a Board-certified orthopedic surgeon, for an examination to resolve the conflict in the medical opinions between Dr. Sandell and Dr. Sidhu. In a November 15, 1993 report, Dr. Nijjar stated that knee and ankle reflexes were equal on both sides, sensation was normal in both legs and no atrophy was found. He diagnosed lumbar disc protrusion at the L4-5 level. Dr. Nijjar related the condition to appellant's employment injuries in 1985 and 1988. He indicated that the 1992 employment injury caused a permanent

[2] Dr. Sidhu also related appellant's injury to a December 13, 1989 incident, in which appellant claimed he was injured by the examination and therapy of Dr. V.R. Dennis, who had performed a fitness-for-duty examination. The Office had subsequently denied appellant's claim for the alleged incident on the grounds that fact of injury was not established.

aggravation of the back condition, which was currently stationary. Dr. Nijjar concluded that appellant could perform modified work four hours a day. He noted that appellant could lift up to 20 pounds and could sit, walk, lift or stand intermittently for 4 hours a day. Dr. Nijjar indicated appellant could not bend, twist, squat, climb or kneel. He related that appellant's main reason for his inability to work was the requirement that he drive 80 miles, one way to work. Dr. Nijjar commented that, with a two-level disc injury, it might be worthwhile to cut down appellant's daily drive as that distance might be tiring for appellant and for his capacity to work four hours a day.

In a June 7, 1992 decision, the Office rejected appellant's claim for temporary total disability compensation for the period June 10 through September 25, 1992 on the grounds that the medical evidence did not establish a change for the worse in appellant's condition until September 28, 1992. In a June 15, 1994 letter, appellant requested a hearing before an Office hearing representative. In a March 25, 1995 decision, after a hearing, the Office hearing representative found that the medical evidence of record showed appellant's period of total disability began June 10, 1992. She, therefore, vacated the Office's June 7, 1994 decision and returned the case to the Office for the payment of appropriate compensation benefits for the period June 10 through September 25, 1992.

In a June 12, 1995 report, Dr. Sandell expressed surprise that appellant had not returned to work as he had expected appellant would have returned to work within the limits he had set. He related that since appellant lived in Newman, California, there were no postal facilities within 20 miles of appellant's home, he had not returned to work. Dr. Sandell noted appellant was anxious to work at a new postal facility being built in Newman. He indicated appellant still had symptoms of low back pain with radiation down the left leg. Dr. Sandell reported that motor strength appeared to be intact with no sensory loss. He stated that, if appellant could be placed in the new postal facility, he could work 4 hours a day with no lifting over 15 pounds and no repeated lifting, bending or stooping.

In a February 12, 1996 letter, the employing establishment offered appellant a modified city letter carrier position in Oakland, California, for four hours a day. The employing establishment indicated that appellant would case bulk business mail on carrier routes needing assistance. It informed appellant that the duties could be performed while sitting or standing. The duties would require lifting, grasping, fine manipulation, intermittent and continuous standing and sitting and intermittent walking. The employing establishment stated that appellant would be given assistance in lifting any item over 15 pounds. It also indicated that appellant would, on occasion, rewrite case labels, assist in answering telephones, deliver mail held for vacationing customers and deliver express mail. The employing establishment listed the physical restrictions as intermittent sitting and walking for 2 hours a day, intermittent standing for 1 hour a day, no lifting over 15 pounds and no bending, squatting, climbing, kneeling or twisting. In a February 21, 1996 response, appellant indicated that his restrictions also included that the distance from home to work could not exceed 20 miles.

In a March 26, 1996 letter, the Office informed appellant that it found the job offered by the employing establishment to be suitable. The Office stated that appellant had 30 days to accept the position or provide a reason for refusing it. The Office indicated that any explanation

for the refusal to accept the position would be considered prior to determining whether or not his reason for refusing the position was justified. The Office warned appellant that if he refused the position without reasonable cause, his compensation would be terminated. In an April 12, 1996 letter, appellant stated that three physicians had restricted him to traveling no more than 20 miles.[3] In a May 10, 1996 decision, the Office terminated appellant's compensation for refusal to accept suitable work.

Appellant requested a hearing before an Office hearing representative. He submitted a June 24, 1996 report from Dr. Goldsmith, who indicated that a recent MRI scan showed a small to moderate central disc protrusion at L4-5, which appeared to be smaller than seen on the August 18, 1992 MRI scan. Dr. Goldsmith suggested that the finding might be related to partial disc desiccation.

In an August 22, 1996 decision, issued without a hearing, the Office hearing representative found that the Office had not properly considered appellant's reason for refusal to accept the offered position. She noted, however, that the Board had held that if an employee moved or relocated from the area in which the employing establishment was located, such a move would be an unacceptable reason for refusing to accept an offer of suitable employment. The hearing representative reversed the Office's May 10, 1996 decision and returned the case to the Office to determine if the position remained available and to afford appellant the opportunity to accept the offered employment. The Office, in accordance with the Office hearing representative's decision, paid compensation for the period May 11 to September 27, 1996.

In a September 19, 1996 letter, the Office informed appellant that it found his reason for refusing to accept the position was not justified. The Office gave appellant 15 days to accept the offered position without penalty. It stated that the employing establishment had indicated that the position remained available. The Office declared that no further reason for refusal would be considered unless appellant gave a compelling reason for his move to Newman, California. The Office warned appellant that if he had not accepted the position within 15 days, his compensation would be terminated.

In a September 29, 1996 letter, appellant stated that he began the plan to move his family to Newman, California in December 1991 and to drive to Oakland, California from Newman. He indicated that the June 1992 employment injury caused the restriction in his driving to just 20 miles from his home. Appellant repeated his refusal of the position, based on the medical reports restricting the distance he could travel.

In an October 7, 1996 decision, the Office terminated appellant's compensation for refusal of suitable work.

In an October 30, 1996 letter, appellant requested a hearing before an Office hearing representative. Appellant submitted a copy of an April 20, 1992 letter he had written to the postmaster of the Newman Post Office, indicating his plan to move to Newman, California in

[3] Appellant's April 12, 1996 letter was sent to the Office's Branch of Hearings and Review and was not received by the appropriate claims examiner until after the Office's May 10, 1996 decision.

approximately four months and expressing his desire to work closer to his home rather than commute to his current employing establishment. At the December 9, 1997 hearing, appellant indicated that prior to the June 1992 injury he planned on moving to Newman, California and driving to the San Francisco Bay area and then take the subway to the employing establishment. He noted that he proceeded with the move to Newman, California in July or August 1992. He noted that he moved because the houses in Newman, California were less expensive.

In a February 12, 1998 decision, a second Office hearing representative found that appellant had voluntarily moved from the Oakland, California area to the Newman, California area for personal and financial reasons. He concluded that the move was not a justifiable reason for refusal of the employing establishment's offer of suitable employment. The Office hearing representative, therefore, affirmed the Office's October 7, 1996 decision.

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

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."[4] 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.[5]

Appellant was offered a position at his former employing establishment that was designed to be within his physical restrictions. The medical reports from Drs. Sandell, Sidhu and Nijjar indicated that the job itself was within appellant's work limitations. Appellant refused the position on the grounds that, due to the employment-related condition, he could not travel more than 20 miles from home and, therefore, could not drive to the employing establishment, which was approximately 80 miles away. The distance of travel to and from an employing establishment can be a justifiable reason for refusing an offer of suitable employment. However, appellant had voluntarily moved to a home further away from the employing establishment. His former residence would have placed appellant within 20 miles of the employing establishment, the limit set by his physicians. The move to Newman, California placed appellant approximately 80 miles from the employing establishment, beyond the 20-mile driving limitation. The difficulty in driving to the offered position is not dispositive as the commute would have been by appellant's choice, not a duty imposed by the employing establishment.[6] It is irrelevant that appellant had contracted to buy the house prior to the June 9, 1992 injury but did not move until after the June 9, 1992 injury. Appellant's stated intention that, before the June 9, 1992 injury, he planned to drive and use the subway to get to work is also irrelevant. The only relevant factors are that appellant remained on the rolls of the employing establishment and that he moved away from the employing establishment area after his June 1992 employment injury. The Board has held that an employee's move away from the area in which the employing establishment is

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[4] 5 U.S.C. § 8106(c)(2).

[5] 20 C.F.R. § 10.124.

[6] *Ronald M. Jones*, 48 ECAB 600 (1997).

located is an unacceptable reason for refusing to accept an offered position if the employee is still on the employing establishment's rolls.[7] Appellant's reason for moving, to seek less expensive housing, is not an acceptable reason for refusing the offered position. The Office, therefore, properly terminated appellant's compensation for refusal to accept suitable employment.

The decision of the Office of Workers' Compensation Programs, dated February 12, 1998, is hereby affirmed.

Dated, Washington, D.C.
May 19, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[7] *Carl N. Curtis*, 45 ECAB 374 (1994); *Richard S. Gumper*, 43 ECAB 811 (1992); *Arquelio Pacheco*, 40 ECAB 277 (1988).