U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHELDON ABRAMOWITZ and U.S. POSTAL SERVICE, POST OFFICE, New York, NY

Docket No. 99-250; Submitted on the Record;
Issued May 24, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM, BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective December 3, 1997 on the grounds that he refused an offer of suitable work; (2) whether the Office abused its discretion by refusing to reopen appellant's case for further review on the merits of his claim under 5 U.S.C. § 8128(a).

On February 23, 1987 appellant, then a 36-year-old clerk, experienced chest pains while carrying heavy bags up a flight of stairs. He filed a claim for benefits which the Office accepted for left chest wall strain and cervical radicular strain. Appellant was paid compensation by the Office for temporary total disability and placed on the periodic rolls. He returned to work in a light-duty capacity as a modified distribution clerk on April 5, 1990 and worked in that capacity until April 20, 1991. Appellant filed a claim for recurrence of disability on March 7, 1991, which the Office accepted on August 20, 1991.

By decision dated November 10, 1993, the Office terminated benefits on the grounds that appellant refused an offer of suitable work. By decision dated June 1, 1994, an Office hearing representative reversed the November 10, 1993 decision, finding that the Office failed to meet its burden of proof to terminate benefits. Appellant was placed back on the periodic rolls.

In a report dated April 15, 1994, Dr. Christopher Kyriakides, an osteopath and appellant's treating physician, advised that appellant had a post work-related injury with resultant cervical and lumbosacral radiculopathy, and a left wall chest strain and left upper extremity atrophy. He stated:

> "It is my overall opinion [appellant] is permanently and totally disabled from any gainful employment in the foreseeable future. He is unable to perform his prior job description in any manner without clearly jeopardizing his future well being. It is apparent what is expected of him [cannot] be performed based upon his current neurologic and physical limitations.… [It] is apparent that he is totally

permanently disabled as evidenced by his physical examination and his diagnostic studies."

In a report dated August 22, 1996, Dr. Kyriakides stated that there was no change in appellant's overall condition, and that his condition was in fact actually worsening in that he had a propagation and an increase in his pain cycle, as well as further restrictions in his motion. He advised that appellant remained totally disabled and was unfit for any gainful activity or employment.

In order to clarify appellant's current condition, the Office scheduled a second opinion examination for appellant with Dr. Henry M. Tischler, a specialist in orthopedic surgery, for June 27, 1996. Dr. Tischler advised that appellant had a post status injury to the neck, left upper extremity and lower back, with chronic pain syndrome. He stated that appellant had some decreased range of motion in his left shoulder, although the results of a magnetic resonance imaging (MRI) scan were normal. Dr. Tischler diagnosed a probable left shoulder and arm pain shoulder syndrome, chronic pain syndrome and low back pain syndrome. Although he found there was a causal relationship between appellant's complaints and the February 23, 1987 work injury, Dr. Tischler advised that some of his physical complaints were not corroborated by diagnostic tests, and indicated that there were no real objective deficits present. He recommended that appellant be allowed to begin a light-duty assignment for four hours per day.

On November 1, 1996 the Office determined that a conflict existed in the medical evidence between the opinion of Dr. Kyriakides, appellant's treating physician, and the opinion of Dr. Tischler as to whether appellant continued to be totally disabled due to residuals from his February 23, 1987 employment injury. The Office referred appellant for a referee medical examination with Dr. Hubert S. Pearlman, a Board-certified orthopedic surgeon, pursuant to Section 8123(a).[1]

In a report dated April 16, 1997, Dr. Pearlman, after reviewing the statement of accepted facts and appellant's medical records, stated that he found appellant to be an anxiety ridden, chronic complaining person who seemed to be suffering from anxiety and helplessness. He stated that the results of an MRI scan appellant underwent on March 28, 1994 were unremarkable, in that he did not think that it was clinically significant in terms of causing symptoms of a disability. Dr. Pearlman also noted that appellant underwent a computerized axial tomography (CAT) scan on March 24, 1994 which showed no evidence of a herniated intervertebral disc, some disc bulging at L4-5 and L5-S1 and minor arthritis, which he did not consider a clinically significant test. He stated that appellant's lower extremities and lower lumbar spine were not factors in this case, and advised that there was no objective or collaborative evidence indicating positive pathology in the lumbar spine or lower extremities. Dr. Pearlman concluded that appellant had a moderate impairment which would not prevent him from doing some work over an eight-hour span, providing it did not involve the lifting and boxing activities which caused his injury. He concluded that appellant had no lower extremity or cervical spine impairment preventing him from doing sedentary work for an eight-hour period. In a work restriction evaluation dated April 14, 1997, Dr. Pearlman restricted appellant from

[1] 5 U.S.C. § 8123(a).

lifting more than 20 pounds and reaching with his left upper extremity and indicated that appellant could work an 8-hour day. He also indicated that appellant had an overlapping mental problem which might affect his motor performance and required evaluation by an expert in that field.

In order to determine whether appellant had any psychological condition resulting from his February 23, 1987 employment injury, the Office referred appellant to Dr. Solomon Miskin, Board-certified in psychiatry and neurology, for a psychiatric examination.

In a report dated June 6, 1997, Dr. Miskin opined that, based on appellant's history, mental status, examination and the records he reviewed, there were no findings indicating a psychiatric disorder, and there did not appear to be any causal relationship between the February 23, 1987 work injury and any current, clinical purported psychiatric symptoms. Dr. Miskin advised that appellant could continue with work and the normal activities of daily life on a full-time basis without restriction.[2]

In a letter to the Office dated September 11, 1997, the employing establishment offered appellant a limited-duty job as a modified distribution clerk based on the physical restrictions outlined by Dr. Pearlman.

By letter to the Office dated October 1, 1997, the employing establishment indicated that it had offered appellant a limited-duty job as a modified distribution clerk on September 11, 1997, but that appellant had rejected the offer on September 26, 1997.

By letter dated October 8, 1997, the Office informed appellant that the employing establishment had made an offer of work to him as a modified distribution clerk, for eight hours per day, consistent with the physical limitations and work restrictions outlined by Dr. Pearlman, the referee examiner. The Office stated that it had reviewed the offer of employment and had compared it with the medical evidence concerning his ability to work and had found the offer to be suitable. The Office advised appellant that if he refused the employment or failed to report for work when scheduled without reasonable cause then his compensation benefits would be terminated. The Office stated that the case would be kept open for 30 days. It instructed appellant to indicate that he accepted the job or submit evidence or reasons for refusing the job offer or elect retirement benefits. The Office indicated that appellant should notify the employing establishment of his intentions in writing. The Office informed appellant that, if he failed to accept the offered position and did not report to work, any reasons in justification of the failure would be considered by the Office before termination of benefits.

In a handwritten note to the Office dated November 4, 1997, appellant rejected the job offer, stating that he was not physically or psychologically capable of returning to work. Accompanying the note was an October 23, 1997 decision from the Social Security Administration which, he asserted, supported his reasons for declining the position. By letter

[2] The Board notes that the Office has never accepted a claim based on an emotional or psychological condition in this case. Appellant retains the burden of proof of establishing any emotional condition related to the accepted emotional injury; *see Ruby I. Fish*, 46 ECAB 276 (1994); *Kimper Lee*, 45 ECAB 565 (1994).

dated November 18, 1997, the Office advised appellant that his reasons for refusing the job were found insufficient and that he had 15 days in which to accept the position or his benefits would be terminated.

By decision dated December 9, 1997, the Office found that appellant was not entitled to compensation benefits, effective December 3, 1997, on the grounds that he had refused to accept a suitable job offer.

By letter dated June 21, 1998, appellant requested reconsideration. Accompanying his request was a May 16, 1998 report from Dr. Kyriakides, in which he stated that appellant continued to display significant limitations in range of motion and an inability to reach overhead with his left shoulder. Dr. Kyriakides diagnosed cervical spinal derangement with trapezius and paraspinal spasm, with limitations in range of motion, left shoulder impingement and adhesive capsulitis, and left lateral epicondylitis. He advised that appellant remained totally disabled.

By decision dated September 22, 1998, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence such that it was sufficient to require the Office to review its prior decision.

The Board finds that the Office properly terminated appellant's compensation benefits effective December 3, 1997, on the grounds that he refused an offer of suitable work.

Under section 8106(c)(2) of the Act[3] the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.[4] Section 10.124(c) 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 or failure to work was reasonable or justified, and shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.[5] To justify termination, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[6]

The initial question in this case is whether the Office properly determined that the position was suitable. The Board finds that the weight of the medical evidence establishes that the position was within appellant's physical limitations. Dr. Pearlman, the referee medical examiner, found that appellant did not have any clinically significant disability or symptomatology of the lumbar spine or left upper extremity based on his examination and the results of diagnostic tests. He concluded that appellant had a moderate impairment which would not prevent him from doing sedentary work for an 8-hour period, and which would not require

[3] 5 U.S.C. §§ 8101-8193.

[4] *Patrick A. Santucci*, 40 ECAB 151 (1988); *Donald M. Parker*, 39 ECAB 289 (1987).

[5] 20 C.F.R. § 10.124(c); *see also Catherine G. Hammond*, 41 ECAB 375 (1990).

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

reaching and lifting more than 20 pounds with his left upper extremity or the lifting and boxing activities entailed by his preinjury job. The Office properly found that the modified distribution clerk job offered by the employing establishment was within these restrictions. The offered position therefore appears to be consistent with these physical restrictions. A review of the above evidence indicates that there is substantial medical evidence to support a finding that the offered position was within appellant's physical limitations. The weight of the medical evidence, as represented by Dr. Pearlman's referee medical opinion, establishes that the position offered was within appellant's physical limitations.

The Board has held that when there exists opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist to resolve the conflict of medical opinion, the opinion of such specialist, if sufficiently well rationalized and based upon a proper medical background, must be given special weight.[7]

The determination of whether an employee is physically capable of performing the job is a medical question that must be resolved by medical evidence.[8] The weight of the medical evidence in this case establishes that appellant was capable of performing the position of modified distribution clerk. The Board finds that the Office properly found that Dr. Pearlman's referee opinion was sufficiently probative, rationalized and based upon a proper factual background and that it therefore constituted sufficient medical rationale to support the Office's December 9, 1997 decision terminating appellant's compensation. Thus, there was insufficient support for appellant's stated reasons in declining the job offer. Accordingly, the refusal of the job offer therefore cannot be deemed reasonable or justified and the Office properly terminated appellant's compensation. Accordingly, the Board affirms the Office's December 9, 1997 termination decision.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for further review on the merits of her claim under 5 U.S.C. § 8128(a).

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law; by advancing a point of law or fact not previously considered by the Office; or by submitting relevant and pertinent evidence not previously considered by the Office.[9] Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.[10] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[11]

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[7] *James P. Robert*, 31 ECAB 1010 (1980).

[8] *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

[9] 20 C.F.R. § 10.138(b)(1); *see generally* 5 U.S.C. § 8128(a).

[10] 20 C.F.R. § 10.138(b)(2).

[11] *Howard A. Williams*, 45 ECAB 853 (1994).

In the present case, appellant has not shown that the Office erroneously applied or interpreted a point of law; nor did he advance a point of law or fact not previously considered by the Office. Neither has he submitted relevant and pertinent evidence not previously considered by the Office. Although appellant submitted the May 16, 1998 report of Dr. Kyriakides, this report essentially reiterated his previous findings and conclusions regarding appellant's condition; thus, his request did not contain any new and relevant medical evidence for the Office to review. His opinion was previously considered by the Office in determining that a conflict of medical opinion was created which necessitated referral to Dr. Pearlman. Additionally, appellant's June 21, 1998 letter did not show the Office erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by the Office. Although appellant generally contended that he continued to suffer residuals from his accepted February 23, 1987 employment injury, he failed to submit new and relevant medical evidence in support of this contention. Therefore, the Office did not abuse its discretion in refusing to reopen appellant's claim for a review on the merits.

The September 22, 1998 and December 9, 1997 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
May 24, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member