U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRUCE E. ALBERT and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, New Orleans, LA

Docket No. 00-678; Submitted on the Record;
Issued April 11, 2001

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 November 8, 1998 on the grounds that he refused suitable work pursuant to section 8106(c) of the Federal Employees' Compensation Act.

The Board has duly reviewed the case record in this appeal and finds that the Office properly terminated appellant's compensation effective November 8, 1998 on the grounds that he refused suitable work pursuant to section 8106(c) of the Act.

On February 6, 1979 appellant, then a 33-year-old electrician, filed a traumatic injury claim (Form CA-1) alleging that on January 31, 1979 he sustained a back injury in the performance of duty. Appellant stopped work on January 31, 1979.

By letter dated November 19, 1982, the Office accepted appellant's claim for a low back sprain and permanent aggravation of preexisting spondylolysis.

On December 9, 1996 appellant accepted the employing establishment's job offer and started work four hours per day on that date.

By letter dated March 4, 1998, the Office referred appellant along with medical records, a statement of accepted facts and a list of specific questions to Dr. James C. Butler, a Board-certified orthopedic surgeon, in response to a March 1, 1995 letter from Dr. Paul M. Doty, an orthopedic surgeon and appellant's treating physician, requesting that the Office schedule a second opinion examination to determine the current status of appellant's disability. By letter of the same date, the Office advised Dr. Butler of the referral.

Dr. Butler submitted an April 7, 1998 medical report finding that appellant was not totally disabled and that he could work eight hours per day with certain physical restrictions.

By letter dated September 16, 1998, the employing establishment offered appellant the position of program support clerk based on Dr. Butler's report, working eight hours per day within the physical limitations set by the physician.

In an October 2, 1998 letter, the Office asked Dr. Doty whether appellant could perform the offered position. Dr. Doty did not respond.

In a letter of the same date, the Office advised appellant that the offered position was suitable for his work capabilities. The Office also advised appellant that he had 30 days in which to accept the offered position or to provide an explanation of the reasons for refusing the job along with relevant medical reports supportive of the refusal. The Office further advised appellant of the penalties for refusing an offer of suitable work under section 8106 of the Act. Appellant did not respond.

By decision dated November 6, 1998, the Office terminated appellant's compensation effective November 8, 1998 on the grounds that appellant refused suitable work.

In a November 20, 1998 letter, appellant requested reconsideration of the Office's decision accompanied by medical evidence.

In a January 12, 1999 decision, the Office denied modification of the November 6, 1998 decision.

It is well settled that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[1] 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).[2] 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.[3] 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 the medical evidence.[4]

The Board has stated that the weight of the medical evidence is determined by its reliability, its probative value and its convincing quality. The opportunity for and thoroughness of examination, the accuracy and completeness of the doctor's knowledge of the facts and

[1] *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

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

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

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

medical history, the care of analysis manifested and the medical rationale expressed in support of the doctor's opinion are factors which enter into such evaluation.[5]

Section 10.517(a)[6] 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 showing before a determination is made with respect to termination of entitlement to compensation.[7] To justify termination, the Office must show that the work offered was suitable,[8] and must inform appellant of the consequences of refusal to accept such employment.[9] According to Office procedures, certain explanations for refusing an offer of suitable work are considered acceptable.[10]

In the present case, the Office properly exercised its authority as granted under the Act and implementing federal regulations.[11] The record supports that the Office met its burden of showing that the full-time position that was offered to appellant by the employing establishment was suitable. Dr. Butler, a Board-certified orthopedic surgeon and second opinion physician, noted in his April 7, 1998 report, a history of appellant's 1979 employment injury and medical treatment, his findings on physical and objective examination and a review of medical records and statement of accepted facts. He opined that there was evidence of spondylolisthesis at L5-S1 in the lumbar spine and there was no evidence of a low back sprain that would continue to exist since 1979. Dr. Butler noted that it was possible appellant's spondylolisthesis was symptomatic. He opined:

> "There is no actual objective evidence that the preexisting spondylolysis or spondylolisthesis was aggravated, since this problem is a radiographic diagnosis and unless a person has x-rays performed prior to an injury and afterwards that show a difference in the position of the spondylolisthesis, one can only *assume* that this is symptomatic if his pain does not respond to routine conservative measures and if there is no other cause to account for a person's symptoms. Thus, there is no objective evidence that this was aggravated, only subjective

[5] *Melvina Jackson*, 38 ECAB 43 (1987); *Naomi A. Lilly*, 10 ECAB 560 (1959).

[6] 20 C.F.R. § 10.517(a) (1999).

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

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

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

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(1)-(5).

[11] It is well established that once the Office accepts a claim, it has the burden of proof of justifying termination or modification of compensation benefits. This includes cases in which the Office terminates compensation entitlement under section 8106(c) for refusal to accept suitable employment; *see Shirley B. Livingston*, 42 ECAB 855 (1991).

> speculation on the part of the physician. His present disability is a result of the spondylolisthesis at the L5-S1 level and degenerative arthritic changes at multiple other levels, notably L1-2, L2-3 and L3-4. His condition of low back pain has nothing to do with his obesity; however, obesity can aggravate a lower back condition. (Emphasis in the original.)
>
> "I do not feel that this [appellant] is totally disabled. I think he should be capable of sedentary to light work on a full-time basis."

In a work capacity evaluation musculoskeletal conditions (Form OWCP-5c) dated April 8, 1998, Dr. Butler indicated appellant's physical restrictions, which included no sitting for more than 5 hours, no walking, standing, pushing and pulling more than 30 pounds for more than 3 hours, no reaching above the shoulder, twisting and lifting more than 15 pounds for more than 4 hours, no operating a motor vehicle for more than 2 hours and no squatting, kneeling or climbing.

The Board finds that the medical opinion of Dr. Butler that appellant is not totally disabled and he can work eight hours per day with certain physical restrictions is rationalized and based on an accurate factual and medical background.

Moreover, the record on appeal demonstrates that the employing establishment, in cooperation with the restrictions set forth by Dr. Butler, identified the full-time position of program support clerk as within appellant's physical limitations. The physical requirements of the position of program support clerk involved no climbing, kneeling or squatting, no lifting over 15 pounds and no pushing or pulling over 30 pounds.

The Board, therefore, finds that Dr. Butler's opinion, as described above, establishes that appellant was able to perform the program support clerk position at the time it was offered and that the position constituted an offer of suitable work. Moreover, the additional medical evidence of record does not show that the Office improperly determined that the position of program support clerk constituted an offer of suitable work.[12] Therefore, given the fact that appellant neglected to work eight hours per day after suitable work was offered and the Office properly advised appellant of the consequences of such neglect, the Office properly terminated appellant's compensation effective November 8, 1998.

[12] Appellant submitted a September 23, 1998 medical report of Dr. Mark O. Hontas, an orthopedic surgeon. In this report, Dr. Hontas noted that appellant slipped on some steps late last week and had experienced increased pain since that time. He noted his findings on physical examination and a review of x-rays. Dr. Hontas opined that he saw Grade I spondylolisthesis with degenerative disc disease. He stated that he thought appellant was working out the soreness from his recent slip, but that overall he was about the same. Dr. Hontas opined that if appellant tried to do more than four hours of work at a time, he would probably have increased symptoms. Dr. Hontas' report is of limited probative value because he failed to provide any medical rationale explaining how or why appellant could not work more than four hours per day.

The January 12, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
April 11, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member