U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOE DIXON and DEPARTMENT OF THE NAVY,
EAST COAST COMMISSARY COMPLEX, Camp Lejeune, NC

Docket No. 01-42; Submitted on the Record;
Issued August 7, 2001

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation entitlement under 5 U.S.C. § 8106(c)(2) on the grounds that he refused suitable work; and (2) whether the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion.

On April 24, 1989 appellant, then a 53-year-old warehouse worker, filed an occupational disease claim alleging that walking on cement, lifting boxes, climbing and stooping aggravated his preexisting knee condition. The Office accepted the claim for aggravation of degenerative arthritis of the right knee. Appellant stopped working on November 30, 1989 and thereafter retired on medical disability. He was placed on the periodic rolls and received appropriate compensation.

On July 19, 1999 the employing establishment offered appellant a light-duty position as a customer service clerk, which accommodated the work restrictions previously outlined by his attending physician. Appellant's restrictions were listed as: carrying and lifting up to 10 pounds for 2 hours per day; sitting for 8 hours per day; intermittent walking, standing and twisting for 2 hours per day and reaching above shoulders for 8 hours per day. The duties of the position included: preparing daily stock listings from inventory; obtaining and announcing daily specials by intercom; assisting customers with special order and new item requests; assisting customers by locating merchandise and verifying prices; replacing shelf labels and making display signs; operating cash register and performing other administrative duties. The job offer was forwarded to appellant's physician Dr. Noel Rogers, a Board-certified orthopedic surgeon for his medical opinion of whether appellant was capable of performing the duties as described. In a report dated September 10, 1999, Dr. Rogers responded that he reviewed the job description of the position and determined that due to appellant's chronic pain, need for medication and use of a cane, the position was unrealistic for appellant and that he was essentially unemployable.

In a letter dated November 24, 1999, the Office referred appellant for a second opinion evaluation with Dr. Robert Moore, a Board-certified orthopedic surgeon, in order to address the extent of his disability and capacity to return to work. In a report dated December 11, 1999, Dr. Moore reviewed appellant's medical records, the statement of accepted facts and the questions outlined by the Office. He reported that appellant's radiographic findings from 1986 indicated the presence of severe degenerative arthritis in the right knee, and current radiographs and physical examination showed the presence of a total right knee arthroplasty functioning satisfactorily with no evidence of complication. Dr. Moore further indicated that he reviewed the job offer of customer service clerk dated July 19, 1999 and opined that appellant would be able to perform the duties described therein. He stated:

> "[Appellant] does have some pain with prolonged walking and standing, but a patient with a satisfactorily functioning total knee prosthesis without complication should be able to tolerate up to 2 hours of walking or standing per day, if he is allowed breaks from walking or standing of approximately 10 minutes every half hour. While [appellant] also is unable to perform climbing, kneeling, squatting or lifting greater than 10 pounds, these activities are not required in the job offer as described."

Based on the conflicting medical opinions between Drs. Rogers and Moore as to whether appellant was capable of performing the duties of the customer service clerk position, appellant was referred for an impartial medical examination to resolve the conflict. In a report dated March 1, 2000, Dr. James Maultsby, a Board-certified orthopedic surgeon, reviewed the case file and medical records and discussed his findings of appellant's physical examination. He reported that appellant walked well without his cane with a variable gait and that he was able to get up from a sitting position with no armrest. Dr. Maultsby further noted that appellant's range of motion of his right knee, which had surgery, was nearly equal to that of the left. He opined that, although appellant reported severe disability because of impairment to his knee, he did not appear to be disabled and that he would have no difficulty in performing the customer service clerk duties described in the job offer.

By letter dated March 29, 2000, the Office notified appellant that the position as a customer service clerk was available, suitable to his work capabilities and that he had 30 days to either accept the position or provide reasons for refusing it, or his compensation entitlement would be terminated.

On April 11, 2000 appellant declined the offered position and stated: "I am unable to sit, stand or walk for long periods of time because I have a lot of pain in my leg. There are times that I have to elevate my leg and be still. Because of the inflammation sometimes it's very hard for me to get around even with my walking cane. I also experience numbness at times in my entire leg and foot."

In a letter dated May 8, 2000, the Office advised appellant that it found his reasons for declining the position unacceptable and afforded him 15 additional days to accept the position.

In the interim, Dr. Maultsby submitted a supplemental report dated June 9, 2000 in response to an Office letter requesting a medical reasoning to support his position that appellant

was capable of performing the customer service clerk position. Dr. Maultsby reported that his findings on physical examination indicated excellent strength, good range of motion and no evidence of any loosening or problem with his knee joint that would prevent his being up on his feet for two hours or sitting for six hours. He further stated that the duties of the position were very carefully reviewed and that it was his impression that appellant's medical condition did not preclude him from performing those activities.

By decision dated May 25, 2000, the Office terminated appellant's entitlement to compensation effective June 18, 2000 based upon his refusal to accept a suitable offer of employment. The Office found that the weight of the medical evidence rested with Drs. Moore and Maultsby since they provided well-rationalized reports on their opinion on why appellant was capable of performing the duties of the customer service clerk position. The Office found that Dr. Rogers based his conclusion that appellant was unable to perform the job on appellant's subjective complaints of pain while Drs. Moore and Maultsby relied upon current diagnostic testing and objective medical findings.

In a letter dated June 6, 2000, appellant requested reconsideration of the May 25, 2000 decision and submitted a May 15, 2000 report from Dr. Rogers. By decision dated July 27, 2000, the Office denied appellant's request for review on the grounds that the evidence submitted in support of the request was similar to previous reports of record and therefore cumulative and insufficient to warrant review of the claim.

In a letter dated August 9, 2000, appellant again requested reconsideration and submitted an August 4, 2000 report from Dr. Rogers. By decision dated August 23, 2000, the Office denied appellant's request for review on the grounds that the evidence submitted in support of the request was again found to be cumulative in nature and insufficient to warrant review of the prior decision.

The Board finds that the Office properly terminated appellant's compensation entitlement under 5 U.S.C. § 8106(c)(2) on the grounds that he refused suitable work.

Section 8106(c)(2) of the Act states that a partially disabled employee who refuses to seek suitable work, or refuses or neglects to work after suitable work is offered to, procured by, or secured for him is not entitled to compensation.[1] The Office has authority under this section to terminate compensation for any partially disabled employee who refuses suitable work when it is offered. Before compensation can be terminated; however, the Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.[2] In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2),

[1] 5 U.S.C. § 8106(c)(2).

[2] *Frank J. Sell*, 34 ECAB 547 (1983).

which is a penalty provision, the Office has the burden of showing that the work offered to and refused by appellant was suitable.[3]

The Office met its burden of proof in this case. In compliance with appellant's medical restrictions previously noted by appellant's physician, the employing establishment outlined duties as a customer service clerk in a July 19, 1999 offer letter that have been found suitable for appellant to perform. The job offer listed work duties, which included general customer service tasks, administrative and cash register duties. Appellant's attending physician, Dr. Rogers reviewed the job description and opined that due to his chronic pain, use of a cane and need for medication the position was unrealistic for appellant. However a second opinion medical evaluation was later obtained and Dr. Moore determined that based on diagnostic testing and findings on examination that appellant was capable of performing the clerk duties. A referee examination was thereafter performed to resolve the medical conflict of record wherein it was determined by Dr. Maultsby that appellant could perform the duties of the offered position. On May 8, 2000 the Office advised appellant that a rehabilitation position was available, suitable to his work capabilities and that he had 30 days to accept the position or provide an explanation for refusing it. Appellant, however, declined to accept the position or return to work. An employee who refuses or neglects to work after suitable work has been offered to him must show that such refusal to work was justified.[4] Appellant argued that he declined the job offer because he was unable to sit, stand or walk for long periods of time due to leg pain, inflammation and numbness. The Office reviewed his reasons for declining the job offer and determined that they were not justified, as the proposed duties outlined in the job offer complied with each of his medical restrictions. The Office provided appellant with a copy of the job description and the opportunity to accept the offer; however, appellant declined the position.

As the Office obtained objective medical evidence that appellant could perform the duties of the customer service clerk position and structured the suitable work position within the physical restrictions previously provided by appellant's physician; and as the Office met the procedural requirements of a suitable work termination, the Office met its burden of proof in this case.

The Board further finds that the Office in its July 27 and August 23, 2000 decisions properly denied appellant's request for reconsideration on the merits under 5 U.S.C. § 8128(a) on the basis that his requests for reconsideration did not meet the requirements set forth under section 8128.[5]

Under section 8128(a) of the Federal Employees' Compensation Act,[6] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal

[3] *Glen L. Sinclair*, 36 ECAB 664 (1985).

[4] 20 C.F.R. §§ 10.515-10.520.

[5] *See* 20 C.F.R. § 10.606(b)(2)(i-iii).

[6] 5 U.S.C. § 8128(a).

regulations,[7] which provides that a claimant may obtain review of the merits if his written application for reconsideration, including all supporting documents, set forth arguments and contain evidence that:

> "(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
>
> "(ii) Advances a relevant legal argument not previously considered by the Office; or
>
> "(iii) Constitutes relevant and pertinent new evidence not previously considered by the [Office]."

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[8]

In the present case, the Office denied appellant's claim on July 27 and August 23, 2000 without conducting a merit review on the grounds that the evidence submitted was cumulative in nature and therefore insufficient. In support of his June 6, 2000 request for reconsideration of the May 25, 2000 decision, appellant submitted a report from Dr. Rogers dated May 15, 2000, in which he stated:

> "This gentleman is 65 years of age. He has been out of work for an extended period of time. After reviewing the description of this light-duty work at the commissary, I really do n[o]t think he is realistically ready to return to any work because of the prolonged nature of the problem and the difficulty that he has. He cannot stand, walk, etc. for any extended period of time, and the commissary invariably is going to have a concrete floor, which also aggravates problems, particularly knee problems."

In support of the August 9, 2000 request for reconsideration of the July 27, 2000 decision, appellant submitted another report from Dr. Rogers dated August 4, 2000. He stated: "This man has arthritis and he has a total knee, which is the reason he should n[o]t be standing for extended periods of time, particularly on concrete floors."

The Board finds that these reports are similar in nature to the previous opinion submitted by Dr. Rogers and considered by the Office and therefore do not constitute relevant evidence. Appellant neither showed that the Office erroneously applied or interpreted a point of law; advanced a point of law not previously considered by the Office; nor did he submit relevant and pertinent evidence not previously considered by the Office.

[7] 20 C.F.R. § 10.606(b) (1999).

[8] 20 C.F.R. § 10.608(b).

The decisions of the Office of Workers' Compensation Programs dated August 23, July 27 and May 25, 2000 are affirmed.

Dated, Washington, DC
August 7, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member