

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MELVIN C. SPARKS and U.S. POSTAL SERVICE,
POST OFFICE, Springfield, MA

*Docket No. 99-1191; Submitted on the Record;
Issued August 6, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated compensation under 5 U.S.C. § 8106(c)(2) on the grounds that appellant refused an offer of suitable work; and if so, (2) whether the Office properly denied appellant's September 8, 1998 request for reconsideration.

On January 15, 1983 appellant, then a 54-year-old carrier, slipped as he was descending a flight of stairs and experienced the onset of pain in his right arm. The Office accepted his claim for right shoulder strain. Appellant returned to limited duty but in 1984 underwent shoulder surgery. He subsequently returned to a light-duty position working approximately four hours a day. The Office paid compensation for wage loss.

On October 26, 1997 the employing establishment medical officer wrote to Dr. Steven M. Wenner, an orthopedic surgeon. Enclosed was a list of various limited-duty jobs that were available to appellant. The medical adviser asked Dr. Wenner to review these jobs and to indicate which appellant could safely perform. The medical adviser also asked for Dr. Wenner's opinion on whether appellant's medical condition precluded him from doing very light work for eight hours a day.

On November 3, 1987 Dr. Wenner reported as follows: "It appears to me based on the job listing that is enclosed with the letter dated October 26, 1987, that appellant should be able to perform these tasks." On November 25, 1987 Dr. Wenner further reported: "I believe that [appellant] can do these tasks eight hours a day. I do think that his disability will be permanent."

According to appellant, the employing establishment offered a job to him on December 18, 1987 working eight hours a day. He accepted the offer and tried to work eight

hours a day but could not because of pain. Appellant nonetheless continued in the position working four hours a day.¹

On January 4, 1988 the employing establishment formally offered appellant the job of Modified Distribution Clerk. The duties of the position were those specified by the employing establishment medical officer in his October 26, 1997 letter to Dr. Wenner. Duty hours were from 7:00am to 3:50pm.

Appellant rejected the formal offer. He noted: "I can do all of these jobs, but the simple fact is that movement causes increased pain. The time that I work now [four hours] is not free of it." As appellant would explain, he had already tried the job for eight hours a day but could not do it. He rejected the formal offer and continued to work in the position for four hours a day.

The Office advised appellant in a letter dated April 21, 1988, that the offer of employment made by the employing establishment was suitable. The Office notified appellant of the provisions of 5 U.S.C. § 8106(c) and allowed him 21 days to reply. The Office stated that any reasons in justification of a failure to accept would be considered before termination of benefits.

In an undated letter received by the Office on May 24, 1988 appellant replied that he could do almost anything he used to do, but the way, the time and the ease with which he could do things had changed. There were things he did less of because of the price he had to pay in pain and working eight hours per day was one of them. Appellant stated that he tried to work full days many times but just could not do it. He was unable to endure the additional pain, discomfort and stiffness that would result from working the eight hours a day required by the offered position.

In a decision dated June 30, 1988, the Office found that appellant was not entitled to compensation after March 26, 1988 and was not entitled to a schedule award because he refused an offer of suitable work. The Office noted appellant's reason for not accepting the offered position, but found that he had submitted no further medical evidence that he was physically incapable of performing the duties outlined in the job offer.

In a decision dated June 15, 1989, an Office hearing representative affirmed the termination of appellant's compensation benefits but modified the date of termination to coincide with the date of the Office's decision or June 30, 1988.

The Board's nonmerit decision of February 28, 1996,² explains the procedural history of this case following the hearing representative's June 15, 1989 decision. The facts of the case as set forth in the Board's decision are hereby incorporated by reference.

¹ On December 18, 1987 the employing establishment medical officer reported that appellant should be able to perform "the attached duties" but that stamping mail seemed to bother him and so the activity should be limited. He also made other recommendations.

² Docket No. 94-1345 (issued February 28, 1996).

In a merit decision dated June 4, 1996, the Office denied modification of its decision to terminate benefits. The Office noted that appellant submitted no medical evidence to support that he was unable to work eight hours a day at the time of the offer. The Office again denied modification in a merit decision dated April 22, 1997. On August 6, 1997 the Office denied a merit review of appellant's claim on the grounds that the evidence submitted in support of his request for reconsideration was cumulative or immaterial.

On September 23, 1997 appellant again requested reconsideration. He submitted a September 11, 1997 report from Dr. Wenner:

"A number of years ago, I performed a decompression of the subacromial space on [appellant's] right shoulder. Following surgery, he developed heterotopic calcification in the subacromial space. Since that time, he had had marked restriction of right shoulder girdle movement and he had had pain in the shoulder. It has impaired his ability to perform work-related activities and activities in his home.

"Although at times [appellant] has worked more than [four] hours a day, he has never done so without having significant pain. Since 1987, he should have been permitted to work only [four] hours a day on a regular basis. The fact that he has, at times, exceeded this limit does not negate the fact that a reasonable restriction would have been [four] hours a day."

In a decision dated January 12, 1998, the Office denied modification of its decision to terminate appellant's compensation. The Office found that Dr. Wenner's September 11, 1997 report had no probative value because he offered no rationale to explain his change of opinion 10 years after clearing appellant to work 8 hours a day.

On February 24, 1998 appellant requested reconsideration. He submitted a February 4, 1998 report from Dr. Wenner:

"With respect to the recent letter addressed to our offices and specifically in answer of the question about why I initially felt that [appellant] was able to work [eight] hour[s] a day in 1987, but that in 1997, I contraindicated my previous statement and indicated that he could not do that, [appellant] found that working [eight] hours a day with his shoulder condition such as it is was very painful for him. He was unable to do this.

"[Appellant] has heterotopic calcification in the subacromial space. He has pain, stiffness and marked restriction of the right shoulder girdle movement. It has impaired his ability to perform work-related activities at a desk or standing and activities in his home.

"In retrospect, I was wrong in 1987, when I stated that he was able to work [eight] hours a day. In fact, he was only able to work [four] hours a day."

In a decision dated June 22, 1998, the Office reviewed the merits of appellant's claim and denied modification. The Office found that Dr. Wenner's February 4, 1998 report was not well reasoned.

On September 8, 1998 appellant requested reconsideration. He submitted a June 25, 1998 treatment note from Dr. Sumner E. Karas, who addressed appellant's current condition. He also submitted a September 2, 1998 report from Dr. Wenner:

“[Appellant's] problem with his shoulder is a result of the fall that he sustained in 1983 and complications following the surgery in 1984. It accounts for his condition from 1987 through the present time. During that period of time, he had been unable to work his job offer [eight] hours a day. I do not believe that he can do it even if he tries because of restricted movement, restricted strength and pain in the shoulder.”

In a decision dated December 9, 1998, the Office denied a merit review of appellant's claim on the grounds that the evidence submitted was repetitious or not relevant.

Appellant filed an appeal to the Board within a year of the Office's June 22, 1998 merit decision, thereby enabling the Board to exercise jurisdiction to review the validity of the Office's initial decision on June 30, 1988 to terminate benefits.³

The Board finds that the Office properly terminated compensation under 5 U.S.C. § 8106(c)(2) on the grounds that appellant refused an offer of suitable work.

Section 8106(c)(2) of the Federal Employees' Compensation 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.⁴ The Office has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects 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.⁵ In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused or neglected by appellant was suitable.⁶

The Office met its burden in this case. Appellant's orthopedic surgeon, Dr. Wenner, reviewed a list of various limited-duty jobs that were available to appellant and reported on November 3, 1987 that appellant “should be able to perform these tasks.” Later that month, on

³ *Clara Anne Andresen*, 5 ECAB 42 (1952); 20 C.F.R. § 501.3(d) (time for filing an appeal).

⁴ 5 U.S.C. § 8106(c)(2).

⁵ *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

⁶ *Glen L. Sinclair*, 36 ECAB 664 (1985).

November 25, 1987, he reported: “I believe that [appellant] can do these tasks eight hours a day.” When the employing establishment formally offered the position of Modified Distribution Clerk to appellant on January 4, 1988, the duties of the position were exactly those reviewed and approved by Dr. Wenner.⁷ The record, therefore, established that the position offered to appellant was suitable.

The Office properly advised appellant that the position was suitable and properly notified him of the penalty provision of 5 U.S.C. § 8106(c)(2). The Office then extended appellant a reasonable opportunity to accept the offer. Appellant replied that he could not work eight hours a day. He had tried but was unable to endure the pain, discomfort and stiffness.

Because the treating orthopedic surgeon had cleared appellant to perform the duties of the offered position for eight hours a day⁸ and because appellant did not accept those terms, the Board finds that he refused or neglected to work after suitable work was offered to, procured by, or secured for him and that he is, therefore, not entitled to compensation pursuant to 5 U.S.C. § 8106(c)(2). The Board will affirm the Office’s June 22, 1998 decision denying modification of the termination of appellant’s compensation.

The Board also finds that the Office properly denied appellant’s September 8, 1998 request for reconsideration.

Section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by (1) showing that the Office erroneously applied or interpreted a point of law, or (2) advancing a point of law or a fact not previously considered by the Office, or (3) 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

In his September 8, 1998 request for reconsideration, appellant submitted a June 25, 1998 treatment note from Dr. Karas, who addressed appellant’s current condition. This is irrelevant to whether appellant was able to work eight hours a day in January 1988 when he was formally offered the position of Modified Distribution Clerk. Evidence that does not address the particular issue involved constitutes no basis for reopening a case.¹¹

⁷ The employing establishment also attempted to incorporate the recommendations of the employing establishment medical officer.

⁸ In 1997 and 1998 Dr. Wenner reported that appellant should have been restricted to four hours a day in 1987 and that, in retrospect, he was wrong in 1987 when he stated that appellant was able to work eight hours a day. The Board finds these reports to be of little probative value because they lack sufficient rationale. *Ceferino L. Gonzales*, 32 ECAB 1591 (1981); *George Randolph Taylor*, 6 ECAB 968 (1954).

⁹ 20 C.F.R. § 10.138(b)(1).

¹⁰ *Id.* at 10.138(b)(2).

¹¹ *Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

Appellant also submitted a September 2, 1998 report from Dr. Wenner, but this report adds nothing of substance to his other reports, which were previously considered by the Office. Evidence that repeats or duplicates evidence already in the record has no evidentiary value and constitutes no basis for reopening a case.¹²

Because appellant's September 8, 1998 request for reconsideration does not meet one of the three requirements for obtaining a merit review of his case, the Office acted within its discretion in denying his request. The Board will affirm the Office's December 9, 1998 decision.

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

Dated, Washington, DC
August 6, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member

¹² *Eugene F. Butler*, 36 ECAB 393 (1984); *Bruce E. Martin*, 35 ECAB 1090 (1984).