

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RONNIE G. IRVIN and DEPARTMENT OF LABOR,
MINE SAFETY & HEALTH ADMINISTRATION, Barbourville, KY

*Docket No. 99-113; Oral Argument Held October 5, 2000;
Issued June 21, 2001*

*Appearances: Ronnie G. Irvin, pro se; Sheldon G. Turley, Jr., for the Director,
Office of Workers' Compensation Programs.*

DECISION and ORDER

Before A. PETER KANJORSKI, PRISCILLA ANNE SCHWAB,
VALERIE D. EVANS-HARRELL

The issues are: (1) whether appellant met his burden of proof in establishing that he sustained a pulmonary condition due to employment factors; and (2) whether the Office of Workers' Compensation Programs met its burden of proof in terminating monetary compensation effective January 31, 1998 on the basis that appellant refused an offer of suitable employment.

On September 12, 1986 appellant, then a 48-year-old mine inspector, injured his right knee when he slipped on a pipe. He later filed additional occupational disease and traumatic injury claims for his knees and low back. Appellant's claims were accepted for tear of the right medial meniscus, calcification of the meniscus, medial meniscectomy, bilateral osteoarthritis of the knees and aggravation of degenerative lumbar disc disease. He underwent arthroscopic surgery of the right knee with removal of the right medial meniscus on September 22, 1986. Appellant received a schedule award for a 28 percent permanent impairment of the right knee. He stopped work on September 5, 1994 and has not returned. Appellant was subsequently taken off the periodic rolls.

During the course of his claims, appellant submitted medical reports and treatment notes from Dr. Gary K. McAllister, a specialist in orthopedics, who reported appellant's progress and his disability status.

On April 11, 1995 the Office referred appellant to Dr. Jeffrey Uzzle, a Board-certified physiatrist, for a second opinion to determine the extent and degree of disability remaining as a result of appellant's work-related injuries.

In an April 25, 1995 report, Dr. Uzzle indicated that appellant could perform sedentary work. He noted that appellant should avoid prolonged standing, walking, climbing ladders, stairs and ramps, deep knee bending, stooping, crawling and driving. Dr. Uzzle stated appellant should limit his lifting to 20 pounds. He noted that appellant could work 8 hours a day, 40 hours a week with these restrictions. Dr. Uzzle recommended that appellant undergo a functional capacity evaluation.

Following an Office request for a supplemental report, Dr. Uzzle indicated on May 31, 1995 that appellant was permanently precluded from returning to employment in his previous capacity as his knee condition prevented him from ambulating in tight spaces. In a report dated June 12, 1995, Dr. Uzzle noted permanent work and physical activity limitations based upon a functional capacity evaluation and indicated appellant could pull up to 25 pounds. Dr. Uzzle restricted appellant from performing work bent over from a standing or sitting position for prolonged periods, prolonged squatting, repetitive squatting, climbing stairs, ladders and crawling activities. He indicated that appellant would be unable to return to his job as a mine inspector. However, he opined that a more sedentary job would be feasible.

On March 8, 1996 the Office referred appellant to a vocational rehabilitation program.

On August 5, 1996 appellant filed an occupational disease claim alleging that he sustained black lung disease causally related to his federal employment. He stated that his lung condition was the result of years of working in coal mines. Appellant stated that he first became aware of his lung condition on February 1, 1990.

In support of his pulmonary claim appellant submitted a pulmonary function studies report and chest x-ray dated February 1, 1990 from Dr. Harold Bushey, an internist; a report dated January 23, 1995 from Dr. Charles A. Moore, Board-certified in internal medicine; and a medical report dated September 5, 1995 from Dr. James W. Giles, Board-certified in internal medicine. The chest x-ray dated February 1, 1990 indicated some emphysemateous changes in the upper lung fields with a profusion of 1/2. Dr. Moore's report dated January 23, 1995 noted that the x-ray on November 28, 1994 showed pneumoconiosis. The pulmonary function test performed on November 8, 1994 indicated obstructive disease with possible restrictive disease. Dr. Moore concluded that appellant was 100 percent disabled from pneumoconiosis. Dr. Giles' report of September 5, 1995 referred to the pulmonary function test performed the same day and noted significant obstructive lung disease, indicating that black lung disease could not be ruled out.

The employing establishment noted that appellant was exposed to respirable coal and dust while evaluating and observing the mining cycles and conducting health and safety inspections of the underground mines.

On December 6, 1996 the Office referred appellant for a second opinion to Dr. Mitchell Wicker, a Board-certified internist and a certified B-reader. In a report dated December 18, 1996, Dr. Wicker indicated that he reviewed medical records and examined appellant. He noted that appellant failed to make a reasonable effort on a pulmonary function. Dr. Wicker indicated that a chest x-ray performed the same day showed no evidence of pneumoconiosis. He determined there was no disease process attributable to employment.

After appellant provided reasons for refusing the position offered to him by the employing establishment, the Office, on January 3, 1997, referred appellant for a second opinion evaluation to Dr. Archer Bishop, Board-certified in orthopedic surgery, to determine whether appellant was capable of returning to sedentary work as a mine safety and health specialist. The Office provided Dr. Bishop with a statement of accepted facts, medical records and a job description for a mine safety and health specialist.

In a report dated January 21, 1997, Dr. Bishop indicated appellant was restricted in his activities secondary to his right knee problems and degenerative changes of his lumbar spine. He noted that appellant had degenerative changes in his lumbar spine compatible with his age and work factors may have temporarily aggravated this condition. Dr. Bishop concluded that, given the job description of a sedentary position as a mine safety and health specialist, appellant would be qualified for this activity.

Dr. McAllister indicated in his report dated June 3, 1997 that appellant has been diagnosed with degenerative disc disease and has been on pain medications for this condition. Dr. McAllister noted that appellant also experienced intermittent episodes of spasms in the low back with limited thoroacolumbar range of motion. He suggested an employment location closer to appellant's residence to avoid the lengthy drive.

In a letter dated July 22, 1997, the Office referred appellant to Dr. Jeffrey Sargent, Board-certified in pulmonary disease and certified B-reader, to resolve the medical conflict regarding whether appellant sustained a lung condition causally related to employment factors. The Office provided Dr. Sargent with a complete case record and a statement of accepted facts.¹

In a medical report dated August 7, 1997, Dr. Sargent indicated that he reviewed the records provided to him and performed a physical examination of the appellant. He noted that an x-ray revealed no abnormalities with a rating of 0/0. Dr. Sargent indicated there was no evidence of pneumoconiosis and that a pulmonary function test showed a mild obstructive impairment, which resolved completely after administering the bronchodilator. He determined that appellant had mild asthma, which could be exacerbated by coal dust exposure but was not caused by such exposure. Dr. Sargent stated that appellant was not suffering from pneumoconiosis or from any permanent respiratory impairment.

On September 11, 1997 the Office denied appellant's claim for a pulmonary condition, and appellant requested a hearing.

On September 12, 1997 the employing establishment offered appellant a modified position as a mine, safety and health specialist, beginning October 14, 1997. The duties included inspection-related support and health program activities, technical assistance, education and

¹ By letter dated May 21, 1997, but date-stamped by the Office on August 6, 1997, appellant requested that he be able to participate in the selection of the impartial medical specialist. By letter dated August 8, 1997, the Office notified appellant that his letter of May 21, 1997 was not received until August 7, 1997 after the scheduled appointment with Dr. Sargent. The Office further notified appellant that he did not provide a reason for participating in the selection of the impartial medical specialist and that permission to participate was at the discretion of the Office.

training and review of reports. The hours of employment were from 8:00 a.m. to 4:30 p.m. Monday through Friday, and appellant's annual salary was based on an eight-hour workday. The position required lifting of up to 10 pounds and kneeling and stooping on an intermittent, occasional basis. The employing establishment noted that no crawling, climbing, bending, squatting or lifting from the floor to the waist was required.

Appellant rejected the job offer for the following reasons: he was precluded from driving the long distances required by the position because of health conditions, specifically the degenerative osteoarthritis in his back and knees; he was taking medications which made him drowsy and had been warned not to drive while under the influence of these medications; the job offer was outside his current commuting area and appellant could not afford the relocation expenses; and he had elderly parents who depended on appellant for daily care. Appellant specifically noted that his parents were both 76 years of age, his mother was in a wheelchair and his father used a walker after sustaining a broken hip. Appellant indicated he was the only child in the area and that he was in constant contact with his parents.

Appellant submitted duplicative records, including a report from Dr. McAllister dated June 3, 1997 and a new report from Dr. Paul E. Spray, Board-certified in orthopedic surgery, who indicated that appellant was "quite disabled."

By letter dated October 16, 1997, the Office notified appellant that the position as mine safety and health specialist was found to be suitable to his work capabilities. The Office indicated that appellant had 30 days to accept the position or provide further explanation for refusing it. The Office advised appellant that, if he did not accept the offered position or did not demonstrate that his refusal to accept was justified, his compensation would be terminated under 5 U.S.C. § 8106(c).

Appellant submitted a statement with additional medical records, detailing his belief that he was unable to accept the position of mine safety and health specialist.

On November 18, 1997 the Office informed appellant that his refusal of the offered position was found to be unjustified and provided 15 days for him to accept the job. On January 14, 1998 the Office terminated disability compensation effective January 31, 1998 on the grounds that appellant refused an offer of suitable work, which the medical evidence established he was capable of doing.

At a hearing on June 16, 1998, appellant reiterated his reasons for refusing the offered employment and argued that three doctors had been paid by the Department of Labor and had found that appellant's pulmonary condition was caused by coal dust exposure.

In a decision dated September 4, 1998, the hearing representative determined that appellant had not met his burden of proof in establishing that he sustained a medical condition due to work factors as alleged. The hearing representative found that the Office properly found a conflict and that the weight of the medical evidence rested with Dr. Sargent, the impartial medical specialist.

The Board finds that appellant has not met his burden of proof in establishing that he sustained a pulmonary condition in the performance of duty.

An employee seeking benefits under the Federal Employees' Compensation Act has the burden of establishing the essential elements of his or her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that the injury was sustained in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.² These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.³

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by claimant.

The medical evidence required to establish causal relationship is generally rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁴

The Office properly determined that there was a conflict in the medical evidence between Dr. Wicker, an Office referral physician, who found no evidence of pulmonary disease, and appellant's attending physician, Dr. Moore, who found appellant 100 percent disabled due to

² *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

³ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁴ *Id.*

pneumoconiosis. The Office properly referred the case to Dr. Sargent to serve as an impartial medical examiner.⁵

Dr. Sargent, a certified B-reader, reviewed the case record, laboratory studies and statement of accepted facts. The laboratory studies revealed an electrocardiogram within normal limits and blood gases within normal limits. The August 7, 1997 chest x-ray revealed no evidence of pneumoconiosis. The B-reading for profusion on comparison with ILO 1980 standard films was 0/0. The pulmonary function test showed mild obstructive impairment which resolved immediately upon administration of the bronchodilator. Dr. Sargent opined that appellant's mild obstructive pulmonary impairment was indicative of asthma that was unrelated to his coal mine employment.

As the report of an impartial medical examiner selected to resolve a conflict in the medical evidence, Dr. Sargent's opinion is sufficiently well rationalized and based upon a proper factual background such that it is entitled to special weight.⁶ The Board concludes that this report constitutes the weight of the medical evidence and establishes that appellant did not sustain an employment-related pulmonary condition.

The Board finds that the other contentions raised by appellant have no merit. Appellant submitted a disability determination by the Social Security Administration (SSA) but the Board has held that disability determinations made by other agencies pursuant to other statutory schemes are not binding on the Office or the Board with respect to whether the individual is disabled under the Act.⁷ Moreover, the findings of other administrative agencies have no bearing on proceedings under the Act which is administered by the Office and the Board, and a determination made for disability retirement purposes is not determinative of the extent of physical impairment or loss of wage-earning capacity for compensation purposes. The two relevant statutes (Social Security Act and FECA) have different standards of medical proof on the question of disability; disability under one statute does not prove disability under the other. Furthermore, under the FECA, for a disability determination, appellant's conditions must be shown to be causally related to her federal employment. Under the Social Security Act, conditions which are not employment related may be taken into consideration in rendering a disability determination.⁸

Additionally, the Board finds that the case record provides no support for appellant's belief that the Office manufactured a medical conflict. There is clearly a conflict between Dr. Moore who found appellant to be 100 percent disabled by pneumoconiosis, and the Office

⁵ Section 8123(a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." 5 U.S.C. § 8123(a). When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence. *William C. Bush*, 40 ECAB 1064 (1989).

⁶ See *James P. Roberts*, 31 ECAB 1010 (1980).

⁷ See *Stephen R. Lubin*, 43 ECAB 564, 568 (1992); *Hazelee K. Anderson*, 37 ECAB 277, 283 (1986).

⁸ *Hazelee K. Anderson*, *supra* note 7.

referral physician, Dr. Wicker, who concluded that appellant had no lung disease caused by his employment.⁹

The contention that the Office ignored appellant's May 21, 1997 request to participate in the selection of the impartial medical specialist has no foundation. The record indicates that the Office did not receive the request until August 6, 1997. In an August 8, 1997 letter, the Office informed appellant that he had provided no reason for his request to participate in the selection process. The Office explained that such participation was not an absolute right, but rested within the discretion of the Office.¹⁰

The Board further finds that the Office met its burden of proof in terminating appellant's disability compensation for refusal of suitable employment.

Once the Office accepts a claim, it has the burden of proving that the employee's disability has ceased or lessened before it may terminate or modify compensation benefits.¹¹ Section 8106(c)(2) of the Act¹² provides that the Office may terminate the compensation of a disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.¹³ The Board has recognized that section 8106(c) is a penalty provision which must be narrowly construed.¹⁴

The implementing regulation¹⁵ provides that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of showing that such a refusal or failure to work was reasonable or justified, and shall be provided with the opportunity to make such a showing before entitlement to compensation is terminated.¹⁶ To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.¹⁷

⁹ Contrary to appellant's contention, Dr. Wicker was the Office referral physician. Dr. Bushey examined appellant at the request of the employing establishment and Dr. Giles failed to provide a definite diagnosis.

¹⁰ Office procedures provide that a claimant who requests to participate in selecting a referee physician or who objects to a selected physician must provide a reason. If the Office finds the reason not to be valid, a formal denial of the request may be issued if it is requested. See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4 (October 1995); see *Joseph R. Boutot*, 45 ECAB 560, 564 (1994); *Roger S. Wilcox*, 45 ECAB 265 (1993).

¹¹ *Karen L. Mayewski*, 45 ECAB 219, 221 (1993); *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

¹² 5 U.S.C. §§ 8101-8193; 5 U.S.C. § 8106(c)(2).

¹³ *Camillo R. DeArcangelis*, 42 ECAB 941, 943 (1991).

¹⁴ *Steven R. Lubin*, *supra* note 7.

¹⁵ 20 C.F.R. § 10.124(c) (1998).

¹⁶ *John E. Lemker*, 45 ECAB 258, 263 (1993).

¹⁷ *Maggie L. Moore*, 42 ECAB 484, 487 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

Office procedures state that acceptable reasons for refusing an offered position when the claimant is no longer on the agency's rolls include the claimant losing health insurance coverage by accepting the job; the claimant is already working and the job fairly and reasonably represents his wage earning capacity; or the claimant has moved, and a medical condition of the claimant or a family member contraindicates return to the area of residence at the time of the injury.¹⁸ Unacceptable reasons include claimants preference for the area in which he resides; personal dislike of the position offered or the work hours scheduled; lack of promotion potential or job security.¹⁹

In April 1995, Dr. Uzzle, an Office second opinion physician, Board-certified in psychiatrist, opined that appellant could perform full-time sedentary employment. The employing establishment identified a sedentary position as a mine safety and health specialist in Barbourville as consistent with the work limitations described by Dr. Archer W. Bishop, the Board-certified orthopedic surgeon and Office second opinion referral physician. In his report dated January 21, 1997, Dr. Bishop indicated that he reviewed the physical requirements of the position and determined appellant would be able to perform the duties on a full-time basis.

On September 12, 1997, the employing establishment offered appellant the mine safety and health specialist position. The employing establishment informed appellant that the position was located outside of his commuting area; however, the Office would pay to relocate him.

In support of appellant's refusal of the employing establishment's job offer, appellant contends that he was precluded from driving the long distances required by the position because of health conditions, specifically the degenerative osteoarthritis in his back and knees. He indicated that he was taking medications which made him drowsy and had been warned not to drive while under the influence of these medications. Although this may be an acceptable reason for appellant to refuse an offer of suitable employment, appellant has not submitted medical evidence to substantiate this claim. The only report submitted by appellant was a June 3, 1997 note prepared by Dr. McAllister, in which the doctor suggested that appellant work closer to home. However, Dr. McAllister did not indicate that appellant would not be able to meet the driving requirement of this position.²⁰

Appellant also contends that the job offer was outside his current commuting area and he could not afford the relocation expenses. The Board notes this contention is also without merit as the Office advised appellant that he would be entitled to reasonable relocation expenses to assist him in his move. Appellant finally contends that he has elderly parents dependent on him for daily care and it would be a hardship for him to move out of the area where his parents

¹⁸ *C.W. Hopkins*, 47 ECAB 725 (1996); see *Patsy R. Tatum*, 44 ECAB 490, 495 (1993); Federal (FECA) Procedural Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(b) (July 1996).

¹⁹ *Arthur C. Reck*, 47 ECAB 339 (1996); Federal (FECA) Procedure Manual, Chapter 2.814.5(c) (July 1996).

²⁰ The Board notes that appellant's belief that he would not be able to drive as needed to perform the job duties is not competent medical evidence and is of no value. See *Clemie P. Sexton (Devey L. Sexton)*, 25 ECAB 342 (1974).

reside. Although this may be an acceptable reason for appellant to refuse an offer of suitable employment, appellant has not supported this allegation with proper medical evidence.

The Board finds that the Office met its burden of proof in terminating monetary compensation effective January 31, 1998 on the basis that appellant refused an offer of suitable employment.

The September 4, 1998 decision of the Office of Workers' Compensation Programs is affirmed.²¹

Dated, Washington, DC
June 21, 2001

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member

²¹ The Board notes that Valerie D. Evans-Harrell, who participated in the hearing held on October 5, 2000, was not an Alternate Board Member after March 11, 2001 and she did not participate in the preparation of this decision and order.