U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RONALD J. HARPER and U.S. POSTAL SERVICE,
POST OFFICE, Murrysville, PA

Docket No. 99-1875; Submitted on the Record;
Issued March 27, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits for refusal to accept a suitable job offer.

On October 30, 1996 appellant, then a 47-year-old letter carrier, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1), alleging that he sprained his left knee on October 15, 1996 when he slipped on wet grass while delivering mail.[1] The Office accepted the claim for left knee sprain on December 31, 1996 and authorized partial lateral meniscectomy surgery on the left knee on March 17, 1997.

The employing establishment provided Dr. Rodney G. Gordon, appellant's attending physician specializing in orthopedic surgery, with a copy of a limited-duty job description for a carrier and Dr. Gordon indicated on June 1, 1997 that appellant could perform the duties of this position. The employing establishment offered appellant the position on June 5, 1997. Appellant rejected the position on June 10, 1997 based on his attending psychiatrist's orders that he cannot work at the employing establishment. In his June 7, 1997 report, Dr. Lawrence B. Haddad, appellant's attending psychologist, diagnosed adjustment disorder with mixed emotional features and opined that appellant could not "reasonably be expected to return to any type of duty" with the employing establishment due to appellant's vulnerability to stress.

By letter dated June 17, 1997, the Office informed appellant that it found the light-duty position to be suitable and informed him of the penalty provisions of 5 U.S.C. § 8106(c) and allowed him 30 days to accept the position or offer his reasons for refusal.

In a letter dated July 16, 1997, appellant's counsel contended that appellant was unable to perform the offered limited-duty position as appellant is totally disabled due to his emotional

[1] This was assigned claim number A03-0222429. Appellant subsequently filed an occupational claim for an emotional condition which the Office denied and was assigned claim number A03-0223211.

condition and appellant's knee injury prevents him from performing even sedentary light duty and enclosed the reports of Dr. Eric J.M. Minde, an attending physician Board-certified in physical medicine and rehabilitation and Dr. Haddad. In his July 15, 1997 report, Dr. Haddad concluded that appellant was unable to return to the employing establishment due to his chronic knee pain and the stress caused by the unrelenting pain. In his June 17, 1997 report, Dr. Minde concluded that appellant was incapable of performing his usual job of letter carrier and that appellant's work-related stress prevented him from working at the employing establishment even in a light-duty position.

In a July 16, 1997 attending physician's report (Form CA-20a), Dr. Gordon indicated that appellant was capable of sedentary work as of July 16, 1997.

By letter dated July 31, 1997, appellant's counsel submitted a July 14, 1997 report from Dr. Gordon in support of appellant's refusal. In the July 14, 1997 report, Dr. Gordon stated that he had reviewed the position description and saw no reason why appellant could not perform the position. Dr. Gordon did note that the sentence in the employing establishment job offer stating "other similar sedentary work as indicated" was uncertain and perhaps should be defined better.

The Office informed appellant, by letter dated July 31, 1997, that his reasons for refusing the offered position were not acceptable and allowed him an additional 15 days to accept the position.

By decision dated September 4, 1997, the Office terminated appellant's compensation benefits as he refused an offer of suitable work. The Office found that evidence of record failed to establish that appellant's psychiatric condition was due to his October 15, 1996 employment injury and that appellant had a long history of psychiatric illness related to his military service.

In a letter dated September 26, 1997, appellant's counsel requested a review of the written record.

By letter dated January 9, 1998, appellant's counsel argued that the medical evidence of record establishes that appellant was totally disabled due to both his employment injury and a subsequently acquired psychological condition.

By letter dated February 16, 1998, appellant's counsel submitted a copy of a May 30, 1997 psychiatric report prepared by Dr. Stuart S. Burstein, a Board-certified psychiatrist and forensic psychiatrist, for the employing establishment and a June 18, 1997 fitness-for-duty note by Dr. Nestor F. Natalio. In a report dated May 30, 1997, Dr. Burstein found there was no psychiatric illness precluding appellant from performing his employment duties. In a June 18, 1997 report, Dr. Natalio, the employing establishment's associate medical director, found appellant fit for duty as a letter carrier.

By decision dated March 19, 1998, the hearing representative affirmed the termination of benefits and found that appellant had refused an offer of suitable employment.

On March 30, 1998 appellant appealed to the Board and the case was docketed as 98-1370. By letter dated August 8, 1998, appellant requested the Board to dismiss the case and the Board dismissed the case on August 25, 1998.

By letter dated August 31, 1998, appellant requested a new or amended decision by an Office hearing representative based upon his March 19, 1998 letter and enclosed medical evidence.

By letter dated December 21, 1998, appellant argued that the report by the employing establishment physician dated May 6, 1998 finding appellant unfit for duty supports that appellant was unable to perform the offered position.

By decision dated May 5, 1999, the Office hearing representative found that the evidence submitted by appellant was insufficient to establish that the offered position was unsuitable. The hearing representative found that appellant had refused an offer of suitable employment and affirmed the September 4, 1997 and March 19, 1998 decisions.

The Board has duly reviewed the case on appeal and finds that the Office failed to meet its burden of proof in terminating appellant's compensation benefits for refusal to accept a suitable job offer.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened before it may terminate or modify compensation benefits.[2] This burden of proof is applicable if the Office terminates compensation, under 5 U.S.C. § 8106(c), for refusal to accept suitable work.[3]

Under section 8106(c)(2) of the Federal Employees' Compensation Act[4] the Office may terminate the 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.[5] Section 10.124(c) of Part 20 of the Code of Federal Regulations[6] 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 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

[2] *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

[3] *See Leonard W. Larson*, 48 ECAB 507 (1997).

[4] 5 U.S.C. § 8106(c)(2).

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

[6] 20 C.F.R. § 10.124(c).

[7] *Camillo R. DeArcangelis*, *supra* note 5; *see* 20 C.F.R. § 10.124(e).

was suitable[8] and must inform appellant of the consequences of refusal to accept such employment.[9]

The issue of 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 medical evidence.[10] In assessing the medical evidence, the number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for and the thoroughness of physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[11]

In the instant case, appellant refused to return to work in the position of modified carrier based upon the advise of Drs. Minde and Haddad. Dr. Minde concluded that appellant was incapable of performing his usual job of letter carrier due to his work-related stress, which prevented him from working at the employing establishment even in a light-duty position. Similarly, Dr. Haddad concluded that appellant was unable to return to the employing establishment due to his chronic knee pain and the stress caused by the unrelenting pain.

The Office rejected appellant's reasons for refusing the job offer, finding that his evidence was not relevant to his accepted work injury. However, under the Office's procedures pertaining to suitable work, if the file documents a medical condition which has arisen since the compensable injury and this condition disables the claimant from the offered job, the job will be considered unsuitable, even if the subsequently acquired condition is not work related.[12] Once the issue of appellant's disability due to his depression was raised by Drs. Minde and Haddad, the Office erred by not obtaining a medical opinion that appellant could perform his duties as described in the offered position despite his emotional condition. As it is the Office's burden of proof to establish that appellant refused a suitable position without reasonable justification, the Office did not meet its burden of proof in this case.[13]

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[8] *See Carl W. Putzier*, 37 ECAB 691, 700 (1986); *Herbert R. Oldham*, 35 ECAB 339, 346 (1983).

[9] *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11(c) (July 1997).

[10] *Marilyn D. Polk*, 44 ECAB 673 (1993).

[11] *Connie Johns*, 44 ECAB 560 (1993).

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(4) (December 1993) provides that "If medical reports in the file document a condition which has arisen since the compensable injury and this condition disables the claimant from the offered job, the job will be considered unsuitable even if the subsequently acquired condition is not work related."

[13] *See Barbara R. Bryant*, 47 ECAB 715 (1996) (the Board reversed a suitable work determination for failure to address the shift hours recommended by appellant's physician).

In this case, because the Office did not properly consider appellant's reasons for refusing the position of carrier, the Office's suitability determination is in error. Because the Office did not follow the appropriate procedures for reaching its suitability determination, the Board concludes that the Office erred in terminating appellant's compensation benefits on the grounds that he refused an offer of suitable work.

The decision of the Office of Workers' Compensation Programs dated May 5, 1999 is hereby reversed.

Dated, Washington, DC
March 27, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member