U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BOBBY CHANG and U.S. POSTAL SERVICE,
POST OFFICE, Flushing, NY

Docket No. 99-1660; Submitted on the Record;
Issued May 3, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's monetary compensation effective January 28, 1998 on the grounds that he refused an offer of suitable employment; and (2) whether appellant has met his burden of proof to establish that he sustained a recurrence of disability on January 2, 1998 causally related to his February 23, 1994 employment injury.

The Office accepted that on February 23, 1994 appellant, then a 37-year-old letter carrier, sustained lumbosacral strain and radiculopathy in the performance of duty. Appellant returned to his regular full-time employment on March 14, 1994 but continued to experience intermittent periods of temporary total disability. Following a recurrence of disability on August 26, 1996, appellant returned to limited-duty employment for four hours per day.

The Office determined that a conflict in medical opinion existed on the issue of appellant's work restrictions and referred appellant to Dr. Leo A. Green, a Board-certified orthopedic surgeon, for an impartial medical examination. In a report dated September 18, 1997, Dr. Green diagnosed chronic low back disease with multiple acute recurrences and extensive degenerative disc disease. He found that appellant could work for eight hours per day at his current desk job. Dr. Green noted that appellant should be provided a chair with a back support and advised against his return to work as a letter carrier. In an accompanying work restriction evaluation, Dr. Green opined that appellant could work for 8 hours "lifting up to 10 pounds as necessary during the course of a full working day at his present clerical work…."

On November 10, 1997 the employing establishment offered appellant a job as a modified carrier beginning November 15, 1997. The job offer included delivery of mail on a limited basis.

By letter dated November 19, 1997, the Office advised appellant that it had determined that the position of modified carrier offered by the employing establishment was suitable. The

Office informed appellant that he had 30 days from the date of the letter to accept the position or provide an explanation for refusing the position. The Office stated that it would consider any evidence or argument provided by appellant for refusing the position prior to termination of his compensation for refusing an offer of suitable work. In a handwritten note on the letter, a claims examiner indicated that the Office had not sent a copy of the letter to appellant's attorney until December 23, 1997. The claims examiner consequently allotted appellant until January 22, 1998 to respond to the Office's November 19, 1997 letter.

The employing establishment reoffered appellant the position of modified carrier on December 1, 1997. Appellant refused the position and stated that he was "medically unable to accept this assignment."

Appellant submitted a letter dated December 18, 1997 to his congressional representative. Appellant requested that his representative compare the medical reports of his attending physician and the impartial medical examiner to the job offer from the employing establishment. Appellant contended:

> "Both Dr[s.] Green and [Robert] Marini state that I must be able to use a chair with a back support. But the job offer from the [employing establishment] did not list any jobs or duties that can be performed when a person is sitting in a chair. I had to decline the job offer because I am not medically able to accept this assignment. All of the jobs listed must be performed standing up."

Appellant also submitted form reports dated December 3, 1997 from his attending physician, Dr. Marini, who found that he could work for four hours per day with restrictions. By letter dated December 18, 1997, the congressional representative forwarded appellant's statement to the Office for review.[1] In a letter dated December 30, 1997, the Office informed the congressional representative that it had not yet issued a final decision from which appellant could exercise his appeal rights.

By decision dated January 27, 1998, the Office terminated appellant's disability compensation effective January 28, 1998 on the grounds that he refused an offer of suitable work.[2]

On January 26, 1998 appellant alleged that he sustained a recurrence of disability on January 2, 1998 causally related to his February 23, 1994 employment injury. Appellant stopped work following the alleged recurrence of disability on January 3, 1998 and did not return.

By decision dated October 9, 1998, the Office denied appellant's claim on the grounds that the evidence did not establish that he sustained an employment-related recurrence of

[1] It is not clear from the record the exact date upon which the Office received the representative's December 18, 1997 letter.

[2] The record contains a January 27, 1998 decision which indicates that the Office terminated appellant's compensation effective December 23, 1997. However, it appears from a review of the case record that the Office paid appellant the appropriate compensation until January 28, 1998.

disability beginning January 2, 1998. By letter dated December 21, 1998, appellant, through his representative, requested reconsideration of the Office's January 27 and October 9, 1998 decisions. In a decision dated March 18, 1999, the Office denied modification of its prior decisions.

The Board finds that the Office improperly terminated appellant's compensation under 5 U.S.C. § 8106(c) based on his refusal to accept suitable employment.

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 or her is not entitled to compensation.[3] 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 requirements of the position.[4] To justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty position, the Office has the burden of showing that the work offered to and refused or neglected by appellant was suitable.[5]

The Board finds that the Office denied appellant a reasonable opportunity to comply with 5 U.S.C. § 8106(c). When the Office sent appellant its November 19, 1997 notification that it had determined that the position offered by the employing establishment was suitable, it informed him of a preliminary determination. By inviting him to write and give reasons for not accepting, the Office acknowledged that its determination was not yet final and that a reasonable explanation would justify his refusal and result in the continuation of his compensation for disability. Certain explanations will, of course, justify a claimant's refusal to accept an offer of employment. The Office's procedure manual lists a number of reasons that are considered acceptable.[6] If a claimant refuses the employment offered and provides such a reason, the Office will consider his refusal justified and will continue his compensation for disability.[7]

If a claimant chooses to respond within the time allotted and gives reasons for not accepting the offered position, the Office must consider these reasons before it can make a final determination on the issue of suitability. Only after it has made a final determination on the issue of suitability can the Office afford the claimant an opportunity to accept or refuse an offer of suitable work. And only after it has finalized its decision on suitability can the Office notify

[3] 5 U.S.C. § 8106(c)(2).

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

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

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5 (July 1997).

[7] *Id.*

the claimant that refusal to accept shall result in the termination of compensation, as the language of 5 U.S.C. § 8106(c) clearly mandates.[8]

In this case, the Office did not afford appellant an opportunity to accept the position offered after making a final determination that the position was suitable. The Office, therefore, denied appellant a reasonable opportunity to accept an offer of "suitable" work. Without such an opportunity, appellant cannot be held to have refused an offer of suitable work within the meaning of the statute. In response to the Office's preliminary notification that the position offered by the employing establishment constituted suitable employment, appellant, through his congressional representative, submitted arguments and medical evidence from his physician. Appellant submitted this evidence prior to January 22, 1998, the date that the Office allotted him to respond to its preliminary determination that the position was suitable. In its January 27, 1998 decision, the Office did not provide any indication that it had considered the evidence and argument presented by appellant for refusing the modified carrier position. In issuing this decision, the Office implicitly determined that appellant did not provide an adequate reason for his refusal to accept the offered position and in doing so it finalized its preliminary decision on suitability. At the same time, however, the Office terminated appellant's compensation for disability, thereby denying him an opportunity to accept the position after determining it to be a suitable one.

Moreover, the medical evidence does not establish that appellant had the capability to perform the selected position of modified carrier. At the time of his examination by the impartial medical examiner, appellant was in a part-time position that required him to case mail, update forward cards and label carrier cases. The position also limited lifting, walking, standing and sitting. The impartial medical examiner found that appellant could perform the duties of his current position for eight hours per day. The impartial medical examiner specified that appellant should work at his current "desk job" and should not return to work as a letter carrier. The job offer from the employing establishment, however, included the requirement that appellant deliver mail on a limited basis. The medical evidence, therefore, is not sufficient to establish that the modified carrier position was within the physical restrictions specified by Dr. Green. The Board further notes that the Office did not request that the impartial medical examiner review the position offered by the employing establishment prior to issuing its suitability determination.

For the foregoing reasons, the Board finds that the Office has not met its burden to justify termination of appellant's compensation effective January 28, 1998.

The Board further finds that appellant has not met his burden of proof to establish that he sustained a recurrence of disability on January 2, 1998 causally related to his February 23, 1994 employment injury.

Where an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee can perform the light-duty position, the employee has the burden to

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

establish by the weight of the reliable, probative and substantial evidence, a recurrence of total disability and to show that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.[9]

Appellant sustained lumbosacral strain and radiculopathy due to an injury on February 23, 1994. At the time of his claim for a January 2, 1998 recurrence of disability, appellant worked in a part-time limited-duty position. There is no evidence in the record establishing any change in the nature and extent of appellant's light-duty position as a cause of his claimed disability beginning January 2, 1998.

Appellant submitted a report dated January 21, 1998 from Dr. Marini, his attending Board-certified physiatrist. He diagnosed chronic low back pain and stated, "During the time of evaluation on this day, he has had an acute exacerbation of low pain and continues to be disabled secondary to his present chronic lumbar derangement." Dr. Marini did not specifically relate appellant's current disability to his February 23, 1994 employment injury and thus his opinion is insufficient to meet appellant's burden of proof.

Appellant submitted numerous form reports, in which Dr. Marini found that appellant was totally disabled and checked "yes" that the condition was caused or aggravated by employment. The Board has held, however, that when a physician's opinion on causal relationship consists only of checking "yes" to a form question, without explanation or rationale, that opinion has little probative value and is insufficient to establish a claim.[10]

In a report dated February 13, 1998, Dr. Marini discussed his treatment of appellant from 1995 to the present and he opined:

> "In summary, [appellant] had injuries sustained from the work[-]related injury of February 23, 1994 producing inflammatory changes of the lumbosacral spine and discs with restricted ROM [range of motion] to forward flexion and extension. He continued to reveal chronic low back pain with referred pain to the lower extremities as well as hip pain. He continued to have difficulties in the activities of daily living, as well as a full course of work in which his pain is exacerbated upon continued sitting and standing. I believe that his symptoms will wax an[d] wane and will directly affect his activities of daily living."

Dr. Marini recommended steroid injections and concluded that appellant continued to be disabled from his work as a letter carrier. He, however, did not address the relevant issue of whether appellant was disabled from his limited-duty employment beginning January 2, 1998. Consequently, Dr. Marini's opinion is insufficient to meet appellant's burden of proof.

In office visit notes dated March 1998 through February 1999, Dr. Marini listed findings on examination of chronic lumbosacral and hip displacement. In his notes, Dr. Marini did not

[9] *Terry R. Hedman*, 38 ECAB 222 (1986).

[10] *Lee R. Haywood*, 48 ECAB 145 (1996).

address the cause of appellant's condition and thus his opinion is not pertinent to the issue of whether appellant sustained a recurrence of disability causally related to his employment injury.[11]

As appellant did not submit rationalized medical opinion evidence supporting a causal relationship between his accepted employment injury and a recurrence of disability on January 2, 1998, he has failed to meet his burden of proof.

The decision of the Office of Workers' Compensation Programs dated March 18, 1999 is affirmed in part in denying appellant's recurrence of disability claim and reversed in part in terminating appellant's compensation on the grounds he refused suitable work. The decision dated October 9, 1998 is hereby affirmed.

Dated, Washington, DC
May 3, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

[11] *See Linda I. Sprague*, 48 ECAB 336 (1997).