U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LEROY G. MOORE and U.S. POSTAL SERVICE,
WORLDWAY POSTAL CENTER, Los Angeles, CA

Docket No. 01-429; Submitted on the Record;
Issued November 8, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation on the grounds that he refused an offer of suitable work; and (2) whether the Office properly denied appellant's request for a review of the written record as untimely.

On March 25, 1994 appellant, then a 48-year-old mailhandler, filed a claim alleging that his right hand and arm conditions resulted from of his federal employment duties. The Office accepted the claim for right shoulder and arm strains on June 10, 1994.

On March 6, 1999 appellant stopped work and on March 24, 1999 he filed a claim for a recurrence of disability, alleging that he was unable to continue to work due to pain in his neck and right arm. On July 22, 1999 the Office accepted that appellant had sustained cervical and right arm strains as a result of his employment duties. Medical expenses were authorized and compensation for wage loss was paid. On November 30, 1999 appellant's attending physician, Dr. Raymond J. Imatani, a Board-certified orthopedic surgeon, released appellant to full-time, limited-duty work, stating that appellant could do work which did not require lifting more than 10 to 15 pounds.

By letter dated January 10, 2000, the employing establishment offered appellant a full-time, limited-duty position as a modified mailhandler. The position would involve using both hands to rewrap parcels weighing fewer than five pounds, using the left hand to distribute letters weighing less than five ounces and sweeping the letter case once a day. Appellant would not lift anything over five pounds at any given time, would not perform repetitive duties, could pace himself when rewrapping and processing mail, and could rest when his hand became tired.

On March 3, 2000 in response to a request by the Office, the employing establishment clarified the duties of the proposed position stated that appellant would not do any sweeping of the mail until fit to do so.

By letter dated March 13, 2000, appellant rejected the employing establishment's offer, stating that the job was exactly the same job as he had done for the past seven years, and was too difficult for him, given his painful swollen arm.

On March 24, 2000 the Office advised appellant that the March 3, 2000 job offer was considered suitable to his physical restrictions as delineated by his physician, Dr. Imatani. The Office afforded appellant 30 days in which to either accept the position or provide an explanation of the reasons for refusing it. In response, appellant stated that the medical report containing his physical restrictions had not been signed by Dr. Imatani, but had been signed by someone else in Dr. Imatani's office.

By letter dated June 2, 2000, after confirming that the offered job was still available, the Office informed appellant that his reasons for failing to accept the position were not acceptable and that he had 15 days to accept the position. The Office further advised appellant that, if he refused the offered position, his wage-loss compensation benefits would be terminated.

In a decision dated July 20, 2000, the Office terminated appellant's compensation on the grounds that he refused an offer of suitable work.

By letter received August 23, 2000, appellant requested a review of the written record by an Office hearing representative.

In a decision dated June 26, 1998, the Office's Branch of Hearings and Review found that appellant request was untimely. The Office further found that the issue in this case could be equally well addressed by requesting reconsideration from the district Office and submitting evidence not previously considered.

The Board has duly reviewed the record and finds that the Office properly terminated appellant's compensation.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.[1] Under section 8106(c)(2) of the Federal Employees' Compensation Act,[2] the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[3] To justify termination of compensation, the Office must show that the work offered was suitable,[4] and must inform appellant of the consequences of refusal to accept such employment.[5]

The Office advised appellant, by letter dated March 24, 2000, that the modified mailhandler position offered by the employing establishment was found to be suitable and

[1] *Frank J. Mela, Jr.*, 41 ECAB 115 (1989); *Mary E. Jones*, 40 ECAB 1125 (1989).

[2] 5 U.S.C. §§ 8101-8193.

[3] *Patrick A. Santucci*, 40 ECAB 151 (1988); *Donald M. Parker*, 39 ECAB 289 (1987).

[4] *Arthur C. Reck*, 47 ECAB 339 (1995).

[5] *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1972).

appellant had 30 days to either accept the offer or provide reasons for refusing the offer. The Office further informed appellant that at the expiration of 30 days, a final decision would be issued and that, if he refused to accept the position, any explanation or additional evidence offered would be considered prior to determining whether his reasons for refusing the job were justified. Subsequent to appellant's response, the Office properly informed appellant that his reasons for refusing the position were not justified and allowed appellant an additional 15 days to accept the position. When the 15 days expired, the Office terminated appellant's compensation benefits. The Board therefore finds that the Office properly followed the procedural requirements for termination under section 8106(c).

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.[6] 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.[7] The Board finds that the probative medical evidence indicates that the position offered was within appellant's medical restrictions.

Dr. Imatani, appellant's authorized treating physician of record, opined that appellant could work full-time modified duty as long as the position did not require lifting over 10 to 15 pounds. In support of his refusal of the position, appellant submitted a series of medical reports from Dr. Susan Keisner, a Board-certified family practitioner. In a report dated November 1, 1999, Dr. Keisner stated that appellant had tenderness of the right posterior nuchal and right upper back muscles, and only 135 degrees extension of the right elbow, but had full range of motion of the shoulder and full strength of the right arm. She concluded that appellant could not tolerate any job which required repetitive motion of the right arm or lifting of more than 5 to 10 pounds. Dr. Keisner submitted treatment notes dated December 23, 1999 to April 8, 2000. However, other than noting that appellant sustained a probable muscle spasm around January 25, 2000, Dr. Keisner opined that appellant remained totally disabled indefinitely but did not discuss the reasons for his disability or why he could not perform the modified-duty job. On March 22, 2000 the Office approved a change in treating physicians and appellant began seeing Dr. Gregory Yoshida, an orthopedic surgeon. In his initial report of record dated April 14, 2000, Dr. Yoshida released appellant to modified duty, provided the position required "no lifting over five pounds with the use of the right shoulder and arm and no overhead work." While Dr. Yoshida indicated on work restriction forms dated April 14 and 28, 2000, that appellant could not use his right arm at all, on subsequent work restriction forms dated May 12 and June 13, 2000, prior to appellant's final refusal of the offered position, he indicated that appellant had limited use of his right arm, and could not perform overhead work of lift anything over five pounds.

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

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

The Board finds that the medical evidence indicates that appellant was capable of performing the duties of the modified mailhandler position, which clearly specified that most of the work was to be done with the left hand and that there would be no lifting anything weighing more than five pounds. Therefore, the modified position offered is considered suitable work. Having been offered a suitable job, appellant must show that his refusal of the position was reasonable or justified.[8] His stated reason that he was physically unable to perform the position is not supported by the medical evidence of record.

The Board further finds that the Office acted within its discretion in refusing to grant appellant an oral hearing.

Section 8124(b)(1) of the Act provides that "a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[9] As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.[10]

In this case, the Office issued its decision on July 20, 2000. The Act is unequivocal in setting forth the time limitation for a hearing request or request for review of the written record. Appellant's undated request for a review of the written record was received by the Office August 23, 2000, and thus it is outside the 30-day statutory limitation for the decision. As appellant did not request a review of the written record within 30 days, he was not entitled to a hearing under section 8124 as a matter of right.

Even when the hearing request is not timely, the Office has discretion to grant the hearing request and must exercise that discretion.[11] In the present case, the Office exercised its discretion and denied the request for a hearing on the grounds that appellant could pursue the issues in question by requesting reconsideration and submitting additional medical evidence. Accordingly, the Board finds that the Office properly exercised its discretion in denying appellant's untimely request for a hearing.

[8] *See* 20 C.F.R. § 10.124(c).

[9] 5 U.S.C. § 8124(b)(1).

[10] *Charles J. Prudencio*, 41 ECAB 499 (1990); *Ella M. Garner*, 36 ECAB 238 (1984).

[11] *Herbert C. Holley*, 33 ECAB 140 (1981).

The decisions of the Office of Workers' Compensation Programs dated October 16 and July 20, 2000 are hereby affirmed.

Dated, Washington, DC
November 8, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member