U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EDDIE C. FOWLER and U.S. POSTAL SERVICE,
POST OFFICE, Greensboro, NC

Docket No. 00-47; Submitted on the Record;
Issued October 12, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective September 13, 1998 on the grounds that he refused an offer of suitable work under section 8106(c) of the Federal Employees' Compensation Act.

The Office accepted that on July 21, 1989 appellant, then a 39-year-old letter carrier, sustained an acute low back strain with radiculopathy when a dog jumped on him, causing him to twist his back and fall. Appellant stopped work that day and returned to part-time light-duty work from September 4, 1989 to June 25, 1991, then stopped work and did not return. He received total disability compensation on the periodic rolls beginning on June 26, 1991.[1] Appellant submitted periodic medical reports through September 1997 discussing his treatment for lumbar pain with right-sided radiculopathy, as well as neck and bilateral shoulder problems.

A December 12, 1989 lumbar magnetic resonance imaging (MRI) scan showed degenerative disc disease at L4-5 with an "anterior herniated nucleus pulposus (HNP)," bilateral foraminal stenosis at L4-5 and findings indicative of lumbar radiculopathy.

An April 27, 1995 lumbar MRI showed "[m]ild degenerative disc disease" from L3-5 with "mild narrowing of the spinal canal" from L3-5 "secondary to bulging of the disc." In a July 2, 1996 report, Dr. David T. Ward, a Board-certified orthopedist and second opinion

[1] On March 22, 1996 appellant filed two claims for recurrence of disability, attributing his right hip "giving way" on October 15, 1993 and July 3, 1995 causing him to fall and injure both shoulders and knees, to the July 21, 1989 injury. In an April 24, 1998 letter, the Office noted that in June 1993 appellant was in a nonoccupational motor vehicle accident and sustained injuries to his back, shoulders, hip and neck. As there are no final decisions of record regarding these claims for recurrence of disability, they are not before the Board on the present appeal. By July 11, 1996 notice, finalized by an Office hearing representative on October 6, 1997, the Office found an overpayment of compensation of $3,705.57 due to the Office's failure to deduct health benefit premiums from June 1, 1991 to May 25, 1996. Appellant was determined to be not at fault in the creation of the overpayment and recovery was waived. The overpayment decisions are not before the Board on the present appeal.

physician, diagnosed chronic low back pain with "light sensory deficits" in the L5 distribution. He opined that the July 1989 injury had not resolved and that appellant could perform sedentary work.[2]

An October 15, 1997 functional assessment indicated that appellant could work eight hours a day at a sedentary job, but that his submaximal effort produced an invalid profile.

In an October 22, 1997 report, Dr. Frank Rowan, an attending orthopedic surgeon, noted that based on the October 15, 1997 evaluation, appellant had "probable mechanical low back pain," had been off "work for six years and does not feel he is fit for duty." Dr. Rowan recommended "if" a new MRI showed no changed from 1995 studies, "he will be found fully qualified for an 8-hour day with a 15-pound occasional lift and 10-pound frequent lift."

In an October 28, 1997 work restriction evaluation, Dr. Gaylan Johnson, a Board-certified orthopedist and second opinion physician, indicated that appellant could work eight hours per day, squat and kneel intermittently for one hour per day, walk intermittently for two hours per day, sit and stand intermittently for three hours per day and lift up to 10 pounds. Dr. Johnson noted that appellant needed "to alternate sitting and standing." In an accompanying report, he diagnosed "chronic pain syndrome of the lower back" and concluded that appellant had reached maximum medical improvement.

In a November 25, 1997 report, Dr. Rowan noted that appellant's November 1997 lumbar MRI scan showed "little, if any interval change from April 26, 1995.… Therefore, … he will return to work as directed." Dr. Rowan opined that appellant was "able to work an 8-hour day at a 15-pound occasional lift and a 10-pound frequent lift." In an accompanying form, he reviewed and agreed with Dr. Johnson's October 28, 1997 restrictions.

On December 23, 1997 the employing establishment provided Dr. Rowan with a copy of a proposed job offer for appellant as a modified distribution clerk, with duties of answering a telephone, writing reports, performing mathematical calculations and miscellaneous clerical duties within Dr. Johnson's October 28, 1997 restrictions of being able to "change positions from sitting to standing as needed" and no lifting over 10 pounds. In a December 30, 1997 response, Dr. Rowan indicated that the proposed offer was within appellant's medical limitations.

On March 18, 1998 the employing establishment offered appellant the modified distribution clerk position as presented to Dr. Rowan, noting that the duties described were within Dr. Johnson's October 28, 1997 restrictions.

In an undated March 1998 response, appellant stated that he was "anxious to accept a position within [his] physical limitations," that Dr. Rowan was no longer his physician as of January 1998[3] and that he would have his "new physician review the position and limitations."

[2] A March 14, 1996 functional assessment performed by Dr. Robert W. Elkins, a physiatrist and second opinion physician, indicated chronic low back pain and chronic pain syndrome, "mild degenerative disc disease at L3-4 and L4-5" with mild spinal stenosis, no disc herniation, symptom magnification and "possible malingering."

In an April 15, 1998 report, Dr. Douglas A. Linville, an attending Board-certified orthopedic surgeon of professorial rank, diagnosed chronic myofascial lumbar pain with degenerative disc disease. He commented that there was "no radiculopathy or significant spinal stenosis" which would cause appellant's symptoms. Dr. Linville referred appellant to a pain management clinic supervised by Dr. Howard Jones, a physiatrist.

On April 15, 1998 the Office provided Dr. Linville with the modified distribution clerk position description and Dr. Johnson's October 28, 1997 restrictions. In an April 16, 1998 response, Dr. Linville indicated that the offered position was within Dr. Johnson's October 28, 1997 restrictions, with which he concurred.

In a May 7, 1998 report, Dr. Jones provided a history of injury and treatment, noted findings on examination, diagnosed mechanical lumbar pain and recommended a functional capacity evaluation.

In a May 18, 1998 letter, the Office advised appellant that the offered modified clerk position was open and available and that it had been determined to be suitable work within the restrictions set forth by Dr. Linville on April 16, 1998, also approved by Dr. Rowan. The Office also advised appellant of the penalty provisions under section 8106 of the Act for refusing suitable work and afforded him 30 days in which to either accept the position or submit evidence and argument as to why he was medically incapable of performing the offered position, or his compensation would be terminated.

In a June 25, 1998 letter, the Office requested that Drs. Linville and Jones provide an update regarding appellant's condition and any continuing work-related disability. The Office also requested that Dr. Jones review the modified distribution clerk position, state a "definite medical diagnosis for [appellant's] back condition," discuss the role of appellant's obesity on his back condition and provide his rationalized opinion on whether appellant was medically capable of performing those duties. The record demonstrates that Drs. Linville and Jones did not reply prior to issuance of the August 21, 1998 decision.

On August 21, 1998 the employing establishment informed the Office that the modified distribution clerk position was still available, but that appellant had not reported for duty.

By decision dated August 21, 1998, the Office terminated appellant's compensation, effective September 12, 1998, on the grounds that he refused suitable work. The Office found that Dr. Johnson found appellant capable of working eight hours per day limited duty as of October 29, 1997 and that Dr. Rowan released appellant to light duty on November 25, 1997. However, appellant did not report for duty as directed.

Appellant disagreed with this decision and, in an August 27, 1998 letter, requested an oral hearing before a representative of the Office's Branch of Hearings and Review.

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[3] In a January 27, 1998 letter, the Office authorized appellant to receive care from Dr. Douglas A. Linville, II, for the accepted acute low back strain with radiculopathy.

In a September 9, 1998 letter, Dr. Jones noted that appellant continued to have "back pain" in the "relative absence of objective pathology." He opined that he could "safely perform the duties" of a modified distribution clerk position.

In a November 24, 1998 report, Dr. Jones stated that he had not notified appellant that he had released him to work, but reiterated that appellant was capable of performing the offered position.

In a December 14, 1998 report, Dr. Jones noted that appellant reported increased "back symptoms," but that he remained "capable of performing the duties of modified distribution clerk."

At the hearing, held May 25, 1999, appellant asserted that he did not accept the modified clerk position as he was unaware that Dr. Jones had approved it and released him to work. Appellant contended that the Office erred by issuing its August 21, 1998 decision prior to receiving the report it solicited from Dr. Jones on June 25, 1998.[4]

By decision dated and finalized July 30, 1999, the Office hearing representative affirmed the August 21, 1998 decision. The hearing representative found that the March 8, 1998 job offer was approved by Drs. Linville and Rowan, that the Office properly advised appellant on May 18, 1998 that the position was determined to be suitable work, but that appellant did not respond within 30 days. The hearing representative also found that appellant did not submit any medical evidence stating that he was incapable of performing the offered position and that his assertion that he was unaware that Dr. Jones had released him to work was irrelevant.

The Board finds that the Office properly terminated appellant's compensation benefits effective September 13, 1998 on the grounds that he refused an offer of suitable work under section 8106(c) of the Act.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[5] As appellant filed his appeal with the Board on September 20, 1999, the only decision properly before the Board is the decision of the Office hearing representative dated and finalized July 30, 1999, affirming the August 21, 1998 decision which terminated appellant's compensation benefits effective September 13, 1998.

Section 8106(c)(2) of the Act[6] provides in pertinent part: "A partially disabled employee who ... refuses or neglects to work after suitable work is offered ... is not entitled to compensation."[7] To prevail under this provision, the Office must show that the work offered

[4] In a June 24, 1999 letter, appellant asserted that he "did not refuse a suitable job offer, but was waiting for a determination of suitability, as was the [Office], from his doctor." Appellant stated that he was "ready and willing to return to a position found suitable by the [Office] subsequent to Dr. Jones' report."

[5] 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[6] 5 U.S.C. §§ 8101-8193.

[7] 5 U.S.C. § 8106(c)(2).

was suitable and must inform the employee of the consequences of refusal to accept such employment. An employee who refuses or neglects to work after suitable work has been offered has the burden of showing that such refusal to work was justified.[8]

In the present case, the record reflects that on March 18, 1998 the employing establishment offered appellant reemployment in a modified-duty distribution clerk position, eight hours per day. There is nothing in the October 28, 1997 medical restrictions provided by Dr. Johnson, a Board-certified orthopedist and second opinion physician, or any other medical opinion at that time, that would preclude appellant from performing the offered position. The Board notes that on November 25, 1997 Dr. Rowan, appellant's attending orthopedist, released appellant to full-time sedentary duty and concurred with Dr. Johnson's October 28, 1997 restrictions. Dr. Rowan approved the offered position on December 30, 1997. Dr. Linville, another attending orthopedist, approved the position on April 16, 1998. Accordingly, the Board finds that the medical evidence establishes that, at the time the job offer was made, appellant was capable of performing the modified position.[9]

In order to properly terminate appellant's compensation under 5 U.S.C. § 8106, the Office must provide appellant notice of its findings that an offered position is suitable and give appellant an opportunity to accept or provide reasons for declining the position[10] and the record in this case indicates that the Office properly followed the procedural requirements. Following the employing establishment's March 18, 1998 job offer, appellant submitted an undated March 1998 letter, in which he stated that he wished to have his "new physician" review the position description before he would accept it. By a May 18, 1998 letter, the Office advised appellant that the offered position had been determined to be suitable work and been approved by Dr. Linville, his attending Board-certified orthopedic surgeon, on April 16, 1998. The Office advised appellant that a disabled employee who refused suitable work was not entitled to compensation, and allotted him 30 days to either accept or provide any additional reasons for refusing the position. Appellant did not respond prior to the August 21, 1998 decision.

There is no evidence of a procedural defect in this case as the Office provided appellant with proper notice. The record, therefore, establishes that appellant was offered a suitable position by the employing establishment and such offer was refused. Under 5 U.S.C. § 8106(c) his compensation was properly terminated on September 13, 1998.

Given that the Office has shown that the limited-duty position offered to appellant was suitable based on his work restrictions at that time, the burden then shifted to appellant to show that his refusal to work in that position was justified.[11]

[8] *See Michael I. Schaffer*, 46 ECAB 845 (1995).

[9] *See John E. Lemker*, 45 ECAB 258 (1993).

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

[11] *See Henry P. Gilmore*, 46 ECAB 709 (1995).

At the May 25, 1999 hearing and on appeal, appellant asserts that the Office erred by issuing its August 21, 1998 decision terminating his compensation benefits prior to receiving the reports from Drs. Jones and Linville, that the Office had requested by a June 25, 1998 letter. The Board finds that the Office did not commit error in this regard. As set forth above, Dr. Rowan, an attending orthopedist, and Dr. Linville, an attending Board-certified orthopedist, had both approved the offered modified distribution clerk position and concurred with Dr. Johnson's October 28, 1997 restrictions. The Office, therefore, had ample evidence upon which to find the offered position suitable.

While it appears that the Office sought additional confirmation of the position's suitability by requesting information from Drs. Linville and Jones on June 25, 1998, neither physician replied prior to August 21, 1998, a period of nearly two months. The Office is not obligated to await evidence indefinitely. Also, Dr. Linville had already approved the position. Thus, the Board finds that it was reasonable for the Office to issue the August 21, 1998 decision, as the offered position had been approved already by two of appellant's attending physicians and Dr. Jones had not replied to the June 25, 1998 letter after nearly two months. Therefore, appellant's contention that the Office erred by not waiting indefinitely for Dr. Jones' report is without merit.[12]

As appellant presented no rationalized evidence supporting his refusal of the modified position, he failed to demonstrate that the termination of compensation on September 13, 1998 for refusal of suitable work was not justified.[13]

[12] The Board notes nevertheless that when Dr. Jones replied to the June 25, 1998 letter in his November 24 and December 14, 1998 reports, he approved the offered modified distribution clerk position.

[13] Regarding appellant's recurrence claim, the Board notes that section 8106(c) serves as a bar to receipt of further compensation under section 8107 of the Act for a disability arising from the accepted employment injury. 5 U.S.C. §§ 8106-8107; *see Merlind K. Cannon*, 46 ECAB 581 (1995).

The decision of the Office of Workers' Compensation Programs dated July 30, 1999 is hereby affirmed.

Dated, Washington, DC
October 12, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member