U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN P. KOTENY and U.S. POSTAL SERVICE,
POST OFFICE, Trenton, NJ

Docket No. 00-462; Submitted on the Record;
Issued October 5, 2001

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective August 21, 1998, on the grounds that he refused an offer of suitable work.

Appellant, a 34-year old mailhandler, filed a claim for compensation benefits on July 25, 1990, alleging that he had developed a herniated disc at L4-5 and a lower back condition which were caused by factors of his employment. The Office accepted the claim on July 9, 1991 for lumbar radiculitis. Appellant returned to light duty for intermittent periods, but has not worked since October 8, 1992. The Office paid appellant compensation for temporary total disability for appropriate periods and placed him on the periodic roll.

In order to ascertain appellant's current condition and determine whether he was capable of returning to employment, the Office referred him to Dr. David M. Smith, a Board-certified orthopedic surgeon. In a report dated September 2, 1994, Dr. Smith, after stating findings on examination and reviewing appellant's medical history and the statement of accepted facts, stated:

> "After a thorough review of the above documents, examination of appellant and his x-rays, it is my opinion to a reasonable degree of medical probability that he constitutes a failed back or post-laminectomy syndrome. At the present time, his subjective complaints are far in excess of the objective physical findings. He clearly is overstating his symptoms and has positive tests for malingering. It is my opinion that he may well have some residual back and leg pain. However, he is dramatically overstating his symptoms and may well demonstrate an underlying psychiatric disturbance. It is apparent that he has significant psychiatric and musculoskeletal impairment, which renders him unable to work as a mailhandler. The original diagnosis of a disc condition was the result of the injuries sustained during his employment. He has failed to respond to conservative treatment and

> while he is undoubtedly overstating his symptoms and malingering at the present time, it is my opinion that he may well have significant underlying psychiatric problems. These may have arisen as a result of his injury, his treatment and his disability. [Appellant's] condition is stable and permanent. [I] do not anticipate that he would ever be able to return to mailhandling activities. However, sitting for periods of time for one to two hours in a sedentary work activity may well be appropriate."

In a report dated August 10, 1995, Dr. Carl J. Chiappetta, Board-certified psychiatry and neurology, diagnosed chronic adjustment disorder, with mixed anxiety and depression and possible pain disorder associated with psychological factors and a general medical condition. He stated:

> "It is clear that, *based on the subjective evidence*, [appellant] continues to suffer from a chronic psychological reaction to his physical injuries [chronic adjustment disorder]. It is also clear that he suffers from pain [--] however, I do n[o]t know an *objective* way to evaluate whether or not this pain represents significant malingering (as another physician suggested in his report); is being magnified or exaggerated; to what extent the psychological reaction is worsening the extent of the pain; or to what extent the pain is actually a part of his medical disorder." (Emphasis in original.)

Dr. Chiappetta advised that, based primarily on subjective evidence, his psychiatric diagnosis might be due to the May 17, 1990 work injury and its sequelae. He opined, however, that, based on the information available to him, that the above psychiatric problems did not render appellant unable to work, from a purely psychiatric point of view.

By decision dated September 22, 1995, the Office terminated appellant's compensation on the grounds that he refused an offer of suitable work.

By letter dated September 28, 1995, appellant's attorney requested a hearing, which was held on October 22, 1996.

By decision dated December 13, 1996, an Office hearing representative reversed the September 22, 1995 termination decision, finding that appellant had been deprived of due process because his attorney had not been informed when the Office submitted its offers for modified employment. The hearing representative stated that, on remand, in the event the employing establishment was able to offer appellant modified work within his physical restrictions, the Office should obtain a psychiatric opinion as to whether appellant was psychiatrically able to perform the proposed job. The hearing representative, noting that appellant did not drive and claimed to be dependent on public transportation, also stated that, in the event public transportation to the job site was not available at either the starting or ending time of the proposed job, the Office should "carefully consider" whether the job was suitable for him. The hearing representative instructed the Office to consider the following factors: Whether appellant used public transportation to get to and from work at the job where he was injured and when he worked from 10:30 p.m. to 7:00 a.m., whether appellant had access to any form of transportation other than public transportation and whether public transportation was not

available at either the starting or ending time of the proposed job. The hearing representative stated, however, that the mere fact that public transportation was not available should not, by itself, preclude a finding that the offered job was not suitable if he had no alternate way of getting to work.

In a report dated August 5, 1997, Dr. Frederick J. McEliece, a Board-certified neurosurgeon and appellant's treating physician, stated that appellant could function at some level and that he would complete the work restriction form for his return to work at approximately four hours per day with restrictions on bending, lifting and stooping but indicated appellant could sit, stand and walk intermittently. He completed a work restriction evaluation, which indicated appellant could work within the above restrictions for four hours per day.

On August 25, 1997 the employing establishment offered appellant a limited-duty job as a modified mailhandler, performing sedentary work, which would allow him the option of sitting, standing and walking intermittently as comfort dictated. The position required no lifting over ten pounds, no pushing or pulling and appellant's duties would include processing empty equipment such as sacks, letter trays and flat tubs, cutting bundles and repairing and preparing for distribution torn letters.

By letter dated August 28, 1997, the Office advised appellant that a suitable position was available and that, pursuant to section 8106(c)(2), he had 30 days to either accept the job or provide a reasonable, acceptable explanation for refusing the offer. The Office stated that, if appellant refused the job or failed to report to work within 30 days without reasonable cause, it would terminate his compensation pursuant to 5 U.S.C. § 8106(c)(2).[1]

By letter dated September 7, 1997, appellant refused the modified job offer, claiming that he did not drive a car and that he would, therefore, be unable to arrange transportation to commute to and from the job site.

By letter dated November 19, 1997, the Office again advised appellant that a suitable position was available and that, pursuant to section 8106(c)(2), he had 30 days to either accept the job or provide a reasonable, acceptable explanation for refusing the offer. The Office stated that, if appellant refused the job or failed to report to work within 30 days without reasonable cause, it would terminate his compensation pursuant to 5 U.S.C. § 8106(c)(2).[2] Appellant did not respond to this letter within 30 days.

By decision dated August 21, 1998, the Office found that appellant was not entitled to compensation benefits on the grounds that he had refused to accept a suitable job offer.

By letter dated August 24, 1998, appellant's attorney requested an oral hearing, which was held on March 30, 1999. Subsequent to the hearing, appellant submitted several additional reports and treatment notes from Dr. David J. Addis, a general practitioner.

[1] 5 U.S.C. § 8106(c)(2).

[2] *Id.*

By decision dated July 8, 1999, an Office hearing representative affirmed the August 21, 1998 termination decision.

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits on the grounds that he refused an offer of suitable work.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits. Under section 8106(c)(2) of the Federal Employees' Compensation Act[3] 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.[4] Section 10.124(c) of the Office's regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured 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 a showing before a determination is made with respect to termination of entitlement to compensation.[5] To justify termination, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[6] This burden of proof is applicable if the Office terminates compensation under 5 U.S.C. § 8106(c) for refusal to accept suitable work. The Office did not meet its burden in the present case.

The initial question in this case is whether the Office properly determined that the position was suitable. 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 the medical evidence.[7] A review of the medical evidence in the present case indicates that there is not sufficient medical evidence to support a finding that the offered position was within appellant's physical limitations. In the Office's December 13, 1996 decision, an Office hearing representative specifically instructed the Office to obtain a psychiatric opinion to determine whether appellant was able to perform a proposed modified job from a psychiatric standpoint. After appellant's treating physician, Dr. McEliece, indicated in his August 5, 1997 report that appellant could return to work with restrictions, the employing establishment located a modified mailhandler job at which appellant could work four hours per day within his physical restrictions. However, contrary to the hearing representative's instruction, the Office did not obtain a psychiatric opinion as to whether the modified job was suitable. In addition, the Office also did not consider whether appellant was capable of obtaining transportation to commute to the job, which the hearing representative had also instructed the Office to consider. The Office is required to include those conditions, regardless of etiology, which existed prior to the job offer.[8] Therefore, as the Office did not obtain a rationalized

[3] 5 U.S.C. §§ 8101-8193.

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

[5] 20 C.F.R. § 10.124(c); *see also Catherine G. Hammond*, 41 ECAB 375 (1990).

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

[7] *Robert Dickinson*, 46 ECAB 1002 (1995).

[8] *See* 20 C.F.R. § 10.124(c).

psychiatric opinion to determine the suitability of the modified position from a psychiatric standpoint and did not consider appellant's transportation situation, as ordered by the hearing representative in his December 13, 1996 decision, the offered position was not suitable. As it is the Office's burden of proof to establish that appellant refused a suitable position, the Office did not meet its burden of proof in this case to terminate appellant's compensation benefits pursuant to 5 U.S.C. § 8106.[9]

The decision of the Office of Workers' Compensation Programs dated August 21, 1998 is hereby reversed.

Dated, Washington, DC
October 5, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

[9] *Barbara R. Bryant*, 47 ECAB 715 (1996).