U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM MORAMARCO and U.S. POSTAL SERVICE,
BULK MAIL CENTER, Jersey City, NJ

Docket No. 01-1261; Submitted on the Record;
Issued October 29, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation on the grounds that he refused an offer of suitable work.

On October 25, 1998 appellant, then a 69-year-old maintenance mechanic, sustained a lumbosacral sprain and bulging disc at L3-4 in the performance of duty. He stopped work on October 25, 1998 and returned to limited duty for four hours a day on November 18, 1998. Appellant sustained a recurrence of disability on December 1, 1998. On February 25, 1999, he was placed on the periodic compensation roll to receive compensation for temporary total disability. On September 15, 1999, appellant underwent a discectomy and fusion.

In a work restriction evaluation form dated February 1, 2000, Dr. Christopher B. Michelsen, an orthopedic surgeon of professorial rank, indicated that appellant could work four hours a day with restrictions which included intermittent sitting limited to four hours a day, intermittent walking limited to three hours a day, intermittent standing limited to two hours a day, no lifting over 20 pounds, and no pushing, pulling, bending, squatting, climbing, kneeling, or twisting.

On March 28, 2000, the employing establishment offered appellant a modified maintenance mechanic position for two hours a day two days a week with duties consisting of repairing and rebuilding trippers and photocells and office work. He was not required to lift, push, pull, twist, squat, bend, kneel or climb but could be required to sit up to four hours, stand up to two hours and walk up to three hours a day.

By letter dated April 6, 2000, the Office advised appellant that it found the modified maintenance mechanic job to be a suitable offer of employment as it was consistent with his physical limitations and was located within his commuting area. Appellant was advised that he had 30 days in which to accept the job offer or provide an acceptable explanation for refusing the

job. He was advised that if he refused the employment without reasonable cause his compensation benefits would be terminated.

In a report dated April 11, 2000, received by the Office on April 27, 2000, Dr. Michelsen stated that he examined appellant on April 6, 2000 and he was unable to walk for more than 10 minutes without significant back pain.

In a work capacity evaluation form dated April 21, 2000 and received by the Office on May 3, 2000, Dr. Michelsen indicated that appellant was totally disabled due to persistent lower back pain.

By decision dated May 10, 2000, the Office terminated appellant's compensation effective that date on the grounds that he refused suitable employment. The Office noted that the job offered by the employing establishment was within the work restrictions of Dr. Michelsen's February 1, 2000 work capacity evaluation in which he indicated that appellant could work for four hours a day with restrictions. The Office did not indicate that it had reviewed Dr. Michelsen's April 11, 2000 report or his April 21, 2000 work capacity evaluation form.

By letter dated October 12, 2000, appellant requested reconsideration.

In a report dated May 23, 2000, Dr. Michelsen stated that appellant had persistent lower back pain after walking more than 100 feet. He stated that he was capable of performing sedentary work four hours a day but it was difficult for him to get to his job if he had to walk more than 100 feet.

In a report dated July 11, 2000, Dr. Michelsen stated that appellant had persistent low back pain with radiation into his legs which was increased with sitting greater than 30 minutes, standing greater than 30 minutes and walking greater than 100 feet. He stated that appellant should not sit or stand for long periods of time and should not take public transportation or be subjected to excessive use of stairs or walking greater then 50 feet.

In a report dated September 7, 2000, Dr. Michelsen stated that he examined appellant on August 24, 2000 and he was unable to walk any distance without leg cramps.

The Office referred appellant to Dr. Harvey A. Levine, a Board-certified orthopedic surgeon for a second opinion evaluation. In a report dated December 8, 2000, Dr. Levine provided findings on examination and stated that appellant could return to work without limitations.

By decision dated December 28, 2000, the Office denied modification of its May 10, 2000 decision on the grounds that the evidence submitted was insufficient to warrant modification.

The Board finds that the Office did not meet its burden of proof in terminating appellant's compensation effective May 10, 2000 on the grounds that he refused an offer of suitable work.

Under section 8106(c)(2) of the Federal Employees' Compensation Act[1] 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.[2] However, to justify such termination, the Office must show that the work offered was suitable.[3] An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was 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.[4] 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.[5]

In this case, the Office terminated appellant's compensation on the grounds that he had refused an offer of suitable work. The Office found the modified maintenance mechanic job offered by the employing establishment to be suitable to appellant's work capabilities based upon a February 1, 2000 work restriction evaluation from Dr. Michelsen, appellant's attending orthopedic surgeon. However, the Office apparently did not consider subsequent medical reports from Dr. Michelsen, his April 11, 2000 report and April 21, 2000 work restriction evaluation, in which he indicated that appellant was totally disabled due to low back pain. The record shows that the April 11 and 21, 2000 reports from Dr. Michelsen were received by the Office prior to the May 10, 2000 decision. However, the Office based its decision on Dr. Michelsen's earlier February 1, 2000 report which differs from the later reports in its assessment of appellant's capacity for work. Therefore, the Office did not meet its burden of proof in terminating appellant's compensation.

For these reasons, the Office improperly terminated appellant compensation effective May 10, 2000 on the grounds that he refused an offer of suitable work.

[1] 5 U.S.C. § 8106(c).

[2] *Camillo E. De Arcangelis*, 42 ECAB 941 (1991).

[3] *David P. Camacho*, 40 ECAB 267, 275 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341, 345 (1981).

[4] 20 C.F.R. § 10.517; *see also Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

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

The decisions of the Office of Workers' Compensation Programs dated December 28 and May 10, 2000 are reversed.

Dated, Washington, DC
October 29, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member