U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VAUGHN REED and U.S. POSTAL SERVICE,
POST OFFICE, Mansfield, OH

Docket No. 01-1116; Submitted on the Record;
Issued September 17, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's wage-loss compensation effective April 4, 2000 on the grounds that he refused an offer of suitable work.

The Office accepted that appellant sustained a temporary aggravation of chronic ilioinguinal neuritis and right rib contusion in the performance of his duties as a distribution clerk on July 15, 1998. Appellant was removing a letter tray when another employee rolled an all-purpose container (APC) into appellant's all-purpose container causing injury to his right side, including his arm, wrist, rib and knee area. Appellant has been off work since July 16, 1998.

In a report dated December 16, 1998, appellant's treating physician, Dr. G. Todd Schulte, a Board-certified anesthesiologist, recommended that appellant "not perform any bending, reaching, pushing, or pulling movements." He also recommended that appellant not lift more than 10 to 20 pounds at a time and do no twisting maneuvers, as it seemed to aggravate appellant's chronic ilioinguinal neuritis.

On March 11, 1999 the employing establishment offered him a position of modified distribution clerk, within the restrictions recommended by his physician. Appellant stated that he would defer from making a decision regarding the position pending a medical examination with Dr. Patricia Wongsam, Board-certified in physical medicine and rehabilitation.

In a report dated April 23, 1999, Dr. Schulte again described appellant's restrictions, noting that he should not lift more than 10 to 20 pounds at a time, avoid excessive standing for greater than 15 to 30 minutes at a time, avoid climbing, kneeling or stooping, not be involved in any pushing or pulling activities, and that he should not reach above his shoulder or head as that seemed to exacerbate his symptomatology.

In a report dated May 13, 1999, Dr. Wongsam opined that appellant would have difficulty performing a sedentary occupation and recommended referring him for vocational rehabilitation.

The Office referred appellant to Dr. Norman W. Lefkovitz, a Board-certified psychiatrist and neurologist, for a second opinion examination.

In a report dated July 23, 1999, Dr. Lefkovitz stated, "The patient's present complaints are ongoing and would prohibit him from being employed as a distribution clerk for the [employing establishment]. His restrictions remain indefinite and his work restrictions also remain permanent." Dr. Lefkovitz also completed a work capacity evaluation dated July 12, 1999. When asked whether there was any reason that appellant cannot work for eight hours per workday, Dr. Lefkovitz replied, "Yes, severe right inguinal pain."

The Office referred appellant for vocational rehabilitation services. In a report dated December 7, 1999, the rehabilitation specialist stated that appellant should be referred to the employing establishment for a permanent job offer.

On January 11, 2000 the employing establishment offered appellant a permanent position of modified distribution clerk, effective February 12, 2000. By letter dated February 10, 2000, the Office informed appellant that he had 30 days to either accept the position or provide an explanation of the reason(s) for refusing it.

Appellant rejected the job offer on February 3, 2000, stating "the job really does n[o]t meet all limitations and I do n[o]t see how they can." By letter dated February 22, 2000, appellant provided further explanation of his reasons for rejecting the position, stating that he cannot work for eight hours at a time and that he has not been able to drive in over a year.

By letter dated March 10, 2000, the Office considered the reasons given by appellant for refusing the job and found them unacceptable. Appellant was advised that he had 15 additional days to accept the position in light of their finding.

Appellant responded on March 24, 2000 by stating again that he could not work eight hours per day, was unable to drive himself to the work location and there was no public transportation available to get to work. He noted that there was a Post Office located one block from his home, within walking distance, but conceded that there were no positions available there within his physical capabilities, as noted by the employing establishment.

By decision dated April 4, 2000, the Office terminated appellant's wage-loss compensation as appellant had refused an offer of suitable work under section 8106(c) of the Federal Employees' Compensation Act.

Appellant disagreed with the decision and requested an oral hearing which was held on October 26, 2000. At the hearing, his representative contended that appellant could not get to work because the job was located too far from his home. Appellant stated that he could not walk to work and that there was no public transportation nearby as he lived in a rural area. He reiterated, however, that there is a Post Office located 2/10 of a mile from his home within walking distance and that the employing establishment is 7.6 miles from his home.

Prior to the oral hearing, the Office received additional follow-up reports from Dr. Schulte dated July 17, August 18, September 18 and October 16, 2000. In his October 16, 2000 report, Dr. Schulte stated:

> "Once again, there have been some questions regarding where [appellant] is at with his restrictions. I have stated once again, that his restrictions are unchanged. He should not lift more than 10 to 20 pounds at a time; he should avoid excessive standing for greater than 15 to 30 minutes at a time and he should avoid climbing, kneeling or stooping. He should not be involved with any pushing or pulling activities and should not reach above his shoulder, as that seems to exacerbate his symptomatology. He also states that he cannot drive a car so we are requesting that perhaps he could go to work at the [employing establishment] that is 2/10 of a mile from his house as opposed to one that is further away."

By decision dated January 30, 2001, the hearing representative affirmed the Office's April 4, 2000 decision.

The Board has duly reviewed the case record and concludes that the Office did not meet its burden of proof to terminate appellant's compensation benefits.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. This includes cases in which the Office terminates compensation under 5 U.S.C. § 8106(c) for refusal to accept suitable work.[1]

Section 8106(c) of the Act provides that a partially disabled employee who: (1) refuses to seek suitable work; or (2) refuses or neglects to work after suitable work is offered is not entitled to compensation.[2] Under 5 U.S.C. § 8106(c)(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 him.[3] However, to justify such termination, the Office must show that the work offered was suitable.[4] Once the Office establishes that the work offered was suitable, the burden of proof shifts to the employee who refuses to work to show that such refusal was justified.[5]

In this case, the Office terminated appellant's compensation benefits on the basis of the reports of Drs. Schulte and Lefkovitz. The Board notes, however, that there is a continuing conflict in the medical evidence between appellant's treating physician, Dr. Schulte, on the one hand, and Dr. Lefkovitz, the second opinion physician, on the other hand, regarding whether appellant can work eight hours per day. Dr. Schulte opined several times that appellant's

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[1] *Shirley B. Livingston*, 24 ECAB 855 (1991).

[2] 5 U.S.C. § 8106(c)(2).

[3] *David P. Camacho*, 40 ECAB 267 (1988).

[4] *Id*.

[5] *Catherine G. Hammond*, 41 ECAB 375 (1990).

restrictions were as follows: no lifting of over 10 to 20 pounds at a time; avoid excessive standing for more than 15 to 30 minutes at a time; avoid climbing, kneeling or stooping; no pushing or pulling activities; and no reaching above his shoulder. Dr. Schulte also indicated that appellant should avoid excessive standing for more than 15 to 30 minutes at a time. Dr. Schulte did not, however, indicate that appellant could not work for eight hours per day.

Dr. Lefkovitz, on the other hand, stated in his July 12, 1999 work restriction evaluation that appellant could not work for eight hours per day because of severe inguinal pain. Also, the limitations on activities that Dr. Lefkovitz listed on the evaluation form do not equal eight hours. He stated that appellant could only sit for 1 hour, walk for 15 minutes, stand for 10 minutes, reach for 1 hour, reach above shoulder for 1 hour and twist for 1 hour. He further indicated that appellant could operate a motor vehicle, push, pull, squat, kneel and climb for zero hours.

Since the Office has not resolved the existing conflict in the medical evidence, it has failed to meet its burden of proof in terminating appellant's compensation benefits effective April 4, 2000.

The January 30, 2001 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC
September 17, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member