U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CARL WOODWARD and U.S. POSTAL SERVICE,
POST OFFICE, Little Rock, AR

Docket No. 00-1584; Submitted on the Record;
Issued April 2, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

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

On December 4, 1988 appellant, then a 33-year-old distribution clerk, injured his right shoulder in the performance of duty and filed a claim for compensation based on a traumatic injury. The Office accepted the claim for right shoulder strain, acute cervical and thoracic outlet syndrome. Appellant stopped work on the date of injury and began receiving compensation on the periodic rolls.[1]

The record indicates that appellant has undergone three surgeries to repair the distal clavicle with excision of a foreign body and scar tissue from the site. Appellant has been under the care of Dr. David Collins, a Board-certified neurosurgeon, who released him to restricted duty effective December 1, 1998. In a report dated December 1, 1998 report, Dr. Collins indicated that appellant could work eight hours per day with restrictions of no climbing, no reaching above the shoulder and no fine manipulation. He also stated that appellant was under a 5-pound lifting restriction with the right arm, but that appellant could lift 75 pounds or more with the left arm.

On December 21, 1998 the employing establishment offered appellant a job as a modified distribution clerk consistent with the work restrictions set forth by Dr. Collins.

Appellant accepted the position on December 30, 1998 and returned to work on January 16, 1999. The record indicates that, shortly after arriving at work on January 16, 1999, appellant complained of right shoulder pain and requested to see a union steward. He was later

[1] Appellant has a history of three previous shoulder surgeries

treated at Baptist Memorial Medical Center for right shoulder and arm pain.[2] Medical treatment records state that appellant was at work when the pain in his right arm became worse. It is appellant's position that he did not have a new injury, just an exacerbation of his pain. The discharge summary completed by Dr. Thomas F. Robinson, a Board-certified internist, diagnosed a right shoulder dislocation that had been reduced under conscious sedation. Appellant was advised to see Dr. Collins the following day.

By letter dated January 21, 1999, the Office notified appellant that the position of a modified clerk was suitable work. Appellant was advised that he had 30 days to either accept the job offer or provide a valid reason for refusing the offer of employment or else he risked termination of his compensation.

In a January 20, 1999 letter, date stamped as received by the Office on January 22, 1999, appellant informed the Office that he had sustained a nonwork-related injury resulting in a dislocated shoulder that precluded his return to work.

Appellant subsequently submitted a copy of the medical records pertaining to a January 19, 1999 emergency room visit. The records stated that appellant had bumped his right shoulder on a wall and x-rays showed a subluxation. The diagnosis was "dislocated right shoulder, reduced under conscious sedation."[3]

In a January 22, 1999 treatment note, Dr. Collins related that appellant had dislocated his right shoulder and was seen at the emergency room. Although he did not have copies of the emergency room records he stated as follows: "It is reasonable to manage him until his soft tissues have effectively healed from the acute nature of the injury though he will not be left with the previously lax shoulder. He will be off until a week from Tuesday at which time I will check him once again and then return him to his duties."

In a CA-17 duty status report dated January 22, 1999, Dr. Collins diagnosed "dislocation [right] shoulder" and advised that appellant was unable to work.

In a memorandum of conference dated February 2, 1999, the Office indicated that the parties had discussed the fact that appellant had been approved to return to work by Dr. Collins effective February 2, 1999 and that he should report to work at 6:00 p.m. on February 3, 1999.

In a report dated February 9, 1999, Dr. F. Richard Jordan, a Board-certified neurosurgeon, noted that appellant was seen for the first time with complaints of "neck pain, headache, right arm pain and dysfunction resulting from a work injury back in 1988." Dr. Jordan related appellant's work history and noted that appellant also presented with a slurred speech pattern, that he could hardly hold his head up, and that he had difficulty walking. He noted that

[2] Appellant's supervisor provided a statement indicating that appellant was displeased with his schedule and that he sought medical treatment at the hospital for treatment of an emotional condition. He related that appellant also claimed to be on too much medication to be working in an industrial environment.

[3] He was also treated at the emergency room on January 22, 1999 for chronic right upper extremity pain with acute exacerbation. It was noted on physical examination that appellant had slight atrophy of the muscles of the right upper extremity compared to the left, contracture of the right hand and decreased sensation over the C8 and T1 distribution.

appellant related having been put on medication, Dilantin, one week prior for seizure activity. Dr. Jordan suspected that appellant was "Dilantin toxic" and ordered a Dilantin level performed.

In a CA-17 form dated February 9, 1999, Dr. Jordan reported that appellant was unable to work due to Dilantin toxicity and his right shoulder syndrome.

In an addendum statement added at the bottom of the page to his previous report, Dr. Jordan noted as follows:

> "We received a call from Arkansas Medical Laboratory which reported [appellant's] Dilantin level to be 39.9. We told them to stop the Dilantin. He apparently fell on the evening of his exam[ination] here and was taken to the V[eterans] A[dministration] Hospital for treatment of a hip fracture. We asked that they call us after he is able to go home to proceed with our evaluation."

In a February 25, 1999 letter, the Office advised appellant that his reasons for refusing the offer of suitable work were deemed unacceptable.[4] The Office gave appellant 15 days to accept the position or else his benefits were to be terminated pursuant to 5 U.S.C. § 8106.

In a March 2, 1999 letter, appellant advised the Office that he was not refusing to return to work. He noted that Dr. Collins on January 2, 1999 had "clearly stated that [he] was not to return to work due to a dislocated shoulder." Appellant's counsel further noted that appellant was in a wheelchair due to his fall. Nonetheless, in order to avoid confusion, appellant's counsel stated that he was advising his client to return to work. He reiterated that appellant was accepting the position by hand delivery of the letter to Office.

On March 10, 1999 appellant returned to work and stayed approximately two hours before he left, complaining that he was in pain.

An emergency room report by Dr. James Rice dated March 10, 1999 states: "He has chronic problems with his shoulder neck ... went to work today and was supposed to not use his right arm, but using his left arm sorting mail he moved and he could not stand the pain." Dr. Rice gave appellant some medication and told him to follow up with his treating physician.

In a decision dated March 12, 1999, the Office terminated appellant's compensation on the grounds that he refused an offer of suitable work.

By letter dated May 3, 1999, appellant requested an oral hearing.

Appellant subsequently submitted a March 22, 1999 report from Dr. Jordan, which recommended that appellant undergo exploratory surgery of the right brachial plexus area. Dr. Jordan also completed a CA-17 form dated March 22, 1999 indicating that appellant could not return to work.

On July13, 1999 appellant underwent a right brachial plexus exploration and resection of the cervical rib.

[4] The Office did not outline appellant's reasons for refusing the job or the grounds for finding them unacceptable.

In a decision dated December 15, 1999, an Office hearing representative affirmed the Office's March 12, 1999 decision.

The Board finds that the Office did not properly terminate appellant's compensation on the grounds that he refused an offer of suitable work.[5]

Once the Office accepts a claim, it has the burden of proving that the employees' disability has ceased or lessened before it may terminate or modify compensation benefits.[6] Section 8106(c)(2) of the Federal Employee's Compensation Act[7] provides that the Office may terminate 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.[8] The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.[9]

The implementing regulation provides that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee 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 entitlement to compensation is terminated.[10] To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.[11]

In the instant case, the employing establishment offered appellant a position as a modified distribution clerk based on the physical restrictions outlined by his treating physician. On January 21, 1999 the Office notified appellant that the position was suitable and that he had 30 days to either accept the job offer or provide a valid reason for refusing the offer of suitable work. On February 25, 1999 the Office issued a letter finding that appellant's reasons for refusing the offered and suitable job were unacceptable and gave him 15 days to either accept the position or have his compensation terminated. The Board notes that at the time the February 25, 1999 letter was issued, appellant had supplied medical evidence including a February 9, 1999 report from Dr. Jordan stating that appellant was on "toxic" levels of Dilantin due to seizure activity and that it would be unsafe for him to work at that time. There was also a January 22, 1999 CA-17 duty status report from Dr. Collins stating that appellant was unable to work due to a dislocated right shoulder. The record indicates that the dislocated shoulder occurred at home on January 19, 1999.

The Office procedure manual states that "[if] medical reports in file document a condition which has arisen since the compensable injury, and this condition disables the claimant from the

[5] Although appellant submitted additional medical evidence along with his hearing request, the Board does not have jurisdiction to review evidence that was not before the Office at the time it issued its final decision.

[6] *Karen L. Mayewski*, 45 ECAB 219 (1993); *Bettye F. Wade*, 37 ECAB 556 (1986).

[7] 5 U.S.C. § 8106(c)(2); *see also* 20 C.F.R. §§ 10.516-517 (1999).

[8] *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

[9] *Stephen R. Lubin*, 43 ECAB 564 (1992).

[10] 20 C.F.R. §§ 10.516-517 (1999).

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

offered job, the job will be considered unsuitable (even if the subsequently acquired condition is not work related)."[12] Furthermore, if the Office is unable to determine whether a claimant's refusal to work is justified without further investigation of the issues, the claims examiner should contact the claimant for clarifying information and set another 30-day deadline. The employing establishment should be contacted again and asked to keep the job offer open during this period.[13]

The Board finds that appellant presented sufficient documentation to establish that he had disabling, nonwork-related conditions that precluded his return to work. The record documents appellant's treatment during the time in question for a nonwork-related hip injury which disabled him for work, along with a dislocated shoulder injury for which appellant was advised to stay off work. Appellant also became disabled for work due to toxic levels of medication he was taking for a nonwork-related seizure condition.

Consequently, the Board finds that the Office improperly terminated appellant's compensation based on a finding that he refused an offer of suitable work.

The decision of the Office of Workers' Compensation Programs dated August 12, 1999 is reversed.

Dated, Washington, DC
April 2, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-earning Capacity*, Chapter 2.814.4(b)(4) (December 1993).

[13] *See* Chapter 2.814.5(d) (December 1993).