U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH V. PULEO and U.S. POSTAL SERVICE,
POST OFFICE, New York, NY

Docket No. 01-2056; Submitted on the Record;
Issued August 21, 2002

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation for refusal to accept suitable work.

The Office accepted appellant's claim for a low back strain and paid the claimant total disability benefits. In a report dated August 12, 1999, appellant's treating physician, Dr. Rita Jhaveri, opined that appellant could perform sedentary work four hours a day and should have a workplace close to home as "travel is large deterrent" in his case. In a work capacity evaluation dated August 13, 1999, Dr. Jhaveri opined that appellant could work four hours a day with no pushing, pulling, lifting, squatting, kneeling or climbing but he could walk, stand and sit for four hours.

By letter dated November 30, 1999, based on Dr. Jhaveri's physical restrictions, the employing establishment offered appellant the job of modified carrier, which involved working four hours a day with no lifting, pushing, pulling, squatting, kneeling, climbing, reaching, reaching above the shoulder, twisting and operating a motor vehicle. The job description stated that appellant's physical restrictions were sitting, standing and walking up to four hours a day. By letter dated December 21, 1999, the Office found that the job of modified carrier was suitable and consistent with appellant's physical restrictions and gave appellant 30 days to accept the job offer or give reasons for refusing it.

On December 1, 1999 appellant refused the job offer "for reasons discussed with 'RC' on December 1, 1999." A report from the rehabilitation counselor dated December 20, 1999, stated that appellant refused to accept the written job offer because the travel was beyond his physical limitations. The rehabilitation counselor noted that travel to the job site at the Brooklyn location involved taking two buses.

By letter dated January 6, 2000, appellant stated that he was "still" refusing the job offer due "to travel time involved and a few other things as well." Appellant stated that he could not "travel that far and long to and from work."

By letter dated January 14, 2000, Dr. Jhaveri stated that she was "happy to see that all restrictions have been adhered to" but stated that appellant needed a position at the employing establishment which was "more easily accessible by transportation" than the current offer. Dr. Jhaveri stated that "it would be much less strain" on appellant's lower back and herniated discs if "he could be given a position that would not require extensive walking for long periods of time and an accessible bus."

By letter dated January 20, 2000, appellant stated that for him to get to the job site at 1223 Sutton Avenue, he would have to take a total of four buses and walk over a mile round trip. Appellant stated that the travel time would be slightly over two hours and that would be 5 days a week. He stated that his back "kills" him on a 90-minute ride to Dr. Jhaveri once or twice a month. Appellant stated that he was not able to work four hours a day five days a week and have a one and one-half hour ride home on the bus. Appellant stated that if he worked four hours a day, which appellant did not think he could do but was willing to try and he had a two-hour commute round trip, then the four-hour day became a six-hour day and he could not do that.

By letter dated March 28, 2000, the Office reiterated that the job of modified carrier was suitable and within appellant's physical restrictions and informed appellant that if he refused the employment or did not report to work when scheduled, his compensation benefits would be terminated within 15 days.

By decision dated May 11, 2000, the Office terminated appellant's compensation benefits effective May 12, 2000, stating that appellant refused a suitable job offer without providing a reasonable, acceptable explanation but was still entitled to medical benefits resulting from the February 16, 1988 employment injury. In the last paragraph on page 5 of the decision, the Office stated:

> "It should be noted that the distance from your home in Howard Beach, Queens to the job site at 1223 Sutter Avenue, Brooklyn is approximately four miles. Transportation to the job site involves taking only one bus, not two. Walking distance would be several blocks, not more than a half mile which you claim."

By letter dated May 12, 2000, the Office clarified the above-quoted paragraph, stating that the employing establishment informed the Office of three travel options from appellant's home in Howard's Beach, Queens to the proposed site at 1223 Sutter Avenue, Brooklyn. The first option involved taking two buses each way to and from work. It would mean appellant's walking 5 blocks from his home to the bus stop for the first bus, traveling 12 to 14 minutes on that bus, catching the second bus where the first bus dropped him off, traveling on the second bus 10 to 12 minutes and then walking two blocks to the job site. The second option involved taking one bus each way to and from work. It would mean appellant's walking 10 blocks to the bus stop, traveling approximately 20 minutes on that bus and then walking one block to the job site. The third option was using "Access-A-Ride," a shared ride, door to door paratransit service for people with disabilities.

By letter dated April 5, 2001, appellant requested reconsideration of the Office's decision and submitted medical evidence consisting of Dr. Jhaveri's reports, dated August 12, 1999, June 1 and January 14, 2000 and an undated report from Dr. Jhaveri received by the Office on

April 11, 2001. In the undated report, she considered appellant's history of injury, performed a physical examination on January 11, 2001 and reviewed diagnostic tests dated through February 16, 2000 and stated that appellant's back and mental condition had worsened since his compensation benefits were terminated. Dr. Jhaveri stated that appellant's "initial enthusiastic response to the possibility of returning to the work force was dampened as he realized he needed more frequent medication and rest periods to control his back pain." Dr. Jhaveri stated that the pain in appellant's lower back and left buttock was intensified and exacerbated even by short bus or car rides and sitting on her examination table for longer than 10 minutes.

She stated that transportation to the job offered to appellant involved either 2 buses with approximately 30 minutes of travel time and 7 blocks of walking or one bus with travel time of 20 minutes and 11 blocks of walking. Dr. Jhaveri stated that the first option involved one bus and over ½ mile of walking one way and option two involved one bus and 1.3 miles of walking one way. She stated that "[o]bviously, this would exacerbate his compromised back condition before even reaching the job site." Dr. Jhaveri stated that appellant applied for "Access-A-Ride" but had not been contacted. She concluded that appellant was not capable of fulfilling the extensive walking and public transportation requirement associated with the offered position at the time of his termination on May 12, 2000 and at the present time. Further, Dr. Jhaveri stated that appellant had received multiple treatment including analgesics, physical therapy, acupuncture, pain management and work hardening to rehabilitate him to no avail. She stated that "[a]t this point, 13 years later [*i.e.*, 13 years after the February 16, 1988 employment injury], this disability is permanent," and appellant could not return to work "in any capacity."

By decision dated May 7, 2001, the Office denied appellant's request for modification. Using maps of the geographic area of the job site and a "walking rate" per hour obtained from a website, the Office analyzed in specific detail the length of appellant's walk for each bus route option. The Office determined that the easiest option requiring the use of two buses (*i.e.*, Q21 or Q 41 and the Q7) would involve .38 miles or 8.5 minutes of walking to catch the first bus, then .21 miles or 4.5 minutes of walking from the second bus to the work site and concluded the transportation to work was within appellant's physical restrictions.

The Board finds that the Office properly terminated appellant's compensation for refusal to accept suitable work.

Once the Office accepts a claim, it has the burden of justifying termination of modification of compensation benefits by establishing that the accepted disability has ceased or that it is no longer related to the employment.[1] This burden of proof is applicable when the Office terminates compensation under 5 U.S.C. § 8106(c) for refusal to accept suitable work. Under this section of the Federal Workers' Compensation Act, 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.[2] The Board has recognized that section 8106(c) serves as a penalty provision as it may bar an employee's entitlement to compensation based on a

[1] *H. Adrian Osborne*, 48 ECAB 556 (1997); *David W. Green*, 43 ECAB 883 (1992).

[2] 5 U.S.C. § 8106(c)(2).

refusal to accept a suitable offer of employment and, for this reason, will be narrowly construed.[3] 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.[4]

In this case, in the work capacity evaluation dated August 13, 1999, Dr. Jhaveri opined that appellant could work four hours a day with no pushing, pulling, lifting, squatting, kneeling or climbing but could walk, stand and sit for four hours. On November 30, 1999 the employing establishment offered appellant the job of modified carrier, which was within Dr. Jhaveri's physical restrictions. In his January 14, 2000 report, Dr. Jhaveri agreed that the job was within appellant's physical restrictions but objected to the nature of the commute, stating that it would be much less strain on appellant's lower back and herniated discs if appellant could be given a position that would not require extensive walking for long periods of time and an accessible bus.

In its May 11, 2000 decision, the Office noted that the distance from appellant's home in Howard Beach Queens to the job site at 1223 Sutter Avenue, Brooklyn was approximately four miles, that transportation to the job site involved taking only one bus, not two and the walking distance would be several blocks, not more than a half mile as appellant claimed. In a letter dated May 12, 2000, the Office clarified its findings on the nature of appellant's commute. The Office stated that the employing establishment had informed the Office of 3 travel options for appellant, 1 involved taking 2 buses each way to work involving an approximate 26 minute bus ride and 7 blocks of walking, the other involved taking 1 bus each way for an approximate 20 minute bus ride and a total of 11 blocks of walking and the 3rd option involving using "Access-A-Ride." The Office properly determined in its May 11, 2000 decision, that the commute was within the restrictions set by Dr. Jhaveri on August 13, 1999. Because all three commuting options were within Dr. Jhaveri's restrictions that appellant could walk, stand and sit for four hours, the Office met its burden of proof in terminating benefits based on appellant's refusal to accept suitable work.

Subsequent medical evidence appellant submitted from Dr. Jhaveri with his request for reconsideration did not undermine the Office's determination. In the undated report, she stated that appellant's back condition had worsened, that appellant could not even tolerate short bus or car rides and that appellant was unable to work at all. In the May 7, 2001 decision, the Office analyzed appellant's commute in greater detail but concluded, as it had in the May 11, 2000 decision, that the commute was within Dr. Jhaveri's physical restrictions.

The Office's finding that Dr. Jhaveri's recent opinion that appellant could not work did not establish that appellant was unable to perform the job of modified carrier is reasonable. Dr. Jhaveri did not provide a well-rationalized medical explanation for the change in her opinion from August 13, 1999, when Dr. Jhaveri opined that appellant could work with restrictions to the present when she opined that appellant could not work. The Board has held that a medical opinion not fortified by medical rationale is of little probative value.[5] On the grounds that the

[3] *See Susan L. Dunnigan*, 49 ECAB 267 (1998); *Stephen R. Lubin*, 43 ECAB 564 (1992).

[4] *See John E. Lemker*, 45 ECAB 258 (1993); *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

[5] *See Annie L. Billingsley*, 50 ECAB 210, 213 n. 20 (1998).

modified carrier job offered to appellant by the employing establishment on November 30, 1999 was within the physical restrictions set by Dr. Jhaveri on August 13, 1999 and Dr. Jhaveri's subsequent reports did not contain a well-rationalized medical opinion explaining why appellant could no longer perform that work, appellant's refusal to perform the job is unreasonable. There is no evidence to show that appellant's commute exceeded the four-hour walking, sitting and standing restriction originally set by Dr. Jhaveri. The Office was justified in terminating benefits and appellant then failed to meet his burden to establish his claim.

The May 7, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
August 21, 2002

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member