U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH E. ARMSTRONG and U.S. POSTAL SERVICE,
POST OFFICE, Hamilton, OH

Docket No. 01-904; Submitted on the Record;
Issued January 7, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation based on a finding that he refused suitable employment.

On July 23, 1990 appellant, then a 53-year-old letter carrier, filed a notice of traumatic injury claim, alleging that he bent over to pick up a mailbag and felt a pain in his lower back and right shoulder. The Office accepted the claim for a lumbar strain, right shoulder sprain and mild posterior disc protrusions at L4-S1. Appellant received compensation for intermittent periods of total disability. He worked light duty and retired effective October 2, 1992.

Appellant came under the care of Dr. David Bryant for treatment of his work injury. In a report dated September 3, 1992, Dr. Bryant stated that appellant suffered from spondyloysis, degenerative disc disease and disc narrowing of the lumbar spine. He attributed those conditions to appellant's history of lower back work injuries and felt that appellant's recent injury on July 23, 1990 had also aggravated his back problems.

Dr. Bryant referred appellant for consultation with Dr Melvin D. Whitfield, a Board-certified neurosurgeon. He requested a magnetic resonance image (MRI) scan of the thoracic and lumbar spine that showed degenerative disease and disc protrusions at L4-S1. Dr Whitfield prescribed a course of physical therapy, but reported later that appellant was unable to tolerate it. He further ordered a bone scan and an electromyogram (EMG) with nerve conduction studies. Although he indicated that appellant's objective testing did not show anything clinically significant to cause his severe back symptoms, he apparently recommended that appellant retire from his employment due to degenerative disc disease.

In a March 30, 1993 treatment note, Dr. Bryant diagnosed a lumbosacral strain, nerve root inflammation, spondyloysis and instability. He related that appellant retired under the advisement of Dr. Whitfield and stated that he was totally disabled for all work as a letter carrier.

Appellant was examined on July 9, 1993 by Dr. Colin Zaditkoff, a Board-certified neurologist, at the request of the Office. In his report dated July 9, 1993, he noted an impression of "chronic back pain which is felt to be related" to the employment injury. Dr. Zaditkoff indicated that although no abnormalities could be detected on diagnostic testing, a muscular strain often did not permit delineation with diagnostic testing. He indicated that MRI testing confirmed degenerative joint disease, which could be contributing to appellant's lower back pain. Dr. Zaditkoff concluded that appellant was totally disabled for all work as a letter carrier.

Appellant was referred for rehabilitation services by the Office in December 1996 when he elected to receive compensation as opposed to disability retirement.

The Office sent appellant for a second opinion evaluation with Dr. Rafael M. Ramirez, a Board-certified neurological surgeon, on August 7, 1996. In a report dated August 16, 1996, he stated that appellant had sustained a lumbar and right shoulder strain at the time of his injury on July 23, 1990. Dr. Ramirez further noted that an MRI of the lumbosacral spine performed in 1992 showed "central bulging disc seen primarily at L5-S1 with similar but lesser changes at the L4-5 level. No evidence of root impingement and no stenosis were visualized." Dr. Ramirez opined that appellant's work injuries had accelerated a preexistent back condition, which had been manifested by changes both on the x-ray and the computerized tomography scan taken shortly after his injury July 23, 1990. He stated: "[I]t is my opinion that [appellant] should be able to engage in a sedentary type of work." Dr. Ramirez further reported that appellant was able to perform lifting up to 10 pounds frequently but only occasional lifting up to 20 pounds as work restrictions. He indicated that bending was not to exceed three times per hour.

In a work-capacity evaluation form dated August 16, 1996, Dr. Ramirez, opined that appellant should limit lifting and bending and that he could lift no more than 10 pounds frequently and 20 pounds on an occasional basis. He advised that appellant should bend no more than two to three times per hour with the limitations to be observed six to eight hours a day. Dr. Ramirez indicated that appellant might have carpal tunnel syndrome, unrelated to his work and that he was unable to perform repetitive motions of the wrists. It was further noted that appellant had reached maximum medical improvement.

Based on Dr. Ramirez's report, the employing establishment subsequently offered appellant a limited-duty job as a "[m]odified [p]art-[t]ime [f]lexible [c]lerk on February 8, 1997. It was noted that the job involved limited bending and lifting up to 10 pounds frequently and 20 pounds occasionally. No bending more than two to three times an hours. Appellant was further advised that he could sit and stand at his own discretion.

In a letter dated February 19, 1997, the Office advised appellant that the limited-duty job offer was found to be suitable to his work capabilities. He was advised that he had 30 days to either accept the position or offer reasons for refusing the job or risk termination of his compensation.

On February 26, 1997 appellant rejected the limited-duty position and stated in his letter that he was unable to sit or stand over an hour as it would cause back and neck pain. He further stated: "I believe I could do the job I did in 1990. Express mail deliver and office work for supervisor. Would you consider this?"

In a March 27, 1997 letter, the Office advised appellant that his reasons for refusing the limited job offer were unacceptable and he was given an additional 15 days to accept the limited-duty job without penalty.

Appellant did not respond to the March 27, 1997 letter, but he did submit a medical report dated April 15, 1997 from Dr. Zadikoff, who stated that appellant had chronic low back pain due to a lumbar strain. He specifically stated: "It is felt unlikely that [appellant] could perform work requiring lifting, twisting, or stooping on a regular basis. It is likely that this will further aggravate his back pain and from a neurologic standpoint, it is felt that [appellant] can do light or sedentary work only."

In a June 11, 1997 decision, the Office terminated appellant's compensation effective May 25, 1997 on the grounds that he refused an offer of suitable work.

Appellant requested a hearing, which was held on May 28, 1998.

In a May 21, 1998 report, that was submitted by appellant at the hearing, Dr. Bradley L. Holaday, a chiropractor, discussed appellant's history of work injury on June 4, 1992 and his duties as a letter carrier. He diagnosed a lumbar strain, disc degeneration, lumbar protrusions at L4-5 and L5-S1 and lumbar discogenic spondylosis. Dr. Holaday opined that all of appellant's conditions should be accepted by the Office as work related and that he should undergo six weeks of pain management.

In an August 17, 1998 decision, an Office hearing representative affirmed the Office's June 11, 1997 decision.

By letter dated August 13, 1999, appellant requested reconsideration and submitted additional medical evidence.

In a report dated June 29, 1999, Dr. John R. Helmick, a Board-certified physician in pain management, discussed appellant's work injury and MRI findings of degenerative disc disease and bulging disc at L5-S1. Physical findings were reported and it was noted that appellant had an average of four on a VAS pain test. Dr. Helmick requested authorization for epidural steroid injections and recommended physical therapy.[1]

Appellant also submitted office notes from Dr. Crystl Willison, a Board-certified neurosurgeon, dated May 20, 1999, which states as follows:

> "[Appellant] returns with his new MRl scan that continues to show [l]umbar disc degeneration at L4-5 and L5-S1. I certainly think the one level is significantly worse that the other and in general, they are not significantly worse than they were on his old MRI scan. This is a patient who I do not think needs neurosurgical intervention right now as I do not feel he has exhausted conservative treatment and indeed, he has not had conservative treatment appropriate for his problems. He is much more concerned in the litigation,

[1] In an August 12, 1999 letter, the Office authorized three epidural steroid injections.

> reasons for his denial of comp[ensation]. Appellant had accepted retirement in 1992 but went back to pursuing his compensation issue. This was apparently won and he is currently on compensation but either cannot go back to his old job and certainly at his age of 61 would n[o]t, I think be able to go back to work with or without surgical intervention so once again, I have suggested that he undergo epidural steroid injections and be managed by a chronic pain center as I do not feel that I have anything to offer him neurosurgically. When he is interested in percent disability, I have told him that I do not do that and it would require a functional capacity evaluation. I spent some time explaining this to [appellant] and reassuring him that I am not angry, it is just that I do not have the time to play social worker and administer [w]orker's [c]omp[ensation] claims, etc. particularly for a patient that I do not feel: (a) [P]erhaps needs surgical intervention; or (b) would even benefit from surgical intervention at this time since he has again not had what I think is conventional conservative care for his problem."

In a May 5, 1999 report, Dr. Willison diagnosed lumbar disc displacement and opined that appellant was "unable to work at this time because of awaiting authorization for vocational [rehabilitation] functional capacity evaluation; and epidural steroid injections."[2]

In a November 12, 1999 decision, the Office denied modification.

On November 5, 2000 appellant requested reconsideration.

The medical evidence received by the Office after issuance of its November 12, 1999 decision include the following: A March 1, 2000 report by Dr. Louis Brose, a Board-certified anesthesiologist, reports dated June 20, July 11 and August 14, 2000 by Dr. Lynda M. Groh, a Board-certified anesthesiologist; and the results of a physical therapy evaluation dated August 2, 2000.

Dr. Brose's report dated March 1, 2000 contains information about medications prescribed to appellant for back pain. It was noted that appellant was fighting with workers' compensation "to get money that is due him from not being able to work previously." He was encouraged to continue with home exercise.

Dr. Groh's report dated June 6, 2000 indicates that, appellant has been a patient of the Care Institute since June, 1999 and that he has not responded well to treatment. She recommends a multidisciplinary evaluation in addition to a functional capacity evaluation. Dr. Groh's July 11, 2000 report discusses appellant's response to treatment and medications and again recommends a functional capacity evaluation. The August 14, 2000 report indicates that, based on a physical therapy evaluation, it was recommended that appellant enter a multidisciplinary pain program. She prescribed physical therapy for two to three weeks to get him ready for the program given his severe degree of deconditioning.

[2] The Office approved appellant's request to have Dr. Willison be her treating physician. An MRI dated April 8, 1999 is associated with the physician's treatment notes indicating that appellant had no evidence of a significant disc herniation but that there was a bulging disc at L5-S1.

In a decision dated November 15, 2000, the Office denied modification.

The Board finds that the Office properly terminated appellant's compensation.

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.[3] Section 8106(c)(2) of the Federal Employee's Compensation Act[4] 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.[5] The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.[6]

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.[7] 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.[8]

In this case, an Office referral physician, Dr. Rameriz, completed a thorough evaluation of appellant and opined that he could perform sedentary work with medical restrictions including frequent lifting up to 10 pounds, occasional lifting up to 20 pounds and limited bending, not to exceed 3 times an hour. Based on Dr. Ramirez's work restrictions, the employing establishment designed a modified part-time position for appellant as a flexible clerk, which was offered to him on February 8, 1997. The Office advised appellant of the suitability of the job on February 19, 1997 but he subsequently rejected the position on February 26, 1997. In accordance with Office procedures, appellant was given an additional 15 days to accept the suitable job, but he did not return to work or otherwise express any interest in the position. Instead, appellant submitted a medical report from Dr. Zadikoff stating that it was "unlikely that [he] could perform work requiring lifting, twisting, or stooping on a regular basis." Dr. Zadikoff's statements, however, did not dispute appellant's ability to perform sedentary work as outlined by the Office referral physician. Moreover, Dr. Ramirez had already placed limitations on appellant's lifting and stooping. Because Dr. Zadikoff's opinion does not support a finding that appellant could not perform the suitable work offered him, the Board concludes that the Office properly terminated his compensation.

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

[4] 5 U.S.C. § 8106(c)(2); *see also* 20 C.F.R. § 10.516 (1999).

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

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

[7] 20 C.F.R. § 10.516 (1999).

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

Furthermore, evidence submitted by appellant subsequent to the June 11, 1997 termination decision, does not refute the propriety of that order. Neither Drs. Helmick, Willison, Brose, or Groh offered an opinion as to whether or not appellant was capable of performing the modified flexible clerk position.[9] These physicians have also not opined that appellant is disabled for work. Basically their reports concern medical treatment for pain including epidural injections and appellant's enrollment in a pain clinic. The termination of appellant's compensation did not extend to his medical benefits and the Office has approved appellant's continuing treatment for pain. That, however, does not prove that appellant is unable to work or that he was justified in refusing an offer of suitable work.

Because the Office followed it procedures in notifying appellant of the suitability of the offered job and gave her the requisite 15 days to accept the job after his reasons for refusing it were deemed unreasonable, the Board finds that the Office met its burden of proof in terminating appellant's compensation.

[9] The report from appellant's chiropractor and the physical therapy evaluation are not relevant since they do not constitute medical evidence. A chiropractor may only qualify as a "physician" under the Act as to the diagnosis and treatment of a spinal subluxation, *see George E. Williams*, 44 ECAB 530 (1993). Appellant does not have a spinal subluxation. Similarly, 5 U.S.C. § 8101(2) states: "[P]hysician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. *See Barbara J. Williams*, 40 ECAB 649 (1988). (The Board found that a physical therapist was not a physician as defined under the Act and was not competent to render a medical opinion).

The decision of the Office of Workers' Compensation Programs dated November 15, 2000 is hereby affirmed.

Dated, Washington, DC
January 7, 2002

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member