U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD M. TUPPER and DEPARTMENT OF THE NAVY, NAVAL AIR SYSTEMS COMMAND HEADQUARTERS, Patuxent River, MD

Docket No. 01-1482; Submitted on the Record;
Issued January 2, 2002

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT, PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs abused its discretion in terminating appellant's compensation under 5 U.S.C. § 8106(c) based on his refusal to accept suitable employment as offered by the employing establishment.

On April 14, 1998 appellant, then a 49-year-old occupational safety and health manager, sustained an employment-related lumbosacral strain. He stopped work that day, received appropriate continuation of pay and compensation and was placed on the periodic rolls on October 6, 1998. He has not returned to work. The accepted condition was later expanded to include herniated disc at L4-5.

The record indicates that, at the time of injury, appellant was in a detail position at the Naval Weapons Station in Yorktown, Virginia. On January 2, 1996 he was formally notified of a transfer of function outside of the commuting area due to base realignment and closure as the Naval Air Systems Command Headquarters (NAVAIR) was being transferred from Arlington, Virginia to Patuxent River, Maryland. On January 3, 1996 appellant accepted the transfer and on August 17, 1997 he was formally transferred to the latter location. The record further indicates that he had been detailed to Yorktown, Virginia beginning in May 1996 and continuing through June 1998. The employing establishment indicated that the detail was not extended beyond that time and his permanent duty station was Patuxent River, Maryland. Appellant lives in Norfolk, Virginia.

Appellant was initially seen by Dr. George N. Cavros, a family practitioner, who referred him to Dr. John S. Wagner, a Board-certified orthopedic surgeon. A June 2, 1998 magnetic resonance imaging (MRI) scan of the lumbar spine demonstrated a small to moderate central disc protrusion at the L4-5 level which caused narrowing and distortion. Appellant underwent physical therapy and, in a report dated August 20, 1998, Dr. Wagner advised that he had referred appellant to Dr. Winifred D. Bragg, a physiatrist, for epidural steroid injections. In a report dated September 17, 1998, she advised that appellant did not want to undergo steroid injections and prescribed aquatic therapy, which he began. Dr. Bragg continued to submit reports and in a

December 1, 1998 treatment note advised that appellant showed improvement with aquatic therapy. In a December 17, 1998 report, she advised that appellant was still totally disabled.

On December 11, 1998 appellant was involved in a physical altercation when he was confronted by a Norfolk, Virginia police and was forcibly handcuffed. In a January 20, 1999 report, Dr. Wagner, reported the December 11, 1998 incident and appellant's complaints of pain radiating from his right shoulder into his right hand. Examination revealed tenderness about the shoulder.

In a report dated February 12, 1999, Dr. Bragg reported that she had not seen appellant since December 1, 1998 because the nonwork-related injury of December 11, 1998 interrupted appellant's care. In a March 11, 1999 report, Dr. Bragg advised that appellant could return to light or medium full-time work with a lifting restriction of no more than 30 pounds. In an April 22, 1999 report, the physician advised that appellant needed to reenter the work force. A functional capacity evaluation was completed on May 5, 1999 and demonstrated inappropriate illness behavior. By report dated May 11, 1999, Dr. Bragg noted the functional capacity evaluation findings and reiterated her opinion that appellant could work at a position with a light to medium physical demand. In a work capacity evaluation date May 13, 1999, she advised that appellant could return to work with restrictions.[1]

Dr. B. Joe Ordonez, a neurosurgeon, provided an initial evaluation report on May 7, 1999. He described the history of injury in April 1998 and stated that appellant related that his lower back pain worsened following the altercation with the police in December 1998. Examination, which was "somewhat" limited secondary to lower back pain, revealed a positive straight leg test and 5/5 strength throughout. Dr. Ordonez recommended that appellant have a repeat MRI scan. In a May 10, 1999 report, he advised that appellant should not return to work until his studies were completed.

On May 18, 1999 the employing establishment offered appellant a modified safety manager position which he refused on May 21, 1999. The letter indicated that appellant's physical restrictions of a light to medium work level with a 30-pound lifting restriction, intermittent sitting and standing, a 10-pound carrying restriction, light weight pushing and pulling and squatting and kneeling for short periods of time would be accommodated. By letter dated August 6, 1999, the employing establishment again offered appellant a modified safety manager position. In response to appellant's concerns, the employing establishment advised that the offered position was principally sedentary and the need to perform inspections was eliminated. The employing establishment further indicated that appellant's permanent duty station was at Patuxent River, Maryland, as evidenced by his January 3, 1996 acceptance of transfer. In a September 16, 1999 letter, the Office advised appellant that the position offered was suitable. Appellant refused the offered position on August 23, 1999 and by letter dated September 30, 1999, advised that he was physically unable to work.

[1] Dr. Bragg stated that appellant could sit eight hours a day but should be given breaks every two hours and should also have breaks from prolonged standing. She stated that he should reduce episodes of repetitive squatting and twisting and advised that he could push and pull 20 pounds and lift 30 pounds. Dr. Bragg further indicated that he should limit repetitive movement of the wrists to 10 to 15 minutes every 2 to 4 hours and advised that this was not due to the employment-related injury.

By letter dated November 17, 1999, the employing establishment provided further explanation regarding the offered position, indicating that the nature of the safety manager position had changed during the prior year as a result of restructuring. The employing establishment noted that appellant would not be required to travel until physically able and that many of the job duties could be accomplished in an office setting. On November 23, 1999 the Office advised appellant that the offered position was suitable and provided him with the November 17, 1999 employing establishment explanation. Appellant was given 30 days to respond. In a letter dated December 13, 1999, he responded that he was physically unable to perform the position, especially the required travel and could not commute from his home in Norfolk, Virginia to Patuxent River, Maryland.

By decision dated March 27, 2000, the Office terminated appellant's wage-loss compensation, effective that day, on the grounds that he refused an offer of suitable work. The Office credited the opinion of Dr. Bragg in finding the position suitable.

On April 14, 2000 appellant requested a hearing. At the hearing, held on November 30, 2000, both appellant and Reuben Koller, Ph.D., a licensed clinical psychologist, testified; appellant also submitted additional medical evidence. By decision dated March 13, 2001, an Office hearing representative affirmed the March 27, 2000 decision. The instant appeal follows.[2]

The Board finds that the Office met its burden to terminate appellant's compensation benefits.

Section 8106(c)(2) of the Federal Employees' Compensation Act[3] provides in pertinent part, "A partially disabled employee who ... refuses or neglects to work after suitable work is offered ... is not entitled to compensation."[4] To prevail under this provision, the Office must show that the work offered was suitable and must inform the employee of the consequences of refusal to accept such employment. An employee who refuses or neglects to work after suitable work has been offered has the burden of showing that such refusal to work was justified.[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

[2] The record also contains a decision dated January 28, 2000, which found that an overpayment in compensation in the amount of $196.50 had been created in the instant case because optional life insurance premiums had not been deducted from appellant's compensation. The overpayment was repaid on February 10, 2000.

[3] 5 U.S.C. §§ 8101-8193.

[4] 5 U.S.C. § 8106(c)(2).

[5] *See Michael I. Schaffer*, 46 ECAB 845 (1995).

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

[7] 20 C.F.R. § 10.517(a) (1999).

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]

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 medical evidence.[9] In assessing medical evidence, the number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for and the thoroughness of physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[10]

In the present case, the record reflects that in reports dated March 11 and May 1, 1999, appellant's treating physiatrist, Dr. Bragg, advised that appellant could return to full-time work with light or medium physical restrictions. The offered position accommodated the physical restrictions set forth by Dr. Bragg. A May 5, 1999 functional capacity evaluation was interpreted as demonstrating inappropriate illness behavior. While appellant submitted reports from Dr. Ordonez, the physician merely noted that appellant reported an exacerbation of his low back pain and advised that appellant should not return to work until studies were completed. Dr. Ordonez submitted nothing further at that time. His reports, therefore, do not establish that appellant was unable to perform the duties of the offered position.

In order to properly terminate appellant's compensation under 5 U.S.C. § 8106, the Office must provide appellant notice of its finding that an offered position is suitable and give appellant an opportunity to accept or provide reasons for declining the position.[11] The record in this case indicates that the Office properly followed the procedural requirements. By letter dated November 23, 1999, the Office advised appellant that a partially disabled employee who refused suitable work was not entitled to compensation, that the offered position had been found suitable and allotted him 30 days to either accept or provide reasons for refusing the position.

In a letter dated December 13, 1999, appellant stated that his current physical condition prevented him from performing the duties of the offered position and that he could not commute to its location. By letter dated February 16, 2000, the Office advised appellant that the reason given for not accepting the offered position was unacceptable. He was given an additional 15 days in which to accept the position. Appellant did not respond. There is, thus, no evidence of a procedural defect in this case as the Office provided appellant with proper notice.

The Board finds that the offered position was medically suitable as it conforms with the restrictions provided by Dr. Bragg. Furthermore, the Board has held that if an employee moves

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

[9] *See Marilyn D. Polk*, 44 ECAB 673 (1993).

[10] *See Connie Johns*, 44 ECAB 560 (1993).

[11] *See Maggie L. Moore*, *supra* note 8.

or relocates, while on employing establishment rolls, from an area in which the employing establishment is located, such a move is an unacceptable reason for refusing to accept an offer of suitable employment.[12] In this case, the record indicates that appellant's permanent duty station was Patuxent River, Maryland, which is where the offered position was located. He was offered a suitable position by the employing establishment and such offer was refused. At the time the position was offered, appellant was on employing establishment rolls. The Office, thus, did not abuse its discretion in terminating appellant's compensation on March 27, 2000.

Subsequent to the March 27, 2000 decision, appellant submitted additional medical evidence including a February 23, 1999 progress note, in which Dr. Bragg described appellant's encounter with the police on December 11, 1998. She reported that appellant continued to complain of severe pain. Slight palpation of the lumbar spine reproduced inappropriate pain responses. Dr. Bragg recommended that appellant restart aquatic therapy.

By report dated September 30, 1999, Dr. Ordonez advised that appellant should not "return to any activities such as prolonged sitting, bending, lifting or twisting until his evaluation has been completed and any future recommended therapies have been completed."

In reports dated March 6 and April 27, 2000, Dr. Alan Kunkel, an osteopathic physician, noted appellant's history of disc herniations and described his complaints of low back and left elbow pain, stating that, although appellant was not able to sit down, "he does not appear to be in any pain." He diagnosed chronic left lateral epicondylitis of questionable etiology, chronic pain syndrome and chronic low back pain with disability. An April 29, 2000 MRI scan of the lumbar spine revealed moderate spondylotic changes with significant disc bulge and broad based moderately prominent central disc herniation at the L4-5 level and moderate spondylosis with a small central focal disc bulge at L3-4. Mild spondylotic changes were present at many intervertebral levels.

In a May 10, 2000 treatment note, Dr. Ordonez advised that appellant had no change in his symptoms. He noted findings on examination of the back and reported reviewing the MRI scan.

By report dated May 26, 2000, Dr. Thomas J. Moran, an osteopathic physician, noted appellant's complaint of low back pain and advised that he had reviewed the April 29, 2000 MRI scan, which showed no significant interval change from that taken on June 2, 1998. Dr. Moran stated that appellant did not return to work because he did not wish to relocate. He noted findings on examination and diagnosed degenerative disc disease of the lumbar spine with left greater than right lower extremity radicular pain and probable psychological factors affecting his physical condition. Dr. Moran referred appellant to Dr. Koller, Ph.D., a licensed clinical psychologist.

By report dated June 28, 2000, Dr. Kunkel diagnosed, *inter alia*, stable chronic low back pain and chronic pain syndrome, probable chronic depression and cognitive memory deficit. In an October 6, 2000 report, Dr. Moran reiterated his diagnoses.

[12] *Edward P. Carroll*, 44 ECAB 331 (1992).

Dr. Koller provided a number of treatment notes dating from June 28 to November 29, 2000, in which he advised that appellant had moderately high verbal and nonverbal pain behavior and noted consulting with Dr. Moran regarding appropriate medications.

At the hearing appellant testified regarding his disagreement with Dr. Bragg's conclusion that he could return to work and that he was in pain and afraid for his safety during the functional capacity evaluation. He described the physical requirements of his previous position and stated that the accommodated position could not be performed as described. Dr. Koller testified that he disagreed with Dr. Bragg's opinion that appellant could return to work. He stated that appellant has problems with medications and got depressed from steroids and, therefore, could not undergo epidural injections. Dr. Koller further testified that he questioned the validity of the functional capacity evaluation and advised that appellant could not perform the offered position but could work in a sheltered workshop environment where he could sit or stand, concluding that a desk job would make his condition worse.

Dr. Koller advised that the job offer was not suitable and seemed to indicate that this was partially due to appellant's level of stress; however, the thrust of his testimony related to appellant's physical inability to perform the job. The Board notes that, as a clinical psychologist, Dr. Koller's testimony is limited in relevance to appellant's psychological condition and not the physical component of his accepted low back strain or disc herniation.[13] Drs. Kunkel and Moran did not provide an opinion regarding appellant's ability to work. Moreover, Drs. Moran and Koller did not begin treating appellant until after the Office rendered the March 27, 2000 decision finding that appellant refused an offer of suitable work. While Dr. Ordonez advised that appellant should not "return to any activities such as prolonged sitting, bending, lifting or twisting until his evaluation has been completed and any future recommended therapies have been completed," he did not indicate that he had reviewed the physical requirements of the offered position. The Board, therefore, finds that the medical evidence submitted by appellant following the termination of benefits does not sufficiently explain why he cannot perform the duties offered by the employing establishment.

[13] The Act defines the term "physician" to include physicians who have an M.D. or O.D. degree, surgeons, podiatrists, dentists, clinical psychologists, optometrists and chiropractors within the scope of their practice as defined by state law. *See Sheila A. Johnson*, 46 ECAB 323 (1994). Under the implementing federal regulations, it is provided that a clinical psychologist may not sever as a physician for conditions that include physical component unless allowed under applicable state law to treat physical conditions. *See* 20 C.F.R. § 10.312.

The March 13, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
January 2, 2002

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member