U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLES A. JACKSON and U.S. POSTAL SERVICE,
POST OFFICE, Carol Stream, IL

Docket No. 01-2010; Submitted on the Record;
Issued July 18, 2002

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits pursuant to 5 U.S.C. § 8106(c)(2), on the grounds that he refused suitable work; and (2) whether the Office properly denied his requests for reconsideration.

On April 14, 1997 appellant, then a 40-year-old mailhandler, filed an occupational disease claim asserting that the degenerative arthritis and osteonecrosis in his left ankle were a result of his federal employment. The Office accepted his claim for permanent aggravation of preexisting degenerative arthritis of the left ankle and authorized an ankle fusion. Appellant received compensation for temporary total disability on the periodic rolls.

A conflict arose between appellant's podiatrist, Dr. M. Lisowsky and an Office referral physician, Dr. Richard Sidell, an orthopedic surgeon, on the issue of work limitations. To resolve the conflict, the Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. Paul D. Belich, a Board-certified orthopedic surgeon.

On March 31, 2000 Dr. Belich related appellant's history, his findings on physical examination and his review of records. He diagnosed post-traumatic arthritis of the left ankle, status post left ankle fusion. On the issue of work limitations, Dr. Belich reported:

> "I am in agreement with Dr. Sidell, that [appellant] is capable of performing duties at the employing establishment with restrictions. I believe that [he] is capable of unlimited sitting, could walk one to two hours a day and stand one to two hours a day. I also believe that, if he is sitting or standing, he could work handling packages weighing 5 to 10 pounds without any problems."

Dr. Belich completed a work capacity evaluation.

On April 7, 2000 the employing establishment offered appellant a modified mailhandler position based on the limitations reported by Dr. Belich. On May 17, 2000 the Office notified appellant that this position was suitable and currently available. The Office advised appellant that he had 30 days to accept the position or to provide an explanation for refusing it. The Office notified appellant of the provisions of 5 U.S.C. § 8106(c)(2).

Appellant rejected the offer[1] and provided the following rationale:

> "The major points in dispute is the number of hours [a] day, the starting time, the restrictions on walking and standing and the need for something indicating the understanding that given weather extremes my attendance could be adversely affected. It is my firm conviction that Dr. Belich was unable to come to an accurate determination of my physical abilities because he was not able to view all of the medical test[s], that were performed, most notably the latest x-ray which was taken just prior to my visit, which showed that the condition was continuing to deteriorate as well as newly developed degenerative arthritis formed in the subtalar region of the ankle. It is important because if the condition is deteriorating and I am not doing anything on the foot, it seems unrealistic that at this time it would be beneficial to me, the DOL [Department of Labor], or the employing establishment to increase significantly my activities. Dr. Stuck has informed me that there is a strong likelihood and that it is n[o]t uncommon for individuals that develop the degenerative joint disease to require additional surgery to fuse the subtalar region. Increase[d] activity at this time no doubt would put me in the undesirable position of having a 6th surgery on this ankle. This is my reason for rejecting the previous assignment. I am enclosing a copy of a letter from Dr. Stuck to help explain my rationale."

Appellant provided a copy of a June 1, 2000 report, presumably from Dr. Rodney M. Stuck, a podiatrist, but the copy is off-center such that the name of the author and much of the text is cut off and is illegible.

On June 20, 2000 the Office notified appellant that it found his reasons for refusing the position to be unacceptable. The Office explained that suitability is a medical issue that needs to be supported by medical evidence and the weight of the medical evidence rested with the impartial medical specialist, Dr. Belich. The Office further notified appellant that he had 15 additional days to accept the position and that, if he did not accept, the Office would issue a final decision in the matter.

The Office thereafter received a readable copy of the June 1, 2000 report from Dr. Stuck:

> "[Appellant] has had a previous left ankle fusion. He has had chronic problems with pain with extended ambulation. [Appellant] also has some subtalar joint arthritis on that same side. This subtalar joint arthritis is aggravated because of his ankle fusion.

[1] He stated that his facsimile "represents my rationale for rejecting the latest job offer from the employing establishment."

"I have the following recommendations for [appellant]. His work should be early in the day to limit the amount of fatigue that he sustains. [Appellant] should not work more than four to six hours a day at this point because walking and standing beyond that time will aggravate his symptoms significantly. As with many types of bone problems, he may have significant pain in the foot, ankle and lower leg when there are weather changes.

"I do not expect any of these findings or recommendations to change. Should you have any questions regarding them, however, please feel free to contact me."

On July 5, 2000 the employing establishment confirmed that the job remained open and available to appellant but that he did not show up for work.

In a decision dated July 14, 2000, the Office terminated appellant's compensation benefits pursuant to 5 U.S.C. § 8106(c)(2). The Office found that the weight of the medical evidence rested with Dr. Belich, the impartial medical specialist. The Office found that Dr. Stuck's report was insufficient to establish that the offered position was unsuitable.

In a June 26, 2000 report, Dr. Stuck repeated appellant's limitations and indicated that appellant was undergoing evaluation for a stress fracture and tarsal tunnel syndrome.

On August 4, 2000 appellant requested reconsideration.

On August 7, 2000 Dr. Stuck reported as follows:

"I have reviewed a letter from Dr. Paul Belich (Orthopedics) regarding [appellant]. I would like to comment on his letter.

"[Appellant] does have an antalgic gait. As you know, he is status post ankle fusion for traumatic arthritis. Although his preoperative pain was an aggravation of a preexisting condition, his pain was very severe, so severe that he decided to have his ankle fused. The aggravation of the pain was from his work at the [employing establishment]. To state that the pain was a temporary aggravation is very misleading as it resulted in this fusion, which has also been troublesome for him. [Appellant's] ankle fusion was a necessity.

"[Appellant] also has subtalar joint arthritis. This arthritis is partially due to compensation for the ankle fusion. This arthritis will likely worsen but at a rate that cannot be determined. This subtalar arthritis may lead to subtalar joint fusion in the future.

"[Appellant] can now work a full eight-hour day in a sitting/sedentary position. He may need to change positions frequently. Due to fatigue as the day progresses, an AM shift would be best. [Appellant] may walk and/or stand up to one hour per day total. Five-pound packages are manageable for him. [Appellant] conditions are now stable but cause daily pain. [He] will need continued intermittent care due to the subtalar joint pain.

"Thank you for your consideration of this additional information. It is based on multiple exam[ination]s of [appellant] over the last several years."

The Office submitted a copy of this report to Dr. Belich for comment. On October 5, 2000 he replied that subtalar joint arthritis could occur in patients who have ankle fusions because the subtalar joint is asked to compensate for the loss of ankle motion. He stated that appellant could work an eight-hour day and was capable of working in the morning shift, the afternoon shift or the overnight shift: "I do not see any medical reason why he could not do so." Dr. Belich reported that he saw no evidence on physical examination to suggest that appellant needed a subtalar joint fusion. He remained of the opinion that appellant needed no further treatment "at this time."

In a decision dated October 10, 2000, the Office reviewed the merits of appellant's claim and denied modification of its prior decision. The Office found that Dr. Stuck provided no medical rationale for limiting appellant to an early shift. The Office noted that appellant could become fatigued with physical exertion regardless of whether his shift was in the morning, afternoon or night.

On October 31, 2000 appellant requested reconsideration, noting that he had returned to his job and was still experiencing significant pain and swelling in the ankle. Appellant requested authorization for medical examination and treatment and information concerning his request for a schedule award.

In a decision dated December 13, 2000, the Office denied appellant's request for reconsideration on the grounds that his request neither raised substantive legal questions nor included new and relevant evidence.

On December 31, 2000 appellant requested reconsideration. He argued, among other things, that the Office had misinterpreted 5 U.S.C. § 8106(c)(2) because its use of the present tense meant that the Office could no longer base its decision on this section once he returned to work. Appellant argued that he did not refuse the offer and did not know the proper procedure for returning to work. Appellant argued that the Office's administrative decision to continue medical benefits was an admission that "there is more than a reasonable doubt that the findings of Dr. Belich are in fact inaccurate." He argued the sufficiency of the medical evidence at length. Appellant submitted additional evidence but no probative medical opinion explaining that he was incapable of performing the duties specified in the April 7, 2000 job offer.

In a decision dated March 19, 2001, the Office denied appellant's request for reconsideration. The Office found that appellant provided no evidence to substantiate his allegation that the Office erred. The Office further found that the medical evidence submitted was repetitious or irrelevant.

On April 9, 2001 appellant filed a claim for a schedule award and a claim for a recurrence of disability beginning October 16, 2000. On May 21, 2001 the Office advised appellant that no action could be taken on these claims because his wage-loss benefits were terminated under 5 U.S.C. § 8106(c)(2).

On April 24, 2001 appellant again requested reconsideration. He argued that the offer was not suitable because his claim for recurrence showed that the position taken by Dr. Belich was incorrect. On May 1, 2001 he repeated his request for reconsideration. Appellant alleged that "Dr. Stuck and staff opined that this situation was continuing to degenerate, as there was new degenerative arthritis developing in the subtalar joint and the job as offered would accelerate the degeneration of this condition." He then discussed how he eventually returned to work after the termination of his benefits.

In a decision dated May 22, 2001, the Office denied appellant's request for reconsideration. The Office found that appellant's request neither raised substantive legal questions nor included new and relevant evidence.

The Board finds that the Office properly terminated appellant's compensation benefits pursuant to 5 U.S.C. § 8106(c)(2) on the grounds that he refused suitable work.

Section 8106(c)(2) of the Federal Employees' Compensation Act states that a partially disabled employee who refuses to seek suitable work, or refuses or neglects to work after suitable work is offered to, procured by, or secured for him is not entitled to compensation.[2] The Office has authority under this section to terminate compensation for any partially disabled employee who refuses suitable work when it is offered. Before compensation can be terminated, however, the Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.[3] In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused by appellant was suitable.[4]

The Office met its burden in this case. To resolve a conflict between Dr. Lisowsky and Dr. Sidell, on the nature and extent of appellant's work limitations, the Office properly referred him to an impartial medical specialist pursuant to 5 U.S.C. § 8123(a). This section provides in part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[5]

The Office provided Dr. Belich, the impartial medical specialist, with appellant's medical record and a statement of accepted facts so he could base his opinion on a proper history. Dr. Belich examined appellant and described his findings. He also noted his review of appellant's records. Diagnosing post-traumatic arthritis of the left ankle, status post left ankle fusion, he set forth appellant's work limitations and completed a work capacity evaluation.

[2] 5 U.S.C. § 8106(c)(2).

[3] *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

[4] *Glen L. Sinclair*, 36 ECAB 664 (1985).

[5] 5 U.S.C. § 8123(a).

When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[6]

The Board finds that Dr. Belich's opinion with respect to appellant's work limitations is based on a proper factual background and is sufficiently reasoned that it must be accorded special weight in resolving the conflict on the issue of work limitations.

The employing establishment offered appellant a job based directly on the work limitations provided by the impartial medical specialist. The Office found the position suitable and properly advised appellant of the penalty provisions of 5 U.S.C. § 8106(c)(2). He rejected the offer but submitted no medical evidence specifically addressing the suitability of the April 7, 2000 offer. The Office properly notified appellant that the issue of suitability was a medical issue and that his reasons for rejecting the offer were unacceptable. The Office advised that appellant had 15 additional days from June 20, 2000 to accept the offer and if he did not, a final decision under 5 U.S.C. § 8106(c)(2) would be made. He neither accepted the offer nor reported for duty by the July 5, 2000 deadline.

The Office received a readable copy of Dr. Stuck's June 1, 2000 report, but this report gave no indication that appellant had shown his physician the April 7, 2000 offer of employment. Instead, Dr. Stuck reported that appellant should not work more than four to six hours a day "because walking and standing beyond that time will aggravate his symptoms significantly." Dr. Stuck, thus, appeared unaware that the April 7, 2000 offer required no more than one or two hours of walking or standing a day. His comment that appellant might have significant pain in the foot, ankle and lower leg when there are weather changes is speculative and, regardless, provides no justification for not accepting the offer and reporting for duty by July 5, 2000.[7]

Dr. Stuck reviewed Dr. Belich's report and commented on August 7, 2000, but he made no finding that the April 7, 2000 offer was unsuitable. In fact, Dr. Stuck reported work limitations that were consistent with the limitations of the offered position, such as working eight hours a day in a sitting/sedentary position, walking and/or standing up to one hour a day and handling five-pound packages. Dr. Stuck did report that a morning shift "would be best" due to fatigue as the day progresses, but he did not report that other shifts were medically unacceptable and he provided no rationale for the implication that appellant would avoid such fatigue with other eight-hour shifts. The Board finds that Dr. Stuck's August 7, 2000 report offers no justification for appellant's refusal of the April 7, 2000 offer.

The Office based its decision on the weight of the medical evidence, complied with all applicable procedural requirements and properly applied the penalty provision of 5 U.S.C. § 8106(c)(2). The Board will affirm the Office's October 10, 2000 merit decision denying modification of its termination of benefits.

[6] *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

[7] Had he accepted the April 7, 2000 offer and reported to work by July 5, 2000, appellant could have thereafter claimed compensation for wage loss when a weather change forced an absence.

The Board also finds that the Office acted within its discretion in denying appellant's subsequent requests for reconsideration.

The Act provides that the Office "may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee shall exercise this right through a request to the district office. The request, along with the supporting statements and evidence, is called the 'application for reconsideration.'"[8]

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[9]

A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[10]

Following the Office's October 10, 2000 decision to terminate benefits, appellant made several requests for reconsideration, but none of these requests showed that the Office erroneously applied or interpreted a specific point of law, advanced a relevant legal argument not previously considered by the Office or contained relevant and pertinent new evidence not previously considered by the Office.

Appellant offered his personal interpretation that the penalty for refusing suitable work under 5 U.S.C. § 8106(c)(2) is one of suspension, not termination and that his entitlement to compensation benefits should have been reinstated upon his eventual return to work. This interpretation is wholly unsupported by the Board case law or federal regulation and fails to show that the Office erroneously applied or interpreted a specific point of law.

Appellant argued that the Office's administrative decision to continue his medical benefits constituted an admission of doubt concerning the accuracy of the opinion of the impartial medical specialist.[11] He also argued that the termination was improper because he did

[8] 20 C.F.R. § 10.605 (1999).

[9] *Id*. § 10.606.

[10] *Id*. § 10.608.

[11] Office regulations provide that an employee remains entitled to medical benefits following the termination of compensation under 5 U.S.C. § 8106(c)(2). 20 C.F.R. § 10.517(b) (1999).

not refuse the offer[12] and did not know how to show up for work.[13] These arguments have no color of validity[14] and no credible basis in fact.[15]

The Office correctly advised appellant that the issue of suitability is a medical issue that must be addressed by medical evidence. Appellant offered his own evaluation of the weight or sufficiency of the medical evidence, but this is an issue the Office previously considered and on which the Office made findings. He submitted medical evidence, but none of this medical evidence attempted to explain that he was justified in rejecting the April 7, 2000 offer because he was physically incapable of performing the duties specified.[16] Though this is the crux of the case, appellant submitted no relevant medical opinion evidence assessing the suitability of the April 7, 2000 offer of employment. His assertion that Dr. Stuck had opined that the position offered on April 7, 2000 "would accelerate the degeneration" of his subtalar joint has no basis whatsoever in the record.

Because appellant's October 31 and December 31, 2000 and April 24, 2001 requests for reconsideration failed to meet one of the three standards for obtaining a merit review of his case, the Board finds that the Office acted within its discretion in denying those requests. The Board will affirm the Office's December 13, 2000, March 19 and May 22, 2001 decisions.

[12] *See supra* note 1. In addition to submitting a statement of his rationale for rejecting the offer, appellant's actions in not expressly accepting the offer and in not showing up for work by the July 5, 2000 deadline constituted a refusal or neglect of suitable work.

[13] Any question appellant might have had about how to return to work after the Office terminated his compensation benefits is immaterial to the termination itself, which was based on his refusal to accept the April 7, 2000 offer of suitable employment, employment that remained open and available to him through July 5, 2000.

[14] Although the reopening of a case for merit review may be predicated solely on a legal premise, such reopening is not required where the contention does not have a reasonable color of validity. *Constance G. Mills*, 40 ECAB 317 (1988) (legal premise not previously considered must have reasonable color of validity). *See generally Daniel O'Toole*, 1 ECAB 107 (1948) (that which is offered as an application should contain at least the assertion of an adequate legal premise, or the proffer of proof, or the attachment of a report or other form of written evidence, material to the kind of decision which the applicant expects to receive as the result of his application; if the proposition advanced should be one of law, it should have some reasonable color of validity to establish an application as *prima facie* sufficient).

[15] Appellant also took exception to the distance he would have to walk from the parking lot (175 yards) and to the cafeteria and locker room (50 yards), but he offered no evidence that such distances would require him to walk more than one or two hours a day, in violation of the limitations of the offered position.

[16] Appellant argued that a previous employment injury, accepted for cervical strain, made it impossible for him to perform the duties of the offered position, but he submitted no relevant medical evidence to support this contention.

The decisions of the Office of Workers' Compensation Programs dated May 22 and March 19, 2001 and December 13 and October 10, 2000 are affirmed.

Dated, Washington, DC
July 18, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member