U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VICTOR I. HOLLOWAY and U.S. POSTAL SERVICE,
POST OFFICE, Compton, CA

Docket No. 02-69; Submitted on the Record;
Issued June 19, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

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

On May 17, 1978 appellant, then a 50-year-old letter carrier, filed a notice of traumatic injury alleging that on January 9, 1978 he was walking in an unlit hallway when a pallet caught his right foot and he tripped. The Office accepted appellant's claim for a fractured right fifth toe and a toe deformity. Appellant also claimed that his limp caused by the toe injury caused him lower back strain. The Office accepted that appellant sustained consequential low back strain with osteoarthritic changes.[1] Appellant continued to receive compensation benefits and has not worked since June 8, 1979. He also received a schedule award for 63 percent permanent impairment of the right fifth toe.

By decision dated October 31, 1997, the Office issued a notice of proposed termination of compensation. By decision dated December 11, 1997, the Office terminated appellant's compensation benefits effective January 4, 1998.

Appellant requested reconsideration and received merit reviews on February 5, 1998 and January 14, 1999. In a merit decision dated March 30, 2000, the Office reinstated appellant's compensation benefits finding previous Office decisions to be erroneous. Appellant was referred to a second opinion physician to determine his current physical limitations and work restrictions.

[1] The Board is unable to find the formal decision in the record and refers to the statement of accepted facts.

In a report dated April 17, 2000, Dr. Kenneth L. Baldwin, a Board-certified orthopedic surgeon, stated:

> "The subjective factors of disability are in excess of what would be expected given the minimal objective findings which would be limited to the presence of a surgical scar to the right fifth toe without any evidence of deformity.
>
> "The patient's low back condition is considered to be age related and not related to an industrial injury, and consistent with mild lumbar discomfort associated with prolonged sitting. The patient's present condition is permanent and stationary with minimal disability involving the right toe only. This disability precludes prolonged walking activities only. There is no interval disability related to the lumbar spine either from industrial or nonindustrial causes."

In a work capacity evaluation, Dr. Baldwin indicated that appellant could work eight hours per day and could walk up to six hours per day.

The Office offered appellant a modified distribution clerk position in May 2000 with restrictions of lifting 10 to 20 pounds 10 minutes within the hour, sitting for ½ hour, walking for 20 minutes, standing for 15 minutes, limited twisting, no pushing and pulling. Appellant did not respond to the employing establishment's offer within the allotted time frame and the Office terminated appellant's compensation benefits by decision dated July 14, 2000.

Appellant requested reconsideration and the Office denied his request on April 25, 2001. He requested reconsideration on May 5, 2001 and the Office denied his request on May 22, 2001. Appellant requested reconsideration on June 27, 2001 and received a merit review. By decision dated August 17, 2001, the Office denied appellant's request for modification of the July 14, 2000 decision terminating his benefits.

The Board finds that the Office properly terminated appellant's compensation benefits on the grounds that he refused an offer of suitable work.

It is well settled that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[2] As the Office in this case terminated appellant's compensation under 5 U.S.C. § 8106(c), the Office must establish that appellant refused an offer of suitable work.

Section 10.517(a)[3] of the Office's regulations 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 showing before a determination is made with respect to termination of entitlement to compensation.[4] To justify termination of compensation, the Office

[2] *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[3] 20 C.F.R. § 10.517(a).

[4] *Arthur C. Reck*, 47 ECAB 339 (1996).

must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[5]

In this case, since appellant was offered a limited-duty position in May 2000, the Board will only consider contemporaneous medical evidence in relation to this date, as old medical evidence pertaining to an appellant's work restrictions is of little probative value.[6]

Appellant's physician, Dr. Margaret E. Elfering, a Board-certified orthopedic surgeon, found in a February 17, 1999 report that appellant had intermittent pain, numbness and burning in his fifth right toe and that his pain increased with prolonged walking and standing. She diagnosed appellant with arthritis of the fifth right toe and also stated in a February 24, 1999 report that appellant's original injury to the fifth right toe had developed into traumatic arthrosis by natural progression. In a report dated July 27, 2000, Dr. Elfering diagnosed appellant with osteoarthritis and degenerative disc disease of the lumbar spine. She did not state that appellant had any type of work restrictions or limitations in her reports.

Dr. Thor C. Gjerdrum, a Board-certified orthopedic surgeon, found in an April 14, 1999 report that appellant suffered from work-related pain and tenderness in the metatarsal region (metatarsalgia). His only recommendation was for appellant to wear shoe inserts to help him walk more comfortably. He also did not indicate that appellant had any physical limitations or work restrictions of any kind.

In a work capacity evaluation dated April 18, 2000, Dr. Baldwin stated that appellant could work eight hours per day with up to six hours of walking. He stated that the only objective findings in regards to appellant's right fifth toe was a surgical scar over the toe with no evidence of deformity. Dr. Baldwin noted that appellant's present condition had little to do with his fifth right toe and only precluded him from prolonged walking activities.

Appellant also submitted reports indicating that he underwent surgery of the third metatarsal space of the right foot. Dr. Jens F.J. Birkholm opined in a November 8, 2000 report that the neuroma in the third interspace of appellant's right foot was directly related to the trauma sustained from the fractured toe. In a May 30, 2001 work restriction evaluation form (pertaining to appellant's neuroma of the third intermetatarsal space) he found that appellant had reached maximum medical improvement and stated that he could work eight hours per day. Dr. Birkolm stated that appellant's restrictions included: sitting continuously for 8 hours per day, walking continuously for up to 3 hours per day; standing intermittently for up to 3 hours per day; and lifting up to 10 pounds.

The employing establishment offered appellant a limited-duty distribution clerk position. The physical requirements of the position were: repetitive hand/wrist motion while sitting at a table or desk; intermittent standing; lifting/carrying; sitting and walking. The position involved sorting through and repairing letters, placing mail in a tray or tub, and walking the mail to a

[5] *Id*.

[6] *See Charles Wofford*, Docket No. 96-1823 (issued June 22, 1998) a suitable work case where a narrative report and work capacity evaluation over one-year-old was not considered current.

designated area. The position description indicated that appellant was not required to stand more than 15 minutes intermittently, walk for more than 20 minutes or lift over 10 pounds over 10 minutes within an hour. He also did not have to push or pull to perform the assignments and could sit or stand for personal comfort while performing the duties.

The Board finds that the work restrictions set forth by Drs. Baldwin and Birkholm conform with the specifications of the modified clerk position offered to appellant.

Dr. Baldwin found that appellant could work eight hours per day and only required that he limit his walking to six hours per day. Dr. Birkholm's restrictions pertained to the neuroma in the third interspace of appellant's right foot, a condition not accepted by the Office. However, the Federal (FECA) Procedure Manual provides that "if medical reports in the file document a condition which has arisen since the compensable injury, and this condition disables the claimant from the offered job, the job will be considered unsuitable (even if the subsequently-acquired condition is not work related)."[7] Even though the restrictions set forth by Dr. Birkholm do not pertain to the accepted employment injury, the Board finds they nevertheless conform with the job specifications offered to appellant.

Dr. Birkholm also stated that appellant could work eight hours per day. He indicated that appellant could sit continuously for 8 hours per day, walk continuously for 3 hours per day, stand intermittently for 3 hours per day and could lift up to 10 pounds. The physical limitations of the offered position included sitting for ½ hour, (appellant could sit for 8 hours per day) walking for 20 minutes, (appellant could walk continuously for up to 3 hours per day) standing for 15 minutes, (appellant could stand for up to 3 hours per day) and lifting 10 to 20 pounds (appellant can lift up to 10 pounds). The position description also indicates that there is no pushing or pulling and that appellant can sit or stand for personal comfort while performing the duties. Dr. Birkholm's restrictions are much broader in scope and allow greater physical activity than those required by the offered position. The Board notes that the other contemporaneous medical reports submitted by appellant do not address physical limitations or job restrictions.[8] Appellant has not submitted any medical evidence showing that he is unable to perform this limited-duty job.

Accordingly, the Board finds that the offered position was medically suitable. The Office properly advised appellant that the position was suitable and the reasons offered for refusing were insufficient. Therefore, the Board finds that the Office properly terminated appellant's compensation benefits based on a refusal of suitable work under 5 U.S.C. § 8106(c).

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

[8] The Board also notes that the contemporaneous reports submitted by appellant address his right toe and not the accepted back injury. The restrictions set forth by the physicians also pertain to the toe condition and not the back injury.

The decisions of the Office of Workers' Compensation Programs dated August 17, May 22 and April 25, 2001 and July 14, 2000 are hereby affirmed.

Dated, Washington, DC
June 19, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member