

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD J. MADDALENA and U.S. POSTAL SERVICE,
BISMARCK PROCESSING & DISTRIBUTION, Bismarck, ND

*Docket No. 01-1343; Submitted on the Record;
Issued May 28, 2002*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

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

On February 26, 1998 appellant, then a 58-year-old letter clerk, stated that he had pain in the tendons of his wrists and shoulders. He filed a claim for tendinitis of the wrists and shoulders. Appellant began working six hours a day on limited duty on February 28, 1998 and claimed compensation for the hours of leave without pay he had after that date. The Office accepted appellant's claim for bilateral shoulder tendinitis and tendinitis of the right wrist. On June 15, 1998 appellant underwent surgery on the right shoulder, consisting of glenohumeral joint debridement, arthroscopic arthroplasty, coracoacromial ligament release and rotator cuff repair. He stopped working on June 12, 1998 and returned to work, two hours a day, on July 25, 1998. On October 1, 1998 appellant underwent surgery for repair of a torn rotator cuff in the left shoulder. Dr. Troy D. Pierce, an orthopedic surgeon, gave postoperative diagnoses of chronic impingement with subacromial spurring, rotator cuff tear involving the supraspinatus tendon, acromioclavicular joint arthritis and a Type I superior labral anterior/posterior lesion. Dr. Pierce performed an arthroscopy with glenohumeral joint debridement, acromioplasty and shoulder decompression with coracoacromial ligament release, distal clavicle excision and rotator cuff repair. Appellant stopped working on October 1, 1998 and returned to limited-duty work, two hours a day, on November 23, 1998. The Office paid compensation for the time appellant did not work.

In a January 28, 1999 letter, the employing establishment offered appellant a limited duty, full-time position, in quality control, which involved six hours of ensuring all mail was dispatched from all operations and two hours scanning certified, registered and express mail. Appellant declined the offer on the grounds that it exceeded his restrictions. He stopped working on February 9, 1999, claiming that the employing establishment had refused to schedule him for work after that date. Appellant returned to work, two hours a day, on July 15, 1999.

On March 25, 1999 appellant filed a claim for bilateral plantar fasciitis, relating his condition to the job requirements of being constantly on his feet at work. In an August 5, 1999 decision, the Office denied appellant's claim on the grounds that he had not established that his condition was causally related to his employment. In an August 26, 1999 letter, appellant requested reconsideration. In a September 13, 1999 merit decision, the Office denied appellant's request for modification of the prior decision.

The Office referred appellant to Dr. Kenneth R. Sebby, a Board-certified orthopedic surgeon, for an examination and second opinion in his case. On the basis of his report, the employing establishment, in a September 7, 1999 letter, again offered appellant a modified position as a quality control clerk. The employing establishment stated that appellant had no restrictions on sitting, walking, lifting, bending, squatting, standing or climbing, but only had a limitation on reaching above his shoulder with his left arm. The employing establishment again stated that appellant would spend six hours a day making sure all mail was dispatched from all operations and would spend two hours a day scanning certified, registered and express mail. In a September 9, 1999 letter, the Office informed appellant that it found the job offered to him to be suitable. The Office gave appellant 30 days to accept the position or give his reasons for refusing it. The Office indicated that any reasons given for refusing the position would be considered before determining whether appellant's refusal was justified. The Office warned appellant that if he refused the position and his refusal was not found to be justified, his compensation would be terminated. In an October 5, 1999 letter, appellant rejected the offered position.

In a November 26, 1999 letter, the Office informed appellant that it had reviewed his reasons for refusing the position and found them to be unacceptable. Appellant was given 15 days to accept the offered position or the Office would proceed with a final decision on the matter. In a December 21, 1999 decision, the Office terminated appellant's compensation effective that date for refusal to accept suitable work.

Appellant requested a hearing before an Office hearing representative which was conducted on October 20, 2000. In a January 4, 2001 decision, the Office hearing representative affirmed the Office's December 21, 1999 decision.

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

Section 8106(c) of the Federal Employees' Compensation Act states: "a partially disabled employee who: (1) refuses to seek suitable work; or (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation."¹ An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.²

¹ 5 U.S.C. § 8106(c)(2).

² 20 C.F.R. § 10.124.

In an August 3, 1999 report, Dr. Sebby diagnosed arthritis in multiple joints of the right hand accompanied by pain, metacarpal carpal joint arthritis of the left hand which was relatively asymptomatic, status post left shoulder repairs with capsulitis and residual, and status post right shoulder repairs with minimal residuals. He suggested that appellant probably had an underlying, preexisting condition as his job duties at the employing establishment would not cause his condition in such a short-time period. Dr. Sebby noted that appellant had diminished motion and crepitation in the left shoulder and diminished motion in the right thumb at the metacarpal phalangeal joint with crepitation at several joints in the thumb. He commented that approximately 95 percent of appellant's condition preexisted his employment. Dr. Sebby stated that appellant could work eight hours a day with only a restriction on reaching over his head with his left arm. He indicated that appellant's symptoms were out of proportion to his condition.

In a September 17, 1999 duty status report, Dr. Pierce indicated that appellant could sit, stand and walk four to six hours a day intermittently, could bend and stoop four hours a day and could push and pull two hours a day. He reported that appellant could not lift above his shoulder and had a lifting restriction of five pounds. In a September 16, 1999 duty status report, Dr. Darin Leetun, an orthopedic surgeon, indicated that appellant had permanent restrictions of no use of the right wrist for more than two hours a day, no lifting above the shoulder, and no lifting above the waist or repetitive motion of the left arm. He stated that appellant should not work two days consecutively. In a September 27, 1999 duty status report, Dr. Francisco Tello, a podiatrist, indicated that appellant's right foot was in a cast. He noted that appellant was on crutches and therefore was unable to accept the job offer because he could not drive. In another September 27, 1999 duty status report, Dr. Michael P. Martire, a Board-certified physiatrist, indicated that appellant could sit four hours a day and could stand and walk two hours a day. He concurred that appellant could lift up to five pounds.

The employing establishment provided Drs. Pierce and Martire with a videotape taken by postal inspectors which showed appellant performing work on a camper and, on another occasion, hooking a trailer on to his car. The postal inspectors stated that appellant was observed using both arms extensively, without using a wrist brace on the right wrist.

In an October 10, 1999 report, Dr. Thomas Jetzer, Board-certified in occupational medicine, stated that there was no basis to support any dysfunction of the lumbar spine. He indicated that neither wrist showed signs of dysfunction, based on the activities he engaged in, including caulking and drilling above his head. Dr. Jetzer commented that appellant's shoulder seemed to have done very well as he was working over his head for almost an hour. He concluded that there were no ongoing reasons for restrictions on appellant.

In a November 9, 1999 report, Dr. Martire stated that appellant appeared to be doing more bending and lifting with his back than he would have expected based on appellant's subjective symptoms. He commented that it was not apparent that appellant was having any difficulty with his low back. Dr. Martire noted that, while it was difficult to tell how long appellant was standing because of time lapses in the videotape, he appeared to be standing most of the time while he was working on his camper. He stated that it was obvious that appellant was able to lift more than five pounds since he was able to lift a cement block without difficulty in his arms or back. Dr. Martire stated that, from the standpoint of appellant's back, he could work eight hours a day.

In a November 11, 1999 report, Dr. Pierce stated that the videotape showed appellant was physically able to do more than he alleged and his pain was not as severe as he stated. He lifted all restrictions on appellant, including overhead restrictions and restrictions on his shoulders and wrists. Dr. Pierce only restricted appellant to no lifting over 50 pounds.

The reports of Drs. Pierce, Sebby and Martire established that appellant had no restrictions involving his arms or his lower back that would restrict him from performing the duties of a quality control clerk. However Dr. Tello noted that appellant had bilateral plantar fasciitis. While the Office did not accept that appellant's plantar fasciitis was causally related to his employment, Dr. Tello's reports established that appellant developed bilateral plantar fasciitis after he began working at the employing establishment. In an August 19, 1999 report, Dr. Tello stated that appellant had plantar fasciitis and tarsalgia due to an overuse syndrome. He discussed the treatment given to appellant for the condition and noted that a cortisone injection would be considered if appellant did not receive sufficient pain relief from other treatments. In a September 5, 1999 report, Dr. Tello indicated that other treatments, including a cortisone shot, gave appellant only temporary relief. He offered appellant either physical therapy or a full contact cast. Dr. Tello reported that appellant elected to try physical therapy. In a September 27, 1999 report, he stated that appellant would be put in a full contact fiberglass cast on the right foot. Dr. Tello indicated that appellant would be in the cast for a month, with the first cast being removed after two weeks and a second one applied if he had improvement. He commented that if appellant did not show improvement, he would consider an endoscopic plantar fasciotomy.

The Office's procedures state, "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."³ Dr. Tello indicated that appellant was able to work due to the treatment for his plantar fasciitis which included the cast on his foot. The Office hearing representative found that the placing of appellant's foot in a cast was not a pressing need and could have been delayed until he had returned to work. He noted that appellant's foot was placed in a cast only after he received the job offer. However, the treatment of appellant's plantar fasciitis was a medical determination. The reports of Dr. Tello indicate that the cast was applied after other forms of treatment had been tried. The Office hearing representative's statement that the application of the cast could have been delayed is only speculation, unsupported by any medical evidence or any other evidence that appellant sought the treatment only to provide a reason for refusing the offer of suitable work. There is no medical evidence that appellant could perform the light-duty position while he was being treated for plantar fasciitis. The Office made no effort to determine whether appellant could perform the duties of the offered position in light of the diagnosis of plantar fasciitis. The Office therefore has not met its burden of proof in establishing that appellant was capable of performing the job offered to him as there is no medical evidence of

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(4) (December 1993).

record that appellant could perform the duties of the offered position in light of his plantar fasciitis.⁴

The decision of the Office of Workers' Compensation Programs dated January 4, 2001 is hereby reversed.

Dated, Washington, DC
May 28, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

⁴ The Board notes that in a March 1, 2000 report, Dr. Eugene M. Wolf indicated that appellant had continued left shoulder pain with atrophy of the supraspinatus and a positive impingement sign. Appellant underwent additional surgery on the left shoulder on March 30, 2000. In an April 25, 2000 report, Dr. Wolf stated that the surgery revealed two prominent knots of nonabsorbable suture material that could have been causing the shoulder pain. He noted that an arthroscopic shaver removed the knots.