U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DANIEL J. CAUSER and U.S. POSTAL SERVICE,
POST OFFICE, Erie, PA

Docket No. 01-2253; Submitted on the Record;
Issued October 15, 2002

DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective July 11, 2001 on the grounds that he refused suitable work.

On March 11, 1998 appellant, then a 57-year-old clerk filed a claim alleging that on March 9, 1998 a steel cage door struck him on the head. He stopped work and did not return.

In a letter dated July 31, 1998, the Office requested detailed factual and medical evidence from appellant, stating that the information submitted was insufficient to establish that appellant sustained an injury in the performance of duty as alleged.

In response to the Office's request, appellant submitted treatment notes from Dr. David H. Johe, a family practitioner dated April 1997 to July 1998; emergency room records from August 11 to 14, 1998; off-work slips from Dr. David Q. Steele, a Board-certified orthopedist, dated August 25 and 28, 1998. The treatment notes from Dr. Johe dated April 1997 to July 1998 indicated that appellant was treated for trigger thumb and back pain. He indicated that he was unsure whether appellant's trigger thumb was employment related but believed it was a possibility. Dr. Johe noted that appellant also complained of cervical pain, which he attributed to his employment. He noted that an electromyogram (EMG) was normal. The emergency room records from August 11 to 14, 1998 indicated that appellant was treated for intractable pain secondary to herniated cervical disc at C7. The off-work slips from Dr. Steele dated August 25 and 28, 1998 noted that appellant would be off work from August 31 to September 4, 1998 and could return to limited duty. He noted that appellant was treated for a ganglion cyst on his wrist and head and neck trauma, which he believed was work related.

In a decision dated September 8, 1998, the Office denied appellant's claim for compensation under the Federal Employees' Compensation Act.[1] The Office found that the

[1] 5 U.S.C. §§ 8101-8193.

medical evidence was insufficient to establish that his medical condition was caused by employment factors.

On July 24 and 31, 1998 appellant filed Forms CA-2a, notice of recurrence of disability. He indicated a recurrence of his neck condition due to employment-related injuries sustained in March 1998.[2]

In a letter dated September 25, 1998, appellant, through his attorney requested an oral hearing before an Office hearing representative. The hearing was held on March 1, 1999. Appellant submitted various records from his treating physician Dr. Marc A. Flitter, a Board-certified neurologist, dated September 29 to December 8, 1998. Dr. Flitter diagnosed appellant with cervical syndrome and a herniated disc at C6-7. He indicated that he performed an anterior cervical decompression at C6-7 with discectomy and diagnosed appellant with herniated disc at C6-7 with intractable cervical radiculopathy and bilateral foraminal stenosis. Dr. Flitter noted that there was a causal relationship between the work-related injury and appellant's subsequent pathology and symptomology.

In a decision dated May 3, 1999, the Office vacated the decision dated September 8, 1998 and remanded the case for further development, specifically for referral to a second opinion physician to determine the causal relationship of the herniated C6-7 disc and the March 9, 1998 injury.

On May 28, 1999 the Office referred appellant for a second opinion to Dr. Vijay S. Kumar, a Board-certified neurologist. The Office provided him with appellant's medical records, a statement of accepted facts as well as a detailed description of appellant's employment duties.

In a medical report dated July 29, 1999, Dr. Kumar indicated that he reviewed the records provided to him and performed a physical examination of appellant. He noted that appellant sustained a C6-7 disc herniation as a result of the work injury of March 9, 1998. Dr. Kumar noted that this injury was directly related to appellant's work-related accident.

Thereafter, appellant submitted various treatment notes from Dr. Flitter dated July 28 to December 21, 1999 which indicated that appellant continued to experience neck and arm pain and headaches after the anterocervical decompression at C6-7.[3]

[2] In a letter dated September 25, 1998, the Office indicated that appellant's claim for compensation was denied and, therefore, they could not consider the recurrences of disability filed by appellant in July.

[3] On January 14, 2000 appellant filed a Form CA-7, claim for a schedule award. However, it appears from the record that the Office did not issue a final decision and, therefore, the Board does not have jurisdiction over the matter. *See* 20 C.F.R. § 501.2(c).

The Office accepted on August 30, 1999 the claim for C6-7 cervical herniated disc and authorized anterior cervical fusion, which was performed on October 24, 1998.[4]

In a letter dated February 1, 2000, the Office requested that Dr. Flitter review a proposed job description for a modified limited-duty position for appellant. The job description for a modified general clerk indicated he would perform sedentary general clerk duties such as answering the telephones, taking messages, intermittent computer input and other miscellaneous duties such as stuffing one ounce letters into envelopes not to exceed one to five pounds.

In a letter dated February 11, 2000, Dr. Flitter indicated that appellant had not reached maximum medical improvement and noted with a checkmark "no" that appellant was not physically capable of performing any type of productive work duties at this time. He indicated that appellant was totally disabled.

On March 2, 2000 the Office referred appellant for a second opinion to Dr. Naren Kansal, a Board-certified neurologist. The Office provided him with appellant's medical records, a statement of accepted facts as well as a detailed description of appellant's employment duties.

In a medical report dated April 27, 2000, Dr. Kansal indicated that he reviewed the records provided to him and performed a physical examination of appellant. He noted that upon physical examination the upper and lower extremities were completely benign without any focal motor deficit; the reflexes were present and equal; the plantars were downgoing; and the straight leg raises were negative. Dr. Kansal diagnosed appellant with neck, interscapular and bilateral shoulder dysfunction, etiology undetermined. He indicated that he was at a loss to explain appellant's symptoms on any given organic basis as his examination was completely normal. Dr. Kansal recommended further development to determine the source of appellant's pain.

Appellant underwent a magnetic resonance imaging (MRI) scan on May 5, 2000 and an EMG on June 8, 2000. The MRI scan revealed postsurgical changes with no evidence of encroachment or stenosis. The EMG revealed a normal nerve conduction study of the left upper extremity and an old leg C6-7 radiculopathy with no new changes.

By letter dated May 10, 2000, the Office requested Dr. Flitter to consider appellant's disability status after reviewing the results of the MRI scan and EMG.

In a form dated May 30, 2000, Dr. Flitter indicated with a checkmark that appellant was totally disabled. He remarked "[appellant] has reached maximum medical improvement and is totally disabled." Dr. Flitter, in a form dated June 2, 2000, check marked "yes" that appellant had reached maximum medical improvement and noted with another check mark "no" that appellant could not perform any productive work duties at this time noting appellant was totally disabled.

[4] The record reflects that in February 1989 appellant was in an automobile accident and sustained an injury to his cervical spine at level C5-6. In May 1989, appellant underwent an anterior cervical disc excision and fusion at C5-6. This injury was not work related.

In a supplemental report dated June 30, 2000, Dr. Kansal indicated that he received the EMG and nerve conduction studies, which failed to show any acute problem. He noted that there was a suggestion of C6-7 radiculopathy, which was not uncommon after surgery. Dr. Kansal noted that this finding did not explain any of the symptoms that appellant was experiencing. In a report dated August 28, 2000, he indicated that the MRI scan revealed postsurgical changes, with no evidence of encroachment or stenosis and the EMG and nerve conduction studies revealed no abnormalities. Dr. Kansal indicated that he did not have a good explanation for appellant's continued disability. Appellant's work-up was essentially negative or was showing old changes. He noted that because of the persistence of symptoms appellant had a mild disability. Dr. Kansal noted that he did not find much in terms of physical limitations.

In a letter dated December 13, 2000, the Office requested that Dr. Kansal review a proposed job description for a modified limited-duty position for appellant. The job description for a modified general clerk indicated that appellant would perform sedentary general clerk duties such as answering the telephones, taking messages, intermittent computer input and other miscellaneous duties such as stuffing one ounce letters into envelopes not to exceed one to five pounds.

In a letter dated March 12, 2001, Dr. Kansal noted that appellant was unable to perform the functional capacity evaluation. He indicated that based on all the information, examination and workup, he did not have a good explanation for appellant's symptom complex and he believed appellant was more than capable of performing the modified job description of a general clerk. Dr. Kansal further noted that appellant should be able to perform the majority of his activities on an unrestricted basis.

By letter dated March 21, 2001, the Office notified appellant that the position as modified general clerk was found to be suitable to his work capabilities. The Office indicated that appellant had 30 days to accept the position or provide further explanation for refusing it. The Office advised appellant that, if he did not accept the offered position or did not demonstrate that his refusal to accept was justified, his compensation would be terminated under 5 U.S.C. § 8106(c).

Appellant submitted duplicate copies of the February 11 and May 30, 2000 notes from Dr. Flitter indicating that he was totally disabled; a narrative statement dated April 2001; social security documents; and a note from Dr. Dilbagh Singh dated April 2, 2001. Appellant indicated that he was totally disabled and could not go back to work. Dr. Singh indicated that appellant reached maximum medical improvement and was now totally disabled and could not be gainfully employed.

On May 29, 2001 the Office informed appellant that his refusal of the offered position was found to be unjustified, based on the fact that there was no current documentation supporting that appellant was unable to work the job offered to him and provided 15 days for him to accept the job.

Appellant submitted letters from Dr. Flitter dated June 11, 2001 and a narrative statement. In his letter of June 11, 2001, he indicated that appellant reached maximum medical improvement as of May 20, 2000. Dr. Flitter noted that as a result of appellant's work injury he

was declared totally disabled. He indicated that appellant was not to be engaged in any work to include the general clerk (modified) position that was offered on March 21, 2001. Dr. Flitter, in his note of June 11, 2001, indicated with a check mark that appellant had reached maximum medical improvement and was totally disabled. Appellant indicated that he was totally disabled and unable to return to gainful employment.

In a decision dated July 11, 2001, the Office terminated appellant's compensation, finding that he refused an offer of suitable work.

The Board finds that the Office did not meet its burden of proof in terminating appellant's disability compensation for refusal of suitable work.

Once the Office accepts a claim it has the burden of proving that the employee's disability has ceased or lessened before it may terminate or modify compensation benefits.[5] Section 8106(c)(2) of the Federal Employees' Compensation Act[6] provides that the Office may terminate the compensation of a disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.[7] The Board has recognized that section 8106(c) is a penalty provision which must be narrowly construed.[8]

The implementing regulation[9] 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 a 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.[10] To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of her refusal to accept such employment.[11]

Office procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.[12]

[5] *Karen L. Mayewski*, 45 ECAB 219, 221 (1993); *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

[6] 5 U.S.C. §§ 8101-8193 (1974); 5 U.S.C. § 8106(c)(2).

[7] *Camillo R. DeArcangelis*, 42 ECAB 941, 943 (1991).

[8] *Steven R. Lubin*, 43 ECAB 564, 573 (1992).

[9] 20 C.F.R. § 10.124(c).

[10] *John E. Lemker*, 45 ECAB 258, 263 (1993).

[11] *Maggie L. Moore*, 42 ECAB 484, 487 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[12] *C.W. Hopkins*, 47 ECAB 725 (1996); *see Patsy R. Tatum*, 44 ECAB 490, 495 (1993); Federal (FECA) Procedural Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5 (May 1996).

Unacceptable reasons include relocation for personal desire or financial gain, lack of promotion potential or job security.[13]

In this case, the Office accepted on August 30, 1999 that appellant sustained herniated discs at C6-7 on March 9, 1998 and paid appropriate compensation thereafter. The Office terminated appellant's compensation effective July 11, 2001 for refusal of suitable work based on Dr. Kansal's examination and report. The Board finds that there is a conflict in medical opinion between Dr. Kansal, the Office referral physician and Dr. Flitter, appellant's treating physician and Dr. Singh, both of whom are Board-certified specialist in their respective fields.

Dr. Kansal opined, in medical reports dated April 27 and August 28, 2000, that appellant had a mild disability and that he was able to perform the duties of a general clerk. By contrast, Dr. Flitter indicated that appellant was not physically capable of performing any type of productive work duties. He noted that appellant was totally disabled as a result of his work injury. Dr. Flitter indicated that appellant was not to be engaged in any work to include the general clerk (modified) position that was offered on March 21, 2001. Dr. Flitter has consistently supported permanent work-related disability related to appellant's cervical condition, while Dr. Kansal found that appellant has mild work-related residuals of the accepted injury and that he is capable of resuming his employment.

Section 8123 of the Act[14] provides that if there is a disagreement between the physician making the examination for the United States and the employee's physician, the Office shall appoint a third physician who shall make an examination.[15] The Board finds that because the Office relied on Dr. Kansal's opinion to terminate appellant's compensation without having resolved the existing conflict, the Office has failed to meet its burden of proof in terminating compensation on the grounds that disability had ceased.[16]

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

[14] 5 U.S.C. § 8123(a).

[15] *Shirley L. Steib*, 46 ECAB 39 (1994).

[16] *See Craig M. Crenshaw, Jr.*, 40 ECAB 919, 923 (1989) (finding that the Office failed to meet its burden of proof because a conflict in the medical evidence was unresolved).

The decision of the Office of Workers' Compensation Programs dated July 11, 2001 is hereby reversed.

Dated, Washington, DC
October 15, 2002

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member