U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH R. ODOM and DEPARTMENT OF AGRICULTURE, FOOD SAFETY INSPECTION SERVICE, Roswell, NM

Docket No. 02-542; Submitted on the Record;
Issued October 3, 2002

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective May 10, 1999 on the grounds that he refused an offer of suitable work.

Appellant, a 48-year-old clerk, filed a Form CA-2, claim for benefits on December 1, 1983 alleging that he had developed a foot condition caused by factors of employment. The Office accepted the claim for permanent aggravation of bilateral plantar fascitis. The Office paid appellant compensation for temporary total disability for appropriate periods and placed him on the periodic rolls. He has not returned to work since December 9, 1984.

In a work capacity evaluation dated November 28, 1994, Dr. Jose H. Velez, a specialist in orthopedic surgery and appellant's treating physician, indicated that he could perform sedentary work for eight hours a day, with limited standing and walking.

In a report dated November 3, 1997, Dr. Velez stated that appellant had recently undergone a computerized axial tomography (CAT) test which revealed no significant changes since his last evaluation. He advised that appellant's condition remained the same, that there had been no significant change in his diagnosis and prognosis and that the restrictions he outlined in 1984 remained the same.

By letter dated October 26, 1998, the employing establishment asked Dr. Velez if appellant was physically capable of performing the modified job of poultry inspector. The Office included a description of the position, which stated:

> "Food inspectors ... are assigned primarily to work at an inspection station on a production line. The birds that they inspect are hung on shackles on a motorized line that runs at waist height in front of the inspector procedures approved by [the employing establishment]. Inspectors may sit on a stool, stand or alternate between the two positions based on their personal preference. The inspection

> stands are normally on an elevated, adjustable stand so the inspector can adjust the height of the stand to accommodate the inspector's stature. Inspectors are trained on the use of proper hand motions and inspection techniques so that inspection can be performed either sitting or standing."

The employing establishment attached a list of the physical requirements entailed by the food inspector position. These included: sitting/standing, optional, up to 8 hours on a regular workday; walking less than 30 minutes; lifting 0 to 5 pounds; no squatting, crawling, crouching, kneeling and infrequent bending and stooping.

In a letter received by the Office on November 30, 1998, Dr. Velez signed a form letter from the employing establishment indicating that appellant was physically capable of performing the job of food inspector, in accordance with the position description.

By letter dated December 2, 1998, the employing establishment offered appellant the modified job as a poultry inspector, in which he would work an eight-hour day.

Appellant rejected the job offer by letter dated December 16, 1998. He stated that he still required medical treatment for his bilateral plantar fascitis, which rendered him unable to stand for any length of time or walk distances.

In a report dated December 23, 1998, Dr. Velez noted that appellant had been offered a sedentary position in Minnesota, by the employing establishment. He stated that although appellant was capable of performing several types of sedentary work, he should undergo a functional capacity evaluation "before a definitive move to Minnesota."

Appellant underwent a functional capacity evaluation on January 15, 1999. The test noted that "the position Dr. Velez described in his December 23, 1998 note for poultry food inspector is within appellant's physical ability, according to Dr. Velez' notes which state the job requires ... walking less than 30 minutes and lifting 0 to 5 pounds with no climbing, balancing, stooping or kneeling."

On March 31, 1999 the employing establishment submitted a revised poultry inspector job offer to appellant. The offer indicated that all work duties would be within his documented medical limitations and stated that the employing establishment would pay his transportation and household expenses in regard to his moving to Minnesota.

By letter dated April 5, 1999, the Office advised appellant that a suitable position was available and that pursuant to section 8106(c)(2), he had 30 days to either accept the job or provide a reasonable, acceptable explanation for refusing the offer. The Office stated that if appellant refused the job or failed to report to work within 30 days without reasonable cause, it would terminate his compensation pursuant to 5 U.S.C. § 8106(c)(2).[1]

By letter dated April 19, 1999, appellant refused to accept the modified food inspector job. He stated that, Dr. Velez had advised him that he was unable to perform the duties of the

[1] 5 U.S.C. § 8106(c)(2).

modified position and that he was now limited to five hours of sitting, standing and walking a day.

In a report received by the Office on May 8, 1999, dated January 27, 1999, Dr. Velez significantly revised appellant's work restrictions. He stated that appellant was now capable of standing for only one to two hours a day, walking one to two hours a day and sitting for only one to two hours a day. Dr. Velez advised that appellant was capable of sitting, standing and walking for no more than five hours a day. He reiterated these revised work restrictions in a report dated April 5, 1999, which was received by the Office on April 22, 1999.

By decision dated May 10, 1999, the Office terminated appellant's compensation benefits on the grounds that he refused an offer of suitable work. The Office stated that the revised report submitted by Dr. Velez on April 5, 1999 did not negate his previous opinion that appellant was capable of performing the duties of the modified poultry inspector position and found that his initial opinion approving the job offer represented the weight of the medical evidence.

By letter dated June 9, 1999, appellant's attorney requested an oral hearing, which was held on February 28, 2000.

By decision dated June 7, 2000, an Office hearing representative affirmed the May 10, 1999 Office decision.

By letter dated January 8, 2001, appellant's attorney requested reconsideration. By decision dated October 31, 2001, the Office denied reconsideration.

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits on the grounds that he refused an offer of suitable work.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits. Under section 8106(c)(2) of the Federal Employees' Compensation Act,[2] the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.[3] Section 10.124(c) of the Office's regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured 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 a determination is made with respect to termination of entitlement to compensation.[4] To justify termination, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[5] This burden of proof is applicable if the Office terminates compensation under

[2] 5 U.S.C. §§ 8101-8193.

[3] *Patrick A. Santucci*, 40 ECAB 151 (1988); *Donald M. Parker*, 39 ECAB 289 (1987).

[4] 20 C.F.R. § 10.124(c); *see also Catherine G. Hammond*, 41 ECAB 375 (1990).

[5] *See John E. Lemker*, 45 ECAB 258 (1993).

5 U.S.C. § 8106(c) for refusal to accept suitable work. The Office did not meet its burden in the present case.

The initial question in this case is whether the Office properly determined that the position was suitable. 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 the medical evidence.[6] A review of the medical evidence in the present case indicates that there is not sufficient medical evidence to support a finding that the offered position was within appellant's physical limitations. Although Dr. Velez indicated in his November 3, 1997 report that appellant was capable of performing sedentary work for eight hours, in conformance with his 1994 work capacity evaluation and signed his assent to the October 26, 1998 form letter from the employing establishment indicating that appellant was physically capable of performing the job of food inspector, as reflected by the position description, he subsequently revised this opinion, finding in his January 27 and April 5, 1999 reports that appellant was only capable of standing for one to two hours a day, walking one to two hours a day, sitting for only one to two hours a day and sitting, standing and walking for no more than five hours a day. The Office, however, in its May 10, 1999 decision, refused to accept Dr. Velez's revised opinion, finding that the position of modified poultry inspector offered by the employing establishment was within appellant's physical restrictions based on his previous opinion. However, once appellant submitted this additional medical evidence indicating that he had greater physical restrictions than those upon which the modified poultry inspector was based, the offered position was no longer suitable. The Office is required to include those conditions, regardless of etiology, which existed prior to the job offer.[7] Therefore, as the Office did not include these additional restrictions outlined by Dr. Velez, this raised the issue of whether the duties of the position exceeded the restrictions currently imposed by his treating physician. The Office, however, did not attempt to have the employing establishment tailor the duties of the job to conform with these additional restrictions. As it is the Office's burden of proof to establish that appellant refused a suitable position, the Office did not meet its burden of proof in this case to terminate appellant's compensation benefits pursuant to 5 U.S.C. § 8106.[8] Thus, the Office's October 31, 2001 decision affirming the May 10, 1999 termination decision was not based on the weight of the medical evidence.

[6] *Robert Dickinson*, 46 ECAB 1002 (1995).

[7] *See* 20 C.F.R. § 10.124(c).

[8] *Barbara R. Bryant*, 47 ECAB 715 (1996).

The decision of the Office of Workers' Compensation Programs dated October 31, 2001 is hereby reversed.

Dated, Washington, DC
October 3, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member