U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICK CONNELLY and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Flagstaff, AZ

Docket No. 03-430; Submitted on the Record;
Issued April 2, 2003

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation on the grounds that he refused an offer of suitable work; and (2) whether the Office abused its discretion by refusing to reopen appellant's case for further consideration of the merits of his claim under 5 U.S.C. § 8128(a).

On May 12, 1981 appellant, then a 37-year-old postal clerk, filed a notice of occupational disease for a bilateral carpal tunnel syndrome condition claiming that he became aware of the condition on April 18, 1981.[1] The Office accepted appellant's claim for temporary aggravation of bilateral carpal tunnel syndrome and subsequent surgeries and began paying compensation benefits for temporary total disability. Appellant was terminated from his employment on May 14, 1981 and has not worked since that time. Appellant's treating physician, Dr. Leonard Bodell, a Board-certified orthopedic surgeon, released appellant to light-duty work on April 7, 1989.

During the period November 8, 1998 through August 24, 2000, the Office paid appellant a schedule award based on his permanent impairment of his upper extremities.[2]

By letter dated January 10, 1996, the Office requested that Dr. Bodell review the position description and physical requirements of a modified general clerk and advise whether the position was suitable for appellant. The physical requirements included light walking and standing with intermittent simple grasping, sitting or standing and occasional fine manipulation and light lifting. By letter dated January 14, 1997, Dr. Bodell stated: "The stated job description and duties are suitable for [appellant]. Specifically, however, [appellant] should not be involved

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[1] Appellant only began work for the postal service on April 1, 1981.

[2] On December 14, 2000 the Office made a preliminary determination of an overpayment in the amount of $677.00. The Office approved installments for the overpayment on June 22, 2001. The balance of the overpayment was eventually dropped because of the termination.

with any repetitive or high volume activities. He may require use of a wrist and thumb splint on the job." On January 13, 1997 Dr. Bodell checked "yes" that he had reviewed the proposed duties and that in his opinion the duties were in compliance with his work restrictions. The Office subsequently offered appellant the position of lobby clerk, which did not require any repetitive activities and conformed to Dr. Bodell's restrictions.

In a work capacity evaluation dated July 16, 1997, Dr. Bodell stated that appellant could work eight hours per day and outlined his physical restrictions. He stated that appellant should limit reaching and lifting with no repetitive motions, could lift a maximum of five pounds and no gripping or repetitive movements of the wrists. He noted that these restrictions were permanent and mentioned that there were psychological factors, which needed to be considered in finding a position for appellant.

By letter dated March 21, 2001, the Office requested that Dr. Bodell review the position description of modified lobby clerk. The position was a light-duty position that would be no more strenuous than appellant's current activity and restricted repetitive activities, which Dr. Bodell identified in 1997. The position, the Office noted, basically entailed greeting customers coming into the post office and could be performed sitting or standing and only required verbal communication.

On April 2, 2001 Dr. Bodell indicated that he reviewed the proposed duties of modified lobby host and checked "yes" that they were in compliance with appellant's physical abilities.

By letter dated April 3, 2001, the employing establishment offered appellant the light-duty position as lobby clerk. The position involved greeting customers with the use of verbal communication skills to provide direction and information for the postal customer. The physical requirements entailed occasional lifting of forms, which weigh less than one ounce, and sitting or standing as desired. The employing establishment also indicated that they would waive appellant passing out forms on an occasional basis to ensure suitability.

By letter dated April 6, 2001, appellant's mother responded to the Office's letter and declined the April 3, 2001 job offer. Appellant's mother stated:

> "My name is Catherine Connolly. I am writing for my son because his condition makes it difficult to write for him. The following are his reasons: 'I am rejecting the position because my condition causes constant pain in both hands and any use of my hands further aggravates condition and increases pain.' He has made an appointment with Dr. Bodell on this matter."

By letter dated May 22, 2001 to appellant, the Office noted that he had been offered the position of lobby clerk and his employing establishment confirmed that it was still available. The Office stated that appellant had 30 days to accept the offered position or provide an explanation of the reasons for refusing it, also noting that his present reason for refusing the position, that the use of his hands caused him pain, was not acceptable. The Office added that Dr. Bodell had reviewed the job offer and on April 2, 2001 opined that the duties were in compliance with his physical abilities.

By letter dated June 8, 2001, the Office received a second letter from appellant outlining why he was declining the April 3, 2001 job offer. Appellant stated:

> "The injury in both hands causes constant pain: aching and throbbing, stiffness, weakness and occasional swelling. I also experience in both hands twitching of thumb and index finger, numbness and tingling into elbow area and burning sensation in the wrists. I have great difficulty and pain with daily activities such as personal hygiene, toilet use and feeding and dressing myself. I also have daily bouts of additional pain so intense as if a hot knife was plunging into the CMC [carpometacarpal] joints and these can come and go without warning and by that I mean use or no use of hands.
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> "I am house bound due to all of the above and the need to use ice packs and or heating pads numerous times a day.
>
> "I do not own a car and I am not driving because my condition makes it difficult and painful. I rely on my mother and others to drive me to doctor appointments etc.
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> "The job position stated on the postal service form begins with GREET CUSTOMERS: 'The position requires the use of verbal communication to provide direction and information for the postal customer.' I believe such a position would require me to be at least pleasant. Considering the constant pain I have expressed and being at work unable to use ice or heat when needed during the day would be agony and because of this a pleasant demeanor and facial expression would be impossible to maintain while greeting and communicating with the public."

The Office notified appellant that his reasons for refusing the position were not justified and granted him an additional 15 days to accept the position without penalty. The Office noted that 5 U.S.C. § 8106(c) provides that a partially disabled employee who refuses suitable work after it is offered is not entitled to compensation.

By decision dated July 19, 2001, the Office terminated appellant's wage-loss compensation, effective July 15, 2001, as appellant refused an offer of suitable work. The Office noted in their decision that appellant would be able to use hot/cold packs during work per the employing establishment, since there was another employee in a similar position who utilized hot/cold packs on the job. The employing establishment also confirmed that there was both bus and taxi service between appellant's residence and the employment site and the job involved virtually no use of the hands. The Office again noted that Dr. Bodell reviewed the job offer of lobby clerk and found that it was within appellant's medical restrictions.

Appellant disagreed with the Office's decision and requested a review of the written record. In support of his request, appellant submitted new reports from Dr. Bodell dated April 9 and June 29, 2001. In the April 9, 2001 letter, Dr. Bodell stated:

> "[Appellant] has refused the job that we signed off on. He says he is just in too much pain and he has trouble even doing personal hygiene let alone turning pages

on magazine. Most of this really focuses around the progressive pain in the CMC joints….

"I think as he is with his complaints he is not going to go back to work. But more importantly than that is perhaps what kind of a life does he have? We have put off surgery because as long as he was able to take care of himself and have some kind of a life that he was happy about. I did not see any reason that we neither had an obligation nor was it appropriate to try and push him into a surgery that was elective."

Dr. Bodell, in his report, mainly focused on whether to proceed with surgery. In the report dated June 29, 2001, he stated:

"[Appellant] has gotten a letter that is very stressful and he has to deal with regarding employment standards from the Administration U.S. Department of Labor regarding getting him back to work. We originally filled out a form realizing that the work itself, if it would be nonrepetitive, sedentary-type work was reasonable. However there are other psychological issues going on here that would prevent him perhaps from being able to perform the job. He has a lot of anxiety about going back to the workplace. He has a lot of pain, which precludes him from being able to really sit for long periods of time and concentrate on interpersonal relationships and then there is the driving to and from work, which is an issue."

The remainder of Dr. Bodell's report focused on his opinion that appellant should undergo surgery to better his condition.

By decision dated January 14, 2002, the Office hearing representative affirmed the July 19, 2001 decision, finding that Dr. Bodell's reports were based on appellant's subjective complaints and not on a documented physical limitation. The hearing representative noted that some of Dr. Bodell's reasons for appellant's inability to return to work were conditions that had not been accepted by the Office as work related. They also noted that Dr. Bodell's opinions regarding appellant's psychiatric condition were of limited probative value since he is not a specialist in the field.

By letter dated April 5, 2002, appellant requested reconsideration and submitted new legal arguments. Appellant, through counsel, argued that the medical reports from Dr. Bodell, upon which the termination of appellant's compensation benefits was based, consisted of Dr. Bodell checking a box and was not probative evidence. He also argued that the medical evidence submitted after the termination had not been properly considered.

In a merit decision dated July 8, 2002, the Office denied modification, finding that the evidence submitted was insufficient to warrant modification of the January 14, 2002 decision.

By letter dated October 11, 2002, appellant requested reconsideration and submitted an August 16, 2002 report from Dr. Bodell.

By nonmerit decision dated November 15, 2002, the Office denied appellant's request for reconsideration finding that Dr. Bodell's August 16, 2002 report was cumulative evidence and insufficient to warrant merit review.

The Board finds that the Office properly terminated appellant's compensation under 5 U.S.C. § 8106(c) based on the grounds that he refused an offer of 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 or her is not entitled to compensation.[3] The Office has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects 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 requirements of the position.[4] To justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty position, the Office has the burden of showing that the work offered to and refused or neglected by appellant was suitable.[5]

The determination of whether appellant is capable of performing the offered position is a medical question that must be resolved by medical evidence.[6] The Board finds that the probative medical evidence establishes that the position offered was within appellant's medical restrictions.

In this case, appellant began treatment with his treating physician, Dr. Bodell, in 1988 and continued to seek treatment intermittently until 2001. Dr. Bodell initially released appellant to light-duty work on April 7, 1989. In a work capacity evaluation dated July 16, 1997, Dr. Bodell stated that appellant could work eight hours per day and outlined his physical restrictions. He indicated that appellant should limit reaching and lifting with no repetitive motions, lifting a maximum of five pounds, and no gripping or repetitive movements of the wrists.

By letter dated March 21, 2001, the Office requested that Dr. Bodell review the position description of modified lobby clerk. The Office noted that the position was a light-duty position that would be no more strenuous than appellant's current activity and also was limited in the restricted repetitive activities which he identified in 1997. The position, the Office stated, entailed greeting customers coming into the post office and could be performed sitting or standing and only required verbal communication. On April 2, 2001 Dr. Bodell indicated that he had reviewed the proposed duties of modified lobby clerk and checked "yes" that the position was in compliance with appellant's physical abilities.

[3] 5 U.S.C. § 8106(c)(2).

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

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

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

On April 3, 2001 the employing establishment offered appellant the position of lobby clerk and described the requirements of the position. The employing establishment also noted that they would waive appellant passing out forms on an occasional basis to ensure that he was able to perform the position. By letter dated April 6, 2001, appellant denied the job offer stating that he could not perform the position because his condition caused him constant pain in both hands and any use of his hands would aggravate his condition and increase his pain. By letter dated May 22, 2001, the Office informed appellant that his reason for not accepting the position was not acceptable and that his physician, Dr. Bodell, had found that the position was in compliance with his physical abilities. Appellant responded again that he was declining the job offer because he was housebound and needed to use ice packs and/or heating pads several times a day, that he could not drive a car, and that he could not maintain a pleasant demeanor and facial expression required by the lobby clerk position because of his constant pain. The Office stated that these reasons were not justified and afforded him 15 additional days to accept the position without penalty. The Office terminated appellant's wage-loss compensation benefits effective July 15, 2001.

The Board finds that the reasons appellant cited in declining the offer of lobby clerk are inadequate.

Appellant alleged that he could not perform the position of lobby clerk because he could not use his hands. The employing establishment explained to appellant that the position mainly involved greeting customers and providing directions and information and involved virtually no use of the hands. The employing establishment also stated that they would occasionally waive the requirement of passing out forms so as to better accommodate appellant. The employing establishment noted that appellant would be able to use hot/cold packs and confirmed that there was both bus and taxi service between appellant's residence and the employment site. The Board finds that appellant's reasons for declining the position of lobby clerk are not acceptable and notes that the question of whether the position was suitable for appellant is a medical issue, which must be resolved by medical evidence.

In this case, Dr. Bodell stated on April 2, 2001 that he reviewed the duties of modified lobby clerk and checked "yes" that the duties were in compliance with appellant's physical abilities. Appellant, through counsel, contends that the evidence from Dr. Bodell was insufficient upon which to base the termination. Appellant cited the case of *Johnny L. Sammons*[7] in support of his argument, stating that in *Sammons* the Board reversed the Office's decision to terminate compensation because medical evidence that was relied upon by the Office consisted of a one-word answer on a copy of a letter. Appellant argued that Dr. Bodell's April 2, 2001 form was also insufficient upon which to base a termination.

The Board has reviewed the *Sammons* case and finds that the case is not comparable to the present case for several reasons. First, the *Sammons* case was not a case about suitable work but a case in which an impartial medical specialist was chosen to resolve a conflict in medical opinion between two physicians. The first physician in the case, Dr. Whitesides, completed a letter from the Office answering "no" to the question of whether appellant had any objective

[7] *Johnny L. Sammons*, Docket No. 00-524 (issued January 5, 2001).

evidence of disability and "probably" to the question of whether the strain appellant had sustained had resolved. The second physician, Dr. Earls, concluded that appellant continued to suffer from residuals of the employment injury. The Office referred appellant and the case record to Dr. James, an independent medical examiner, to resolve the conflict in medical opinion of whether appellant suffered residuals of the accepted employment injury. The Board found that the evidence received from Dr. Whitesides, in the form of the letter answering "no" and "probably," was insufficient to cause a conflict in the medical evidence. As a result, Dr. James could not be considered an impartial medical specialist. The Board instead found that a conflict was created between Dr. Earls and Dr. James and remanded the case for referral to a proper impartial medical specialist.

The fact pattern and result of *Sammons* is quite different from the present case and the Board finds the two cases are not comparable. Appellant contended that the Board, in *Sammons*, outright reversed the Office's decision to terminate compensation because the medical evidence that was relied upon by the Office consisted of a one-word answer. This is not entirely true. The one-word answers that appellant refers to were from the second opinion physician, which were not the bases upon which the Board reversed the Office's decision. The Board remanded the case to the Office for referral to a proper impartial specialist because the first impartial specialist could not be considered as such, since a conflict in medical opinion was never created. The Board did not outright reverse the case because of Dr. Whitesides' letter as appellant contends. The Board thus finds that the *Sammons* case is not applicable to the current situation and appellant's argument is without merit.

The Board finds that the evidence from Dr. Bodell was sufficient to terminate appellant's compensation benefits. First, even though Dr. Bodell only checked "yes" that the proposed duties of lobby clerk were in compliance with appellant's physical abilities, his opinion was made after a thorough review of the position description and of all the physical requirements. Second, Dr. Bodell had been appellant's treating physician since approximately 1988 and was well acquainted with appellant's medical condition, and his opinion was based on 13 years of personal knowledge and experience. The Board finds that Dr. Bodell's response, considering all the medical evidence of record and his in-depth knowledge of appellant's medical history, was sufficient upon which to base the termination of appellant's compensation benefits. The Board notes that there was also no other medical evidence of record stating that appellant could not perform the position of lobby clerk.

The Board also points to the case of *Donna D. Sampson*[8] and finds that this case is supportive of the Board's decision. In *Sampson*, the Office terminated appellant's compensation benefits on the grounds that she refused an offer of suitable work. The Office sent a job offer within the identified restrictions to Dr. Sidney N. Busis, a Board-certified otolaryngologist, for his opinion of whether appellant was capable of performing the duties of the position of modified mailhandler, while taking public transportation to get to and from work. Dr. Busis found that the offered position was within appellant's restrictions. The Office's decision to terminate was mainly based on a September 22, 1997 report from Busis, who stated that he reviewed the limited-duty employment offer and checked "yes" that the job offer was "in compliance with

[8] *Donna D. Sampson*, Docket No. 99-863 (issued May 26, 2000).

[appellant's] work restrictions."[9] The Board upheld the Office's decision. In the present case, the Office also largely relied upon Dr. Bodell's April 2, 2001 report, which indicated that he had reviewed the proposed duties and checked "yes" that they were in compliance with appellant's physical abilities. The Board finds that the case of *Sampson* is analogous to the present situation and will also uphold the Office's decision.

The weight of the medical evidence establishes that the position offered appellant was consistent with his physical limitations. Therefore, the refusal of the job offer cannot be deemed reasonable or justified and the Office properly terminated appellant's compensation.

Subsequent to the Office's termination of compensation, appellant submitted reports from Dr. Bodell dated April 9 and June 9, 2001 and August 16, 2002. In the report dated April 9, 2001, Dr. Bodell did not mention the lobby clerk position or state that appellant could not perform the position. He only stated: "[Appellant] has refused the job we signed off on. He says he is in just too much pain and he has trouble even doing personal hygiene let alone turning pages on magazine." This statement is based on appellant's own subjective complaints and not objective findings, and is insufficient to show that appellant could not perform the offered position. In the report dated June 9, 2001, Dr. Bodell discussed appellant's subjective complaints and did not mention objective findings. He acknowledged that he originally filled out a form approving nonrepetitive, sedentary-type work, but noted that there were other psychosocial issues that may prevent appellant from performing the position. Dr. Bodell mentioned that appellant had a lot of pain and anxiety which precluded him from sitting for long periods of time and from concentrating on interpersonal relationships. He did not explain how or why these conditions would prevent appellant from performing the offered position. He also did not support his statements with objective findings or medical rationale. In the August 16, 2002 report, Dr. Bodell acknowledged that when he filled out the form regarding appellant's modified job offer, he filled it out with the understanding that the limitations were "only in regards to appellant's carpal tunnel syndrome." Now, he stated, if one was to consider all the factors as they relate to appellant's upper extremities, including chronic pain and depression, he did not think appellant was in a position to return to any gainful type of employment. Again, Dr. Bodell did not support his statement with medical rationale or explain how or why these conditions prevented appellant from performing the specific position of lobby clerk. The issue in this case is medical in nature, whether appellant was medically capable of performing the position of lobby clerk and whether he refused an offer of suitable work. Dr. Bodell, in his reports, did not address the specific position and its requirements and did not explain why appellant could not perform the position in relation to these new conditions. He only vaguely noted that appellant "could not return to any type of gainful employment" and did not support his statement with an explanation. The Board also notes that Dr. Bodell is not a specialist in the area of psychiatry and his opinions regarding appellant's mental condition are of limited probative value. Since the issue in this case is whether appellant was medically able to perform the position of lobby clerk and Dr. Bodell did not address this issue in his reports, they are of little probative value.

[9] *Id*.

The weight of the medical evidence establishes that the position offered appellant was consistent with his physical limitations. Therefore, the refusal of the job offer cannot be deemed reasonable or justified, and the Office properly terminated appellant's compensation.

The Board also finds that the Office acted within its discretion in refusing to reopen appellant's case for further reconsideration of the merits.

To require the Office to reopen a case for merit review, section 10.606 provides that a claimant may obtain review of the merits of his or her claim by written request to the Office identifying the decision and setting forth arguments or submitting 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.[10] When a claimant fails to meet at least one of the above standards, the Office will deny the application for review without reviewing the merits of the claim.[11]

In this case, appellant submitted the August 16, 2002 report from Dr. Bodell in support of his October 11, 2002 request for reconsideration. The Board finds that Dr. Bodell's August 16, 2002 report is cumulative evidence as it mirrors other reports already contained in the record and reviewed by the Office in their previous decisions. The issue in this case is medical in nature, specifically whether appellant was medically capable of performing the offered position of lobby clerk. In order to obtain a merit review, appellant must submit relevant new evidence on the issue of whether he was physically capable of performing the duties of that position. In his report, Dr. Bodell discussed appellant's current conditions, including increased complaints of pain in the thumb bases as well as other previously mentioned conditions, but again did not explain how these conditions prevented appellant from performing the offered position. The Board finds that the information in this report is essentially the same as the information in the April 9 and June 29, 2001 reports and does not offer any new insight as to why appellant was not able to perform the position. The Board also notes that many of the conditions cited by Dr. Bodell would not interfere with the selected position as the position did not involve the use of the hands and only involved greeting customers at the door and giving them directions. The Board finds that the August 16, 2002 report is cumulative of evidence already found in the record and insufficient to reopen the case.

Since appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or submit relevant and pertinent new evidence not previously considered by the Office, he did not establish that the Office abused its discretion in denying his request for reconsideration.

[10] 20 C.F.R. § 10.606(a). *See generally* 5 U.S.C. § 8128.

[11] 20 C.F.R. § 10.608(a).

The decisions of the Office of Workers' Compensation Programs dated November 15, July 8 and January 14, 2002 are hereby affirmed.

Dated, Washington, DC
April 2, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member