U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES R. LEWIS and U.S. POSTAL SERVICE, NORTH METRO PROCESSING & DISTRIBUTION CENTER, Duluth, GA

Docket No. 03-927; Submitted on the Record;
Issued December 8, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's wage-loss compensation benefits effective February 24, 2002 under section 8106(c) of the Federal Employees' Compensation Act on the grounds that he refused or neglected an offer of suitable work.

The Office accepted that, on or before June 8, 1999, appellant, then a 38-year-old supervisor of distribution operations, sustained an adjustment disorder with anxiety, pursuant to an April 13, 1999 threat on his life by one of his subordinates, Anthony Goff.[1] Appellant stopped work on June 18, 1999 and returned to work on July 18, 1999 and received appropriate compensation. He had intermittent absences through April 17, 2000, when he returned to regular duty.[2] The Office also accepted a recurrence of disability commencing August 17, 2000[3] and paid total disability compensation beginning January 13 through June 2001 and continuing.[4]

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[1] In an April 28, 1999 report, a postal inspector stated that, on April 13, 1999, Mr. Goff told his psychologist that he would harm appellant if appellant did not leave him alone and let him perform his job. Mr. Goff "checked into a crisis center" on April 13, 1999 and was released on April 14, 1999. On April 15, 1999 Mr. Goff informed the postal inspector that he did not intend to harm appellant. The investigation was concluded on April 28, 1999 with no action taken. In a July 16, 1999 statement, appellant alleged that, from approximately May 4, 1999 onward, he experienced stress as he believed Mr. Goff had threatened his life. In a September 13, 1999 statement of accepted facts, the Office accepted that, on April 13, 1999, one of appellant's subordinates informed his psychologist "that should he (the subordinate) return to work someone would be hurt" and that he would hurt appellant if appellant did not leave him alone. The employee was reassigned to another postal facility.

[2] In an April 21, 2000 report of termination of disability (Form CA-3), the employing establishment stated that appellant returned to regular duty on April 17, 2000 with unspecified duty restrictions.

[3] Dr. Lynn Thomas, an attending physician, released appellant to regular duty on August 22, 2000.

[4] In a statement of earnings and employment (Form EN-1032) dated October 7, 2001, appellant indicated that he was not employed or self-employed during the previous 15 months.

Appellant submitted medical evidence in support of his claim from Dr. Michael McLeod, an attending Board-certified psychiatrist. In a November 22, 1999 report, Dr. McLeod related appellant's account of stress from the April 1999 threat with increased symptomatology after returning to work in July 1999, which appellant attributed to multiple job site transfers and shift schedule changes. Dr. McLeod held appellant off work from October 26 to November 3, 1999. In a February 1, 2001 report, Dr. McLeod also diagnosed generalized anxiety disorder, which could be "exacerbated by ongoing acute stressors," as secondary to the accepted adjustment reaction with anxious symptoms. Dr. McLeod stated, in an April 19, 2001 report, that appellant had ongoing symptoms related to the April 1999 threat which still caused periodic work absences. Dr. McLeod related appellant's account of the employing establishment's refusal to "accept him back," accommodate his limitations and acquiesce to appellant's use of leave.

In a June 26, 2001 letter, the Office requested that Dr. McLeod provide appellant's work restrictions. As Dr. McLeod did not respond, in a September 27, 2001 letter, the Office requested that the employing establishment offer appellant a light-duty position within the restrictions provided in Dr. McLeod's April 19, 2001 report.[5]

On October 31, 2001 the employing establishment offered appellant a limited-duty position, beginning no later than November 2, 2001, as a modified supervisor at a post office in Decatur, Georgia. Appellant would perform all duties of a supervisor of distribution operations, within the restriction that he could not work at his previous duty station in Duluth, Georgia. The proposed duty shift was from 10:30 p.m. to 7:00 a.m.

In a November 2, 2001 letter, the Office advised appellant that the offered modified supervisor position was suitable work. The Office also advised appellant that under section 8106(c)(2) of the Act, a partially disabled employee who refused or neglected to work after suitable work was offered was not entitled to compensation. The Office afforded appellant 30 days in which to accept the offered position or provide good cause for refusal.

In a November 2, 2001 letter received by the Office on November 6, 2001, appellant requested a meeting with Ms. Muchia, an employing establishment official, regarding the offered position. Appellant stated that he was not refusing the job. He explained that he received approximately four "obscene" telephone calls per week which he believed were from the subordinates who wanted to kill him. Appellant stated that he still felt threatened by Mr. Goff, and well as a Ms. Gaines. He alleged that having to work at night put his family in danger as he would not be there to protect them.

In a November 23, 2001 letter,[6] Ms. Muchia asserted that a meeting was not necessary as the offered position was based on appellant's restrictions of record. Ms. Muchia advised

[5] In an October 24, 2001 letter, Donna Muchia, an employing establishment official, requested that another official prepare a job offer for appellant. Ms. Muchia noted that appellant had "no restrictions except that he cannot work in the same building with another employee at North Metro."

[6] On its face, the letter is dated October 23, 2001. However, as it responds to appellant's November 2, 2001 letter, it is likely that it should be dated November 23, 2001.

appellant to either accept the job or refuse the offer if he could provide updated medical evidence establishing increased restrictions.

In a January 14, 2002 letter, the Office advised appellant that it interpreted his November 23, 2001 letter as a refusal of the offered position and that it did not demonstrate good cause for such refusal. The Office afforded appellant 15 days in which to accept the offered position, noting that no further reasons for refusal would be considered and that any further refusal would result in a final decision being made. Appellant did not submit additional evidence prior to the issuance of the Office's February 12, 2002 decision.

By decision dated February 12, 2002, the Office terminated appellant's wage-loss compensation benefits effective February 24, 2002 on the grounds that he "neglected suitable employment" without just cause. The Office found that Dr. McLeod opined that appellant was able to perform the modified supervisor position as offered.

On February 20, 2002 the Office received a facsimile cover sheet from Dr. McLeod stating that an enclosed form had been sent by facsimile to the employing establishment on January 15, 2002 and that appellant was "cleared to return to work with restrictions recommended on his work shift as noted on the form." In the enclosed undated form report, Dr. McLeod checked a box "yes" indicating that appellant could perform his date-of-injury job. Dr. McLeod stated that, "[g]iven the nature of the work-related stressor which resulted in [appellant's] condition (adjustment disorder with anxiety)," it is recommended that he return to a site different than that of the person who previously threatened his safety. Additionally it would be necessary that he return to a day shift (tour 2) duty assignment upon his return."

In a February 26, 2002 letter, appellant requested an oral hearing before a representative of the Office's Branch of Hearings and Review, held on October 21, 2002. At the hearing, appellant explained that in 1999 he was threatened by two of his subordinates, Mr. Goff and Ms. Gaines and began receiving threatening telephone calls at his home. Appellant described the telephone calls as silence, noting that they were stopped by a call blocking feature that blocked telephone calls without a caller identification tag, but resumed when the call blocker was deactivated. Appellant could not obtain telephone records showing that these telephone calls had been made and noted that the telephone company could not trace the telephone calls to ascertain who had made them. Appellant asserted that he continued to receive these telephone calls as of mid-October 2002 and that he believed it was unsafe to leave his family alone at night. Appellant noted that, beginning in June 2002, he worked as a computer technician for a private company. The hearing representative afforded appellant 30 days in which to submit a report from Dr. McLeod documenting that, prior to October 31, 2001, Dr. McLeod informed the employing establishment and the Office that appellant could not work the night shift. Appellant submitted additional evidence.[7]

An April 26, 1999 employing establishment inspection report stated that, on April 9, 1999, Ms. Gaines, one of appellant's subordinates, submitted a physician's report to an injury compensation official stating that she had "anger and violent ideation toward" appellant.

[7] Appellant also submitted a copy of the undated form report received by the Office on February 20, 2002, dated January 8, 2002.

Ms. Gaines informed the postal inspector that she did not intend to harm anyone. Ms. Gaines' access badge was then deactivated and she was told to stay away from the North metro facility. Ms. Gaines then applied for disability retirement.[8]

In a January 8, 2002 chart note, Dr. McLeod noted the employing establishment's request for a return to work date and discussing the issue with appellant. Appellant described increased anxiety, worry and insomnia about returning to work on the evening shift. "This anxiety is in relation to threats made against [appellant] and [appellant's] family by other [postal] employees reportedly and the fact [that] they would be left at home alone at night.… [Appellant] [d]oes not feel that he would optimally f[unction] given this fact and nature of threats…."

In an October 18, 2002 report, Dr. McLeod stated that he released appellant to work as of January 8, 2002 provided that there would be no exposure to Mr. Goff and Ms. Gaines and that appellant was "assigned to a day shift (tour #2) duty assignment." Dr. McLeod asserted that the February 12, 2002 decision excluded both restrictions.

In a November 18, 2002 report, Dr. McLeod stated that, when he cleared appellant to return to restricted duty, he assumed that appellant "would be returning to his previously assigned shift of work (*i.e.,* day shift hours). Once it became evident that the offered position was that of an evening shift, this restriction to day shift (tour 2) was specifically written in a formal reply." Dr. McLeod explained that the restriction was necessary, "due to nature of the previous incident (*i.e.,* an alleged threat against [appellant's] safety and the subsequent reported ongoing harassment and threat[s] against [him] and his family primarily in the evening hours). The return to an evening/night shift of work would have unduly increased his anxiety symptoms and interfered with his effective work functioning at that time."

By decision dated and finalized January 6, 2003, the Office hearing representative found that the Office properly terminated appellant's monetary compensation on the grounds that he refused an offer of suitable work. The hearing representative found that, as there was "no proof that [appellant] ever actually received threatening [tele]phone calls at home from his former subordinates[,] … the restriction against working nights appears to be based entirely on an unsubstantiated fear." Therefore, the hearing representative concluded that Dr. McLeod's restriction against working the night shift was insufficient to establish that the offered modified supervisor position was not suitable work.[9]

The Board finds that the Office properly terminated appellant's wage-loss compensation benefits effective February 24, 2002 on the grounds that he refused or neglected suitable work.

[8] In a February 19, 2001 chart note, Dr. McLeod stated that appellant was "still experiencing barriers to return to work despite new completed form which was returned to [the employing establishment]" and sent by facsimile to the Office.

[9] The hearing representative noted that, on October 9, 2002, he "telephoned Ms. Muchia and asked her why the job offer was for the hours of 10:30 p.m. to 7:00 am when Dr. McLeod had stated [appellant] had to work daytime hours. In an October 10, 2002 facsimile response, Ms. Muchia indicated [that] the job offer was based" on Dr. McLeod's February 1 and April 19, 2001 reports, "which did not indicate any restriction against working night hours."

It is well settled that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[10] 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 8106(c) of the Act provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee is not entitled to compensation.[11] Section 10.517 of the applicable regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secure 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 to terminate entitlement to compensation.[12] To justify termination of compensation, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusing such employment.[13]

In this case, appellant established the April 13, 1999 threat by Mr. Goff as factual and that he sustained an adjustment disorder with anxiety resulting from this threat. The Board also finds that appellant submitted sufficient evidence, in the form of the April 26, 1999 postal inspection report, that he was also threatened on April 9, 1999 by subordinate Ms. Gaines.

Prior to the October 31, 2001 job offer, appellant submitted reports from Dr. McLeod, an attending psychiatrist. In the November 22, 1999 report, Dr. McLeod noted Mr. Goff's threat against appellant and that appellant attributed an increase of symptoms after returning to work in July 1999 to multiple job site transfers and shift schedule changes. In an April 19, 2001 report, Dr. McLeod stated that appellant had ongoing, intermittent symptoms related to the April 1999 incident, as well as "difficulties in the workplace" regarding use of leave and "recommended accommodations to return to work…." However, Dr. McLeod did not set forth any work limitations regarding appellant's duty shift.

Following the October 31, 2001 job offer, the Office advised appellant, by November 2, 2001 letter, that the offered position was suitable work within Dr. McLeod's restrictions. Appellant then submitted a November 2, 2001 letter to the Office and the employing establishment asserting that he could not work the night shift as he had to protect his family from what he perceived was an ongoing threat from Mr. Goff and Ms. Gaines, who allegedly made "obscene" telephone calls to his home approximately four times per week. The Office advised appellant, in a January 14, 2002 letter, that his reasons for refusing the offered position were insufficient and that he must either accept the job or face termination of his wage-loss compensation benefits under section 8106(c)(2) of the Act. The Board finds that the Office's January 14, 2002 letter was sufficient notice to fulfill the Office's procedural obligations prior to terminating his wage-loss compensation.

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

[11] 5 U.S.C. § 8106(c)(2).

[12] 20 C.F.R. § 10.517(a).

[13] *Arthur C. Reck*, 47 ECAB 339, 341-42 (1995).

Appellant did not submit additional evidence prior to the Office's February 12, 2002 decision terminating his monetary compensation benefits on the grounds that he neglected suitable work. Appellant then requested an oral hearing, which was held October 21, 2002, at which he acknowledged that he could not prove that the "silen[t]" calls he received in the evenings at home were from Mr. Goff or Ms. Gaines. He reiterated that he did not wish to leave his family at night when he felt the threat would be greatest.

At and after the hearing, appellant submitted additional reports from Dr. McLeod regarding the work shift issue. In a January 8, 2002 chart note, Dr. McLeod stated that appellant experienced anxiety regarding threats against himself and his family by "other [postal] employees reportedly and the fact they would be left at home alone at night," such that appellant felt he could not function optimally on the night shift. In an initially undated report which Dr. McLeod asserted he sent to the employing establishment on January 15, 2002,[14] Dr. McLeod stated that it was necessary that appellant be assigned to a day shift (tour 2) due to the "nature of the work-related stressor which resulted in [his] condition…." In an October 18, 2002 report, Dr. McLeod asserted that he restricted appellant to the day shift as of January 8, 2002. Dr. McLeod elaborated, in a November 18, 2002 report, that restricting appellant to the day shift was necessary due to threats against appellant and his family "and the subsequent reported ongoing harassment … primarily in the evening hours." The return to an evening/night shift of work would have unduly increased his anxiety symptoms and interfered with his effective work functioning at that time."

The Board finds that Dr. McLeod's reports that restrict appellant to the day shift not due to the April 1999 threats by Mr. Goff and Ms. Gaines, but to the telephone calls appellant allegedly received at home. However, these calls have not been established as factual. Appellant admitted, at the October 21, 2002 hearing, that he could not prove that Mr. Goff or Ms. Gaines had made the telephone calls or nor could he provide telephone records establishing that he had in fact received the telephone calls. Therefore, as Dr. McLeod restricted appellant to the day shift only because of the telephone calls, this limitation cannot be used to assert that the offered position was not suitable work as it is based on a factor not established as factual. Thus, appellant's assertion that the offered modified supervisor position was not suitable because it was a night shift position, is insufficient to establish that the offered position was not suitable work. Also, appellant has not alleged or established that Dr. McLeod's remaining restriction of not being in the presence of Mr. Goff or Ms. Gaines would be violated by the offered position.

Therefore, the Office's February 12, 2002 decision terminating appellant's monetary compensation benefits on the grounds that he neglected suitable work is proper under the law and facts of this case.

[14] The Board finds that Dr. McLeod's February 20, 2002 note explaining that he had sent the report to the employing establishment by facsimile on January 15, 2002 is sufficient to establish this assertion as factual.

The decision of the Office of Workers' Compensation Programs dated and finalized January 6, 2003 is hereby affirmed.

Dated, Washington, DC
December 8, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member