U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD A. WILSON and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Los Angeles, CA

Docket No. 02-2066; Submitted on the Record;
Issued February 12, 2003

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective January 10, 2000 on the grounds that he refused an offer of suitable work.

On September 9, 1979 appellant, then a 29-year-old nurse, sustained a lumbosacral strain and herniated discs at L3-4 and L4-5 when he attempted to catch a falling patient at work. The Office paid compensation for periods of disability.[1] On December 10, 1999 the employing establishment offered appellant a modified-duty position as a clerk. The full-time position was sedentary in nature and consisted of clerical duties such as answering the telephone, making copies, engaging in data entry and collating paperwork. The position required lifting up to 2 pounds, walking up to 2 hours intermittently and sitting 1 to 8 hours on a discretionary basis. On December 10, 1999 the Office advised appellant of its determination that the clerk position was suitable and provided him with 30 days to accept the position or provide reasons for not accepting it. Appellant refused the clerk position indicating that he was not physically capable of performing it. By decision dated January 10, 2000, the Office terminated appellant's compensation effective January 10, 2000 on the grounds that he refused an offer of suitable work. By decisions dated June 12, 2000, April 4, 2001 and May 1, 2002, the Office affirmed its prior decisions.

The Board finds that the Office improperly terminated appellant's compensation effective January 10, 2000 on the grounds that he refused an offer of suitable work.

Section 8106(c)(2) of the Federal Employees' Compensation Act provides in pertinent part, "A partially disabled employee who ... (2) refuses or neglects to work after suitable work is

---

[1] Appellant had previously sustained an employment-related lumbosacral strain on September 30, 1978. He last worked in April 1980 and underwent a discectomy at L4-5 on September 14, 1993 which was authorized by the Office.

offered ... is not entitled to compensation."[2] However, to justify such termination, the Office must show that the work offered was suitable.[3] 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.[4]

The evidence of record does not show that appellant was capable of performing the position offered by the employing establishment and determined to be suitable by the Office in December 1999. In determining that appellant was physically capable of performing the clerk position in late 1999 the Office relied on the opinion of Dr. Donald V. Stevenson, an attending Board-certified orthopedic surgeon. However, the opinion of Dr. Stevenson does not clearly show that appellant was capable of performing the clerk position when it was offered. Therefore, the Office did not meet its burden of proof to show that the position was suitable at the time it was offered.

In a report dated March 23, 1999, Dr. Stevenson diagnosed a lumbar strain and spondylosis, possible lumbar radiculopathy, cervical strain and possible cervical spondylosis and radiculopathy. He noted that appellant exhibited a limited range of motion and pain complaints on examination. Dr. Stevenson stated that he had not reviewed any findings of x-ray testing but had reviewed the findings of computerized tomography testing from 1983. He indicated that viewing the findings of magnetic resonance imaging (MRI) scan and electromyogram (EMG) testing of appellant's cervical and back regions would be helpful in evaluating his condition. Dr. Stevenson recommended that appellant be referred to a pain management specialist and indicated that it was unlikely he could return to his regular work.[5]

In a form report dated August 17, 1999, Dr. Stevenson diagnosed chronic lumbar strain and lumbar spondylosis and indicated that appellant could return to sedentary work on August 18, 1999. The Office apparently relied on this report as the basis of its determination that the clerk position offered by the employing establishment in late 1999 was suitable. However, Dr. Stevenson has provided an essentially equivocal opinion regarding appellant's ability to work at that time.[6] He did not indicate what type of sedentary work appellant was able to perform. Dr. Stevenson did not delineate various work restrictions for activities such as lifting, walking and sitting.[7] Moreover, it is unclear whether Dr. Stevenson provided an opinion that

[2] 5 U.S.C. § 8106(c)(2).

[3] *David P. Camacho*, 40 ECAB 267, 275 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341, 345 (1981).

[4] 20 C.F.R. § 10.124; *see Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

[5] Dr. Stevenson stated, "His current level of drug dependency, immobility and subjective pain would preclude a return to all but the most sedentary of work activities."

[6] Dr. Stevenson completed another form report which contained an equivocal opinion regarding appellant's ability to work. In an undated form report, received by the Office on July 27, 1999, Dr. Stevenson indicated that appellant could return to sedentary work in September 1999. He also checked a box and added a notation which indicated that appellant should permanently remain off work.

[7] The position required lifting up to two pounds, walking up to two hours and sitting one to eight hours.

appellant could work on a full-time basis.[8] In addition, he provided limited findings in support of his apparent opinion on disability and it does not appear that his opinion was based on a complete and accurate factual and medical history.[9] For example, it remains unclear whether Dr. Stevenson engaged in an adequate review of the relevant findings on diagnostic testing.[10]

For these reasons, the Office improperly terminated appellant's compensation effective January 10, 2000 on the grounds that he refused an offer of suitable work.

The May 1, 2002 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, DC
February 12, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[8] After the word, "sedentary," Dr. Stevenson included the notation, "? Q/W," which literally would mean, "question mark, each week." Therefore, it appears that Dr. Stevenson was uncertain regarding how many hours appellant could work per week.

[9] *See William Nimitz, Jr.*, 30 ECAB 567, 570 (1979) (finding that a medical opinion must be based on a complete and accurate factual and medical history).

[10] It is unclear whether Dr. Stevenson reviewed the MRI findings from 1995 and 1997 and the EMG findings from 1995. The record contains other reports of Dr. Stevenson, but these were produced after the Office terminated appellant's compensation effective January 10, 2000.