U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SAMUEL W. SWOFFORD and U.S. POSTAL SERVICE,
HILLTOP CARRIER ANNEX, Greensboro, NC

Docket No. 02-2259; Submitted on the Record;
Issued February 6, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits on the grounds that he refused an offer of suitable work.

Appellant, a 46-year-old letter carrier, filed a notice of occupational disease on November 4, 1994 alleging that he developed a right shoulder condition due to duties of his federal employment. The Office accepted appellant's claim for rotator cuff tendinitis on the right on December 6, 1994. He received a schedule award for 15 percent permanent impairment of his right upper extremity on November 8, 1995. Appellant filed a notice of recurrence of disability on March 30, 1996. The Office expanded his claim to include right carpal tunnel syndrome as well as surgical treatment for both his wrist and shoulder. On June 5, 1997 appellant received a schedule award for an additional 10 percent permanent impairment of his right upper extremity.

Appellant filed a claim for pain in the neck, left shoulder and left upper back on September 11, 1997. The Office accepted this claim for left rotator cuff tendinitis on November 17, 1997. He underwent left shoulder surgery on February 2, 1998. Appellant returned to light-duty work on July 13, 1998. By decision dated July 30, 1998, the Office determined that his light-duty position represented his wage-earning capacity. The Office granted appellant a schedule award for 20 percent impairment of his left upper extremity on August 27, 1998.

Appellant filed a claim alleging that he developed right foot pain due to walking and standing in the performance of duty on January 4, 1999. The Office accepted appellant's claim for aggravation of right plantar fasciitis on April 25, 2000.

Appellant underwent a second right wrist surgery on February 28, 2000. The Office entered him on the periodic rolls on March 6, 2000.

The Office found that the position of modified distribution clerk offered by the employing establishment was suitable work on August 6, 2001 and allowed appellant 30 days to accept the position or offer his reasons for refusal. Appellant offered his reasons for refusing the position on September 5, 2001. In a letter dated November 26, 2001, the Office informed appellant that his reasons for refusing were unacceptable and allowed him an additional 15 days to accept the position. In a letter dated December 6, 2001, appellant stated that he was willing to accept the position, but that he did not have a copy of the position to sign. By decision dated April 19, 2002, the Office terminated appellant's compensation benefits finding that he refused an offer of suitable work. Appellant requested reconsideration and by decision dated July 19, 2002, the Office denied modification of its April 19, 2002 decision.

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits on the grounds that he refused an offer of suitable work.

Section 8106(c) of the Federal Employees' Compensation Act[1] 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. 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. 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 job requirements of the position. In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2),[2] which is a penalty provision, the Office has the burden of showing that the work offered to and refused or neglected by the claimant was suitable.[3]

Appellant's attending physician, Dr. Daniel F. Murphy, a Board-certified orthopedic surgeon, set forth appellant's work restrictions on December 12, 1999 as lifting no more than 10 pounds for 30 minutes a day, sitting for 6 hours a day, standing for 2 hours a day, walking for 2 hours a day, no climbing, kneeling, bending, stooping, twisting, pushing or pulling, simple grasping for 1 hour a day, no fine manipulation or reaching above the shoulder and no repetitive use of the right hand including writing.

The Office referred appellant for a second opinion with Dr. Andrew Bush, a Board-certified orthopedic surgeon. In an August 5, 2000 report, Dr. Bush noted appellant's history of injury and performed a physical examination. He diagnosed right biceps tendinitis, right shoulder impingement syndrome and right thumb flexor tenosynovitis. Dr. Bush stated that appellant could perform light-duty work and recommended a functional capacity evaluation. In a supplemental report dated September 11, 2000, Dr. Bush stated that appellant could perform the duties of a modified distribution clerk with additional restriction of no repetitive above shoulder

[1] 5 U.S.C. § 8106(c)(2).

[2] Section 8106(c) serves as a bar to claimant's entitlement to further compensation for total disability, partial disability or a schedule award for permanent impairment arising out of an accepted employment injury. *Albert Pineiro*, 51 ECAB 310, 313 (2000).

[3] *Id.* at 311-12.

responsibilities. The Office found a conflict between Drs. Murphy and Bush regarding the extent of appellant's work restrictions. Section 8123(a) of the Act,[4] provides: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

The Office referred appellant, a statement of accepted facts and a list of specific questions to Dr. Robert W. Elkins, a Board-certified orthopedic surgeon, to resolve the conflict regarding appellant's work restrictions. On December 12, 2000 Dr. Elkins noted appellant's history of injury and performed a physical examination including range of motion and strength testing. He diagnosed multiple areas of repetitive motion degenerative changes including the right and left shoulders, right carpal tunnel syndrome and plantar fasciitis. Dr. Elkins recommended a sedentary job with no repetitive motion of the right upper extremity and no repetitive motion over appellant's head. He provided work restrictions including walking for two hours a day, standing for two hours a day, reaching for two hours a day, no reaching above the shoulder and repetitive movements of the wrists and elbows for only one hour a day each. Dr. Elkins further indicated that appellant could push for one hour no more than two pounds, that he could pull for one hour no more than two pounds and that he could lift no more than five pounds.

In situations were there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[5] Dr. Elkins based his report on a proper factual background and included all of appellant's physical findings in reaching his work restrictions including the conditions of plantar fasciitis, right and left shoulder injuries, right carpal tunnel syndrome, left knee, left hand and neck conditions. He provided work restrictions substantially similar to those provided by appellant's attending physician, Dr. Murphy. The Board finds that Dr. Elkins' well-reasoned report is entitled to the weight of the medical opinion evidence.

The employing establishment provided appellant with a limited-duty job offer on March 21, 2001. In a report dated April 3, 2001, Dr. Murphy diagnosed bilateral plantar fasciitis, left knee chondromalacia patella and arthritis right hand. He reviewed the position description and stated: "My only concern reviewing this is the potential for repetitive motion, but based on what I [a]m seeing by the description alone I do not see a lot of repetitive motion. I think based on that description of the job a trial period at this job is a reasonable approach as long as his previous restrictions are adhered to. As long as there [i]s not a lot of repetitive motion it may be something he can do."

On April 5, 2001 the employing establishment further revised the job offer after eliminating duties and mailed a copy to appellant. In a note dated April 10, 2001, Dr. Murphy stated that appellant had soft tissue symptomatology in his right hand, both feet, both shoulders and right knee. He stated that appellant had permanent restrictions in regards to weight with

[4] 5 U.S.C. §§ 8101-8193, 8123(a).

[5] *Nathan L. Harrell,* 41 ECAB 401, 407 (1990).

pushing, pulling and lifting as well as repetitive motion. Dr. Murphy stated that the new job description provided by appellant did fall within vocational parameters "if and only if all work is done at his pace so there is not a lot of repetitive motion." He concluded: "If a trial period at this job is undertaken it is very likely that it may increase symptoms in multiple areas and, therefore, any consideration of a job trial of this or any other job must be done with very careful consideration on his part as well as his employers part as it may very well produce more symptoms requiring treatment."

The position description clearly adheres to Dr. Murphy's requirement that all work be done at appellant's pace as each duty mentions "self-paced." Furthermore, the Board has held that the possibility of a future injury does not constitute an injury under the Act and, therefore, no compensation can be paid for such a possibility.[6] Dr. Murphy approved the position except for the speculative possibility of future injury. He did not provide any acceptable medical reason that appellant could not return to work in the offered position and, in fact, indicated that he could attempt to perform the offered duties. This report does not establish that the offered position was not suitable work.

On April 28, 2001 appellant noted receiving this job offer and discussed his disagreement with it, alleging that the duties entailed repetitive motion. In a letter dated August 6, 2001, the Office informed appellant that it found the April 6, 2000 position to be suitable work and allowed appellant 30 days to accept the position or offer his reasons for refusal. The Office included a copy of the job offer with this letter. All the enumerated duties specifically mentioned that the duties are "self-paced." Appellant responded in a letter received by the Office on September 5, 2001 relying on Dr. Murphy's April 10, 2001 note without providing a clear acceptance or denial of the offered position.

In a letter dated November 26, 2001, the Office informed appellant that his reasons for refusing the position were not acceptable and allowed him an additional 15-day period to accept the position. The Office informed appellant that, "In the event you now wish to accept the offer, you should also provide a copy of your acceptance to the employer who offered the position and cooperate with any of their instructions about starting the position."

Appellant stated that he was willing to accept the job offer in a letter dated December 6, 2001. However, he stated that he did not have a copy of the job offer to sign, that he had requested a job offer from the employing establishment and that the employing establishment had not provided him with a copy of the position offer.

The Office contacted the employing establishment on April 19, 2002 and determined that the job offer was still available and that appellant had not contacted the employing establishment regarding a return to work. By decision on that date, the Office terminated appellant's compensation benefits finding that he refused an offer of suitable work.

The medical evidence from both the impartial medical examiner, Dr. Elkins and appellant's attending physician, Dr. Murphy, establishes that the offered position was within his work restrictions. The Office provided appellant with the necessary procedural steps to insure

[6] *Gaetan F. Valenza*, 39 ECAB 1349 1356 (1988).

that he was aware of his duty to return to suitable work and the consequences for refusal. Although appellant alleged that he did not have a copy of the limited-duty job offer to sign and return to the employing establishment, the record establishes that both the employing establishment and the Office provided appellant with a copy of the position prior to the termination decision. The Board finds, therefore, that the Office met its burden of proof to terminate appellant's compensation benefits for refusing to work after suitable work was procured for him.

Appellant requested reconsideration on June 7, 2002 and again alleged that he had not refused the offered position, but that his December 6, 2001 letter to the Office was an acceptance of the offered position. He submitted a statement from his union representative, James G. Tvelia, asserting that appellant had informed him that he had requested a copy of the position description from both the employing establishment and the Office and had not received one. Mr. Tvelia stated: "Without an offer to sign [appellant] could not return to work. Postal regulations prohibit an employee from returning to work without clearance or a signed agreement to the fact that he is cleared to return to duty in this new modified position." Mr. Tvelia further alleged that he had a conversation with the station manager at the employing establishment who confirmed that the limited-duty position was no longer available in September or October 2000.

This statement is insufficient to establish that appellant did not refuse an offer of suitable work. As noted previously, appellant received at least two copies of the job offer by mail prior to the date the Office terminated his compensation benefits. Provided appellant had misplaced these copies and wished to return to the designated suitable work position, there is no reason that he could not obtain a copy of the position description from the employing establishment. The employing establishment noted on both November 26, 2001 and April 19, 2002 that the job was still available. As appellant did not take reasonable steps to return to work there is no evidence substantiating the allegation that the position was no longer available by October 2000.

The July 19 and April 19, 2002 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
February 6, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member