U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RAMON GUITRON and U.S. POSTAL SERVICE,
POST OFFICE, Redwood City, CA

Docket No. 03-418; Submitted on the Record;
Issued March 12, 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 compensation benefits on the grounds that he refused an offer of suitable work.

On October 29, 1997 appellant, then a 49-year-old distribution clerk, sustained an employment-related right knee strain and lumbar sprain when he slipped and fell at work. On January 19, 1999 he underwent authorized arthroscopy of the right knee. The Office continued to develop the claim, and on June 14, 1999 referred appellant to Dr. Jeffrey L. Halbrecht for a second opinion evaluation. Finding that a conflict in the medical opinion existed between the opinions of Dr. Halbrecht and that of Dr. Duc M. Nguyen, appellant's treating physician, by letter dated January 26, 2000, the Office referred appellant to Dr. Ned M. Grove for an impartial medical evaluation.[1]

By letter dated June 19, 2001, the employing establishment offered appellant the position of modified distribution clerk. Appellant was to work six hours per day for two weeks and then begin eight-hour workdays. The job offer further described work duties, including 4 1/2 to 5 hours per day at the DBCS machine. On June 27, 2001 appellant accepted the job offer, but stated that he disagreed with Dr. Grove's opinion. He returned to work, six hours per day, on June 30, 2001. On July 14, 2001 appellant stopped work due to an employment-related hernia. He returned to work, four hours per day, on August 27, 2001. The record indicates that the physician treating his hernia returned appellant to full duty.

In a letter dated September 26, 2001, the Office advised appellant that the position offered on June 19, 2001 was suitable. Appellant was notified of the penalty provisions of section 8106 and given 30 days to respond. In response, appellant submitted reports from Dr. Nguyen who noted that magnetic resonance imaging (MRI) done on July 24, 2001

[1] All three physicians are Board-certified orthopedic surgeons. Drs. Halbrecht and Grove were furnished with the medical record, a statement of accepted facts and a set of questions.

demonstrated bulging discs at L2-3, L3-4 and L4-5 and advised that appellant could work only four hours per day. In a letter dated November 1, 2001, the Office advised appellant that his reasons for refusing the offered position were not acceptable, and he was given an additional 15 days to respond.

By decision dated November 20, 2001, the Office terminated appellant's wage-loss compensation on the grounds that he declined an offer of suitable work. Appellant, through his attorney, requested a hearing that was held on July 25, 2002. At the hearing appellant testified that he sustained an employment-related arm injury in 1995 and had restrictions of no lifting above the head or twisting and, therefore, worked outside his restrictions when working at the DBCS machine. He further testified that upon his initial return to work from the 1997 injury, he did not work at the DBCS machine, and that he returned to eight-hour-per-day duty on November 17, 2001 but is still not working at the DBCS machine.[2] Lastly, appellant testified that he now has a back condition. He also submitted additional reports from Dr. Nguyen who continued to advise that appellant should work only four hours per day and statements from coworkers Ricardo Negrete and Aristide B. Valerio, who stated that working at the DBCS machine required twisting maneuvers of the body.

By decision dated October 17, 2002, an Office hearing representative affirmed the prior decision, based on the opinion of Dr. Grove, the impartial medical examiner. The instant appeal follows.[3]

The Board finds that the Office did not meet its burden of proof in terminating compensation under 5 U.S.C. § 8106(c).

Section 8106(c)(2) of the Federal Employees' Compensation Act[4] provides in pertinent part, "A partially disabled employee who ... refuses or neglects to work after suitable work is offered ... is not entitled to compensation."[5] To prevail under this provision, the Office must show that the work offered was suitable and must inform the employee of the consequences of refusal to accept such employment. An employee who refuses or neglects to work after suitable work has been offered has the burden of showing that such refusal to work was justified.[6] Section 8106(c) will be narrowly construed as it serves as a penalty provision, which may bar an

[2] Appellant testified that he is performing all the duties of the June 19, 2001 job offer with the exception of operating the DBCS machine and processing passports, an area in which he has not been trained.

[3] The record also contains a September 26, 2001 decision finding that an overpayment in compensation in the amount of $325.71 had been created. This was repaid in full. By decision dated November 12, 2002, the Office approved an attorney's fee in the amount of $2,187.50; neither the September 26, 2001 overpayment decision nor the November 12, 2002 decision approving an attorney's fee have been appealed to the Board.

[4] 5 U.S.C. §§ 8101-8193.

[5] 5 U.S.C. § 8106(c)(2).

[6] *See Michael I. Schaffer*, 46 ECAB 845 (1995).

employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.[7]

The initial question presented is whether the Office properly determined that the offered position was medically suitable. In the instant case, the medical evidence on which the Office relied in making its decision is the opinion of the referee examiner Dr. Ned R. Grove, a Board-certified orthopedic surgeon, who provided a narrative report dated February 9, 2000 and a work capacity evaluation (Form OWCP- 5c) dated February 15, 2000. By November 20, 2001, when the Office rendered a decision in this case regarding the suitability of the offered position, Dr. Grove's reports were 22 months old. The Board finds that these reports cannot be considered to be current medical evidence as to appellant's ability to perform the offered position.[8] The Board also notes that the Office did not send the job description to a physician for an opinion as to whether appellant could perform the specific duties outlined in the job offer.

The Board further notes that in numerous reports dating from January 24, 2000 to August 12, 2002, Dr. Nguyen, appellant's treating Board-certified orthopedic surgeon, continued to advise that appellant could work only four hours per day and that appellant had bulging discs at L2-3, L3-4 and L4-5, which also precluded full-time work. Subsequently acquired conditions are to be considered in suitability determinations.[9] The most current medical evidence of record, therefore, does not establish that the offered job was within appellant's work restrictions.

As noted above, it is the Office's burden to establish that the offered position was medically suitable. The Board finds that the Office has not met its burden in this case.

[7] *See Robert Dickerson*, 46 ECAB 1002 (1995).

[8] *See, e.g., Keith Hanselman*, 42 ECAB 680 (1991) where the Board determined that the Office, in a wage-earning capacity decision, improperly relied on a work restriction evaluation that was over a year old.

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(4) (December 1993).

The decision of the Office of Workers' Compensation Programs dated October 17, 2002 is hereby reversed.

Dated, Washington, DC
March 12, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member