

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RAYMOND J. COOPER and U.S. POSTAL SERVICE,
POST OFFICE, Bronx, NY

*Docket No. 02-1717; Submitted on the Record;
Issued May 9, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation for failure to accept a suitable job offer; and (2) whether the refusal of the Office to reopen appellant's case for reconsideration constituted an abuse of discretion.

The Office accepted that appellant, a custodian, born November 23, 1944, sustained bilateral carpal tunnel syndrome due to repetitive motions performed in the course of his federal duties on or about October 21, 1993.¹ Appellant returned to full duty on April 4, 1994 with intermittent periods of disability. On October 28, 1995 appellant underwent a left median nerve decompression of the carpal tunnel as a result of the employment-related condition. The Office later authorized a second carpal tunnel release surgery; however, appellant declined the surgery. The employing establishment provided appellant a limited-duty position on or about January 29, 1996, however, the record does not reflect when appellant returned to modified work. He was paid compensation for wage loss as appropriate.

Dr. Jacob Nir, a Board-certified physician in physical medicine and rehabilitation treated appellant for the accepted condition. In a work capacity evaluation report dated January 29, 1996, Dr. Nir indicated that appellant had not completely recovered from the accepted condition and had complained of wrist pain, numbness and tingling. In a separate report with the same date, he indicated that diagnostic tests performed on January 26, 1996 revealed that there was no improvement of the left median nerve following the 1995 surgery. Dr. Nir stated that the electromyography report specifically revealed severe left and mild right carpal tunnel syndrome and that, as a result, appellant was disabled.

The Office referred appellant for a second opinion examination with Dr. Robert Beasley, a Board-certified hand and wrist surgeon on November 13, 1996 to determine the extent, if any,

¹ Recurrences of disability were accepted on May 10 and December 20, 1994, and March 6 and October 12, 1995.

of appellant's work-related impairment. In the second opinion reports dated November 13, 1996 and January 23, 1997, Dr. Beasley opined that, although appellant complained that he continued to suffer with his carpal tunnel syndrome, there was no objective documentation or physical evidence to substantiate appellant's disability.

By decision dated December 19, 1997, the Office terminated appellant's compensation as the evidence established that appellant's injury-related disability had ceased. On January 17, 1998 appellant requested an oral hearing. On July 23, 1998 an Office hearing representative remanded the case for further medical development.

On remand appellant was referred to Dr. Daniel Feuer, a Board-certified neurologist. In a September 24, 1998 report, Dr. Feuer discussed the diagnosed carpal tunnel syndrome and that appellant had decided not to undergo further surgery as a treatment option. He concluded that appellant's disability was causally related to the October 21, 1993 incident; however, Dr. Feuer found appellant neurologically capable of engaging in full-time limited-duty employment if he avoided repetitive continuous exertions that brought upon the initial injury. Dr. Feuer outlined work restrictions on a separate work-capacity evaluation dated September 24, 1998.

Following review of Dr. Feuer's findings, the Office referred appellant to the vocational rehabilitation program to assess positions appropriate for appellant and a rehabilitation plan was prepared by a rehabilitation counselor for the following positions: security system monitor; information clerk; and receptionist, nontyping.

The Office thereafter received a report by Dr. Nir dated August 6, 1999, in which he opined that appellant remained completely disabled as a result of the previously accepted condition and could not perform any type of work. Based on the opinion provided by Dr. Nir, appellant refused to sign the rehabilitation plan prepared by his rehabilitation counselor.

The Office referred appellant to another second opinion examination with Dr. Robert April, a Board-certified neurologist. In a December 20, 1999 report, Dr. April discussed appellant's diagnosis of carpal tunnel syndrome, his medical history and that he continued treatment with Dr. Nir. He reviewed his findings and appellant's examination and concluded that there was no evidence, based on history or job evaluation, that appellant's employment was causally related to his condition. Dr. April opined that, from a functional point of view, there was no injury-related disability or objective findings that would warrant work limitations.

The Office determined that a conflict in the medical evidence existed between Drs. Nir and April and referred appellant to Dr. Joseph Polifrone, a Board-certified neurologist for resolution. In his report dated February 8, 2000, Dr. Polifrone reviewed the statement of accepted facts, the medical record and his findings on examination. He stated:

“The electromyographic studies done in this case all appear to make a diagnosis of carpal tunnel syndrome, yet the clinical examination is not typical of carpal tunnel syndrome in that there is no atrophy or weakness present and no specific sensory loss on sensory examination. Therefore clinically we cannot make a

diagnosis of carpal tunnel syndrome although supposedly it has been made on electrical studies.”

* * *

“It is difficult to understand how four months as a custodian could cause carpal tunnel syndrome in an individual who unless had it from the beginning because of the diabetes and the type of work then could have aggravated that situation...”

* * *

“I would strongly recommend that he undergo electromyographic studies by an outside consultant who is proficient in doing these types of studies and then we will take it from there. In the meantime, I doubt if he will be doing any type of work...”

Appellant was thereafter referred for an EMG on April 18, 2000 and Dr. Polifrone reviewed the findings. In a May 26, 2000 report, Dr. Polifrone discussed that the EMG revealed evidence of mild to moderate left median mononeuropathy at the left wrist. He noted that the findings of the physician conducting the electrical study were mainly in the sensory functioning of the median nerve and that appellant’s motor studies were all within normal limits. Dr. Polifrone concluded that that was the reason that his clinical examination failed to reveal any evidence of carpal tunnel syndrome. He concluded that there was no clinical reason or evidence to explain why appellant felt worse following surgery in 1995 and opined that appellant could engage in useful gainful employment without any problems.

Dr. Polifrone submitted a work-capacity evaluation form outlining appellant’s work restrictions for future light duty. He noted that appellant was capable of working 8 hours per day with limitations on reaching, reaching above shoulders, operating a motor vehicle, twisting, repetitive wrist and elbow movements, pushing and pulling not more than 25 pounds and lifting not more than 20 pounds.

In a May 10, 2001 letter, the employing establishment offered appellant a modified custodian position based on the work restrictions outlined by Dr. Polifrone. The specified duties of the position consisted of cleaning the lobby, men’s and women’s restrooms, manager’s office and carrier station work floor, sweeping the loading dock floor, bay area and in front of station, and raising the American Flag daily.

On May 22, 2001 appellant refused the job offer stating that his condition had gotten worse and that sweeping and cleaning were some of the most difficult things to do. He further advised that he would submit additional medical evidence supporting disability.

By letter dated June 7, 2001, the Office advised appellant that he had been offered a position as modified custodian, which was currently available and found to be suitable. The Office advised appellant that he had 30 days within which to accept the position or provide an explanation for refusing. Appellant was also advised as to the consequences of his refusing the suitable job offer.

On June 9, 2001 the Office advised appellant that his reasons for refusal had been found unacceptable, as the medical evidence of record established that he was capable of performing the offered position. The Office advised appellant that he had 15 days within which to accept the offered job without penalty and that, if he did not accept it, all compensation would be terminated.

The Office received reports dated July 21 and December 22, 2000, in which Dr. Nir maintained that appellant had shown no improvement and that he remained totally disabled. Appellant submitted nothing further regarding the offer of employment.

In a decision dated August 10, 2001, the Office terminated appellant's wage-loss compensation benefits effective that date, finding that he refused to work after a suitable job offer was made.

In a letter dated January 31, 2002, appellant through counsel requested reconsideration and submitted a legal brief in support of the request.

In a nonmerit decision dated April 24, 2002, the Office denied appellant's request for reconsideration on the basis that he failed to submit any new or relevant evidence.

The Board finds that the Office properly terminated appellant's compensation based on his refusal to accept suitable employment as offered by the employing establishment.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened before it may terminate or modify compensation benefits.² This burden of proof is applicable if the Office terminates compensation under 5 U.S.C. § 8106(c), for refusal to accept suitable work.³ The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.⁴

The implementing regulation provides that an employee who refuses or neglects to work after suitable work has been offered or secured 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 a showing before entitlement to compensation is terminated.⁵ To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.⁶

The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by

² *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

³ *See Leonard W. Larson*, 48 ECAB 507 (1997).

⁴ *Stephen R. Lubin*, 43 ECAB 564 (1992).

⁵ *John E. Lemker*, 45 ECAB 258 (1993).

⁶ *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

medical evidence.⁷ In assessing the medical evidence, the number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for and the thoroughness of physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.⁸

The Board finds that the weight of the medical evidence establishes that the modified custodian position was within appellant's physical limitations. Dr. Polifrone, the impartial medical examiner, examined appellant on February 4, 2000 and indicated that upon review of recent EMG testing appellant's mild to moderate left median mononeuropathy at the left wrist would not preclude him from engaging in gainful employment with the employing establishment. Dr. Polifrone outlined work restrictions for appellant including limitations on reaching, reaching overhead, operating a motor vehicle, twisting, repetitive wrist and elbow movements and outlined weight limitations on pushing, pulling and lifting. The duties of the offered position included cleaning the lobby, men's and women's restrooms, the manager's office and carrier station work floor. The position also required sweeping the loading dock floor, bay area and front station and raising the American flag. There is substantial medical evidence, namely Dr. Polifrone's referee medical opinion, which supports that the position offered is within appellant's physical limitations.

The Board has held that, when there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist to resolve the conflict of medical opinion, the opinion of such specialist, if sufficiently well rationalized and based upon a proper medical background must be given special weight.⁹

The weight of the medical evidence in this case establishes that appellant is capable of performing the position offered to him on May 10, 2001. The Board finds that Dr. Polifrone's referee opinion is sufficiently probative, rationalized and based upon a proper factual background and, therefore, constitutes the weight of medical opinion. Although appellant contends that he remains medically unable to perform the offered job based on the opinion of Dr. Nir, the weight of the medical evidence, as represented by Dr. Polifrone's February 8 and May 26, 2000 reports and work-capacity evaluation, establishes that the position offered is consistent with appellant's physical limitations. Dr. Polifrone's medical opinion on appellant's work capacity is given special weight over the opinion of Dr. Nir, who was on one side of the conflict created in this case.

The Board further finds that the refusal of the Office to reopen appellant's case for reconsideration did not constitute an abuse of discretion.

⁷ *Marilyn D. Polk*, 44 ECAB 673 (1993).

⁸ *Connie Johns*, 44 ECAB 560 (1993).

⁹ *James P. Robert*, 31 ECAB 1010 (1980).

Under section 8128(a) of the Federal Employees' Compensation Act,¹⁰ the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,¹¹ which provides that a claimant may obtain a review of the merits if his written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

“(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or

“(ii) Advances a relevant legal argument not previously considered by [the Office], or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office].”

Section 10.608(b) provides that any application for review of the merits of the claim which fails to meet at least one of the standards described in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.¹²

The Board has held that the submission of evidence, which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.¹³

In support of appellant's reconsideration request, appellant's counsel submitted additional medical reports from Dr. Nir which reiterated findings previously provided and opining that appellant remained totally disabled as a result of the accepted employment-related injuries. Appellant's counsel also submitted various arguments, which primarily concerned the medical opinions of Dr. Robert April, the second opinion examiner and duties of the offered position. Appellant's counsel generally argued that the medical opinion of Dr. Polifrone was insufficient to justify termination of benefits in this case. In this regard, the medical evidence is duplicative of that previously submitted from Dr. Nir.

Appellant's counsel asserted that the Office took an adversarial approach in this case when it failed to further develop the medical evidence as a result of Dr. April's report. Appellant's counsel argued that Dr. April simply outlined the same carpal tunnel symptoms discussed by appellant's treating physician since the inception of the disease, without a sufficient discussion on causation. He further asserted that Dr. April's report was inconsistent with the factual evidence of record. These arguments are largely irrelevant to the issue as a conflict in medical opinion was created between Drs. Nir and April, necessitating a referral to the impartial medical specialist.

¹⁰ 5 U.S.C. § 8128(a).

¹¹ 20 C.F.R. § 10.606(b)(2) (1999).

¹² 5 U.S.C. § 10.608(b).

¹³ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

Appellant's January 31, 2002 request for reconsideration failed to demonstrate that the Office erroneously applied or interpreted a specific point of law and did not advance a relevant legal argument not previously considered by the Office. Additionally, as appellant's request did not include any relevant and pertinent new evidence not previously considered by the Office, appellant is not entitled to a review of the merits of his claim. Accordingly, the Board finds that the Office did not abuse its discretion in denying appellant a merit review.

The decisions of the Office of Workers' Compensation Programs dated April 24, 2002 and August 10, 2001 are affirmed.

Dated, Washington, DC
May 9, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member