U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHNNY MENDEZ and DEPARTMENT OF AGRICULTURE,
U.S. FOREST SERVICE, Mountainair, NM

Docket No. 03-765; Submitted on the Record;
Issued September 15, 2003

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant is entitled to continuation of pay beyond April 10, 1999; and (2) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits effective December 1, 2002 on the grounds that he refused an offer of suitable work.

Appellant, a 51-year-old seasonal firefighter, filed a notice of traumatic injury on March 23, 1999 alleging that he injured his back while putting a generator in storage on March 22, 1999. The Office accepted appellant's claim for a thoracic sprain and approved appropriate medical and compensation benefits. A June 6, 1999 magnetic resonance imaging (MRI) scan revealed a T12-L1 disc bulge/facet arthropathy. Appellant stopped work on the date of injury and has not returned. The record reflects that appellant was appointed as an emergency casual employee AD-2 on March 22, 1999 for an incident assignment which terminated on April 10, 1999.

The Office found that a conflict in medical opinion existed between the opinions of Dr. Claude Gelinas, a Board-certified orthopedic surgeon, who had provided a second opinion evaluation for the Office and appellant's treating physician, Dr. Richard R. Weber, an osteopath. By letter dated November 1, 2001, the Office referred appellant to Dr. Jonathan Burg, a physiatrist, for an impartial medical evaluation and to resolve the issue regarding appellant's work capacity.

By decision dated February 25, 2002, the Office determined that appellant's eligibility for continuation of pay ceased effective April 10, 1999, the date his assignment ended with the employing establishment.

By letter dated May 30, 2002, the employing establishment offered appellant a position as an information receptionist. He declined the position on June 10, 2002 explaining that his prescribed medication caused drowsiness and made it difficult for him to drive, that he had to lie down during the day to relieve the pain, that he had just started to undergo treatments at a

wellness clinic in Albuquerque and, as he did not know how to read or write very well, he would not be able to do the job.

By letter dated June 13, 2002, the Office informed appellant that he had received an offer of suitable work. He was notified of the penalty provisions of section 8106 and given 30 days to accept the position or offer his reasons for refusal. On June 17, 2002 the employing establishment forwarded appellant's June 10, 2002 refusal of the job offer, including his letter of explanation. By decision dated November 26, 2002, the Office terminated his compensation benefits effective December 1, 2002 finding that he refused an offer of suitable work.

The Board finds that the Office properly determined that appellant was not entitled to continuation of pay beyond April 10, 1999.

Section 8118 of the Federal Employees' Compensation Act provides for payment of continuation of pay, not to exceed 45 days and subject to specified conditions, to an employee who has filed a claim for a period of wage loss due to a traumatic injury.[1] Section 10.222(a)(5) of the applicable regulations[2] provides that, where pay is continued after an employee stops work due to a disabling traumatic injury, such pay shall be terminated only when the employee's period of employment expires or employment is otherwise terminated, as established prior to the date of injury.

In a September 24, 2001 letter, the employing establishment advised that appellant was hired as an emergency casual employee AD-2 for eight hours daily effective March 22 until April 10, 1999. As the evidence in this case supports that appellant's term with the employing establishment was effective only from March 22 through April 10, 1999, appellant's eligibility for continuation of pay ceased effective April 10, 1999, the date his temporary assignment ended. Appellant was, therefore, entitled to receive continuation of pay from the employing establishment only until April 10, 1999.

The Board further finds that the Office properly terminated appellant's compensation benefits on the grounds that he refused an offer of suitable work.

It is well settled that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[3] 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)(2) of the Act[4] 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. The implementing regulation at section 10.516 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

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[1] 5 U.S.C. § 8118.

[2] 20 C.F.R. § 10.222(a)(5) (1999).

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

[4] 5 U.S.C. § 8106(c)(2).

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] Section 10.517 of the applicable regulations[6] 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 with respect to termination of entitlement to compensation. To justify termination of compensation, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[7] The Board has required that, if an employee presents reasons for refusing an offered position, the Office must inform the employee if it finds the reasons inadequate to justify the refusal of the offered position and afford appellant one final opportunity to accept the position.[8]

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 medical evidence.[9] In assessing 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.[10]

The Office referred appellant for a second opinion evaluation with Dr. Claude Gelinas, a Board-certified orthopedic surgeon, on February 21, 2001. In his March 16, 2001 report, Dr. Gelinas noted appellant's history of injury and findings on physical examination. He stated that although appellant had evidence of multilevel degenerative spondylosis of the lower thoracic and lumbar spine, there was no evidence that appellant suffered other than an aggravation of preexisting degenerative changes. He advised that the proper diagnosis was multilevel lumbar spondylosis with chronic back pain. Dr. Gelinas opined that appellant was able to work in a light to medium level function. In an OWCP-5c work restriction form dated March 14, 2001, Dr. Gelinas opined that appellant could work an eight-hour day with no more than two hours of twisting. He further opined that appellant could lift, pull and push no more than 20 pounds.

In an April 19, 2001 report, Dr. Richard R. Weber, appellant's attending osteopath, advised that he reviewed Dr. Gelinas' March 16, 2001 report and concurred with the diagnosis.

[5] 20 C.F.R. § 10.516 (1999).

[6] 20 C.F.R. § 10.517(a).

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

[8] *Rosie E. Garner*, 48 ECAB 220 (1996); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[9] *See Marilyn D. Polk*, 44 ECAB 673 (1993).

[10] *See Connie Johns*, 44 ECAB 560 (1993).

He stated that, although appellant could return to work, he might not be able to lift 20 pounds and might not be able to work a full day.

To resolve the disagreement between appellant's attending physician, Dr. Weber, and the Office's second opinion physician, Dr. Gelinas, regarding the nature and extent of appellant's work restrictions, the Office properly referred appellant, a statement of accepted facts and a list of specific questions to Dr. Burg, a physiatrist, to resolve this issue.[11] In his November 13, 2001 report, Dr. Burg reviewed appellant's history of injury and medical treatment. He advised that the diagnostic impression, based on appellant's history, physical examination and radiographic studies, was chronic degenerative disc disease with multilevel degenerative spondylosis (facet arthritis) in the thoracic and lumbar spine, most symptomatic at T12-L1. Dr. Burg advised that the proper diagnosis for the work injury would be T12-L1 disc bulge with facet arthropathy and chronic pain at the thoracolumbar junction, either caused by or exacerbated by the work injury of March 22, 1999. He advised that appellant could work at a desk job or at a light-duty job with very limited lifting, based on the functional capacity evaluation, in the light to medium capability of handling up to 40 pounds occasionally and 15 pounds intermittently. In a November 29, 2001 OWCP-5c form report, Dr. Burg indicated that appellant was able to work an eight-hour day with restrictions of walking, standing, reaching and reaching above the shoulder for three hours a day with no twisting or climbing. Dr. Burg indicated that appellant could lift no more than 20 pounds and would be able to push, pull, lift, squat and kneel for only 2 hours and a 15-minute break was required every 2 hours.

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.[12] Dr. Burg's report is based on the proper history of injury and provided medical findings to support his conclusion that appellant was capable of light-duty work. The Board concludes that his report is entitled to special weight and establishes that appellant could return to light-duty work eight hours a day.

The employing establishment offered appellant a light-duty position as an information receptionist on May 30, 2002. This position required him to stand, walk, stoop and reach, with occasional lifting and carrying of small packages. The employing establishment advised that appellant would not be required to perform repetitive bending or stooping or to lift over 20 pounds. He would not be required to drive industrial-type vehicles during the course of his duties. Appellant was further allowed to sit, stand or walk whenever necessary to insure his comfort. The employing establishment advised that the light-duty work was no more demanding than home living.

On June 10, 2002 appellant declined the employing establishment's job offer. The reasons noted for his refusal were: his prescribed medication which caused drowsiness and made

[11] Section 8123(a) of the Federal Employees' Compensation Act, 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." 5 U.S.C. §§ 8101-8193, 8123(a).

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

it difficult for him to drive, that he had to lie down during the day to relieve the pain, that he had just started to undergo treatments at the wellness clinic in Albuquerque and, as he did not know how to read or write very well, he would not be able to do the job.

In a letter dated June 13, 2002, the Office advised appellant that the position was suitable within appellant's work capabilities. The Office afforded appellant 30 days from the date of the letter in which to accept the position or provide an explanation of the reasons for refusing it. He failed to respond to the Office's letter.

In order to properly terminate appellant's compensation under section 8106, the Office must provide appellant notice of its finding that an offered position is suitable and give him an opportunity to accept or provide reasons for declining the position.[13] The record in this case indicates that the Office properly followed the appropriate procedures in informing appellant that the offered position was suitable. The Office considered appellant's responses to the employing establishment's offer regarding the drowsiness and needing to lie down during the day and found that they were unacceptable. More importantly, appellant failed to respond to the Office's June 13, 2002 letter which contained the notification of suitability and advised him to respond within 30 days. Thus, the evidence of record establishes that the Office afforded the requisite procedural protections to appellant. The Office, therefore, has met its burden to terminate appellant's compensation benefits on the grounds that appellant unreasonably refused an offer of suitable work.

The decisions of the Office of Workers' Compensation Programs dated November 26 and February 25, 2002 decision are affirmed.

Dated, Washington, DC
September 15, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[13] *Maggie L. Moore*, *supra* note 8.