U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES W. WILLARD and U.S. POSTAL SERVICE,
WHEELER STREET STATION, Saginaw, MI

Docket No. 03-1783; Submitted on the Record;
Issued April 5, 2004

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits, effective April 6, 2001, on the grounds that he refused an offer of suitable work.

On April 25, 1997 appellant, then a 50-year-old letter carrier, filed an occupational disease claim assigned number A9-432873, alleging that on December 27, 1994 he first became aware of the pain in his neck, arms and back and numbness in his left leg. He further alleged that on April 23, 1997 he first realized that his pain and numbness were caused or aggravated by factors of his employment.

On September 17, 1997 appellant filed a second occupational disease claim assigned number A9-429077, alleging that on December 27, 1994 he realized that his spondylolisthesis and multilevel spinal stenosis were caused or aggravated by factors of his employment. He stopped work on September 15, 1997.[1]

By letter dated August 27, 1997, the Office accepted appellant's claim for spondylosyndesis and multilevel stenosis and authorized cervical decompression and fusion, which was performed on June 12, 1998. Appellant returned to work for four hours a day on November 23, 1998 and he was restricted from carrying a mailbag, lifting more than five pounds and working overtime. He stopped work on March 10, 1999 and has not returned.[2]

Upon review of the medical evidence from Dr. Lester Webb, a Board-certified family practitioner and appellant's treating physician, Dr. E. Malcom Field, a Board-certified

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[1] On October 9, 1997 the Office combined the April 25 and September 17, 1997 claims into a master case file record assigned number A9-429077, because they were duplicate claims.

[2] Appellant filed a claim alleging that he sustained a recurrence of disability on March 10, 1999 due to his December 27, 1994 employment injury. The Office accepted his recurrence claim on May 25, 1999.

neurosurgeon, and Dr. Pervez Yusaf, a Board-certified orthopedic surgeon, the Office determined that it was uncertain as to whether appellant was disabled for work. The Office referred him to Dr. Bruce D. Abrams, a Board-certified orthopedic surgeon, for a second opinion medical examination. He submitted a March 20, 2000 report, finding that appellant could return to light-duty work with the permanent restrictions of avoiding repetitive flexion, extension and turning of the neck and no lifting more than five pounds.

The Office found a conflict in the medical opinion evidence between Dr. Webb and Dr. Abrams, regarding the nature and extent of appellant's disability and referred him to Dr. Robert J. Gordon, a Board-certified osteopath specializing in occupational and sports medicine, for an impartial medical examination by letter dated August 25, 2000.

Dr. Gordon submitted a September 5, 2000 report, providing a history of appellant's medical conditions and treatment and family background. He also provided his findings on physical examination and noted a review of radiographic test results. Dr. Gordon stated that he needed to review additional medical records and that after completion of such review he would dictate an addendum and his conclusion. He submitted an addendum report dated September 6, 2000, indicating that appellant could work with the restriction of lifting no more than five pounds, avoiding any type of motion of the neck including flexion, extension and rotation, no work above shoulder level and no driving. In a work capacity form dated September 26, 2000, Dr. Gordon reiterated appellant's ability to work with restrictions.

On November 15, 2000 the employing establishment offered appellant the modified position of general clerk based on Dr. Gordon's September 6, 2000 report. In a letter dated December 28, 2000, the Office informed appellant that the offered position was suitable and allowed him 30 days to accept the position or offer his reasons for refusal. The Office also informed him of the penalty provisions of 5 U.S.C. § 8106(c).

In a January 25, 2001 letter, appellant, through his attorney, refused to accept the offered position on the grounds that he was totally disabled for work and that the job offer was not made in good faith because the job was stripped from his wife. By letter dated March 9, 2001, the Office informed appellant that his reasons for refusing the position was not acceptable and allowed him an additional 15 days to accept the position. In response, appellant's attorney submitted a March 19, 2001 letter, stating that appellant again rejected the offered position for the same reasons provided in his January 25, 2001 letter. In addition, appellant's attorney stated that, when appellant initially applied for work at the employing establishment, he only applied for work within the carrier craft and not clerical work such as, the offered position. He further stated that it was not clear whether the offered position was permanent.

By decision dated April 5, 2001, the Office terminated appellant's compensation benefits effective April 6, 2001 on the grounds that he refused suitable work as a general clerk pursuant to 5 U.S.C. § 8106(c). In a May 3, 2001 letter, appellant, through his attorney, requested an oral hearing before an Office hearing representative.

In a February 20, 2002 decision, the hearing representative affirmed the Office's decision, finding that Dr. Gordon's opinion was entitled to special weight as he was an impartial medical examiner who provided a well-rationalized medical opinion. On February 19, 2003

appellant, through his attorney, requested reconsideration and submitted arguments and evidence he believed merited further consideration.

By decision dated March 27, 2003, the Office denied appellant's request for modification based on a merit review of his claim.

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits, effective April 6, 2001, 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), it must establish that appellant refused an offer of suitable work. Section 8106(c) of the Federal Employees' Compensation 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. Section 10.517 of the applicable regulation[5] 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.[6]

In this case, the Office properly found a conflict in the medical opinion evidence between Dr. Webb, appellant's treating physician, who opined that appellant was totally disabled and Dr. Abrams, an Office referral physician, who opined that appellant could perform light-duty work eight hours a day with certain physical restrictions. The Office referred appellant to Dr. Gordon, a Board-certified osteopath specializing in occupational and sports medicine.

Section 8123(a) of the Act[7] 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."

When the Office referred appellant to Dr. Gordon for an impartial medical examination on August 25, 2000 the Office procedure manual provided that "unlike selection of second opinion examining physicians, selection of impartial physicians is made by a strict rotational system using appropriate medical directories" and specifically stated that "the Physicians'

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

[4] 5 U.S.C. § 8106(c)(2).

[5] 20 C.F.R. § 10.517(a).

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

[7] 5 U.S.C. § 8123(a).

Directory System [PDS] should be used for this purpose."[8] The Office procedure manual explained that the "PDS is a set of stand-alone software programs designed to support the scheduling of second opinion and impartial medical examinations" and stated that "the database of physicians for referee examinations was obtained from the *MARQUIS* Directory of Medical Specialists."[9] The *MARQUIS* Directory of Medical Specialists contained the names of physicians certified by the American Board of Medical Specialties.

Subsequent to the Office's selection of Dr. Gordon as an impartial medical examiner, the Office made changes in its procedure manual that became effective May 23, 2003. The Office procedure manual provides that, "unlike selection of second opinion examining physicians, selection of impartial physicians is made by a strict rotational system using appropriate medical directories" and specifically states that "the Physicians' Directory System (PDS), including physicians listed in the American Board of Medical Specialties Directory and specialists certified by the American Osteopathic Association (AOA), should be used for this purpose."[10] The Office continues to use the PDS for its selection of impartial physicians but, it has expanded the database of physicians included in the PDS. The procedure manual provides: "[The Office] recognized osteopathic doctors (DDs) as physicians within the meaning of the Act. As such, [The Office] also accords special weight to their opinions as impartial [medical] physicians, provided they are Board-certified and it can be established that such certification has been verified with the American Osteopathic Association (AOA)."[11]

In this case, Dr. Gordon was selected as an impartial medical examiner on August 25, 2000 prior to the implementation of the Office's modifications. He could not have served as an impartial medical specialist under the procedures in effect at that time, as the Office was not recognizing the American Osteopathic Board in its list of approved Boards and did not list Dr. Gordon in its list of Board-certified physicians.[12] Thus, his opinion that appellant was able to work with certain physical restrictions cannot be accorded the special weight given to an impartial medical specialist. Accordingly, the Office had no basis for its termination of appellant's compensation benefits based on the grounds that he refused suitable employment offered by the employing establishment.[13]

As the record contains an unresolved conflict of medical opinion as to whether appellant is capable of performing the duties of the offered modified position of general clerk, the Office failed to meet its burden of proof in terminating appellant's compensation benefits. Consequently, this case must be remanded for further medical development. On remand the

[8] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b)(March 1994).

[9] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.7(a)(March 1994).

[10] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b)(May 2003).

[11] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.7(a)(May 2003).

[12] The American Board of Medical Specialties Directory of Board-Certified Medical Specialists (30th ed. 1998).

[13] *Albert Cremato*, 50 ECAB 550, 551-52 (1999) (the Board found that an osteopathic physician certified by the American Osteopathic Board could not serve as an impartial medical examiner as his credentials did not comply with standards set forth in the Office's procedural manual).

Office should prepare an updated statement of accepted facts[14] and refer this and appellant, together with the complete medical record, to an impartial medical specialist for a rationalized report addressing the issue whether appellant is totally disabled for work in the offered position of general clerk.

The March 27, 2003 decision of the Office of Workers' Compensation Programs is hereby set aside and the case is remanded for further development consistent with this decision.

Dated, Washington, DC
April 5, 2004

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[14] *William C. Bush*, 40 ECAB 1064, 1075 (1989).