U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM H. LOVELESS and U.S. POSTAL SERVICE,
POST OFFICE, Rome, GA

Docket No. 03-2116; Submitted on the Record;
Issued January 2, 2004

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 56-year-old city carrier, filed a notice of traumatic injury alleging that on December 16, 1991 he injured his lower back while lifting in the performance of duty. The Office accepted appellant's claim for back strain on January 10, 1992. Appellant returned to full-duty work on January 27, 1992. Appellant underwent back surgery on August 31, 1992. On September 9, 1992 the Office entered appellant on the periodic rolls for the condition of back strain superimposed on spondylolisthesis and spondylolysis. Appellant returned to light-duty work on June 7, 1997.

Appellant filed a notice of recurrence of disability on September 22, 1997 alleging that he sustained a recurrence of disability on June 13, 1997 causally related to his December 16, 1991 employment injury. In a letter dated September 16, 1997, the Office proposed to terminate appellant's compensation benefits. By decision dated October 17, 1997, the Office terminated appellant's compensation benefits effective November 9, 1997. Appellant requested an oral hearing and decision dated May 28, 1998, the hearing representative reversed the Office's October 17, 1997 decision.

The Office entered appellant on the periodic rolls on July 16, 1998. Appellant underwent additional surgery on October 16, 1998. Appellant's attending physician, Dr. James L. Chappuis, a Board-certified orthopedic surgeon, recommended further surgery on September 16, 1999 and found that appellant was totally disabled. The district medical adviser requested a second opinion evaluation regarding the request for surgery. Dr. Harold Alexander, a Board-certified orthopedic surgeon and Office second opinion physician, completed a report dated November 15, 1999 and recommended further conservative treatment, finding that appellant could return to sedentary work. Due to the disagreement between appellant's physician and the Office referral physician, the Office referred appellant to Dr. Plas T. James, a Board-certified

orthopedic surgeon, for an impartial medical evaluation. Dr. James agreed that surgery was appropriate. On January 11, 2002 the Office requested that Dr. James provide an opinion regarding appellant's work restrictions. In a report dated February 18, 1992, Dr. James recommended that appellant undergo a functional capacity evaluation. The Office authorized the functional capacity evaluation on February 25, 2002. Dr. James did not respond.

The Office referred appellant for a second impartial medical evaluation with Dr. Scott Kleiman, a Board-certified orthopedic surgeon, to resolve the issue of appellant's work restrictions. In a report dated May 22, 2002, Dr. Kleiman recommended a functional capacity evaluation. He reviewed this report on June 12, 2002 and found that appellant was capable of performing sedentary work with restrictions.

The employing establishment offered appellant a light-duty position of modified city carrier on July 5, 2002. Appellant refused this position on July 11, 2002 and submitted a note from Dr. Robert E. Windsor, a physician Board-certified in physical medicine and rehabilitation, stating that appellant could not return to full-time work. In a letter dated July 16, 2002, the Office informed appellant that the offered position was suitable, informed him of the penalty provisions of the Federal Employees' Compensation Act and allowed him 30 days to accept the position or offer his reasons for refusal. Appellant's attorney responded and alleged that appellant could not return to work based on reports from Dr. James. On August 16, 2002 the Office stated that appellant's reasons for refusing the position were not acceptable and allowed him an additional 15 days to accept the position. By decision dated September 6, 2002, the Office terminated appellant's compensation benefits on the grounds that he refused an offer of suitable work.[1]

The Board finds that the Office failed to meet 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 Act[2] 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

[1] On appeal to the Board, appellant submitted additional new evidence. As the Office did not consider this evidence in reaching a final decision, the Board may not review the evidence for the first time on appeal. 20 C.F.R. § 501.2(c).

[2] 5 U.S.C. § 8106(c)(2).

5 U.S.C. § 8106(c)(2),[3] 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.[4]

In this case, appellant's attending physician, Dr. Chappuis, a Board-certified orthopedic surgeon, found that appellant was totally disabled due to his accepted employment injury and recommended further surgery. The Office second opinion physician, Dr. Alexander, a Board-certified orthopedic surgeon, concluded that appellant would not benefit from additional surgery and found that appellant was capable of sedentary work. Due to this conflict of the medical opinion evidence, the Office properly referred appellant to Dr. James, a Board-certified orthopedic surgeon, to resolve the medical issues.[5]

Dr. James examined appellant and submitted several reports requesting additional diagnostic studies as well as additional reports in response to specific Office questions. On June 19, 2001 Dr. James recommended either surgery or a chronic pain management protocol. The Office requested a supplemental report on September 12, 2001 which should address appellant's work restrictions and provide medical rationale for his conclusions. On October 9, 2001 Dr. James recommended surgery and stated that he did not feel that appellant would be "capable of resuming full-time light/sedentary work if he does not undergo the surgery." He provided work restrictions and stated that these would not necessarily allow appellant to work an eight-hour day. The Office requested further clarification of appellant's current work restrictions on January 11, 2002. In a report dated February 18, 1992, Dr. James stated that appellant required a functional capacity evaluation to determine his work restrictions. The Office authorized the functional capacity evaluation on February 25, 2002 and requested that Dr. James arrange the evaluation. The record does not contain a further response from Dr. James.

The Office's procedure manual provides, "Only if the selected physician fails to provide an adequate and clear response after a specific request for clarification may the Office seek a second referee specialist's opinion."[6] As Dr. James failed to respond to the Office's request for work restrictions and there is no further indication that appellant underwent the functional capacity evaluation as suggested, the Office properly referred appellant for a second impartial medical evaluation with Dr. Scott Kleiman, a Board-certified orthopedic surgeon, on May 6, 2002. In a May 22, 2002 report, Dr. Kleiman also recommended that appellant undergo a functional capacity evaluation to determine his work restrictions. Dr. Kleiman reviewed the results of this testing on June 12, 2002 and concluded that appellant could perform sedentary work eight hours a day with restrictions. Dr. Kleiman stated that appellant could sit for six hours a day, walk for two hours a day and stand for one hour a day. He further found that appellant could push and pull for 2 hours each out of an 8-hour day with a weight limitation of 10 pounds.

[3] 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).

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

[5] 5 U.S.C. §§ 8101-8193, 8123(a).

[6] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.6.b (September 1995).

He stated that appellant could lift 10 pounds for 1 hour and could not squat, kneel or climb. He stated that appellant needed 15 minute breaks "at least every 2 hours." Dr. Kleiman further stated that appellant should avoid ladders and repeated stair climbing and concluded "should be able to take breaks -- sit or stand as necessary."

The limited-duty position of modified city carrier offered by the employing establishment and approved by the Office, indicated that appellant would work eight hours a day and that the position was sedentary. Appellant was allowed to sit, stand or walk as comfort dictated and walking and standing were limited to one hour per day. The Board notes that appellant was only allowed to sit for six hours a day in accordance with Dr. Kleiman. It is unclear from the position description whether appellant would be walking and standing for one hour total or performing each of the activities for one hour. Clarification of this issue is necessary as a limitation of one hour of both walking and standing would necessarily limit appellant to a seven-hour workday. The position description further stated, "Lifting, pushing and pulling were limited to up to 5 to10 pounds frequently." Dr. Kleiman specifically limited appellant to two hours each of pushing and pulling with only one hour of lifting. The offered position did not clarify how frequently appellant would be required to lift, push and pull. Due to the restrictive nature of Dr. Kleiman's findings on appellant's ability to perform these activities, the Board finds that the use of the work "frequently" in the job description indicates that these restrictions would be exceeded. Dr. Kleiman specifically stated that appellant required a 15-minute break every 2 hours in his list of restrictions. The position description provides for a half hour lunch, but does not provide for the required breaks. Due to the discrepancies between the position offered by the employing establishment and the work restrictions provided by Dr. Kleiman, the Board finds that the Office failed to provide appellant with a suitable work position conforming to the physical restrictions as imposed by the impartial specialist. The September 6, 2002 decision must be reversed and appellant's compensation benefits reinstated.

The September 6, 2002 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC
January 2, 2004

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member