U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GREGORY APICOS and U.S. POSTAL SERVICE,
POST OFFICE, New York, NY

Docket No. 97-2729; Submitted on the Record;
Issued January 14, 2000

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly reduced appellant's compensation benefits to zero on the grounds that he refused to cooperate with vocational rehabilitation efforts; (2) whether the Office met its burden of proof to terminate appellant's compensation benefits on the grounds that he refused an offer of suitable work; and (3) whether the Office abused its discretion by refusing to reopen appellant's claim for a consequential injury for review of the merits.

The Board has duly reviewed the case on appeal and finds that the Office failed to meet its burden of proof to reduce appellant's compensation benefits to zero for failing to cooperate in the vocational rehabilitation process.

Appellant, then a 42-year-old clerk, filed a claim alleging that he fractured his left elbow in the performance of duty on June 24, 1992. The Office accepted appellant's claim for fracture of the left elbow on July 13, 1992. The Office expanded appellant's claim to include lumbosacral strain and compression fracture of L1 on November 3, 1993. The Office entered appellant on the periodic rolls on February 14, 1994.

The Office referred appellant for vocational rehabilitation on August 15, 1996. The rehabilitation counselor sent appellant a letter dated August 21, 1996 noting that appellant refused to schedule an initial meeting by telephone. The rehabilitation counselor scheduled the initial meeting for August 29, 1996 and provided appellant with the location.

Appellant's representative responded on August 26, 1996 and stated that appellant was unable to attend the August 29, 1996 meeting and proposed a meeting on September 3, 1996 at appellant's home.

In a letter dated August 29, 1996, the Office noted that appellant refused to schedule an appointment with his vocational rehabilitation counselor over the telephone and that he failed to

keep a scheduled appointment on August 29, 1996. The Office allowed appellant 30 days to cooperate with rehabilitation efforts.

Appellant's representative submitted a letter dated August 30, 1996 and asserted that the vocational rehabilitation counselor terminated the telephone conversation with appellant on August 21, 1996 and that she had raised her voice in two additional telephone conversations with appellant and his mother. Appellant's representative requested another rehabilitation counselor and reiterated that appellant was available on September 3, 1996.

By letter dated August 31, 1996, appellant alleged that he had not refused to schedule an initial interview at his home, but that the rehabilitation counselor terminated the conversation. He further stated that he informed the rehabilitation counselor that the scheduled meeting on August 29, 1996 was not convenient for him due to the location. Appellant also asserted that he had an appointment on that date.

The Office responded on September 6, 1996 and stated that there would be no change of vocational rehabilitation counselors.

In the vocational rehabilitation report dated September 12, 1996, the counselor related telephone conversations with appellant stating that appellant refused to schedule an initial appointment on August 20, 1996 and that he abruptly terminated the conversation. She noted on August 28, 1996, appellant stated that he would not appear at the scheduled meeting on August 29, 1996. Later that day, appellant's mother stated that he was not available on August 29, 1996 due to an appointment, but that he was available at his home later in the week. The rehabilitation counselor stated that she felt it would be ill-advised to meet with appellant at his home as the telephone conversations had been both "abusive and abrasive." She further stated that she was not available on the date suggested by appellant.

Appellant's representative corresponded with the Office on September 23, 1996 regarding vocational rehabilitation efforts. He stated that appellant's scheduling of an appointment at his home constituted a good faith effort to cooperate.

On September 30, 1996 the Office rehabilitation specialist noted neither appellant nor his representative had contacted the rehabilitation counselor and that there had been no initial meeting.

By decision dated October 9, 1996, the Office reduced appellant's compensation benefits to zero finding that he failed to cooperate with rehabilitation efforts.

Appellant requested reconsideration on January 16, 1997. By decision dated March 6, 1997, the Office denied modification of its October 9, 1996 decision.

Section 8113(b) of the Federal Employees' Compensation Act provides:

> "If an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed under section 8104 of this title, the Secretary, on review under section 8128 of this title and after finding that in the absence of the failure the wage-earning capacity of the individual would probably have substantially increased, may reduce prospectively the monetary compensation of the individual in accordance with what would probably have been his wage-earning capacity in the absence of the failure, until the individual in good faith complies with the direction of the Secretary."[1]

Section 10.519(b) and (c) of the Office's regulations provides that, if a suitable position is not identified because of the failure or refusal to cooperate in the early but necessary stages of a vocational rehabilitation effort, *i.e.*, meeting with nurse, interviews, testing, counseling, functional capacity evaluations or work evaluations, then the Office will assume that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity and will reduce compensation to zero. This reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of the Office.[2]

The Board finds that the Office did not consider appellant's attempt to cooperate with the vocational rehabilitation counselor prior to reducing his compensation benefits to zero. Although appellant admits that he did not attend the scheduled appointment on August 29, 1996, both he and his representative informed the Office that he was willing to meet with the rehabilitation counselor on September 5, 1996 at his home. The rehabilitation counselor indicated that she was not comfortable with this arrangement nor with the date, but did not offer appellant any additional times or locations. The Board finds that one missed appointment without any further efforts to schedule additional appointments is not sufficient grounds to reduce appellant's compensation benefits to zero. Appellant indicated a willingness to cooperate at another time and place and offered such an alternative. As neither the rehabilitation counselor nor the Office responded further to this offer nor offered an alternative, the Board finds that appellant was not provided with sufficient opportunity to cooperate with vocational rehabilitation efforts and that his compensation benefits were improperly reduced.

The Board further finds that the Office did abuse its discretion by refusing to reopen appellant's claim for consequential injury for review of the merits.

Appellant filed a claim on December 1, 1994 alleging that on December 9, 1993 he injured his right hand at the employing establishment while completing claim forms for his previous claim. By decision dated March 14, 1995, the Office denied that appellant's December 9, 1993 injury occurred in the performance of duty. Appellant, through his representative, requested reconsideration on March 14, 1996 and argued that either his injury occurred in the performance of duty or that it was a consequential injury.[3] By decision dated

[1] 5 U.S.C. § 8104.

[2] 20 C.F.R. § 10.519(b) and (c).

[3] As the Office has not issued a final decision on this timely request for reconsideration, the Board may not

June 12, 1996, the Office denied that appellant had sustained a consequential injury. Appellant requested reconsideration of this decision on May 16, 1997. The Office declined to reopen this claim for consideration of the merits on June 2, 1997.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[4] Inasmuch as appellant filed his appeal with the Board on August 19, 1997, the Board lacks jurisdiction to review either the March 14, 1995 or June 12, 1996 merit decisions, denying appellant's claim. The Board may only consider the June 2, 1997 decision, in which the Office declined to reopen appellant's claim for review of the merits.

Section 10.138(b)(1) of the Office's regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.[5] Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.[6]

In support of his request for reconsideration appellant, through his representative, argued that the Office failed to follow its procedures in developing appellant's claim for a consequential injury. Specifically, he stated that the Office failed to inform appellant of the deficits of the evidence submitted in support of his claim and failed to request the necessary factual and medical evidence to establish the claim. He further alleged that the Office failed to obtain an opinion from the district medical adviser regarding the causal relationship between appellant's accepted employment injury and his alleged consequential injury. Appellant's representative alleged that the Office's decision was not based on a proper factual background and did not properly consider the medical evidence submitted.

In its June 2, 1997 memorandum, the Office stated, "[I]t cannot be discerned from the writing what relevant argument he is trying to make." The Office concluded that the issue could not reasonably be determined from the application and that no further action need be taken.

As noted previously, the Board was able to discern the arguments set forth by appellant, through his representative, and finds that the arguments are relevant to appellant's claim and have not been previously considered by the Office. Therefore, the Board finds that the Office abused its discretion by refusing to reopen appellant's claim for a consequential injury for review of the merits.

---

address this issue for the first time on appeal. 20 C.F.R. § 501.2(c).

[4] 20 C.F.R. § 501.3(d)(2).

[5] 20 C.F.R. § 10.138(b)(1).

[6] 20 C.F.R. § 10.138(b)(2).

The Board further finds that the Office failed to meet its burden of proof to terminate appellant's compensation benefits.

The employing establishment provided appellant with a limited-duty position on October 1, 1996. Appellant refused the position on October 11, 1996. The Office informed appellant that the position was suitable on October 24, 1996. By decision dated April 25, 1997, the Office terminated appellant's compensation benefits finding that he refused 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.[7] 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) of the Act[8] 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 10.124(c) of the applicable regulations[9] 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.[10]

In this case, appellant's attending physician, Dr. Theodore Giannaris, a Board-certified orthopedic surgeon, opined that appellant was totally disabled due to his lumbosacral strain and right elbow fracture in reports dated July 13, September 7 and November 6, 1995, and February 1 and May 2, 1996.

The Office referred appellant for a second opinion evaluation with Dr. Kenneth Seslowe, a Board-certified orthopedic surgeon, on February 9, 1996. In a report dated March 12, 1996, Dr. Seslowe noted appellant's history of injury and performed a physical examination. He noted that appellant had no spasm of his back and that his motor examination revealed no focal weakness. He noted limited range of motion of the spine and stated that appellant held his spine rigidly. Dr. Seslowe noted that appellant's sensory examination revealed glove-stocking hypesthesia of the right lower extremity from the groin to the toes, which were unaccountable. He found that x-rays revealed a mild compression fracture at L1 which involved less than 25 percent of vertebrae. Dr. Seslowe noted that appellant's left elbow had full range of motion and normal sensory examination. He further noted that appellant received medication for seizure disorder. Dr. Seslowe diagnosed fracture of the left proximal ulna which had healed, compression fracture of L1 which had healed and chronic mild lumbosacral sprain. He found that

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

[8] 5 U.S.C. § 8106(c)(2).

[9] 20 C.F.R. § 10.124(c).

[10] *Arthur C. Reck*, 47 ECAB 339, 341-42 (1996).

appellant had mild partial disability with reference to his back only and that appellant could work eight hours a day.

Dr. Giannaris completed a narrative report on October 10, 1996 and stated that appellant had sustained a serious back injury and had very limited mobility. He stated that appellant required assistance at all times. Dr. Giannaris stated, "Due to the injury to his back, [appellant] is required to wear a brace at all times. He also needs to use a cane for walking since both his equilibrium and gait are impaired." Dr. Giannaris stated that appellant was totally disabled.

The Board finds that Dr. Seslowe's report is entitled to the weight of the medical evidence and establishes that appellant is only partially disabled. Dr. Seslowe provided a history of injury and findings on physical examination to support his conclusion of only partial disability. He noted that x-rays established the limited involvement of the vertebrae in the compression fracture and that this injury had healed. Dr. Seslowe further noted the absence of back spasm or neurological findings. He provided work restrictions related to appellant's chronic lumbosacral strain. Dr. Giannaris failed to provide any findings on physical examination to support his conclusion of total disability or to provide any medical reasoning relating appellant's need for assistance to his accepted employment injury. Without the necessary findings and medical rationale, Dr. Giannaris' report does not create a conflict with the detailed report of Dr. Seslowe.

Dr. Seslowe provided work restrictions of limited standing, bending, lifting twisting and sitting. He indicated that appellant could lift up to 20 pounds, stand for 4 hours, sit for 4 hours and that he could bend and twist occasionally.

The limited-duty position offered by the employing establishment listed appellant's specific duties as patching torn letters, flats and parcels. The position description indicated that appellant would lift no more than 20 pounds, stand for no more than 4 hours and sit and twist for no more than 4 hours. The position description also stated that the modified work assignment would be performed in a sitting position and would not involve any lifting, bending, squatting, twisting, pushing, pulling or reaching above the shoulder.

As this position indicates that appellant is required to twist up to four hours per day, the Board finds that the position is not suitable. Dr. Seslowe indicated that appellant could twist only occasionally. There is no indication that he approved the additional requirement of twisting up to four hours a day. As the position offered exceeds appellant's work restrictions, it is not suitable and the Office failed to meet its burden of proof to terminate appellant's compensation benefits.

The decisions of the Office of Workers' Compensation Programs dated April 25 and March 6, 1997 and October 9, 1996 are hereby reversed. The June 2, 1997 decision is set aside and remanded for review of the merits.

Dated, Washington, D.C.
January 14, 2000

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member