U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM J. HICKEY and U.S. POSTAL SERVICE,
PROCESSING & DISTRIBUTION CENTER, Montgomery, AL

Docket No. 02-1730; Submitted on the Record;
Issued December 16, 2002

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation for abandoning suitable work.

On April 25, 2000 appellant, then a 39-year-old motor vehicle operator, was pushing a loaded postal container onto a ramp when he felt pain in his lower back. He stopped working on April 27, 2000.

In an April 27, 2000 report, Dr. Robert Bradley, a Board-certified neurosurgeon, noted that appellant had a history of an L4-5 microdiscectomy with a good result. He reported that appellant had the onset of severe back pain two days previously while pushing equipment at work. Dr. Bradley indicated that x-rays showed significant degenerative changes at L4-5 and L5-S1 with disc space narrowing.

In a May 1, 2000 report, Dr. Elizabeth Vining, a Board-certified radiologist, stated that a magnetic resonance imaging (MRI) scan showed disc dessiccation and disc narrowing at L3-4 and L4-5. She indicated that appellant had a laminectomy on the right at the L4-5 disc. Dr. Vining found no recurrent disc herniation. At L5-S1, appellant had an annular bulge accompanied by osteophytes. Dr. Vining found enhancing scar tissue anterior to the thecal sac and narrowing the lateral recesses, which was unchanged from a previous MRI scan.

In a May 4, 2000 note, Dr. Bradley indicated that he disagreed with the interpretation of the MRI scan. He stated that the scan showed a large, recurrent disc herniation centrally and to the left at L5-S1 as well as significant stenosis at L3-4 and L4-5. Dr. Bradley suggested that appellant also had a central disc herniation at L3-4 or at least an annular tear. He noted that appellant had been offered sedentary work but concluded that he was unable to do such work.

The Office accepted appellant's claim for lumbosacral strain. Appellant received continuation of pay for the period April 26 through June 9, 2000. He used paid leave from June 10 to June 23, 2000 and received temporary total disability beginning June 24, 2000.

In a July 18, 2000 letter, the employing establishment offered appellant a limited-duty job beginning July 17, 2000 for four hours a day, increasing to eight hours a day on July 29, 2000. The employing establishment indicated that the job required sitting four hours a day, standing two hours a day and walking one hour a day. Appellant returned to work on July 17, 2000 for four hours a day. He continued working four hours a day after July 29, 2000 and received compensation for the hours he did not work. Appellant stopped working on September 7, 2000. In a November 6, 2000 note, Dr. Bradley indicated that he could return to sedentary work, four hours a day. In a November 9, 2000 letter, the employing establishment offered appellant the sedentary position he held previously, working four hours a day. In a November 14, 2000 letter, the Office indicated that it had reviewed the position and found it suitable for appellant. The Office informed appellant that he had 30 days to accept the position or provide his reasons for refusing to accept it. The Office stated that, if appellant did not accept the position, any explanation he gave would be considered before a determination of whether his reasons for refusing the job were justified. The Office warned that if appellant failed to accept the position and failed to establish that his reasons for doing so were justified, his right to future compensation would be jeopardized. He rejected the position because he was unable to endure extended sitting or standing.

In a November 9, 2000 report, Dr. Richard T. Herrick, a Board-certified orthopedic surgeon, reviewed appellant's medical history. He noted that appellant reported that he performed light duty in July and August 2000 but after one to two weeks had to discontinue work temporarily because he was unable to sit for more than 15 to 20 minutes at a time. Dr. Herrick indicated that the problem persisted in that appellant could sit for only 15 to 20 minutes at a maximum after which appellant had a significant increase in his symptoms, primarily on the right, although occasionally on the left, sometimes to the knee laterally and slightly over the anterior ankle and partial foot. Dr. Herrick reported that appellant had a significant decreased range of motion of the thoracolumbar spine and had trigger points with tenderness over several posterior muscles from T1 to L5, worse on the right than the left. He found tenderness in the posterior lumbar region and in the sacroiliac joint and along the spinous process. Dr. Herrick noted that the sciatic stretch test was positive bilaterally, more on the right than the left. He stated that sensation was grossly within normal limits with no atrophy. Dr. Herrick diagnosed chronic back dysfunction with probable recurrent lumbar discs, piriformis syndrome and chronic secondary myofascial pain or fibromyalgia incompletely rehabilitated, with hyperpronation and tight musculature. He stated that appellant did not have any subjective complaints that did not correspond with any objective findings. Dr. Herrick indicated that appellant had not reached maximum improvement from the employment injury and could not be expected to do so until he completed the rehabilitation process. He stated that appellant could not sit for more than 1 to 2 hours at a time maximum, could not stand for more than 1 hour at a time and could not pull, push or lift anything more than 10 to 20 pounds because of muscle spasms. Dr. Herrick concluded that appellant was totally disabled for his job, perhaps permanently. In an accompanying work capacity evaluation, he stated that appellant could work two hours a day, maximum. Dr. Herrick indicated that appellant could sit 2 hours a day with 10 to 15 minute breaks every hour. He stated that appellant could not walk or stand at work. Dr. Herrick noted that appellant could reach above his shoulder for four hours a day. He stated that appellant could push, pull or lift 10 pounds for up to 2 hours a day. Dr. Herrick recommended that appellant receive physical therapy four hours a day.

The Office referred appellant for a functional capacity evaluation. In a January 22, 2001 report, the physical therapist stated that the test results were not reflective of appellant's maximal functional abilities, based on discrepancies noted in the examination, including symptom exaggeration and inconsistent movement patterns. He stated that, based on the completed portions of the evaluation, appellant's work classification level was estimated to be in a light category.

In a January 26, 2001 note, Dr. Bradley indicated that appellant should be able to function in a sedentary to minimal light-duty capacity. In a February 6, 2001 report, Dr. Brad P. Katz, a Board-certified anesthesiologist, indicated that appellant complained of pain in the right lower back with pain radiating into the right leg. He noted that appellant had no atrophy in any muscle group, particularly in the legs. Dr. Katz reported that appellant had a marked amount of pain to just cutaneous stimulation of the low back especially on the right side of paraspinal muscles. He stated that appellant's symptoms were markedly inconsistent with his examination. Dr. Katz indicated that in the right leg appellant had decreased sensation to touch in a stocking glove distribution, which was not consistent with any dermatomal distribution. He diagnosed postlaminectomy syndrome with symptom embellishment.

Appellant returned to work two hours a day, on February 4, 2001 to a position offered by the employing establishment. The employing establishment indicated that the job required no walking or standing and did require reaching and reaching above the shoulder for 2 hours a day and the ability to push, pull and lift 10 pounds. In a February 25, 2001 note, an Office field nurse indicated that appellant's physicians were allowing him to be offered a light-duty position for eight hours a day. On February 26, 2001 appellant's work hours were increased to eight hours a day. In a March 6, 2001 letter, he stated that he had been informed in a telephone call that the Office was requiring him to return to work eight hours a day. Appellant stated that he signed a new job offer but had been incapable of completing an unabridged shift due to his back pain, but had at most worked only three hours a shift. He contended that there was no medical documentation that he could return to work eight hours a day.

In a March 12, 2001 report, Dr. Bradley noted that he had reviewed Dr. Herrick's reports and restrictions to working two hours a day. He indicated that appellant was working eight hours a day, which he was tolerating poorly. Dr. Bradley stated that appellant was attending work less than the required hours due to his ongoing symptoms of lower back pain and intermittent right leg pain. He reported that appellant had palpable lumbar spasm from L1 to the sacrum, mostly on the right side. Dr. Bradley noted that appellant limited his range of motion due to pain. He stated that, unless something changed, appellant still needed limitation in the number of hours worked and had stated by history that he did not tolerate more than four hours daily. In a March 19, 2001 note, Dr. Bradley stated that appellant should be working only four hours a day

The employing establishment offered appellant a limited-duty position with restrictions of working 4 hours a day, no walking, no standing, reaching above the shoulders for no more than 4 hours a day, occasional walking, pulling and pushing restricted to 20 pounds and lifting to 30 pounds. He accepted the position effective March 19, 2001. The Office paid compensation, based on appellant working four hours a day. In a May 17, 2001 decision, the Office found that appellant could work 20 hours a week and, therefore, determined his compensation should be paid on his loss of wage-earning capacity, based on his actual earnings.

In an April 15, 2001 letter, appellant stated that there was no documented evidence releasing him to full duty since his employment injury. He noted that Dr. Herrick restricted him to two hours a day. Appellant indicated that Dr. Bradley indicated that he should work only four hours a day. He claimed that there was no medical support for the Office's determination that appellant could work eight hours a day.

In a June 26, 2001 letter, the employing establishment informed the Office that appellant had called in sick on June 4, 2001 and had not returned to work since that time. The employing establishment noted that appellant had not submitted any medical documentation to support his absence from work. The employing establishment asked that appellant's compensation for four hours a day be suspended.

In a June 28, 2001 letter, the Office informed appellant that it had been informed that he had stopped working. The Office noted that appellant had been offered a modified clerk position which it had found suitable to his work capabilities. The Office indicated that the job was still available to him. The Office stated that appellant had 30 days to either accept the position and return to work or give his reasons for abandoning it. The Office indicated that, if he failed to accept the position, any explanation or evidence which he provided would be considered prior to determining whether his reasons for abandoning the job were justified. The Office stopped appellant's compensation effective as of the date of the letter.

In a July 2, 2001 letter, appellant stated that he stopped working due to the continued pain he endured in his lower back. He commented that he continued to seek a solution for his condition, which included additional nerve blocks. Appellant indicated that he was unable to sit for any extended period due to his pain, making it impossible for him to complete any work requirement. He cited Dr. Herrick's report, which stated that he could only work two hours a day.

In an August 3, 2001 letter, the Office informed appellant that it had reviewed his reasons for abandoning his job and found them unacceptable. The Office gave him 15 days to return to accept the position in writing. The Office warned appellant that, if he continued to refuse the position, it would proceed with a final decision. In an August 8, 2001 letter, he stated that he was unable to do the job and claimed that the job requirements were beyond his work restrictions.

In a September 11, 2001 report, Dr. Robert T.Y. Moon, a Board-certified family practitioner stated that appellant had preexisting low back pain secondary to severe degenerative disc disease and degenerative arthritis for 10 years with prior right discectomy L4-5 and L5-S1 which was not work related. He noted that appellant sustained a lifting injury on April 25, 2000. Dr. Moon indicated that an MRI scan was positive for a recurrent left L5-S1 herniated nucleus pulposus. He stated that appellant's reproducible symptoms were consistent with biomechanical low back pain secondary to degenerative disc disease and degenerative arthritis with clear evidence of multifidus dysfunction secondary to the prior discectomy. Dr. Moon concluded that there was no objective evidence to support residual impairment stemming from the employment injury. He noted that appellant had an electromyogram performed which was negative for radiculopathy. Dr. Moon commented that surgery would not offer appellant much relief as the degree of instability had not been demonstrated and appellant was fairly functional without

objective evidence of nerve damage or disuse atrophy. He stated that appellant's return to work according to the functional capacity evaluation was more than acceptable for appellant's current condition.

In a September 28, 2001 decision, the Office terminated appellant's compensation for abandoning suitable work.

The Board finds that the Office improperly found that appellant abandoned suitable work.

Section 8106(c)(2) of the Federal Employees' Compensation Act states: "a partially disabled employee who: (1) refused to seek suitable work; or (2) refuses or neglects to work after suitable work is offered is not entitled to compensation."[1] An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.[2]

Before the Board determines whether appellant refused or abandoned suitable work, it must first determine whether the work offered by the employing establishment and approved by the Office was suitable. In this case, appellant was offered a modified clerk position. He began working at the position at two hours a day, was required to work at the position for eight hours a day and, after protest, was required to work four hours a day. The physical restrictions of the position was the ability to reach above the shoulder for 4 hours a day, push or pull 20 pounds and lift no more than 30 pounds. However, Dr. Herrick, in his report, indicated that appellant could only work 2 hours a day and could not push, pull or lift over 10 pounds. Dr. Bradley gave no specific restrictions on appellant's ability to lift, push or pull. Dr. Moon indicated that he concurred with the work restrictions set forth in appellant's functional capacity evaluation. That evaluation reported that appellant could lift up to 30 pounds from his shoulders to overhead and from his waist to his shoulder and could carry up to 30 pounds for 30 feet and had a light capacity for work.

The record, therefore, has differing descriptions of appellant's work restrictions. The physical requirements of the final job appellant was offered and subsequently left exceeded the current work restrictions set forth by Dr. Herrick. The report from the functional capacity evaluation showed an ability to lift up to 30 pounds. However, as that report was prepared by a physical therapist, it cannot be considered medical evidence as it was not signed by a physician. Dr. Moon subsequently used that report to set his opinion of appellant's work restrictions. The Office did not have any medical documentation to show that appellant could perform the duties of the offered position until it received Dr. Moon's report, three months after appellant left the position. The medical evidence, therefore, shows that the job offered to appellant, which he accepted, was beyond the work restrictions set forth by Dr. Herrick at the time it was offered and, as a result, was unsuitable employment. The Office has, therefore, failed to show that appellant abandoned suitable employment.

[1] 5 U.S.C. § 8106(c)(2).

[2] 20 C.F.R. § 10.124.

The decision of the Office of Workers' Compensation Programs dated September 28, 2001 is hereby reversed.

Dated, Washington, DC
December 16, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member