U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRANCIS D. PICARD and DEPARTMENT OF THE INTERIOR, BUREAU OF RECLAMATION, Grand Coulee, WA

Docket No. 98-12; Submitted on the Record;
Issued August 19, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation entitlement under 5 U.S.C § 8106(c)(2) on the grounds that he refused suitable work.

On September 6, 1994 appellant, then a 49-year-old boilermaker, sustained neck injury, which was accepted by the Office as cervical strain, and later was also accepted as temporary aggravation of cervical stenosis and which required a multilevel vertebrectomy with bone grafts.

Appellant returned to light-duty work on September 14, 1995 on fire watch but was unable to continue due to back, hip and neck pain. Appellant's attending physician, Dr. Charles M. Colwell, a Board-certified occupational medicine specialist, recommended work hardening; he completed a duty status report on January 23, 1996 indicating appellant's activity restrictions and indicating that he could perform full-time light-duty work. Appellant again returned to light-duty work on February 5, 1996 for four hours per day but was unable to continue, stopping work again on February 8, 1996.

A physical capacities evaluation (PCE) was performed on April 1, 1996 which in part recommended a work hardening program, in which appellant participated until June 13, 1996 when he was removed by Dr. Colwell. The work hardening provider and nurse consultant did an employing establishment on-site job analysis on July 17, 1996, evaluating the position of Core Technician. It was determined that the April 1, 1996 PCE and a May 28, 1996 reassessment demonstrated that appellant had the ability to perform the necessary requirements for the position of Core Technician.

On July 30, 1996 Dr. Colwell opined that it would be appropriate for appellant to begin the process of returning to work and he noted that appellant was having a difficult time mourning the recent loss of his wife.

The employing establishment formally offered the position of Security Clerk to appellant on August 26, 1996. In a September 13, 1996 telephone conversation, the employing establishment advised that personnel had reclassified the position of Core Technician to Security Clerk, to place it in the proper series, but that the job functions and physical requirements remained the same.

A copy of the offered position was submitted to Dr. Colwell and by letter dated September 10, 1996, he concurred that the position of Core Technician with accommodations as suggested, now reclassified as Security Clerk, was within appellant's functional capabilities.

By letter dated September 13, 1996, the Office advised appellant that the position of Security Clerk had been found to be suitable to his partially disabled condition and it advised appellant of the provisions of and his responsibility under 5 U.S.C. § 8106(c)(2). It advised that he had 30 days within which to accept the position or to give reasons supporting his refusal.

In a September 19, 1996 medical report, Dr. Colwell stated that there was no evidence of nerve damage in appellant's right arm and that he was ready to begin "his highly accommodated return to work process."

On October 8, 1996 the Office received an undated memorandum from a family nurse practitioner noting appellant's recent treatment for diabetes, severe depression, insomnia and severe back pain and she opined that appellant was unable to work.

On October 9, 1996 the Office confirmed with the employing establishment that the position of Security Clerk remained available and it advised appellant by letter, that date, of the position's continued availability. The Office also advised that the opinions of a nurse practitioner had no probative value as she was not considered to be a physician under the Federal Employees' Compensation Act (FECA), that no further reasons for refusal would be considered and that appellant had 15 days within which to accept the position.

On October 24, 1996 the employing establishment advised the Office that appellant had not reported for work or contacted them regarding the job offer.

By decision dated October 25, 1996, the Office found that appellant was not entitled to further compensation on the grounds that he neglected to work after suitable work was offered. The Office found that the PCE demonstrated appellant's ability to perform the necessary physical requirements of the position and that Dr. Colwell concluded that the position was within appellant's capabilities. It found that appellant had been properly advised of the position's suitability, his responsibilities under 5 U.S.C. § 8106(c)(2) and the consequences if he refused the job offer and it gave him a time period within which to accept the position.

Thereafter, appellant requested a schedule award, which the Office denied by decision dated February 4, 1997, finding that he was not entitled to compensation benefits under the Act due to termination for refusal of suitable work.

By letter dated May 8, 1997, appellant, through his representative, requested reconsideration of the prior decisions, arguing that he was totally disabled and unable to work.

In support appellant submitted a February 27, 1997 report from Dr. Colwell which noted appellant's multiple diagnoses, discussed his medical history and treatment, indicated that appellant was last seen for his problems on September 19, 1996 and opined that appellant's medical condition was stable and that there was no additional curative treatment to be offered. Dr. Colwell opined that appellant was not capable of returning to his original position in his field, that his restrictions applied to all phases of his life and that his limitations were documented by his functional capacity evaluation. He noted that appellant was offered a permanent, highly accommodated position, but that he declined to return to work. Dr. Colwell recommended Office of Personnel Management disability retirement.

In an affidavit appellant stated that he could not work because he was disabled. Also submitted was a March 25, 1997 report, from Dr. William E. Bronson, a Board-certified orthopedic surgeon, which stated that postoperatively appellant was left with permanent upper extremity weakness, pain and numbness and that these were exacerbated by his diabetic polyneuropathy. Dr. Bronson opined that appellant had residual stenosis and he opined: "Because of his cervical injury, I do not feel that he is capable of returning to work and recommend that he be considered for pensioning."

By decision dated June 17, 1997, the Office denied modification of the prior decision finding that the evidence submitted in support was insufficient to warrant modification. The Office found that, while Dr. Colwell's February 27, 1997 report supported that appellant could not return to his former job, it did not address appellant's ability to return to the accommodated Security Clerk position or alter his earlier opinion that appellant was capable of performing the duties of Security Clerk. The Office found that appellant's affidavit stating that he was totally disabled was not probative as it was only a lay opinion. The Office, however, did not address Dr. Bronson's report.

The Board finds that the Office properly terminated appellant's compensation entitlement under 5 U.S.C. § 8106(c)(2) on the grounds that he refused suitable work.

Section 8106(c)(2) of the Act states that a partially disabled employee who refuses to seek suitable work, or refuses or neglects to work after suitable work is offered to, procured by, or secured for him is not entitled to compensation.[1] The Office has authority under this section to terminate compensation for any partially disabled employee who refuses suitable work when it is offered. Before compensation can be terminated, however, 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.[2] In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused by appellant was suitable.[3]

[1] 5 U.S.C. § 8106(c)(2).

[2] *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

[3] *Glen L. Sinclair*, 36 ECAB 664 (1985).

The Office met its burden of proof in this case. Appellant's treating physician determined in January 1996 that appellant could work full time with specified work restrictions. A thorough and complete functional capacity evaluation was thereafter performed and appellant's physical capabilities were determined. This report was reviewed by appellant's treating physician who concurred with its determinations and who concluded, after examining the detailed physical and functional requirements of the position of Security Clerk with accommodations for appellant's activity restrictions, that appellant was physically capable of performing this selected position. Appellant was advised of this determination, but he declined to accept the position or return to work.

An employee who refuses or neglects to work after suitable work has been offered to him must show that such refusal to work was justified.[4]

Although Dr. Colwell's February 27, 1997 report, supported that appellant could not return to his former job, it did not address appellant's ability to return to the accommodated Security Clerk position or alter his earlier opinion that appellant was capable of performing the duties of Security Clerk. Dr. Colwell also recommended disability retirement for appellant, but the Board notes that the FECA is not a disability retirement program and that such an opinion does not support that appellant is totally disabled under the FECA for all employment.[5] Therefore, it is insufficient to establish that the limited-duty position offer appellant was unsuitable.

Appellant's affidavit declaring his total disability is also insufficient to establish that the work offered was unsuitable as it is a lay opinion and, therefore, has no probative value.[6]

Additionally, Dr. Bronson's report is insufficient to establish that appellant is totally disabled for all employment under the FECA as a result of his accepted employment-related injuries, as he demonstrates no evidence of knowledge of appellant's PCE study results which demonstrate the physical capacity to work light duty with restrictions, or knowledge of the physical requirements of the offered position, does not address Dr. Colwell's opinion that appellant could perform the duties of a Security Clerk and merely provides a unrationalized conclusion that "because of [appellant's] cervical injury," he did not feel that appellant was capable of returning to work.

To be rationalized, medical opinion evidence must include a physician's comprehensive opinion supported with affirmative evidence and an explanation containing medical reasoning on the issue in question. Such an opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be

[4] 20 C.F.R. § 10.124.

[5] *See James L. Sutton*, 32 ECAB 1886 (1981) (A determination of "disability" under Civil Service retirement provisions has no application under the FECA, as even though an employee is unable to perform the duties of the position he held when injured, which is considered "disabled" for disability retirement purposes, he is not totally disabled under the FECA if he has the capacity to perform duties of another position for which he is qualified); *see also Earl L. Swanson*, 29 ECAB 707 (1978).

[6] *See Sheila Arbour (Victor E. Arbour)*, 43 ECAB 779 (1992); *Barbara J. Williams*, 40 ECAB 649 (1989).

supported by medical rationale explaining how and why the physician arrived at his determination.[7] The Board has further explained that a medical opinion consisting solely of a conclusory statement regarding disability, without supporting rationale, is of little probative value.[8]

As Dr. Bronson's opinion is conclusory and unrationalized and as it appears to be based upon an incomplete factual and medical background, it is of diminished probative value and, therefore, is insufficient to meet appellant's burden of proof to establish that he was incapable of performing the suitable work offered. Therefore, the Office properly denied modification of the termination decision.

As appellant's entitlement to compensation was properly terminated on October 25, 1996, he was not entitled to a subsequent schedule award, as the Office properly found on February 4, 1997.[9]

[7] *See, e.g., Arthur Sims*, 46 ECAB 880 (1995); *Ern Reynolds*, 45 ECAB 690 (1994); *Connie Johns*, 44 ECAB 560 (1993); *Robert J. Krstyen*, 44 ECAB 227 (1992).

[8] *Marilyn D. Polk*, 44 ECAB 673 (1993); *Leon Harris Ford*, 31 ECAB 514 (1980); *Neil Oliver*, 31 ECAB 400 (1980); *Leontine F. Lucas*, 30 ECAB 925 (1979).

[9] *See Henry P. Gilmore*, 46 ECAB 709 (1995) (Section 8106 of the FECA serves as a bar to a claimant's entitlement to further compensation for total disability, partial disability or permanent impairment arising out of an accepted employment injury.)

Accordingly, the decisions of the Office of Workers' Compensation Programs dated June 17 and February 4, 1997, and October 25, 1996 are hereby affirmed.

Dated, Washington, D.C.
August 19, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member