U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRANKLIN D. HAISLAH and U.S. POSTAL SERVICE,
POST OFFICE, Cleveland, OH

Docket No. 98-659; Submitted on the Record;
Issued December 27, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective October 27, 1997 based upon his refusal to accept suitable work.

The Office accepted appellant's claim for aggravation of a prior job-related lumbar sprain.[1] Appellant has not worked since the August 16, 1996 employment injury.

In a report dated April 3, 1997, Dr. Daniel M. Dorfman, a Board-certified physiatrist and a second opinion physician, considered appellant's history of injury, performed a physical examination, and reviewed diagnostic tests including x-rays and a magnetic resonance imaging (MRI) scan. He concluded that he saw limited objective evidence to suggest that appellant could not be performing his occupational duties as an acting supervisor. Dr. Dorfman stated that appellant could not perform his work of a letter carrier based on his complaints of restricted mobility and the length of time he had been limited in physical pursuits. He stated that following four weeks of therapy appellant should be able to perform his usual work without restrictions. In a report dated May 2, 1997, Dr. Dorfman stated that he found no objective physical evidence, which would limit appellant's capacity to work as a letter carrier or supervisor. Dr. Dorfman stated that his recommendation for physical therapy was based solely on appellant's subjective complaints to improve appellant's mobility of the lumbar spine and overall endurance. He stated that if, as the Office had informed him, appellant had not sought physical therapy treatment, he could return to his usual work.

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[1] This case is on appeal to the Board for the second time. In *Franklin D. Haislah*, 45 ECAB 483 (1994), the Board reversed the Office's May 14 and July 2, 1992 decisions on the issue of whether appellant met his burden of proof that he sustained a lumbosacral strain due to the January 15, 1992 employment injury and remanded the case for the Office to determine the periods of appellant's disability.

By letter dated May 12, 1997, when asked by the Office to review Dr. Dorfman's letter, apparently his April 3, 1997 letter, appellant's treating physician, Dr. Paul A. Steurer, Jr., a Board-certified orthopedic surgeon, stated that he concurred with Dr. Dorfman. He stated that after his therapy, appellant would be able to return to light work. Dr. Steurer stated that, if appellant elected not to go to physical therapy, that he concurred with Dr. Dorfman's report.

In progress notes dated May 15, 1997, Dr. Steurer stated that appellant was undergoing therapy for a month to manage his back pain and he had been in therapy for a week. He stated that, at the end of the month, he would release appellant for light duty and "hopefully" find him a job with the employing establishment closer to home so the long distance driving would not aggravate his back.

To resolve the conflict between Drs. Steurer and Dorfman as to whether appellant required work restrictions, the Office referred appellant to an impartial medical specialist, Dr. Charles J. Paquelet, a Board-certified orthopedic surgeon.

In his report dated June 5, 1997, Dr. Paquelet considered appellant's history of injury, performed a physical examination and reviewed the February 1997 MRI scan. He stated that the only positive abnormal finding was limited motion of the lumbar spine, which might be related to the August 16, 1996 employment injury. Dr. Paquelet stated that appellant could return to work despite his objective findings but would require restrictions of no standing, walking or sitting for more than an hour but "four hours in an eight-hour day," have mixed standing, walking and sitting for a full eight-hour day, and occasional bending, stooping and squatting. Dr. Paquelet stated that appellant could lift 10 pounds frequently but rarely lift more than 40 pounds and should avoid heavy loads. In his letter dated June 12, 1997, Dr. Paquelet stated that appellant's range of motion was limited based on his physical ability and willingness to perform the maneuvers.

In progress notes dated June 12, 1997, Dr. Steurer stated that he would "[t]ry to find [appellant] a lighter-duty job that is closer to home so he does not have to do the long distance travel with the back."

By letter dated July 25, 1997, the employing establishment offered appellant a position as a modified letter carrier. The job required fine manipulation, simple grasping and frequent lifting of 5 to 10 pounds. The restrictions were maximum lifting of 10 pounds and no standing, sitting or walking for more than 1 hour at a time. By letter dated August 18, 1997, the Office found that the position of modified letter carrier was suitable for appellant with his work capabilities and was available. The Office gave appellant 30 days to respond, stating that if appellant failed to accept the offered position and failed to demonstrate that the failure was justified, his compensation would be terminated.

In duty status reports dated July 17 and September 9, 1997, Forms CA-17, Dr. Steurer indicated that appellant was unable to work.

By decision dated October 23, 1997, the Office denied the claim, stating that the evidence of record demonstrated that appellant refused or neglected to work a suitable job.

By letter dated November 24, 1997, appellant requested reconsideration of the Office's decision and submitted additional evidence. In his request, appellant stated that in the job offer that was made to him, he was required to drive from his home in Brimfield, Ohio to Solon, Ohio which "in good weather and no traffic problems takes between 45 to 55 minutes." In his report dated November 4, 1997, Dr. Steurer stated, "We are trying to find [appellant] a job to do that is light and sedentary work at the local post office and hopefully get back to work in an occupation such as that. He is to keep driving to less than 30 minutes." Appellant resubmitted Dr. Steurer's May 15 and June 12, 1997 progress notes stating that appellant should have a job closer to home so the long distance driving would not aggravate his back.

By decision dated December 3, 1997, the Office denied appellant's request for modification.

The Board finds that the Office properly terminated appellant's compensation benefits effective October 27, 1997, based on his refusal to perform suitable work but erred in denying appellant's request for modification as the evidence appellant submitted in support of his request requires further development.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits. This includes cases in which the Office terminates compensation under 5 U.S.C. § 8106(c) for refusal to accept suitable work.[2]

Under section 8106 (2) of Federal Employees' Compensation Act,[3] the Office may terminate compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[4] Section 10.124(c) of the Office's regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured 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.[5] The Federal Procedure Manual, Part 2 -- Reemployment: *Determining Wage-Earning Capacity*, Chapter 2.814.5a(5) (May 1991), states that an acceptable reason for refusal is if the medical evidence establishes that claimant is unable to travel to the job because of residuals of his work-related injury. To justify termination, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[6] The Board has required that if an employee presents reasons for refusing an offered position, the Office must

[2] *Henry W. Sheperd, III*, 48 ECAB ____ (Docket No. 96-814, issued March 3, 1997); *Shirley B. Livingston*, 24 ECAB 855 (1991).

[3] 5 U.S.C. §§ 8101-8193.

[4] *Henry W. Sheperd, III, supra* note 2; *Patrick A. Santucci*, 40 ECAB 151 (1988).

[5] 20 C.F.R. § 10.124(c); *see also Catherine G. Hammond*, 41 ECAB 375 (1990).

[6] *Karen L. Mayewski*, 45 ECAB 219 (1993).

inform the employee if it finds the reasons inadequate to justify the refusal of the offered position and afford appellant one final opportunity to accept the position.[7]

In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[8] To resolve the conflict between Dr. Steurer's May 12, 1997 letter and May 15, 1997 progress notes that appellant could return to light duty and Dr. Dorfman's April 3, 1997 report that appellant could return to work without restrictions, the Office referred appellant to an impartial medical specialist, Dr. Paquelet. In his June 5, 1997 report, which is complete and well rationalized, Dr. Paquelet stated that appellant required restrictions consisting of no standing, walking or sitting for more than an hour, but could perform those activities for up to four hours in an eight-hour day, and could perform occasional bending, stooping and squatting. He also stated that appellant could lift 10 pounds frequently but rarely lift more than 40 pounds and should avoid heavy loads. As the impartial medical specialist, Dr. Paquelet's opinion is entitled to special weight. Moreover, the July 25, 1997 description of the job of modified letter carrier is consistent with these restrictions as it stated that appellant would not be required to stand, sit or walk for more than 1 hour at a time and would have to lift from 5 to 10 pounds frequently. Dr. Paquelet's opinion, therefore, justified the Office's termination of benefits on October 23, 1997.

In his request for reconsideration, however, appellant stated that his drive to the job the Office offered to him from Brimfield, Ohio to Solon, Ohio was 45 to 55 minutes in good weather with no traffic problems and submitted Dr. Steurer's November 4, 1997 report, in which Dr. Steurer stated that appellant should not drive more than 30 minutes to avoid aggravating his back. In the December 3, 1997 decision, the Office dismissed Dr. Steurer's November 4, 1997 opinion that appellant should not drive more than 30 minutes, stating that "the amount of driving time to work is not a recognized work restriction," but even if it were, the Office found that, since Dr. Paquelet stated that appellant could sit for an hour, appellant was able to drive for almost an hour. The Office's finding in this regard is erroneous. Appellant's ability to drive to the job is a factor, separate from appellant's ability to sit, which must be considered in determining the job's suitability particularly where, as here, appellant's treating physician has indicated that the commute to the job of modified letter carrier is too long for appellant. Contrary to the Office's conclusion, the Board finds appellant's ability to sit does not automatically equate to his ability to drive. Therefore, the case must be remanded for further development on the issue of appellant's ability to drive to the job the Office offered him taking into account appellant's physical limitations and the exact geographic distance involved. Upon this and any further development, the Office deems necessary, the Office shall issue a *de novo* decision.

[7] *Rosie E. Garner*, 48 ECAB ____ (Docket No. 95-74, issued December 6, 1996); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[8] *Kathryn Haggerty*, 45 ECAB 383, 389 (1994); *Jane B. Roanhaus*, 42 ECAB 288 (1990).

The decision of the Office of Workers' Compensation Programs dated December 3, 1997 is hereby set aside and the case is remanded for further action consistent with this decision. The decision of the Office dated October 23, 1997 is hereby affirmed.

Dated, Washington, D.C.
December 27, 1999

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member