U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MICHAEL A. GERMANY and U.S. POSTAL SERVICE,
POST OFFICE, Cleveland, OH

*Docket No. 97-1175; Submitted on the Record;*
*Issued July 20, 1999*

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DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for surgery; and (2) whether the Office met its burden of proof to terminate appellant's compensation benefits.

Appellant filed a claim alleging that on February 18, 1985 he injured his lower back in the performance of duty. The Office accepted his claim for lumbar spine contusion and sprain on February 28, 1985. On July 25, 1985 appellant filed a second claim which the Office accepted for recurrent severe lumbar muscle strain on August 21, 1985. He underwent a lumbar laminectomy at L5-S1 on July 14, 1986. Appellant sustained an additional injury on March 6, 1987 and the Office accepted that he sustained a herniated disc at L4-5. The Office entered appellant on the periodic rolls on August 27, 1987.

The employing establishment offered appellant a light-duty position on May 16, 1995. The Office found the position suitable on May 30, 1995, informed appellant of the penalty provision of 5 U.S.C. § 8106 and allowed appellant 30 days to accept the position. On July 3, 1995 the Office informed appellant that his reasons for refusing the position were not acceptable and allowed an additional 15 days for appellant to accept the position. By decision dated July 21, 1995, the Office terminated appellant's compensation benefits finding that he refused an offer of suitable work. The Office also denied appellant's request for surgery in that decision. Appellant requested an oral hearing and by decision dated January 8, 1997, the hearing representative affirmed the termination of appellant's compensation benefits as well as the denial of the request for surgery.

Section 8103 of the Federal Employees' Compensation Act[1] provides that the Office shall provide a claimant with the services, appliances, and supplies prescribed or recommended by a qualified physician which are likely to cure, give relief, reduce the degree or period of

[1] 5 U.S.C. §§ 8101-8193, 8103.

disability or aid in lessening the amount of monthly compensation. In interpreting section 8103, the Board has recognized that the Office has broad discretion in approving services provided under the Act. The Office has the general objective of ensuring that an employee recovers from his injury to the fullest extent possible in the shortest amount of time. The Office therefore has broad administrative discretion in choosing means to achieve this goal. The only limitation on the Office's authority is that of reasonableness.[2]

In this case, appellant's attending physician, Dr. Young H. Kim, a Board-certified neurosurgeon, began evaluating appellant in September 1993. Dr. Kim reported on November 5, 1993 that appellant had diffuse degeneration of the fourth and fifth lumbar discs as demonstrated by a magnetic resonance imaging scan. He noted appellant's complaints of low back pain and bilateral leg pain. Dr. Kim diagnosed lumbar canal stenosis and recommended surgery.

The Office referred appellant for a second opinion evaluation with Dr. Malcolm Brahms, a Board-certified orthopedic surgeon, on April 4, 1994. In a report dated May 11, 1994, Dr. Brahms, reviewed appellant's history of injury and performed a physical examination. He stated that further surgery was doubtful of improving appellant's low back problem and that appellant should be able to return to light duty with limitations on repetitive bending and lifting.

Dr. Kim responded on June 16, 1994 and stated that appellant had degenerated discs at L4 and L5 causing his low back pain. On July 12, 1994 Dr. Kim again recommended surgery to relieve appellant's continuing and increasing lower extremity symptoms.

Section 8123(a) of the Act[3] provides, "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

In this case, the Office properly found that there was a conflict of medical opinion evidence regarding the need for surgery and the extent of appellant's employment-related disability. The Office referred appellant, a statement of accepted facts and a list of specific questions, to Dr. Gary Katz, a Board-certified orthopedic surgeon, to perform an impartial medical examination.

In a report dated October 13, 1994, Dr. Katz noted appellant's history of injury and reviewed medical records including diagnostic studies. He performed a physical examination and found that appellant's lumbar spine and lower extremities were completely normal with no objective findings. Dr. Katz stated that appellant had functional overlay and exaggeration of the physical findings. He stated that further surgery was not recommended as there was no indication that it would be beneficial and as appellant had previously undergone surgery as well as conservative treatment with no improvement in his symptoms.

On March 23, 1995 Dr. Kim again recommended surgery, bilateral L4 and L5 lumbar decompressive laminotomies along with lysis of adhesions and discectomy. In a report dated

[2] *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

[3] 5 U.S.C. § 8123(a).

April 10, 1995, Dr. Kim repeated these findings and recommended psychiatric consultation. Dr. Kim recommended back surgery on April 14, 1995 and diagnosed bilateral carpal tunnel syndrome and right ulnar neuropathy at the elbow. On May 19, 1995 Dr. Kim reviewed appellant's history of injury and recommended surgery to relieve symptoms of low back and sciatic pain. In a report dated March 4, 1996, Dr. Kim recommended lumbar paraspinal blocks.

In situations were 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.[4]

In this case, the weight of the medical opinion evidence rests with the report from Dr. Katz, the impartial medical examiner, who found that as appellant had previously undergone surgery as well as a conservative treatment with no improvement and as he had a functional overlay to his physical complaints, surgery was not recommended.

Although Dr. Kim submitted additional medical reports following Dr. Katz's October 13, 1994 opinion, these reports did not contain additional medical reasoning in support of his opinion that surgery was an appropriate treatment for appellant's condition. Due to this lack of supporting medical rationale and as Dr. Kim was on one side of the conflict that Dr. Katz resolved, the additional reports from Dr. Kim are insufficient to overcome the weight accorded Dr. Katz's report as the impartial medical specialist or to create a new conflict with it.[5]

As Dr. Katz, the impartial medical examiner, found that surgery would not be beneficial to appellant's condition, the Office decision to deny appellant's request for surgery was not unreasonable.

The Board has duly reviewed the case on appeal and finds that the Office met its burden of proof to terminate appellant's compensation benefits.

It is well settled that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[6] 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[7] 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[8] provides that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee, has the burden of showing that such refusal or failure

[4] *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

[5] *Dorothy Sidwell*, 41 ECAB 857, 874 (1990).

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

[7] 5 U.S.C. § 8106(c)(2).

[8] 20 C.F.R. § 10.124(c).

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.[9]

Appellant's attending physician, Dr. Kim, completed a work restriction evaluation on November 16, 1993 and indicated that appellant could not work eight hours a day. The report indicated that appellant could work two hours a day. Dr. Kim indicated that appellant should not bend, climb nor twist and limited sitting, walking, lifting squatting, kneeling and standing to intermittently for two hours a day. He indicated that appellant could lift up to 10 pounds.

Dr. Brahms, the Office second opinion physician, completed a work restriction evaluation and indicated that appellant could work 4 to 6 hours a day with limitations on kneeling, standing, bending, twisting, and no lifting over 20 pounds and frequent lifting of 10 pounds.

As noted previously, there was a unresolved conflict of medical opinion evidence between Drs. Kim and Brahms regarding the nature and extent of appellant's employment-related disability. Dr. Kim indicated on November 16, 1993 that appellant could work no more than two hours a day, while Dr. Brahms indicated that appellant could work between four and six hours a day. The Office therefore properly referred this issue to Dr. Katz, the impartial medical examiner, to determine the nature and extent of appellant's disability.

Dr. Katz indicated that appellant could not lift over 10 pounds, and could perform no prolonged standing, walking, bending nor stooping. Dr. Katz completed a work restriction evaluation on November 7, 1994 and indicated that appellant could work six to eight hours a day with limited bending, stooping, prolonged standing or walking. He indicated that appellant should not lift over 10 pounds and that he should not stand or walk for more than 1 hour without rest.[10] As Dr. Katz's opinion is based on a proper history of injury and a physical examination, his report is entitled to the weight of the medical evidence.

On May 16, 1995 the employing establishment provided appellant with a limited-duty position of modified mailhandler. This position required appellant to patch mail, tray mail, and included intermittent limited bending, stooping, no prolonged standing or walking of more than 1 hour and no lifting over 10 pounds.

Appellant declined the position on May 22, 1995 and stated that he was unable to work because of his pain due to his accepted employment injury as well as carpal tunnel syndrome.

[9] *Arthur C. Reck*, 47 ECAB 339 (1995).

[10] Following Dr. Katz's October 13, 1994 report, Dr. Kim on April 14, 1995 diagnosed bilateral carpal tunnel syndrome and right ulnar neuropathy at the elbow. However, as Dr. Kim did not provide an opinion that appellant could not perform the offered position due to this condition, this report is not sufficient to establish that the modified mailhandler position was not suitable.

Appellant stated that this position was the same as he previously performed and that he could not stand, walk to find a chair, nor sit due to the pain in his lower back and legs.

The Office properly found that the offered position was within the physical limitations provided by Dr. Katz. The Office followed the procedural requirements and allowed appellant 30 days to submit his reasons for declining the position, considered these reasons and informed appellant that the reasons he offered were inadequate as the weight of the medical evidence established that appellant could perform the duties of the offered position and allowed him 15 days to accept the suitable work. As appellant declined to accept an offer of suitable work, the Office properly terminated his compensation, but not his medical benefits.

The decision of the Office of Workers' Compensation Programs dated January 8, 1997 is hereby affirmed.

Dated, Washington, D.C.
July 20, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member