U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THOMAS K. FORSBERG and U.S. POSTAL SERVICE, NORTH BAY BRANCH, Biloxi, Miss.

Docket No. 97-2055; Submitted on the Record;
Issued May 20, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON, MICHAEL E. GROOM

The issues are whether the Office of Workers' Compensation Programs properly terminated appellant's disability compensation because he refused an offer of suitable work and whether the Office abused its discretion in declining to reopen appellant's claim for merit review.

On July 25, 1994 appellant, then a 58-year-old part-time rural carrier, filed a notice of traumatic injury, claiming that he hurt his back when he bent over on July 18, 1994 while unloading boxes. The Office accepted the claim for lumbar subluxation and aggravation of lumbosacral stenosis. Appellant received continuation of pay and was placed on the periodic rolls for disability compensation.

On February 22, 1995 Dr. Richard J. Gorman, a neurologist and appellant's treating physician, recommended that appellant return to work half days on light duty with no lifting greater than 15 pounds, no repetitive bending or stooping and no prolonged standing or walking. Dr. Gorman completed a work capacity form, stating that appellant could work three hours a day initially and gradually increase that time.

On April 14, 1995 Dr. Gorman stated that appellant had declined to seek any surgical treatment options and had exhausted conservative chiropractic therapy. Dr. Gorman again recommended light duty with work restrictions. On June 29, 1995 Dr. Gorman saw appellant who continued with his multi-level lumbar radiculopathy, "moderately improved but not back at work." Dr. Gorman noted that he had released appellant to work but no light duty was available so he was still not working. Dr. Gorman added:

> "Apparently the choices at this point are to determine him temporarily totally disabled and shoot for a period of 12 months, hoping he can return to his regular job which requires apparently lifting 100 pounds. This lifting of 100 pounds at his age and with his lumbar disease would probably be unrealistic. The other

choice according to [appellant] would be seeking disability, which would probably be more reasonable given the two choices."

Dr. Gorman completed a second work capacity form dated July 17, 1995, stating that maximum medical improvement had been reached on February 22, 1995.

On October 11, 1995 the Office conducted a telephone conference, which included appellant, his representative and the employing establishment. The position of distribution clerk, four hours a day, available on October 14, 1995, was offered -- the job duties consisted of distributing mail, flats, and magazines into cases and answering the telephone. The job was sedentary and permanent, with the freedom to stand and sit as needed, and lifting would be limited to the work restrictions.

Appellant stated that he had sustained another medical condition, starting in September when he began to have blackout spells when he bent down. Appellant was informed that he needed to submit medical evidence within 15 days establishing the existence of his new condition and the extent of any disability.

On October 30, 1995 the Office informed appellant that the offered position of distribution clerk had been found to be suitable to his work capabilities and was available and that the medical information he had submitted regarding his dizzy spells did not prove that he could not perform the duties of the offered job because the evidence did not contain a secure diagnosis, objective findings, or a rationalized opinion on whether appellant could do the light-duty work. The Office provided appellant with 30 days to accept the offered position or submit reasons for refusing it and cited the penalty for refusing suitable work without justification.

On November 27, 1995 appellant submitted a November 9, 1995 computerized tomography (CT) scan of his cervical spine showing degenerative spurring at C-3 through C-7 with accompanying neural foramina stenosis. A November 21, 1995 note indicated positional testing for appellant's cervical vertigo was within normal limits.

On December 12, 1995 the Office terminated appellant's compensation on the grounds that he had refused an offer of suitable work. The Office found that none of the medical evidence established appellant's physical inability to do the job.

Appellant requested reconsideration on the grounds that he had been disabled due to medical conditions unrelated to his accepted work injury and submitted medical records showing hospitalizations in May 1 through 12, November 6 through 9, November 21 through 25 and December 11 through 15, 1995.

On February 1, 1996 the Office denied reconsideration on the grounds that the evidence was insufficient to warrant modification of its prior decision. Appellant again requested reconsideration, arguing that he had not arbitrarily refused the offered position but had been unable to accept the job due to medical conditions unrelated to his claim, which required hospitalization when the offer was made.

On February 16, 1996 the Office denied appellant's request on the grounds that the evidence was insufficient to warrant review of its prior decision. The Office found that the job offer was made on October 14, 1995 and appellant was not hospitalized until November 6, 1995. The Office noted that appellant had been treated for Crohn's disease since 1956 and that, although he may have had to take sick leave, the evidence failed to show that his medical condition prevented him from accepting the offered position.

Appellant requested reconsideration on September 18, 1996 and submitted medical reports from Dr. Gorman, Dr. Martin E. Avalos-Ortiz, Board-certified in internal medicine, and Dr. M.F. Longnecker, Jr., a Board-certified orthopedic surgeon. On November 4, 1996 the Office denied appellant's request on the grounds that the evidence was insufficient to warrant modification of its December 12, 1995 decision. The Office noted that while all three physicians found appellant unable to work, none opined that he was incapable of performing the limited-duty job when offered.

Appellant's January 17, 1997 request for reconsideration was based on a December 20, 1996 letter from Dr. Gorman, who indicated that in completing the July 17, 1995 form he had neglected to consult his June 29, 1995 office note in which he had placed appellant on temporary disability status. Dr. Gorman added that he had reviewed the October 11, 1995 work restrictions and felt that appellant would be unable to function or perform these duties.

On April 28, 1997 the Office denied reconsideration on the grounds that the evidence was insufficient to warrant modification of its prior decision. The Office noted that Dr. Gorman provided no rationale for changing appellant's work status and found the medical evidence insufficient to establish that the offered light-duty position was medically unsuitable in October 1995.

The Board finds that the Office met its burden of proof in terminating appellant's compensation because he refused an offer of suitable work.

Once the Office accepts a claim it has the burden of proving that the employee's disability has ceased or lessened before it may terminate or modify compensation benefits.[1] Section 8106(c)(2) of the Federal Employees' Compensation Act[2] provides that the Office may terminate the compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[3] The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.[4]

[1] *Karen L. Mayewski*, 45 ECAB 219, 221 (1993); *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

[2] 5 U.S.C. §§ 8101-8193; 5 U.S.C. § 8106(c)(2).

[3] *Camillo R. DeArcangelis*, 42 ECAB 941, 943 (1991).

[4] *Stephen R. Lubin*, 43 ECAB 564, 573 (1992).

The implementing regulation[5] 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 to work was reasonable or justified, and shall be provided with the opportunity to make such a showing before entitlement to compensation is terminated.[6] To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.[7]

Office procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.[8] The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by medical evidence.[9]

In this case, Dr. Gorman released appellant to return to part-time, limited-duty work in February 1995 with specific restrictions. He completed a work evaluation form on March 21, 1995 and reiterated on April 14, 1995 that appellant was physically capable of light-duty work. The July 17, 1995 form signed by Dr. Gorman indicated similar work restrictions.

With these restrictions in mind, the employing establishment developed the permanent position of part-time distribution clerk, which the Office found to be suitable, based on Dr. Gorman's reports. Following the telephone conference, the Office provided 15 days to appellant to submit medical evidence in support of his contention that a new condition prevented him from doing the clerk's job.

The medical treatment notes submitted by appellant concerned some episodes of vertigo and complaints of neck pain in September and October 1995 but failed to address the relevant issue of whether appellant was physically capable of performing the duties of the offered position. Similarly, the CT scan and the November 21, 1995 vertigo testing submitted in response to the Office's 30-day notice provided no opinion on appellant's physical capacity.

Inasmuch as appellant failed to establish that he was medically unable to perform the duties of the offered position and the Office complied with its required procedures, the Board finds that the Office properly terminated his compensation for refusing suitable work.[10]

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[5] 20 C.F.R. § 10.124(c).

[6] *John E. Lemker*, 45 ECAB 258, 263 (1993).

[7] *Maggie L. Moore*, 42 ECAB 484, 487 (1991), *aff'd on recon.*, 43 ECAB 818 (1992).

[8] *C.W. Hopkins*, 47 ECAB 725, 727 n.5 (1996); *see Patsy R. Tatum*, 44 ECAB 490, 495 (1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5 (May 1996).

[9] *Marilyn D. Polk*, 44 ECAB 673, 680 (1993).

[10] *See Edward P. Carroll*, 44 ECAB 331, 341 (1992) (finding that appellant's assertion of inability to work is not reasonable grounds for refusing suitable work absent supporting medical evidence).

The Board also finds that the Office properly declined to reopen appellant's claim on the grounds that the evidence submitted in support of his requests for reconsideration was insufficient to warrant modification of the December 12, 1995 decision.

Section 8128(a) of the Act[11] provides for review of an award for or against payment of compensation. Section 10.138(b)(1) of the Office's federal regulations provides, in pertinent part, that a claimant may obtain review of the merits of his or her claim by written request to the Office identifying the decision and the specific issues within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed.[12]

With the written request, the claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.[13] Section 10.138(b)(2) of the implementing regulations provides that any application for review which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.[14] Abuse of discretion by the Office is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or administrative actions that are contrary to both logic and probable deductions from established facts.[15]

In this case, appellant's initial requests for reconsideration were based on his hospitalizations in November and December 1995 for conditions not related to the accepted work injury.[16] Appellant argued that he had not arbitrarily refused suitable work but was unable to accept the position because of deteriorating health. Appellant subsequently submitted medical reports stating that he was totally disabled.

As the Office pointed out in its February 16, 1996 decision, none of the medical evidence appellant submitted addressed the relevant issue -- was he capable of performing the duties of the offered position in October 1995? While appellant may have experienced dizzy spells and neck pain, no physician opined that these would prevent him from doing the light-duty job. Further, his first hospitalization occurred on November 6, 1995, three weeks after the clerk position was made available. Therefore, hospitalization did not preclude appellant from accepting the position.

In his September 18, 1996 request for reconsideration, appellant submitted reports from Dr. Avalos-Ortiz, who stated that appellant could not fulfill any working obligations while he

[11] 5 U.S.C. § 8128(a).

[12] *Vicente P. Taimanglo*, 45 ECAB 504, 507 (1994).

[13] 20 C.F.R. § 10.138(b)(1).

[14] 20 C.F.R. § 10.138(b)(2).

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

[16] These included Crohn's disease, recurrent nephrolithiasis, cardiac arrhthmias and degenerative osteoarthritis.

was hospitalized; Dr. Gorman, who concluded on April 16, 1996 that appellant's "multiplicity of problems" had progressed to the point where he could not tolerate any sort of regular job, even sedentary; and Dr. Longnecker, who opined on May 7, 1996 that appellant would never return to any form of gainful employment. However, none of these physicians addressed appellant's physical condition in October 1995. Thus, their reports are irrelevant to the pivotal issue and therefore insufficient to require the Office to reopen appellant's claim.

Other documents submitted in support of reconsideration, such as medical reports from 1994 to April 1996, were already in the record and previously considered by the Office. Medical treatment records concerning appellant's nonwork-related conditions offered no opinion on why these conditions prevented him from performing the job in October 1995. Similarly, Dr. Gorman's September 18, 1996 treatment note, stating that from a neurological standpoint, appellant was totally disabled, failed to address his physical capacities at the relevant time.[17]

Finally, the Board finds that the December 20, 1996 letter from Dr. Gorman, which did address the relevant issue, has diminished probative value because Dr. Gorman failed to explain why he changed his opinion on appellant's ability to work. The June 29, 1995 treatment note, which Dr. Gorman later stated he had not reviewed before completing the July 17, 1995 work capacity form, indicated that Dr. Gorman had released appellant for light-duty work but none was available.

Dr. Gorman then discussed temporary total disability in terms of returning appellant to his regular date-of-injury job, but dismissed that possibility as unrealistic, given the lifting requirements. At no point did Dr. Gorman disclaim or modify his recommendations for work restrictions or find that appellant could not perform light duty.

In his 1996 letter Dr. Gorman stated that he "today" reviewed the October 11, 1995 work restrictions for light duty and felt that appellant would be unable to function or perform these duties. However, Dr. Gorman offered no explanation for this conclusion, particularly in light of his conclusion in July 1995 that no medical factors other than appellant's accepted condition needed to be considered in developing a light-duty position.[18]

He also failed to distinguish whether appellant had been unable in October 1995 to perform the job or was now unable to perform the job. Finally, he provided no opinion on what specific nonwork factors affected appellant's ability to work. Thus, his 1996 report and the other medical evidence are insufficient to require the Office to reopen appellant's claim for merit review.

[17] *See Barbara A. Weber*, 47 ECAB 163, 165 (1995) (finding that neither the evidence nor the argument submitted in support of reconsideration addressed the relevant issue and was therefore insufficient to require the Office to reopen appellant's claim).

[18] *See Ronald C. Hand*, 49 ECAB __ (Docket No. 95-1909, issued October 1, 1997) (finding that a medical opinion not fortified by medical rationale is of little probative value).

The April 28, 1997 and November 4, 1996 decisions of the Office of Workers' Compensation Programs are affirmed.

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

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member