

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JERRY McDANIEL and DEPARTMENT OF LABOR,
MINE & SAFETY ADMINISTRATION, Jackson, Tenn.

*Docket No. 98-1062; Oral Argument Held March 3, 1999;
Issued May 24, 1999*

Appearances: *Ronnie Irvin*, for appellant; *Catherine P. Carter, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation benefits effective January 4, 1997 on the grounds that he refused an offer of suitable work pursuant to section 8106(c) of the Federal Employees' Compensation Act.

On May 20, 1993 appellant, then a coal mine inspector, filed a traumatic injury claim (Form CA-1) assigned number A11-125725 alleging that on May 18, 1993 he sustained a low back strain while loading self-rescuers into the back of a vehicle.¹ Appellant stopped work on May 20, 1993.² Appellant received continuation of pay for intermittent time lost from work from May 20 through July 9, 1993 and received compensation for total wage loss beginning July 24, 1993.

¹ Previously, appellant filed a Form CA-1 assigned number A11-114417 on December 19, 1991 alleging that he sustained a neck strain on that date when he struck his head against a roof bolt plate as he went through a mandoor. The Office accepted appellant's claim for an acute cervical strain. Appellant received continuation of pay from December 17, 1991 through January 30, 1992 and received compensation for total wage loss from February 6 through March 15, 1992. Appellant returned to work on March 16, 1992. The Office consolidated appellant's claim assigned number A11-114417 and claim assigned number A11-125725 into a master claim assigned number A11-125725.

² Subsequently, on October 10, 1996, appellant filed a claim for an occupational disease (Form CA-2) assigned number A11-0152925 alleging that he first became aware that his pneumoconiosis was caused or aggravated by his employment on that date. By decision dated December 5, 1996, the Office found the evidence of record insufficient to establish that appellant sustained a disease as alleged.

The Office accepted appellant's claim for an acute lumbar strain and aggravation of a preexisting disc at L5-S1. The Office authorized back surgery which was performed on March 9, 1994.

By letter dated January 12, 1995, the Office referred appellant along with a statement of accepted facts and medical records to Dr. Paul E. Spray, a Board-certified orthopedic surgeon, for a second opinion examination to evaluate appellant's prognosis, to recommend medical care and to determine the extent of the duration of appellant's disability. By letter of the same date, the Office advised Dr. Spray of the referral. In a January 24, 1995 letter, the Office advised Dr. Spray to determine whether additional surgery was necessary as recommended by appellant's treating physician.

In a January 25, 1995 medical report, Dr. Spray indicated a history of the May 18, 1993 employment injury and appellant's medical treatment, a review of medical records and his findings on physical and x-ray examination. Dr. Spray diagnosed severe spondylosis of the cervical and lumbar spine with the spondylosis in the lumbar spine apparently aggravated by the May 18, 1993 employment injury. He also diagnosed scarring and possibly some spinal stenosis following appellant's lumbosacral fusion, a history of congestive heart failure, chronic obstructive pulmonary disease, hiatal hernia and peptic ulcers. Additionally, Dr. Spray diagnosed psycho-neurosis, type undetermined, spastic colon, polyps and obesity. Dr. Spray opined that it was extremely doubtful that appellant could improve enough to return to any gainful occupation and that the recommended surgery was necessary. Dr. Spray further opined that apparently appellant's disability was related to his occupational back strain which apparently aggravated his preexisting severe spondylosis at the lumbosacral interspace. Dr. Spray concluded that appellant's participation in a work hardening program would not enable him to return to gainful employment. In an accompanying work capacity evaluation for musculoskeletal conditions (Form OWCP-5c) of the same date, Dr. Spray indicated that appellant could not work and appellant's physical restrictions.

The Office granted appellant's request for additional back surgery to remove the previous fusion rods and implantation of a bone simulator from his back, which was performed on April 19, 1995.

Appellant submitted an October 2, 1995 medical report, of Dr. Charles A. Moore, a Board-certified internist, revealing that he had pneumoconiosis and chronic lumbar sacral disc disease. Dr. Moore's medical report also revealed a history of appellant's employment and medical treatment, his findings on physical examination and a review of objective test results. Dr. Moore opined that appellant was 100 percent disabled from any form of work due to his findings.

By letter dated March 6, 1996, the Office requested that Dr. Sidney L. Wallace, a Board-certified orthopedic surgeon and appellant's treating physician, complete a Form OWCP-5c. In response, Dr. Wallace submitted a Form OWCP-5c dated March 22, 1996. In this Form OWCP-5c, Dr. Wallace indicated that appellant could lift 30 pounds occasionally and 20 pounds frequently, trunk bend occasionally, climbing and crawling occasionally without weights, and stooping, kneeling and crouching occasionally.

By letter dated August 5, 1996, the Office advised the employing establishment that it was aware of its attempt to reemploy appellant in the position of mine safety and health specialist which was located in Birmingham, Alabama. The Office further advised the employing establishment that this position was suitable and fell within the restrictions proscribed by Dr. Wallace. The Office also advised the employing establishment to release funds in payment of appellant's moving expenses.

In an August 12, 1996 letter, the employing establishment offered appellant the position of mine safety and health specialist based on Dr. Wallace's March 22, 1996 Form OWCP-5c.

By letter dated September 6, 1996, the Office advised appellant that the offered position of clerk was suitable to his work capabilities.³ The Office also advised appellant that he had 30 days in which to accept the offered position or to provide an explanation of the reasons for refusing the job. The Office further advised appellant of the penalties for refusing an offer of suitable work under section 8106 of the Act.

On August 30, 1996 appellant rejected the employing establishment's job offer. Appellant stated that he could not accept the job offer due to his medical condition, the location of the position and financial difficulty.

By letter dated October 15, 1996, the Office correctly advised appellant that the offered position of mine safety and health specialist was suitable to his work capabilities. The Office also advised appellant that he had 30 days in which to accept the offered position or to provide an explanation of the reasons for refusing the job. The Office further advised appellant of the penalties for refusing an offer of suitable work under section 8106 of the Act.

On October 17, 1996 the Office received an undated letter from appellant rejecting the employing establishment's job offer due to his medical condition. In a November 19, 1996 letter, the Office advised appellant that his reasons for refusal of the offered position were unacceptable and that he had 15 days to accept this position. Appellant did not respond.

By decision dated December 10, 1996, the Office terminated appellant's compensation benefits effective January 4, 1997 based on his refusal of an offer of suitable employment. In an undated letter, appellant requested an oral hearing before an Office representative.

By decision dated November 10, 1997, the hearing representative affirmed the Office's December 10, 1996 decision.

The Board finds that the Office failed to meet its burden of proof in terminating appellant's compensation benefits effective January 4, 1997, on the grounds that he refused an offer of suitable work pursuant to section 8106(c) of the Act.

³ The Boards notes that the Office inadvertently stated that the offered position was that of a clerk rather than a mine safety and health specialist.

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.⁴ Section 8106(c)(2) of the Act⁵ 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.⁶ The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.⁷

The implementing regulation⁸ 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.⁹ 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.¹⁰

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.¹¹ In assessing medical evidence, the number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for and the thoroughness of physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.¹²

In this case, the light-duty position offered by the employing establishment was found to be within the physical restrictions specified by Dr. Wallace, who completed a Form OWCP-5c on March 22, 1996 and stated that appellant was capable of returning to work eight hours per day. However, Dr. Spray, a Board-certified orthopedic surgeon and second opinion physician, opined that appellant was totally disabled from work due to his employment injury. Similarly,

⁴ *Karen L. Mayewski*, 45 ECAB 219, 221 (1993); *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

⁵ 5 U.S.C. §§ 8101-8193 (1974); 5 U.S.C. § 8106(c)(2).

⁶ *Camillo R. DeArcangelis*, 42 ECAB 941, 943 (1991).

⁷ *Stephen R. Lubin*, 43 ECAB 564, 573 (1992).

⁸ 20 C.F.R. § 10.124(c).

⁹ *John E. Lemker*, 45 ECAB 258, 263 (1993).

¹⁰ *Maggie L. Moore*, 42 ECAB 484, 487 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

¹¹ *Marilyn D. Polk*, 44 ECAB 673, 680 (1993).

¹² *Connie Johns*, 44 ECAB 560, 570 (1993).

Dr. Moore, a Board-certified internist and appellant's treating physician, who examined appellant after his April 19, 1995 back surgery, opined that he was totally disabled from work.

Inasmuch as the report of Dr. Spray finding appellant disabled for work is in disagreement with Dr. Wallace's finding that appellant is capable of light-duty work, the Board finds a conflict in medical opinion pursuant to section 8123 of the Act,¹³ which provides that if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination.¹⁴ Further, Dr. Wallace's March 22, 1996 Form OWCP-5c does not constitute a rationalized narrative medical opinion based on an accurate factual and medical background.

The Board, therefore, finds that the Office has failed to meet its burden of proof in terminating appellant's compensation effective January 4, 1997.¹⁵

The November 10, 1997 decision of the Office of Workers' Compensation Programs hearing representative is hereby reversed.

Dated, Washington, D.C.
May 24, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

¹³ 5 U.S.C. § 8123(a).

¹⁴ *Shirley L. Steib*, 46 ECAB 309, 316 (1994).

¹⁵ *See Craig M. Crenshaw Jr.*, 40 ECAB 919, 923 (1989) (finding that the Office failed to meet its burden of proof because a conflict in the medical evidence was unresolved).