U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TERRY L. EDMONDS and U.S. POSTAL SERVICE,
POST OFFICE, Detroit, MI

Docket No. 98-1970; Submitted on the Record;
Issued September 23, 1999

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective May 23, 1998 on the grounds that he refused an offer of suitable work.

The Board finds that the Office properly terminated appellant's compensation effective May 23, 1998 on the grounds that he refused an offer of suitable work.

Section 8106(c)(2) of the Federal Employees' Compensation Act provides in pertinent part, "A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation."[1] However, to justify such termination, the Office must show that the work offered was suitable.[2] An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.[3]

In the present case, the Office accepted that on September 1, 1989 appellant, then a 40-year-old mail carrier, sustained a lumbosacral strain, herniated nucleus pulposus (HNP) at L5-S1 and chronic S1 neuropathy. The Office authorized a hemilaminectomy at L5-S1 which was performed on August 26, 1991 and later accepted that appellant sustained employment-related depression. Appellant stopped work on October 4, 1989, returned to limited-duty work for various periods and stopped work on October 23, 1991. By decision dated May 20, 1998, the Office terminated appellant's compensation effective May 23, 1998 on the grounds that he refused an offer of suitable work.

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[1] 5 U.S.C. § 8106(c)(2).

[2] *David P. Camacho,* 40 ECAB 267, 275 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341, 345 (1981).

[3] 20 C.F.R. § 10.124; *see Catherine G. Hammond,* 41 ECAB 375, 385 (1990).

The evidence of record shows that appellant is capable of performing the modified carrier position offered by the employing establishment and determined to be suitable by the Office in January 1998.[4] The position is essentially sedentary in nature and involves the performance of such clerical duties as typing and using a scanner weighing one pound to scan mail. The position does not require repeated bending or lifting over 10 pounds. It allows appellant to sit or stand "ad lib" and to start working four hours per day and build his way up to working more hours over time. The modified carrier position was selected by appellant's vocational rehabilitation counselor and the Office properly relied on the opinion of appellant's counselor in determining that appellant is vocationally and educationally capable of performing the position.[5]

In determining that appellant is physically capable of performing the file clerk position, the Office properly relied in the opinion of Dr. Steve R. Geiringer, a physician Board-certified in physical medicine and rehabilitation, to whom the Office referred appellant. In a report dated September 27, 1996, Dr. Geiringer determined that, based on appellant's physical abnormalities, appellant "could be returned to a sedentary type job, sitting versus standing ad lib, no repeated bending or lifting over 10 pounds, which essentially confines him to a desk job with a sit versus stand option."[6] In an accompanying September 27, 1996 form report, he stated that appellant should start working four hours per day and build his way up to working more hours over time. The Board notes that the restrictions delineated by Dr. Geiringer are well within the requirements of the modified carrier position offered by the employing establishment.

Appellant submitted a February 21, 1996 report, in which Dr. Anne M. Pawlak, an attending osteopath, diagnosed failed back syndrome and status post surgical intervention for HNP with chronic pain syndrome and recommended treatment at a pain clinic. In a report dated April 30, 1996, Dr. Pawlak recommended that appellant participate in a work-hardening program. In a report dated May 15, 1996, she stated, "[Appellant] may return to work with a schedule that allows for work hardening, such as starting at two hours a day and gradually working for up to eight hours a day." These reports do not establish that appellant could not physically perform the modified carrier position in that she did not provide a rationalized medical opinion that appellant could not perform the position. Dr. Pawlak did not adequately detail appellant's findings upon examination and diagnostic testing; nor did she explain how such findings necessitated treatment in a pain clinic or work-hardening program such that appellant would not be able to perform the modified carrier position.[7] It should be noted that

[4] The employing establishment initially offered appellant the modified carrier position on August 7, 1997 and appellant refused the position on August 18, 1997. On August 7, 1997 the Office initially determined that the position was suitable. After further development of the medical evidence, the employing establishment offered appellant the same position on January 12, 1998 and appellant refused the position on January 26, 1998.

[5] *See* Federal (FECA) Procedure Manual, Part 2 -- Claim, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(d) (December 1993).

[6] In his August 28, 1996 report, Dr. Geiringer had indicated that appellant was totally disabled. However, in his September 27, 1997 report, he explained that this disability assessment was essentially based on appellant's apparent emotional state. Dr. Geiringer indicated that appellant's chronic pain syndrome was subjective in nature and included psychological aspects. Given his professional specialty, it would not be appropriate for Dr. Geiringer to assess appellant's psychological condition.

[7] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (finding that a medical opinion not fortified by medical

when appellant went for a functional capacity evaluation on June 28 and July 1, 1996 the physical therapist indicated that the poor results of the evaluation suggested less than maximum effort on appellant's part in that the results were inconsistent with appellant's ability to attend school, drive a vehicle and perform tasks around his house.

The Office also properly determined that appellant is emotionally capable of performing the modified carrier position. In reports dated December 17, 1996 and March 11, 1997, Dr. Robert S. Burnstein, a Board-certified psychiatrist, to whom the Office referred appellant, diagnosed dysthymic disorder and depression secondary to back pain, but determined that appellant did not have psychiatric disability in that his emotional condition would not prevent him from performing his job duties.[8] In a report dated December 29, 1997, Dr. A. Michele Morgan, an attending Board-certified psychiatrist, determined that appellant's psychological condition did not disable him from the modified clerk position. She stated, "I agree with the previous opinion of Dr. Burnstein that any return to the [employing establishment] will most likely increase [appellant's] anger and frustration, which would have a detrimental effect, but that does not constitute a psychiatric disability."[9]

The Board notes that, therefore, the Office has established that the modified carrier position offered by the employing establishment is suitable. As noted above, once the Office has established that a particular position is suitable, an employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified. The Board has carefully reviewed the evidence and argument submitted by appellant in support of his refusal of the modified carrier position and notes that it is not sufficient to justify his refusal of the position.[10] For these reasons, the Office properly terminated appellant's compensation effective May 23, 1998 on the grounds that he refused an offer of suitable work.

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rationale is of little probative value).

[8] Dr. Burnstein indicated that appellant's return to the employing establishment would increase his anger and frustration. However, it is well established that the possibility of future injury constitutes no basis for the payment of compensation. *Gaeten F. Valenza*, 39 ECAB 1349, 1356 (1988).

[9] In a report dated October 16, 1997, Dr. Morgan had diagnosed major depression, single episode. The record also contains a May 12, 1997 report, in which Dr. Theodore J. Ruza, an attending Board-certified psychiatrist, assessed appellant's emotional condition. Dr. Ruza apparently did not respond to the Office's request for clarification regarding whether appellant's condition was disabling.

[10] Appellant had indicated that he was not physically or emotionally capable of performing the modified carrier position. The Board notes that the Office complied with its procedural requirements prior to terminating appellant's compensation, including providing appellant with an opportunity to accept the modified carrier position after informing him that his reasons for initially refusing the position were not valid; *see generally Maggie L. Moore*, 42 ECAB 484 (1991); *reaff'd on recon.*, 43 ECAB 818 (1992).

The decision of the Office of Workers' Compensation Programs dated May 20, 1998 is affirmed.

Dated, Washington, D.C.
September 23, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member