U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN J. PIAZZA and DEPARTMENT OF AGRICULTURE, FOREST SERVICE, Robbinsville, NC

Docket No. 98-901; Submitted on the Record;
Issued February 8, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's benefits on the grounds that he refused suitable work.

On September 4, 1991 appellant, a 60-year-old volunteer, filed a claim for a traumatic injury alleging that he twisted his ankle and pinched a nerve in his lower back on August 30, 1991 when he tripped on a stump in the course of his federal employment. The Office accepted the claim for a lumbar strain and a herniated nucleus pulposus, L3-5. Appellant underwent a laminectomy on September 24, 1991. Appellant subsequently received compensation for total temporary disability.

On August 3, 1994 Dr. G Alan Binkley, appellant's treating physician, indicated that appellant had reached maximum medical improvement and stated that a functional capacity evaluation revealed that appellant was capable of light-duty work. The functional capacity evaluation indicated that appellant could perform sedentary and light work. Light work involved lifting 20 pounds maximum, frequently, and carrying objects up to 10 pounds. It also involves walking or standing to a significant degree or sitting while pushing/pulling arm and/or leg controls.

On May 2, 1995 the Office referred appellant to Dr. James M. Alday, Jr., a Board-certified orthopedic surgeon, for a second opinion examination. On May 16, 1995 Dr. Alday reviewed the history of appellant's injury and the treatment he received. He also performed a physical examination. Dr. Alday diagnosed status post laminectomy L3-5 with bilateral foramenotomies and removal of disc free fragment L5. He also diagnosed S1 radiculopathy as manifested by decreased sensation to pin prick and light touch dermatome and atrophy right calf. Dr. Alday stated that appellant had reached maximum medical improvement. He noted that objective evidence of back injury with resultant S1 neuropathy was based on weakness of plantar flexion of the right lower extremity on motor manual testing and further supported by right calf atrophy. Dr. Alday stated that these permanent residuals were not disabling. He indicated that

appellant should not ambulate on uneven surfaces or stand in one position for a long time without moving. Dr. Alday stated that appellant was also unable to perform stoop labor. He stated that appellant could work eight hours per day with no standing on uneven surfaces, alternate standing and only occasional stooping.

On February 28, 1997 the employing establishment offered appellant a job as a forestry technician at the same work site at which he was injured. The position required appellant to perform sedentary tasks while standing for short periods of time with the option to sit. The duties were to be performed on an even work surface.

By letter dated March 24, 1997, the Office indicated that the offered position was suitable to appellant's work capabilities. Appellant was allowed 30 days to accept the position or provide an explanation for refusing it.

On April 18, 1997 appellant indicated that he would reject the job offer because the 100-mile commute would be too onerous physically and financially, and because he could not physically perform the duties.

On June 17, 1997 the Office allowed appellant 15 days to accept the job offer or his benefits would be terminated pursuant 5 U.S.C. § 8106(c).

By decision dated July 15, 1997, the Office terminated appellant's wage-loss and schedule award benefits pursuant to 5 U.S.C. § 8106(c)(2) because appellant refused suitable work. In an accompanying memorandum, the Office noted that there was no medical evidence indicating that appellant could not perform the duties offered. It further indicated that the medical evidence failed to indicate that appellant could not commute or move closer to the job.

On August 25, 1997 Dr. Glenn A. Meyer, a Board-certified neurological surgeon, reviewed appellant's history and conducted a physical examination. He noted a heavy limb and evaluated appellant's lower extremity muscles. Dr. Meyer stated that appellant had a significant neurological deficit in the right leg which would severely handicap him in performing any physical activity. He ordered an x-ray on the date of the examination which only indicated that appellant was status post L3-5 laminectomy.

On September 10, 1997 Dr. Don L. Abernethy, a family practitioner, indicated that he examined appellant and that he had severe neurological deficit in the L5-S1 nerve root of his right leg evidently sustained from his September 1991 work injury. He noted deficits in these dermatomes and muscle atrophy in appellant's lower leg. Dr. Abernethy stated that appellant could only stand for brief periods of time and was unable to walk prolonged distances. He further indicated that appellant could not step out with his foot or turn on it. Dr. Abernethy noted that appellant also complained of electrical shock sensations and snapping of the foot. He opined that appellant should not be required to work. Dr. Abernethy also stated that appellant would risk further injury if he returned to work.

On September 11, 1997 appellant requested reconsideration.

By decision dated October 30, 1997, the Office reviewed the merits of the case and denied modification. In an accompanying memorandum, the Office indicated that appellant failed to submit a reasoned medical opinion establishing that his accepted injury prevented him from performing the duties of the job offered.

The Board finds that the Office properly terminated appellant's benefits on the grounds that he refused suitable work.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[1] This burden of proof is applicable if the Office terminates compensation pursuant to 5 U.S.C. § 8106(c) for refusal to accept suitable work.

Under section 8106(c)(2) of the Federal Employees' Compensation Act,[2] the Office may terminate the compensation of a disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[3] Section 10.124(c) of the Code of Federal Regulations[4] 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 showing before a determination is made with respect to termination of entitlement to compensation.[5] To justify termination of compensation, the Office must show that the work offered was suitable[6] and must inform appellant of the consequences of refusal to accept such employment.[7]

In the present case, appellant was offered a position as a forestry technician in Robbinsville, North Carolina, the same work site where he was injured.[8] The position required appellant to perform sedentary tasks while standing for short periods of time and allowed for sitting breaks. The duties were also to be performed on an even surface. The position was within the restrictions provided by Dr. Alday, a Board-certified orthopedic surgeon, who based his opinion on a complete review of appellant's history and a thorough physical examination. His motor manual testing and physical examination of appellant's lower extremity provided the

[1] *Frederick Justiniano*, 45 ECAB 491 (1994).

[2] 5 U.S.C. § 8106(2).

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

[4] 20 C.F.R. § 10.124(c).

[5] *Camillo R, DeArcangelis*, *supra* note 3; *see* 20 C.F.R. § 10.124(e).

[6] *See Carl W. Putzier*, 37 ECAB 691 (1986); *Herbert R. Oldham*, 35 ECAB 339 (1983).

[7] *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Reemployment and Determining Wage-Earning Capacity*, Chapter 2.813.11(c) (December 1991).

[8] The record reflects appellant remained on the employing establishment rolls at the time the job offer was made. Consequently, his preference for the area in which he currently resides is not an acceptable reason for refusing the job; *see Fred L. Nelly*, 46 ECAB 142 (1994).

basis for his functional evaluation. Dr. Alday's well-rationalized opinion was supported by appellant's treating physician, Dr. Binkley, who opined that appellant was capable of light-duty work involving walking or standing to a significant degree or sitting while pushing/pulling arm and leg controls.

In support of his motion for reconsideration, appellant submitted reports from Dr. Meyer, a Board-certified neurological surgeon, and Dr. Abernethy, a family practitioner. Dr. Meyer, however, failed to specify appellant's physical capabilities other than to indicate that he was severely handicapped from performing any physical activity. Because Dr. Meyer failed to explain his conclusion, his opinion is entitled to little weight.[9]

Dr. Abernethy, a general practitioner, provided the remaining opinion addressing whether appellant could perform the limited duty position. He stated that appellant should not be required to work and that he risked further injury if he resumed working. Dr. Abernethy, however, indicated that appellant's specific limitations where that he could stand for brief periods, but that he could not walk prolonged distances. These restrictions are within the duties provided for in the limited-duty job offer. The medical evidence is not sufficient to establish that appellant is disabled from traveling to the job due to residuals of the employment injury. Moreover, the fear of future injury is not sufficient reason for an appellant to reject suitable work.[10] Dr. Abernethy's opinion, therefore, does not provide any basis for rejecting the limited-duty job offer.

Accordingly, the weight of the medical evidence rests with the well-rationalized opinion of Dr. Alday which supports appellant's ability to perform the limited-duty position offered. In addition, appellant's relocation to a different area from which the employing establishment is located is an unacceptable reason for rejecting the offer of suitable employment.[11]

[9] *Jean Culliton*, 47 ECAB 728 (1996).

[10] *Edward P. Carrol*, 44 ECAB 331 (1992).

[11] *Id.*

The decisions of the Office of Workers' Compensation dated October 30 and July 15, 1997 are affirmed.

Dated, Washington, D.C.
February 8, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member