U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ORLANDO BURTON and U.S. POSTAL SERVICE,
POST OFFICE, Greensboro, NC

Docket No. 98-1131; Submitted on the Record;
Issued February 4, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation entitlement effective December 15, 1997 on the grounds that he refused an offer of suitable work.

The Office accepted that on May 4, 1994 appellant, then a 29-year-old mailhandler, sustained low back strain, thoracic and lumbar strain and aggravation of lumbar degenerative disc disease and spondylolysis.[1] Concurrent disability not due to injury was noted to include degenerative disc disease, liver dysfunction, chronic low back pain since 1986 and a congenital anomaly. Appellant was granted a Veterans Administration disability rating of 10 percent for recurrent low back strain with congenital anomaly from August 12, 1987.

Appellant stopped work on May 6, 1994 and received compensation through August 1, 1994. He returned to limited duty until September 4, 1994 when he stopped again. Appellant returned to limited duty for four hours per day on November 24, 1994, stopped work on February 2, 1995 and returned to limited duty for two hours per day on June 17, 1995. On August 26, 1995 appellant claimed a new injury from reaching for a letter while sitting in an adjustable chair. He stopped work that date, received continuation of pay through October 10, 1995 and was placed on the periodic rolls beginning October 11, 1995. Appellant's new injury was accepted for low back strain. On June 21, 1996 appellant underwent an L4 to S1 decompression stabilization and fusion, followed by physical therapy. On October 21, 1996 and again on March 31, 1997 radiographic evaluation revealed a solid L4-S1 fusion.

After appropriate treatment and surgery by Dr. T. Craig Derian, a Board-certified orthopedic surgeon, he submitted work restrictions dated April 7, 1997 indicating that appellant could return to work gradually. He indicated that appellant could return to eight hours per day by working four hours per day for two weeks, six hours per day for two weeks, then eight hours

[1] Appellant was injured when the forklift he was driving hit a hole in the work room floor.

per day. Dr. Derian's restrictions included no prolonged or repetitive bending, lifting, stooping or twisting, with no lifting over five pounds frequently or ten pounds occasionally. Dr. Derian noted that appellant should be allowed frequent position changes from sitting to standing to walking as needed and should be allowed to use his own judgment concerning these activities.

On April 8, 1997 appellant underwent a fitness-for-duty evaluation by Dr. Joseph J. Guarino, Jr., a Board-certified internist, who determined that a functional capacity evaluation was needed.

On April 24, 1997 a functional capacity evaluation was performed.

By report dated April 29, 1997, Dr. Guarino noted that the functional capacity evaluation supported that appellant could lift 25 pounds occasionally and 10 pounds frequently, that he would be able to function best if he could sit and stand on an alternating basis, that occasional bending would be tolerated well and that pushing and pulling should be limited to the same weight restrictions as lifting.

On May 6, 1997 Dr. Guarino completed an OWCP-5 work restriction evaluation form indicating that appellant could lift up to 20 pounds, perform light pushing and pulling and occasional intermittent bending but no twisting and could work 8 hours per day. No other activity restrictions were noted.

On September 25, 1997 the employing establishment sent Dr. Derian a proposed job description in accordance with the work restrictions recommended by Dr. Guarino. The job was for a modified mailhandler.

On September 29, 1997 Dr. Derian signed the job offer checking "it is in compliance with [appellant's] restrictions."

By letter dated October 21, 1997, the employing establishment offered appellant the job as a modified mailhandler. The position duties included restrapping, separating loose mail, rewrapping and miscellaneous duties, minimal bending, intermittent sitting and standing and no lifting greater than 20 pounds.[2]

On November 6, 1997 the employing establishment advised the Office that appellant had refused the offered position. The employing establishment also noted that postal inspectors had obtained pictures of appellant trimming his hedges "in approximately 90 degrees heat."

[2] Restrapping required appellant to stand, open a letter tray, ascertain the zip code, write out a label and insert in letter tray, place tray on strapping machine, push button, then place the tray on the conveyor belt. It required no lifting greater than 20 pounds and a 1-hour rotation. Separating loose mail required opening a sack, placing magazines in a flat tray to half full and lifting the half full flat tray to the ERMAC. It required no lifting greater than 20 pounds and a 1-hour rotation. Rewrapping required removing damaged mail from a hamper, when hamper gets empty pushing hamper to hamper tilt to get mail, minimal bending was required when using hamper tilter and assistance could be requested to get mail out of bottom of hamper. It required carrying mail to rewrap table, sitting and rewrapping or repairing damaged mail and writing address on new label. Employee was to select items weighing no more than 20 pounds and intermittent sitting and standing was required. Other duties were to be assigned within the guidelines of the physical restrictions as stated by Dr. Guarino.

By letter dated November 13, 1997, the Office advised appellant that it had found the offered position suitable to his partially disabled condition and that he had 30 days from the date of the letter within which to accept this offered position or provide his explanation and reasons for not doing so. It also advised appellant of the provisions of 5 U.S.C. § 8106(c). Appellant did not respond within the specified 30-day period.

By decision dated December 16, 1997, the Office terminated appellant's entitlement to compensation for wage loss finding that he had refused an offer of suitable work. The Office found that appellant failed to provide any acceptable reason to support his refusal to accept the job of modified mailhandler.

On December 17, 1997 the Office received appellant's response, through his representative, concerning his refusal to accept the offered position, which had been submitted to the employing establishment injury compensation office on December 15, 1997 and thereafter transmitted to the Office.[3] The response letter was dated December 10, 1997. On December 18, 1997 it received the same material by facsimile.

On December 19, 1997 appellant, through his representative, requested reconsideration.

In support of the request, appellant resubmitted the information previously submitted with the December 10, 1997 response and the December 10, 1997 response itself.

Appellant also submitted a personal statement claiming that he had undergone a three level lumbar spinal fusion with implantation of steel rods and screws, which would make the modified mailhandler job unsuitable, that the modified mailhandler position required repetitious movements to perform restrapping, separating loose mail and rewrapping and that the standing and walking required by the position would be too physically demanding for his back condition. Appellant also submitted information from the employing establishment dated November 12 and December 5 and 15, 1994, which was repetitive of information already of record and previously considered.

The December 10, 1997 letter from appellant's representative stated that appellant strongly felt he was unable to accept the offered position because his physical condition had limitations. Appellant's representative then set out appellant's version of his physical restrictions and suggested three positions, which appellant felt he could perform. Additionally submitted was a December 5, 1997 report from Alan C. Gorrod, a "certified evaluator" for Triad Therapy Services.

Appellant also submitted a December 29, 1997 report from Dr. Derian, which stated that he had reviewed the job descriptions in appellant's return-to-work situation, that he had previously recommended avoidance of prolonged repetitive bending, stooping, lifting, twisting,

[3] Appellant's 30-day time period would have ended on December 13, 1997 which was a Saturday, such that a response postmarked December 15, 1997 would have been considered timely as that was the next regular day of business; *see John B. Montoya*, 43 ECAB 1148 (1992). Timeliness is determined by the postmark on the envelope, if available. However, if no envelope is included in the case record, the date of the letter itself should be used. *Douglas McLean*, 42 ECAB 759 (1991); *William J. Kapfhammer*, 42 ECAB 271 (1990).

standing and walking and that he was now recommending quality control including checking in-bound meter dates and rates, vehicle operation assistant and control room assistant. Dr. Derian stated that these jobs would allow appellant to return to work minimizing the repetitive motion aspects, which would aggravate his underlying back condition. He noted that "prolonged bending, lifting, stooping, bending over hampers to manipulate mail may subject [appellant's] back to significant pressures, which may contribute to continued pain and lead to further difficulties with [his] back. In order to avoid these problems, I am recommending a light-duty type of job as I have previously recommended." Dr. Derian stated that the jobs offered to appellant included repackaging mail and other mailhandler duties, which would subject him to repetitive bending, stooping and lifting type of activities, which were not recommended.

By decision dated January 27, 1998, the Office denied modification of the prior decision finding that the evidence submitted was insufficient to warrant modification of the December 16, 1997 decision. The Office found that the position offered appellant was indeed suitable to his partially disabled condition, that Dr. Derian opined on September 29, 1997 that the job was in compliance with appellant's restrictions and that appellant refused the suitable job offer without providing an acceptable reason for his refusal. The Office fully reviewed appellant's statement and his representative's December 10, 1997 letter and found that they were of no significant probative value because appellant was not a physician and, therefore, could not dictate his own work restrictions or make a judgment as to what he could and could not do. The Office further found that the issue of appellant selecting his own job was not an option, that the employing establishment developed a position within the restrictions of Dr. Guarino and that appellant's own treating physician agreed that he could perform this created position. The Office found that the repetitive information submitted was not probative as the Office had already considered it and that the report from Mr. Gorrod was of no probative value as he was not a physician under the Federal Employees' Compensation Act.[4] The Office reviewed Dr. Derian's December 29, 1997 letter and noted that he provided no rationale as to why he changed his mind to opine that appellant could only perform the jobs he wanted to perform. The Office noted that Dr. Derian did not opine that appellant could not perform the position offered and that the offered position required no prolonged bending, lifting, stooping, or bending over hampers to manipulate mail as appellant had evidently led Dr. Derian to believe. The Office found that, therefore, the job offered appellant was indeed suitable employment and that appellant refused the suitable position without an acceptable reason.

The Board finds that the Office improperly terminated appellant's compensation entitlement effective December 15, 1997 on the grounds that he refused an offer of suitable work.

Under section 8106(c)(2) of the Act[5] the Office may terminate the compensation of a partially disabled employee who refuses or neglects to work after suitable work has been offered to, procured by or secured for the employee.[6] Section 10.124(c) of Title 20 of the Code of

[4] *See Sheila A. Johnson*, 46 ECAB 323 (1994).

[5] 5 U.S.C. § 8106(c)(2).

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

Federal Regulations[7] 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[8] is offered, is not entitled to compensation."[9] 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.[10] However, to justify such termination, the Office must show that the work offered was suitable.[11] The Office met its burden of proof here.

Appellant's treating physician, Dr. Derian initially indicated that appellant could return to work eight hours per day by working four hours per day for two weeks, six hours per day for two weeks, then eight hours per day, with restrictions that included no prolonged or repetitive bending, lifting, stooping or twisting, with no lifting over five pounds frequently or ten pounds occasionally. Dr. Derian also noted that appellant should be allowed frequent position changes from sitting to standing to walking as needed and should be allowed to use his own judgment concerning these activities.

However, Dr. Guarino noted that the functional capacity evaluation supported that appellant could lift 25 pounds occasionally and 10 pounds frequently, that he would be able to function best if he could sit and stand on an alternating basis, that occasional bending would be tolerated well and that pushing and pulling should be limited to the same weight restrictions as lifting. He completed an OWCP-5 work restriction evaluation form indicating that appellant could lift up to 20 pounds, perform light pushing and pulling and occasional intermittent bending but no twisting and could work eight hours per day; no other activity restrictions were noted.

The employing establishment then sent Dr. Derian a proposed job description in accordance with the work restrictions recommended by Dr. Guarino for the position of a modified mailhandler and on September 29, 1997 Dr. Derian signed the job offer checking "it is in compliance with [appellant's] restrictions." This evidence supports that Dr. Derian believed that at that time appellant could perform the proposed modified mailhandler position. As there was no contradictory medical evidence of record at that time supporting that appellant could not perform the proffered position, the Office properly determined that the offered position of modified mailhandler was indeed suitable to appellant's partially disabled condition.

By letter dated November 13, 1997, the Office advised appellant that it had found the offered position suitable to his partially disabled condition and that he had 30 days from the date of the letter within which to accept this offered position or provide his explanation and reasons for not doing so and it advised appellant of the provisions of 5 U.S.C. § 8106(c).

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[7] 20 C.F.R. § 10.124(c).

[8] *See Camillo R. DeArcangelis, supra* note 6; *see* 20 C.F.R. § 10.124(e).

[9] 5 U.S.C. § 8106(c)(2).

[10] 20 C.F.R. § 10.124.

[11] *See Carl W. Putzier*, 37 ECAB 691, 700 (1986); *Herbert R. Oldham*, 35 ECAB 339, 346 (1983).

Appellant, therefore, had until December 13, 1997 to respond to the job offer with his reasons for refusal. Appellant, through his representative, responded by letter dated December 10, 1997. No envelope with any postmark was included in the case record; however, the letter was date stamped December 15, 1997 by the injury compensation office of the employing establishment and was date stamped received by the Office on December 17, 1997. Because December 13, 1997 fell on a Saturday, appellant had until the next regular day of business, December 15, 1997, to get the response postmarked.[12] However, since no envelope from either appellant or the employing establishment injury compensation office appears in the case record, the date of the response must be considered to be the date of the letter, which was December 10, 1997.[13] Hence, appellant timely responded to the Office's November 13, 1997 letter, but the Office failed to consider appellant's timely response and failed to further inform appellant of whether or not his reasons for refusal were justified and, if not, allow him additional time within which to accept the offered position.[14] Therefore, the December 16, 1997 termination of appellant's compensation was improper.

As the December 16, 1997 termination of appellant's compensation entitlement was improper, the Board will not address the following January 27, 1998 denial of modification.

[12] *See John B. Montoya*, *supra* note 3. Appellant may have properly mailed the response directly to the Office and had it postmarked prior to or on December 15, 1997, which would have been timely. Appellant improperly submitted the time sensitive response to the employing establishment injury compensation office instead, which received it timely on December 15, 1997 and in turn forwarded it to the Office, possibly, also with a postmark of December 15, 1997, since the Office stamped it received on December 17, 1997, which would also have been timely.

[13] *See Douglas McLean*, *supra* note 3; *William J. Kapfhammer*, *supra* note 3.

[14] *See Maggie L. Moore*, 41 ECAB 334 (1989), *reaff'd on recon.*, 43 ECAB 818 (1992) (The Office must evaluate a claimant's reasons for refusal and supporting evidence and inform the claimant of its decision as to whether such reasons were accepted or rejected and give the claimant a reasonable period to make an informed decision on whether to accept or reject the job.)

Accordingly, the decisions of the Office of Workers' Compensation Programs dated January 27, 1998 and December 16, 1997 are hereby reversed.

Dated, Washington, D.C.
February 4, 2000

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member