U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CARLTON E. DAVIS and U.S. POSTAL SERVICE,
POST OFFICE, Coppell, TX

Docket No. 98-2079; Submitted on the Record;
Issued February 25, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation; and (2) whether the Office properly denied appellant's request for a hearing before an Office hearing representative.

On February 1, 1995 appellant, then a 42-year-old maintenance worker, filed a claim for chronic back strain which he related to the work he performed to repair postal carts. He was notified on January 30, 1995 by the employing establishment that his employment would be terminated for inability to perform the duties of his position. In a March 1, 1995 letter, the employing establishment removed appellant from his position. The Office accepted appellant's claim for aggravation of preexisting lumbar strain and began payment of temporary total disability compensation effective March 5, 1995.

In a February 21, 1997 decision, the Office terminated appellant's compensation effective March 1, 1997 on the grounds that appellant had recovered from the work-related aggravation of his underlying lumbar syndrome. In a March 18, 1997 letter, appellant, through his representative, requested reconsideration. In an April 7, 1997 decision, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted and the legal arguments presented related to refusal to perform suitable work and therefore were irrelevant to the February 21, 1997 decision. In a March 24, 1997 letter, appellant, through his attorney, requested a hearing before an Office hearing representative. In a May 27, 1997 decision, the Office found that appellant was not entitled to a hearing because his request for a hearing was untimely. The Office reviewed appellant's request on its own discretion and found that the issue in the case could be equally well addressed by submitting evidence not previously submitted and requesting reconsideration.

The Board finds that the Office did not meet its burden of proof in terminating appellant's compensation.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[1]

In a January 31, 1995 report, Dr. John Thompson stated that appellant had a chronic back condition which was aggravated by swinging a hammer at work. He indicated that this was a temporary condition for which appellant should be given light duty. The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. John A. Handal, a Board-certified orthopedic surgeon, for an examination and second opinion. In a July 21, 1995 report, Dr. Handal indicated that appellant had a history of a back injury in 1989 while in military service for which he underwent surgery. He noted that x-rays showed some narrowing at L5-S1 and previous lumbar laminectomy at that level on the left side. Dr. Handal reported that appellant had back pain and leg pain in an S1 pattern. He diagnosed a lumbar syndrome and related appellant's symptoms to the L5-S1 level. Dr. Handal indicated that appellant stopped working in February 1995. He concluded that appellant had an aggravation of a preexisting condition in association with swinging a sledgehammer. He commented that the symptoms could be regarded as temporary if appellant received reasonable treatment such as rehabilitation.

In a December 5, 1995 report, Dr. Handal indicated that appellant would be referred for a functional capacity evaluation and would return to work on December 11, 1995 with restrictions based on the examination. He noted that appellant could work eight hours a day. In the December 8, 1995 report, a physical therapist indicated that appellant could lift up to 40 pounds for 5 percent of an 8-hour day, 30 pounds for up to 33 percent of an 8-hour day, 20 pounds for 67 percent of an 8-hour day and 10 pounds for 100 percent of an 8-hour day. The therapist indicated that appellant could walk intermittently for the entire workday. Sitting and standing tolerances were not tested.

In a January 16, 1996 report, Dr. Handal stated that appellant had reached maximum medical improvement. He noted that he had no further treatment to offer appellant. He indicated that he would follow appellant on an as needed basis. Dr. Handal commented that appellant's return to work was a matter between him and the employing establishment.

In a March 4, 1996 letter, the employing establishment offered appellant a position as a custodian with modified, limited duties. The position required the ability to lift up to 30 pounds for 2½ hours a day, and standing, walking and sitting 8 hours a day.

In a March 22, 1996 report, Dr. Andrew B. Dossett, an orthopedic surgeon, stated that appellant would be unable to be on his feet all day. He indicated that appellant could do clerical work. Dr. Dossett commented that appellant should not be on his feet more than one hour at a time or more than three hours in a day. In an accompanying work restriction form, Dr. Dossett indicated that appellant should limit standing, lifting, pushing and pulling.

[1] *Jason C. Armstrong*, 40 ECAB 907 (1989).

In a March 27, 1996 letter, the Office informed appellant that his physical restrictions precluded him from performing the job offered to him by the employing establishment. It noted the expectation that the employing establishment would either modify the job offered to appellant or would offer another position.

In an April 1, 1996 letter, the Office asked Dr. Dossett whether the job offered to appellant was valid, complying with appellant's work restrictions. It further asked whether the temporary aggravation of appellant's preexisting lumbar strain had ceased. In an April 10, 1996 response, Dr. Dossett stated that the job offer was not valid due to appellant's limitations. He commented that he thought the temporary aggravation ceased on January 6, 1996 when Dr. Handal found appellant had reached maximum medical improvement.

The Office based its decision to terminate appellant's compensation solely on Dr. Dossett's April 10, 1996 comment. However, Dr. Dossett gave no rationale or explanation in support of his opinion that the employment-related aggravation of appellant's lumbar strain had ceased. He only referred to Dr. Handal's January 16, 1996 report. Dr. Handal, in that report, only indicated that appellant had reached maximum medical improvement and noted that he had no further treatment to offer appellant. He did not give any opinion on whether the employment-related aggravation of appellant's lumbar strain had ceased. The Office therefore has not received a detailed, well-rationalized report specifically indicating that appellant's disability due to a temporary aggravation of lumbar strain had ceased. Drs. Handal and Dossett had indicated that appellant could return to work up to eight hours a day with some work restrictions. These reports, however, did not show that the effects of the employment-related temporary aggravation had ceased but only that appellant could do some work other than the position he held at the time of his employment injury. The reports did not show that the effects of the accepted aggravation had ceased or that appellant had no disability remaining that could be related to the accepted aggravation. The Office has not met its burden of proof.[2]

[2] In light of the Board's decision in this case, the decision denying appellant's request for a hearing, dated May 27, 1997, is moot.

The decisions of the Office of Workers' Compensation Programs, dated April 27 and February 21, 1997, are hereby reversed.

Dated, Washington, D.C.
February 25, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member