U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN R. PEREZ and U.S. POSTAL SERVICE,
POST OFFICE, Los Angeles, CA

Docket No. 99-816; Submitted on the Record;
Issued February 1, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's entitlement to monetary compensation benefits under 5 U.S.C. § 8106(c)(2) on the grounds that he refused an offer of suitable work.

The Office accepted that on May 29, 1979 appellant, then a 52-year-old letter carrier, sustained a sprain of the right ankle, superficial phlebitis of the right ankle, osteopenia of the right ankle, and a herniated nucleus pulposus at L5-S1 after stepping on a crack in the pavement.[1] Following the injuries, appellant stopped work and was placed on the periodic rolls for receipt of monetary compensation benefits beginning May 30, 1980.[2]

Appellant was evaluated and examined on September 3, 1992 by Dr. James E. McSweeney, a Board-certified orthopedic surgeon, for a second opinion evaluation. By report dated October 1, 1992, Dr. McSweeney reviewed the statement of accepted facts, appellant's history and the medical evidence of record. He reported appellant's complaints at that time,

[1] Previously on May 9, 1966 while delivering mail appellant had slipped on a wet step and sustained a bruise and abrasion of the right forearm, and a bruised and fractured coccyx.

[2] On October 26, 1979 appellant was diagnosed with chronic recurrent musculoligamentous lumbar spine strain, right sciatica, a fracture of the distal sacrum and coccyx, chronic coccydynia, lateral ligamentous and capsular right ankle strain, and right ankle sinus tarsi syndrome. In 1983 appellant was involved in a motor vehicle accident, sustaining a neck injury. On March 22, 1986 appellant again was in a motor vehicle accident where he was rear-ended, sustaining possible loss of consciousness, recurrent headaches, irritability, tiredness, neck and upper back pain radiating into his scapular regions, right greater than left, a tingling sensation in his right arm, numbness and tingling in the left leg, weakness in the low back and right leg, and right ankle pain. He was subsequently diagnosed with post-traumatic head syndrome, sub-acute musculoligamentous cervicothoracic strain, cervical disc syndrome with upper extremity radiculitis, right carpal tunnel syndrome, sub-acute musculoligamentous lumbosacral strain with right lower extremity radiculitis, and a herniated lumbar disc at L4-5 and/or L5-S1 with right lower extremity radiculitis. Appellant was also in receipt of Veterans Administration benefits for military service-related back and leg injury.

performed a physical examination, noted deficits in ranges of motion and other objective abnormalities, performed neurological testing, and opined that appellant had reached permanent and stationary status. Dr. McSweeney opined that appellant was disabled as a postman, and was advised to wear a corset and use a cane and an elastic right ankle support. He opined that retraining into another trade or occupation was impractical and beyond appellant's mental and physical capabilities.

Dr. McSweeney also provided an April 20, 1993 report as requested by the Office commenting on appellant's permanent impairment rating. He did not examine appellant for this report.

By report dated June 25, 1994, Dr. McSweeney provided an additional report at the Office's request on appellant's status with regard to his ability to return to work, but he did not actually examine appellant. Dr. McSweeney reviewed the statement of accepted facts, the history of injury, the case record and the complete medical history; he noted that a 1986 computerized tomography (CT) scan demonstrated a slight disc herniation at C6-7 at the left foramen with slight left-sided neural foraminal stenosis and with hypersthesias in the C6-7 nerve root distribution, neck and upper back pain radiating into the shoulder blades and arms and a feeling of numbness, weakness and tingling into the arms secondary to a motor vehicle accident. Dr. McSweeney noted that a 1989 magnetic resonance imaging (MRI) scan revealed a mid-sized disc herniation at L5-S1 causing mild bilateral neural foraminal stenosis and slight compression of the anterior thecal sac and with mild to moderate central canal stenosis, and that a CT scan demonstrated bilateral facet arthropathy at T8 and T9 with neural foraminal stenosis bilaterally, and facet arthropathy at T9-10, T10-11 and T11-12. Dr. McSweeney examined appellant, noted that he reached maximum medical improvement prior to his 1986 motor vehicle accident, noted that his permanent and stationary status occurred in mid-1983, and noted that he was unable to perform work as a letter carrier. Dr. McSweeney enumerated appellant's objective factors of disability, which included loss of lumbar lordosis, localized tenderness, paralumbar hypertrophy, loss of lumbar rotation, losses in ranges of motion, mild weakness of multiple muscle groups, facet arthropathy, joint irregularity, osteoporosis, left calf atrophy, positive straight leg raising with referred low back pain, and reduced right hip flexion, and opined that he was capable of performing primarily light sitting work which could be performed intermittently for eight hours per day with the option to stand as needed, and with minimal demands for physical effort including no standing for greater than one hour throughout the day, no lifting over 10 pounds, no pushing or pulling, and no overhead work or shoulder level reaching.[3]

Thereafter appellant was enrolled in vocational rehabilitation and on March 15, 1996 he graduated from Nordstrom Business Institute, with his vocational objectives being an order clerk or customer service representative position. During this training appellant acquired entry level skills in computer software applications.

[3] Dr. McSweeney did not, however, explain why he now opined that appellant could work eight hours a day, when in 1992 following his actual examination of appellant, he opined that retraining appellant into another trade or occupation was impractical and beyond appellant's mental and physical capabilities.

On February 15, 1996 the employing establishment offered appellant the position of modified carrier for eight hours a day at the Los Angeles district office on Central Avenue. Duties included "seeding collection test cards, compiling data and various clerical duties within physical limitations." Work limitations were noted as primarily sitting work intermittently eight hours per day with the option to sit or stand as needed, minimal demands for physical effort, no standing for more than one hour over the eight-hour day, no pushing or pulling, no overhead work or at shoulder level, and no lifting over 10 pounds.

By letter dated April 19, 1996, the Office advised appellant that the offered job as a modified clerk was found to be suitable as it was consistent with the 1994 work restrictions proposed by Dr. McSweeney, and advised that he had 30 days within which to accept the position or to provide his reasons for refusal. It also advised of the provisions of 5 U.S.C. § 8106(c)(2).

Appellant signed the letter indicating that he accepted the offered position on February 18, 1996.

The rehabilitation counselor reported on May 31, 1996 that appellant was awaiting final word from the employing establishment with regard to the job offer, and that since appellant had been removed from the employing establishment rolls he would have to go through the preemployment process including fingerprints and urinalysis, and a physical examination. The counselor noted that appellant was awaiting a physical examination date.

By report to the Office dated June 10, 1996, Dr. Albert W. Lizarraras, a Board-certified neurosurgeon, noted that appellant, then 69 years old, was referred by his carrier, the Department of Labor, for an appropriate specialist's care of his work-related injuries. Dr. Lizarraras noted that appellant used a cane for stability during ambulation, had limited range of neck motion, bilateral trace ankle reflexes, weak major muscle groups in all four extremities, the inability to walk on his toes on the right, an absent Romberg's sign, hypesthesia to pinprick over the C6 root distribution on the left and global decreased sensation of the entire left leg, and reduced back range of motion. Physical therapy was recommended.

A July 31, 1996 rehabilitation counselor noted that appellant was still awaiting his preemployment physical examination and that they had just discovered that he had completed a computer training program.

By report dated August 21, 1996, Dr. Lizarraras noted that appellant now resided with his daughter in Chula Vista, such that commuting to work would require an hour and a half drive each way from where she lived to his place of work in Los Angeles. Dr. Lizarraras opined that, because appellant still used a cane for discomfort and for support, and since three hours of driving time was a considerable burden, and considering appellant's age and his cervical and lumbar disc problems, "the most prudent course of action would be for him to work part time from 10:00 a.m. to 2:00 p.m. and thereby he would be able to minimize his driving time and avoid driving during the rush hour." Dr. Lizzarraras recommended, however, that appellant be retired since this proposed job would place a considerable burden on a man of his age, and because his ill wife was at home and required a considerable amount of care which would take

priority over working four hours a day for the employing establishment. Dr. Lizarraras recommended retirement from the employing establishment.

In an August 31, 1996 rehabilitation report, the counselor indicated that appellant stated that he was examined by his own physician who indicated that appellant should only consider working part time at this point. The counselor also noted that appellant still needed to go through the preemployment process as he was no longer on the employing establishment's rolls.

A September 24, 1996 report from Dr. Lizarraras, now clearly acting in the capacity of appellant's treating neurosurgeon, noted that appellant had experienced a flare-up of discomfort not only in his neck but also in his low back, and claimed that his symptoms really had not changed, but that he felt relief over the fact that he was now considered for retirement. He noted that appellant was still using his cane for support when walking, and that he required further physical therapy for his back and neck problems.

In a September 30, 1996 rehabilitation report, the counselor noted that appellant again indicated that his own physician recommended that he should only consider working part time at this point.

The employing establishment scheduled an interview with appellant on November 7, 1996 but it was rescheduled upon request to November 18, 1996. On that date appellant called to say that because of his ill health, and because of the ill health of his wife, he could not attend the interview and had therefore decided to retire. By letter to the employing establishment dated November 21, 1996, appellant advised that he had chosen to follow his doctor's recommendation and was electing to take disability retirement as he did not feel that he was capable of returning to work at that time.[4]

By letter dated November 25, 1996, the employing establishment noted that appellant had refused to attend a prehire job interview and was pursuing Office of Personnel Management disability retirement, and it requested that an "LWEC [loss of wage-earning capacity]" be done.[5] On December 2, 1996 the employing establishment requested that the Office invoke 5 U.S.C. § 8106(c).

However, by letter dated December 27, 1996, the Office advised appellant that he was being put on the automatic rolls for receipt of compensation benefits for temporary total disability.

By letter dated February 4, 1997, appellant acknowledged the December 27, 1996 letter indicating that his compensation had been extended, requested another copy, and asked if he could select Dr. Richard C. Richley, a Board-certified orthopedic surgeon, as his treating physician since Dr. Lizarraras had retired.

[4] Appellant stated that during vocational rehabilitation that year he became very much aware of his incapacity to carry out a normal days work because of his multiple on-the-job injuries, his herniated cervical disc, his carpal tunnel syndrome, and his predisposition to diabetes, coupled with the ill health of his wife.

[5] Appellant became 70 years old on November 14, 1996.

Nevertheless, by letter dated February 6, 1997, the Office advised appellant that his reasons for refusal of suitable employment were not justified and that he had 15 days within which to accept the position without penalty. The Office stated in explanation that it found the position suitable to his limitations "*as described by your treating physician.*"[6] (Emphasis added.) The Office stated that Dr. McSweeney's work restrictions outweighed the more contemporaneous restrictions of Dr. Lizarraras, but it failed to explain why. The Office explained that it did not consider relocation a justifiable reason for refusing a light-duty job offer nor did it consider family "obligations" as a justifiable reason. The Office stated that appellant's age alone did not prevent him from performing the physical requirements of the light-duty job.

By letter dated February 20, 1997, appellant advised that he was accepting the job offer under protest, and he argued that his work-related injuries precluded him from performing this job; he further indicated that additional medical information would be forthcoming.

On March 25, 1997 the Office contacted the employing establishment to ascertain whether appellant had returned to work. The employing establishment advised that he had not.

By decision dated March 28, 1997, the Office terminated appellant's monetary compensation entitlement finding that he had refused to accept suitable work. The Office stated that Dr. Lizarraras thought that appellant was capable of performing the job duties, and that the reasons of appellant's age, his commute, the health of his wife or "domestic responsibilities" were not acceptable reasons for refusal.

Appellant disagreed and requested an oral hearing.

A hearing was held on June 18, 1998 at which appellant's union official, Ann Moore, testified on his behalf. Ms. Moore noted that Dr. McSweeney's actual physical examination of appellant was in 1992, four years before the actual job offer, that there were no additional examinations of appellant during that following period, and that in his 1994 supplemental report Dr. McSweeney did not address the several hours of driving which would be required of appellant to perform the offered position. Ms. Moore also noted that at the time of the job offer appellant's own treating physician was recommending that appellant retire due to his age and disability, but that if he worked it should only be for four hours per day due to the long commute from Chula Vista to Los Angeles. Ms. Moore submitted a new medical report from Dr. Richey which opined that appellant could only participate in a rehabilitation program working four hours per day. She stated that appellant moved from Los Angeles to Chula Vista in 1983 so he could live near his children so that they could assist him with caregiving for himself and for his ill wife.[7] Ms. Moore claimed that no consideration was given to the location of the employee when the job offer was made, and she cited to *Glen L. Sinclair*, 36 ECAB 664 (1985) in which the Board found that the Office failed to consider whether appellant's postinjury back condition left him with the functional capacity to drive a 112-mile round-trip to and from the job site as

[6] The limitations the Office relied on were not from appellant's physicians but were from a 1994 addendum to a 1992 second opinion examination. The actual job was never approved as suitable by any physician.

[7] Appellant stated that in 1983 he and his wife moved to San Diego at the request of their daughter who wished to have them live with her in order for her to aid in their care.

required by the job offer.[8] The Board opined that a job was not suitable if the position is not available within appellant's commuting area, which would be determined by appellant's ability to get to and from the job. Ms. Moore opined that appellant's commute would be 2½ to 3 hours during rush hour each way in rush hour commuter traffic.

The January 30, 1998 report from Dr. Richley reviewed appellant's history, indicated extensive physical examination results, noted the objective deficits, and opined that appellant "would be able to participate in a rehab[ilitation] program working four hours a day with restrictions to no repeated squatting, climbing or prolonged standing." Dr. Richley opined that appellant was partially disabled and was not yet considered permanent and stationary.

By decision dated August 27, 1998, the hearing representative affirmed the termination of appellant's compensation entitlement finding that, although appellant's two treating physician's opined that appellant could at most work four hours per day, and noted that the job was at least one and one half hour's commute from appellant's home one way, the Office had determined that it was suitable based upon the vocational and physical restrictions outlined four years earlier by the second opinion examiner who evaluated appellant in 1992. The hearing representative also found that an employee's move away from the area in which the employing establishment is located was an unacceptable reason for his refusal to accept the offered position, citing *Richaed (sic) S. Gumper*, 43 ECAB 811 (1992), a case about a 29-year-old appellant who abandoned a suitable light-duty job that he was successfully performing and moved from California to Michigan for "personal" reasons, which included cost of living, "career" reasons, the fact that his California doctor retired and appellant was not happy with his replacement, and relocation of his step children nearer their natural father. The Board in that case stated that "An employee's move away from the area in which the employing establishment is located is an unacceptable reason for his refusal to accept an offered position *if the employee is still on the agency's rolls.*"[9] (Emphasis added.)

The hearing representative further opined that, although appellant moved from Los Angeles to Chula Vista so that his children could assist him, there was no indication that his health necessitated such assistance. She did not, however, consider whether appellant's wife's health necessitated such assistance, particularly if appellant were absent for work. The hearing representative opined that consideration of commuting time was not appropriate in this case.

The Board finds that appellant did not refuse an offer of suitable work.

Section 8106(c)(2) of the Federal Employees' Compensation Act states that a partially disabled employee who refuses to seek suitable work, or refuses or neglects to work after suitable work is offered to, procured by, or secured for him is not entitled to compensation.[10]

[8] In the instant case, the road distance between Chula Vista and the employing establishment in Los Angeles is measured at 112 miles using one route and 125 miles using another route one way, making a round trip approximately 224 miles or 250 miles depending on the route.

[9] *Richaed [sic] S. Gumper*, 43 ECAB 811 at 816 (1992).

[10] 5 U.S.C. § 8106(c)(2).

The Office has authority under this section to terminate compensation for any partially disabled employee who refuses suitable work when it is offered. Before compensation can be terminated, however, the Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work, and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.[11] In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused by appellant was suitable.[12]

In this case, the Office did not meet its burden of proving the proffered position was indeed suitable. The medical evidence upon which the Office based its decision was a 1994 report from a former second opinion examiner who had not seen, physically examined, or spoken with appellant since 1992. As the job was offered in April 1996 based upon 1994 restrictions of a claimant not physically examined since 1992, these restrictions are not reasonably current enough to probatively use to determine job suitability, particularly in this case of a man 70 years old at the time of termination for refusal of the job offer.[13] Therefore the Office erred in relying on these stale work restrictions.

Additionally, Dr. McSweeney's 1994 report does not constitute the weight of the medical evidence in this case as it was not based upon an actual physical examination, as it was not rationalized, as conclusions that appellant could work eight hours a day were contradicted by his 1992 opinion which was based upon actual examination of appellant, and as Dr. Lizarraras' more contemporaneous reports based upon actual examination disagree with Dr. McSweeney's opinions. In his June 10, 1996 report, Dr. Lizarraras appeared to be an Office referral physician as he stated that appellant had been referred to him by the Department of Labor for evaluation of his work-related injuries. In this case, Dr. Lizarraras would constitute a more contemporaneous second opinion specialist, and his report would be entitled to greater weight than earlier second opinion reports. In his August 21, 1996 report, it is not entirely clear whether Dr. Lizarraras is acting still as a second opinion examiner providing a supplemental opinion with detailed job restrictions and a recommendation of retirement due to appellant's age and disabilities, or as appellant's private physician at that point. If the report was supplemental to his original second opinion, it constitutes the weight of the medical evidence due to its contemporaneousness and establishes that appellant should retire, and if it were merely a report from appellant's new treating neurosurgeon, it would certainly create a conflict in medical opinion evidence with the earlier reports of Dr. McSweeney which would require resolution. Further reports from Dr. Lizarraras and Dr. Richley additionally support that appellant is incapable of performing an eight-hour day job, and create further conflict with the less contemporaneous report of Dr. McSweeney. Therefore, the Office erred in finding that Dr. McSweeney's 1994 report constituted the weight of the medical evidence.

[11] *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

[12] *Glen L. Sinclair*, 36 ECAB 664 (1985).

[13] *See, e.g., Linda L. Mendenhall*, 41 ECAB 532 (1990); *Thomas Talmadge*, 40 ECAB 1167 (1989); *Mary J. Briggs*, 37 ECAB 578 (1986).

Further, the Office erred in its August 27, 1998 decision in reliance on *Gumper* as its rationale for disregarding appellant's move to Chula Vista as justifiable reason for refusing the Los Angeles job, as *Gumper* specifies that such a relocation is unacceptable "*if the employee is still on the agency's rolls"* (Emphasis added.) In this instant case, appellant had been removed from the employing establishment rolls after he moved to Chula Vista in 1983. Therefore *Gumper* does not apply, and relocation must be considered as a reason for refusal.[14]

The Board notes that the Office procedure manual Chapter 2.814.5(b)(3) considers as acceptable reasons for refusal, if an employee has been removed from the employing establishment rolls, that he has moved and a medical condition of a family member or of himself contraindicates a return to the area of original injury. In this case, the Office gave no consideration to the reason that appellant relocated to obtain assistance and care from his children, which his ill wife apparently needed, and he too, considering his age and disability probably needed or would need shortly. The Office erred in failing to consider this situation.

The Office further erred in failing to consider appellant's eligibility for relocation expenses under Office procedure manual Chapter 2.814.6(a) and to advise him of such eligibility. The Office also erred in that it failed to consider appellant's functional capacity to perform the 224- to 250-mile round-trip commute which would have been required for him to perform the offered position, as addressed in *Sinclair* and in Chapter 2.814.5(a)(5) of the Office procedure manual addressing a claimant's ability to travel, in this case 224 to 250 miles round trip by automobile.

The Board additionally notes that Chapter 2.814.5(a)(4) states that if a claimant provides evidence that his refusal was based upon an attending physician's advice and that such advice included medical reasoning, further development is required by the Office. In this case appellant so advised the Office in his November 21, 1996 letter that he was following his physician's advice in electing disability retirement. Dr. Lizarraras' rationale for this advice was stated as appellant's age and residual disability, and because of appellant's ill wife's need for care. Therefore, the Office erred by not further developing this aspect of the case in accordance with Chapter 2.814.5(a)(4).

For all of these above-enumerated reasons, the Office has failed to meet its burden of proving that the job offered was suitable to appellant's age, which at this point in time is 73 years of age, and his partially disabled and evidently not stationary condition.

Accordingly, the decision of the Office of Workers' Compensation Programs dated August 27, 1998 is hereby reversed.

Dated, Washington, D.C.

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[14] *See* Federal (FECA) Procedure Manual, Part -- 2, Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.5(b)(3) which stated that for claimants no longer on the employing establishment's rolls -- that is, who have been separated by formal personnel action -- the following are also considered acceptable reasons for refusing the offered job: "… (3) The claimant has moved, and a medical condition (either preexisting or subsequent to the injury) of the claimant *or a family member* arises which contraindicates return to the area of residence at the time of injury." (Emphasis added.)

February 1, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member