U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DENNIS R. CARTER and DEPARTMENT OF VETERANS AFFAIRS, VETERANS AFFAIRS MEDICAL CENTER, Washington, DC

Docket No. 99-339; Submitted on the Record;
Issued March 23, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's monetary compensation effective May 24, 1997 on the grounds that he refused an offer of suitable work.

On September 30, 1980 appellant, then a 47-year-old electrician, filed a claim alleging that he sustained a traumatic injury to his lower back on that date while cleaning a conveyor system. The Office accepted appellant's claim for lumbosacral strain, aggravation of degenerative joint disease at L5-S1 and aggravation of spinal stenosis at L5-S1. Appellant stopped work on September 2, 1981 and did not return.

In a decision dated July 10, 1995, the Office terminated appellant's compensation effective July 23, 1995 on the grounds that he refused an offer of suitable work. However, by decision dated October 18, 1995, the Office vacated the July 10, 1995 decision on the grounds that the offered position of a part-time information specialist on the midnight shift was not suitable.

On April 3, 1996 the employing establishment offered appellant a part-time position as a maintenance helper on a daytime shift. By letter dated April 12, 1996, the Office advised appellant that the position was suitable and informed him of the consequences of refusing of suitable work set forth in 5 U.S.C. § 8106(c). In a response form dated April 18, 1996 and letter dated May 2, 1996, appellant indicated that he could not perform the duties of the offered position due to his medical condition. By letter dated October 4, 1996, the Office advised appellant that his reasons for refusing the position were not acceptable, that the position remained open and that he had 15 days within which to accept the position.

In a letter dated March 12, 1997, the Office notified appellant that it proposed termination of his compensation on the grounds that he was no longer totally disabled and had refused an offer of suitable work. By decision dated May 7, 1997, the Office terminated

appellant's compensation effective May 24, 1997 on the grounds that he violated section 8106(c) of the Federal Employees' Compensation Act[1] by his refusal of an offer of suitable work. In a decision dated June 15, 1997, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was not sufficient to reopen the case for merit review. By decision dated June 12, 1998, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was not sufficient to warrant modification of the prior decision.

The Board has duly reviewed the case record on appeal and finds that the Office properly terminated appellant's compensation effective May 24, 1997 under 5 U.S.C. § 8106(c) based on his refusal to accept suitable employment.

Section 8106(c)(2) of the 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 or her is not entitled to compensation.[2] The Office has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects 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 requirements of the position.[3] To justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty position, the Office has the burden of showing that the work offered to and refused or neglected by appellant was suitable.[4]

The determination of whether appellant is capable of performing the offered position is a medical question that must be resolved by medical evidence.[5] The Board finds that the probative medical evidence establishes that the position offered was within appellant's medical restrictions.

In the instant case, the Office properly determined that there was a conflict in medical evidence between the opinions of Dr. Richard J. Warchol, a Board-certified internist and appellant's attending physician, and Dr. Roger Raiford, a Board-certified orthopedic surgeon and Office referral physician, regarding whether appellant remained totally disabled. The Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Sanford H. Eisenberg, a Board-certified orthopedic surgeon, for an impartial medical examination.

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[1] 5 U.S.C. §§ 8101-8193.

[2] 5 U.S.C. § 8106(c)(2).

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

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

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

When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[6]

In a report dated July 11, 1996, Dr. Eisenberg discussed appellant's employment injury, his history of medical treatment and the results of objective studies. He further listed detailed findings on physical examination and noted appellant's current complaints of problems with his back, right shoulder and right wrist. Dr. Eisenberg opined that a magnetic resonance imaging (MRI) study revealed fissures in the posterior annular structures at L4-5 and L5-S1 and noted that the "intervetebral discs are markedly dried out and desiccated." He stated, "The complaints and findings of the lumbosacral strain are confirmed by the recent MRI of the lumbar spine. The changes that are noted are competent producing causes of the objective findings and subjective complaints…." Dr. Eisenberg diagnosed lumbosacral strain and degenerative disc disease. In a work restriction evaluation (OWCP-5c) dated August 6, 1996, he found that appellant could work four hours per day with the following limitations: no lifting over 10 pounds more than 10 times per hour, limited bending, twisting, reaching and no standing over 1 hour without a 15-minute break.

Dr. Eisenberg provided a thorough and well-rationalized report based upon an accurate factual and medical history of the case and thus his report is entitled to special weight. The position of maintenance helper was within the restrictions provided by Dr. Eisenberg. Therefore, the weight of the medical evidence, as represented by the report of Dr. Eisenberg, establishes that appellant was capable of performing the duties of the light-duty part-time maintenance helper position offered by the employing establishment.

The Office further complied with its procedural requirements by advising appellant in a letter dated April 12, 1996 that the position of maintenance helper was suitable and providing him 30 days to accept the position or provide an explanation for refusing it and of the consequences of refusing suitable work. By letter dated October 4, 1996, the Office advised appellant that his reasons for refusing the position were not valid and gave him and additional 15 days within which to accept the position, which it determined remained available. Appellant did not accept the job offer and, in support of his refusal, submitted a report dated October 14, 1996 from Dr. Peter I. Kenmore, a Board-certified orthopedic surgeon, who found appellant unable to work due to problems with his back and wrist. Dr. Kenmore's report is unsupported by medical rationale and, therefore, insufficient to outweigh the probative value of Dr. Eisenberg's impartial medical examination report.[7]

Following the termination of his benefits, appellant submitted a report dated August 8, 1997 from Dr. Steven C. Fish, who recommended against surgical intervention on his back, a report of his April 16, 1998 right wrist operation, a chart note dated April 16, 1998, in which a

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[6] *Carl Epstein*, 38 ECAB 539 (1987).

[7] *Jacquelyn L. Oliver*, 48 ECAB 232 (1996) (Medical reports unsupported by rationale are of diminished probative value).

physician diagnosed Kienbock disease of the right wrist, neurological tests dated July 30, 1997 and an MRI of the lumbosacral spine dated August 4, 1997. However, this evidence is not relevant to the issue at hand, which is whether appellant was capable of performing the offered position of maintenance helper as of May 24, 1997. Appellant further submitted a chart note dated March 26, 1998, which indicated that he was totally disabled; however, the report is devoid of any rationale or detailed physical findings and thus of little probative value. In a report dated March 6, 1998, Dr. Howard D. Cohn, a Board-certified internist, found that appellant was "imbued with the notion that he is unemployable" and that "it may be unreasonable to think that he could return to the work force at this time. However, I cannot be absolutely certain of this." Dr. Cohn did not address appellant's specific work restrictions; further, his opinion is speculative and equivocal in nature and thus insufficient to establish appellant's disability from the offered limited-duty position.[8]

Accordingly, the Board finds that the Office properly determined that appellant rejected an offer of suitable employment and met its burden of proof in terminating his monetary compensation benefits under section 8106(c).

The decision of the Office of Workers' Compensation Programs dated June 12, 1998 is hereby affirmed.

Dated, Washington, D.C.
March 23, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member

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[8] *Jennifer L. Sharp*, 48 ECAB 209 (1996) (medical opinions which are speculative or equivocal in nature have little probative value).