U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of STEVEN K. COLLINS and U.S. POSTAL SERVICE,
POST OFFICE, Forest Park, IL

Docket No. 99-1905; Submitted on the Record;
Issued March 17, 2000

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation based on his refusal of suitable work.

On September 23, 1997 appellant, then a 44-year-old mechanic, was injured in the performance of duty when a huge metal door slammed down on his left hand. He received emergency medical treatment and underwent surgery on his fingers. The Office accepted the claim for amputation of the tip of the left ring finger, fracture of the distal phalanx of the little finger and post-traumatic stress disorder. Appellant has not worked since his injury. He has been under the care of Dr. Cavalenes, a Board-certified orthopedist, for treatment of his left hand condition and Dr. Leonard J. Weiss, a Board-certified psychiatrist, for treatment of post-traumatic stress disorder (PTSD).

In an attending physician's report dated October 9, 1997, Dr. Cavalenes indicated that appellant would be released for full-time limited-duty work after six to eight weeks or December 1997. Appellant, however, did not return to work as he was receiving continuing treatment for his emotional condition.

The Office referred appellant to Dr. David Nagle, a Board-certified hand surgeon, for a second opinion evaluation relating to the nature and extent of appellant's disability on June 30, 1998. He concluded that appellant's left hand had recovered and opined that appellant could return to work with the aid of a fingertip protector.[1]

In a report dated August 25, 1998, Dr. Spivy, a Board-certified psychologist and Office referral physician, opined that appellant's PTSD was in remission. He stated that appellant required no further medical treatment. Dr. Spivy concluded that there was no psychological reason why appellant could not return to his date-of-injury job.

[1] Dr. Cavalenes concurred with Dr. Nagle's opinion on January 23, 1998.

In a report dated November 13, 1998, Dr. Weiss diagnosed major depression, panic disorder and PTSD. He indicated that returning to work at the employing establishment would exacerbate appellant's PTSD.[2]

Dr. Weiss referred appellant to Dr. David Barthwell, a Board-certified psychiatrist, who agreed that appellant suffered from PTSD and was totally disabled from work. He opined that since appellant did not suffer from PTSD prior to the work injury, his condition was directly related to his work injury trauma.

Due to the conflict in the medical evidence as to whether appellant had continuing disability and residuals related to his accepted emotional condition, by letter dated November 9, 1998, the Office referred appellant for an impartial evaluation with Dr. Suhail Ghattas. In a report dated November 30, 1998, he opined that appellant was able to return to work so long as he had no involvement with machines. Dr. Ghattas reported that appellant's PTSD had resolved. He indicated that appellant chose not to return to work out of anger and resentment towards the employing establishment for his work injury. Dr. Ghattas also noted that appellant's anger over the work injury should have resolved given the amount of time he had undergone therapy.

The employing establishment subsequently offered appellant a job as a modified custodial laborer effective January 9, 1999. The duties of the job required appellant to sweep, mop and wax the floors of the canteens, designated work areas and bathrooms, with no work on any machinery.

By letter dated December 10, 1998, the Office advised appellant that the position of modified custodial laborer was found to be suitable work. He was provided 30 days to either accept the position or provide reasons for his refusal.

Appellant subsequently submitted a December 18, 1998 report from Dr. Weiss. He stated that appellant suffered from major depression, panic disorder and PTSD. Dr. Weiss also noted additional stresses in appellant's life that included financial hardship, loss of earned income and psychogenic impotency. According to him, in terms of the PTSD, any work at the employing establishment would exacerbate appellant's psychological condition and worsen his prognosis.

By letter dated December 19, 1998, appellant refused the job offer, noting again that his treating physician had advised him not to return to work with the employing establishment based

[2] Dr. Weiss also suggested that appellant's emotional condition resulted in impotency. The Office attempted to have him examined by an Office referral physician to ascertain whether or not his impotency was a consequential injury or causally related to his accepted emotional condition. Because appellant refused to attend a scheduled examination on January 18, 1999, the Office properly refused to accept appellant's claim for impotency. The Board has reviewed the record and considers the Office's selection of the locale for the examination to be reasonable despite appellant's argument that the second opinion specialist was located too far from his place of residence. The Office reasonably noted that the physician selected was the only doctor available who agreed to perform an examination for a workers' compensation case. Under section 8123(d) of the Federal Employees' Compensation Act, appellant's right to compensation is suspended until such time as his refusal or obstruction of the examination stops; *see* 5 U.S.C. § 8123(a).

on his emotional state. He suggested that a reasonable solution would be to employ him at another agency.

By letter dated January 11, 1999, the Office informed appellant that his reasons for refusing the job offer were not acceptable. The Office advised appellant that he had 15 days to accept the position or his compensation would be terminated.

In a decision dated January 28, 1999, the Office terminated appellant's compensation on the grounds that he refused an offer of suitable work.

The Board finds that the Office met its burden of proof in terminating appellant's compensation on the grounds that he refused an offer of suitable work.[3]

It is well established that once the Office accepts a claim and pays compensation for disability, it has the burden of justifying termination or modification of benefits. Under such circumstances, the Office must establish either that its original determination was erroneous or that the employment-related disability has ceased.[4]

Section 8106(c)(2) of the Act[5] provides that the Office may terminate compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.[6] The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.[7]

The implementing regulation 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 a showing before entitlement to compensation is terminated.[8] To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.[9]

The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by

[3] Appellant submitted additional evidence subsequent to the Office's decision but the Board does not have jurisdiction to review on appeal evidence that was not before the Office at the time it issued its final decision; *see* 20 C.F.R. § 501.2(c).

[4] *Lawrence D. Price*, 47 ECAB 120 (1995).

[5] 5 U.S.C. §§ 8101-8193 (1974); 5 U.S.C. § 8106(c)(2).

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

[7] *Stephen R. Lubin*, 43 ECAB 564 (1992).

[8] *John E. Lemker*, 45 ECAB 258 (1993).

[9] *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon*, 43 ECAB 818 (1992).

medical evidence.[10] In assessing the medical evidence, the number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for and the thoroughness of physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[11]

In the instant case, the Office properly determined that appellant was physically capable of performing the position of a modified custodial laborer from the standpoint of his hand injury. Both, Drs. Cavalenes and Nagle, were in agreement that appellant could return to work so long as he was provided with a fingertip protector.

Appellant, however, refused to return to work based on his emotional condition. Dr. Weiss has stated that appellant should not return to work at the employing establishment because it would aggravate appellant's PTSD. Conversely, Dr. Spivy opined that appellant has fully recovered from his emotional condition and should return to work.[12]

Based on a conflict in the medical evidence between Drs. Weiss and Spivy, the Office as to whether appellant was disabled from work due to his emotional condition, properly referred appellant for an impartial evaluation with Dr. Ghattas.[13] Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently reasoned upon a proper factual background, must be given special weight.[14]

Dr. Ghattas offered a reasoned opinion based on a complete review of appellant's medical and work histories, that appellant's PTSD related to his work injury had resolved. Although he acknowledged that appellant had continuing anxiety over using machines, he recommended only that appellant not return to his preinjury job as a mechanic. Inasmuch as Dr. Ghattas' opinion is entitled to special weight, the Board finds that the Office properly concluded that appellant was capable of performing the job offered by the employing establishment. The custodial position offered by the employing establishment did not involve the use of machines; therefore, the Office properly determined that the job offered by the employing establishment was suitable work. Consequently, the Board finds that the Office

[10] *Marilyn D. Polk*, 44 ECAB 673 (1993).

[11] *Connie Johns*, 44 ECAB 560 (1993).

[12] The Board notes that Dr. Weiss' opinion essentially precludes appellant from returning to work for fear of a future injury which is not an acceptable medical rationale for keeping appellant on disability compensation.

[13] Where there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict; *see* 5 U.S.C. § 8123(a); *Gertrude T. Zakrajsek (Frank S. Zakrajsek)*, 47 ECAB 770 (1996).

[14] *Roger Dingess*, 47 ECAB 123 (1995); *Charles E. Burke* 47 ECAB 185 (1995).

properly terminated appellant's wage-loss compensation on the grounds that appellant refused an offer of suitable work.[15]

The decision of the Office of Workers' Compensation Programs dated January 28, 1999 is hereby affirmed.

Dated, Washington, D.C.
March 17, 2000

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

[15] Appellant's refusal to undergo a medical examination with an Office referral physician precludes the Board from finding that he is unable to work the position of a custodian based on his alleged condition of impotency that he attributes to his work injury.