U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LEONARD J. DAIDONE and U.S. POSTAL SERVICE,
POST OFFICE, Paterson, NJ

Docket No. 01-259; Submitted on the Record;
Issued December 14, 2001

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective August 12, 2000, on the grounds that he refused an offer of suitable work.

On December 28, 1976 appellant, a 38-year-old rural carrier, slipped on a patch of ice, injuring his left knee, ankle and hip. He filed a claim for benefits on December 29, 1976, which the Office accepted for left knee strain, left ankle strain and torn medial meniscus.[1] The Office paid appellant compensation for appropriate periods. Appellant returned to part-time work for four hours per day on September 8, 1991 and to full-time work on November 12, 1996. He worked until April 29, 1988, when he sustained a recurrence of his work-related left knee condition.[2] Appellant has not returned to work since that time and the Office paid him compensation for temporary total disability.

In a work restriction evaluation dated November 15, 1999, Dr. Peter F. DiPaolo, an orthopedic surgeon, advised that appellant could work two to three hours a day in a job which entailed intermittent sitting. Dr. DiPaolo totally restricted appellant from walking, lifting, bending, squatting, climbing, kneeling, twisting, standing, simple grasping, fine hand manipulation and reaching above the shoulder. In a report dated November 15, 1999, Dr. DiPaolo restricted appellant from performing any high speed repetitive movements such as computer work or any other kind of keyboard work, which involved grasping, lifting, or carrying.

On March 30, 2000 the employing establishment offered appellant a limited-duty job as a modified city carrier, for three hours a day. The job description indicated, under the heading

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[1] Appellant also sustained a work-related injury to his left knee on February 21, 1978.

[2] By decision dated April 15, 1999, an Office hearing representative set aside the previous Office decision and found that appellant sustained a recurrence of his work-related disability on April 29, 1988.

"General Duties", that his duties would involve "computer input ... line out reject mail, cross off bar codes ... answer telephones ... vehicle cards and gas consumption report ... all other sedentary duties as assigned by supervisor within specific medical restrictions." Under the heading "Physical Restrictions," it was indicated that appellant would be able to work three hours a day and sit for three hours a day.

On April 3, 2000 appellant refused the modified job offer. In a letter to the employing establishment accompanying the rejection, appellant stated that he was refusing the modified job offer because he was electing to accept disability retirement and because he was physically unable to perform the position due to his work-related condition.

By letter dated May 26, 2000, the Office advised appellant that a suitable position was available and that pursuant to section 8106(c)(2), he had 30 days to either accept the job or provide a reasonable, acceptable explanation for refusing the offer. The Office stated that, if appellant refused the job or failed to report to work within 30 days without reasonable cause, it would terminate his compensation pursuant to 5 U.S.C. § 8106(c)(2).[3]

By letter dated June 8, 2000, appellant advised the Office that he was refusing the modified job offer. He reiterated that he was electing to accept disability retirement and was physically unable to perform the position due to his work-related condition.

By letter dated June 8, 1998, the Office advised appellant that it had received his June 8, 2000 letter indicating he had refused to accept the employing establishment's modified job offer. The Office advised appellant that he had 15 days in which to accept the position, or it would terminate his compensation. Appellant did not respond to this letter within 15 days.

By decision dated July 26, 2000, the Office found that appellant was not entitled to compensation benefits on the grounds that he had refused to accept a suitable job offer.

By letter dated August 25, 2000, appellant's attorney requested reconsideration of the July 26, 2000 decision and requested an award under the schedule for his total left knee replacement. In support of his request, appellant resubmitted the November 15, 1999 reports from Dr. DiPaulo, but did not submit any new medical evidence.

By decision dated October 20, 2000, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its prior decision.

The Board has duly reviewed the case record and concludes that the Office did not meet its burden of proof to terminate appellant's compensation benefits on the grounds that he refused an offer of suitable work.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits. Under section 8106(c)(2) of the Federal Employees'

[3] 5 U.S.C. § 8106(c)(2).

Compensation Act[4] the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[5] Section 10.124(c) of the Office's regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured 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 a determination is made with respect to termination of entitlement to compensation.[6] To justify termination, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[7] This burden of proof is applicable if the Office terminates compensation under 5 U.S.C. § 8106(c) for refusal to accept suitable work. The Office did not meet its burden in the present case.

The initial question in this case is whether the Office properly determined that the position was suitable. 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 the medical evidence.[8] Dr. DiPaolo, appellant's treating physician, advised that appellant could work for two to three hours a day at a sedentary job. He restricted appellant from walking, lifting, bending, squatting, climbing, kneeling, twisting, standing, simple grasping and hand manipulation and reaching above the shoulder. Dr. DiPaolo also restricted appellant from performing any high speed repetitive movements such as computer work or any other kind of keyboard work, which involved grasping, lifting, or carrying. The Office reviewed the employing establishment's offer to appellant of a modified city carrier job, which was based on Dr. DiPaolo's work restrictions, reviewed the medical evidence of record which indicated that appellant should be limited to sedentary work for no more than three hours a day and found the position suitable to appellant's restrictions. Dr. DiPaolo, however, did not specifically approve the employing establishment's modified city carrier position.

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits pursuant to 5 U.S.C. § 8106. A review of the above evidence indicates that there is not medical evidence to establish that the offered position was within appellant's physical limitations. Although appellant's treating physician, Dr. DiPaolo, advised in his report that appellant should avoid computer work, simple grasping and fine hand manipulation, the employing establishment selected a position whose duties required appellant to perform "computer input" … "line out reject mail", "cross off bar codes" ... "vehicle cards" and "gas consumption report." Thus the job requirements of the modified position are in conflict with several of the restrictions imposed by Dr. DiPaolo. Further, the Office did not submit any medical opinion or factual evidence indicating that the position involved alternate tasks, which would diversify appellant's duties and prevent him from engaging in activities contrary to

[4] 5 U.S.C. §§ 8101-8193.

[5] *Patrick A. Santucci*, 40 ECAB 151 (1988); *Donald M. Parker*, 39 ECAB 289 (1987).

[6] 20 C.F.R. § 10.124(c); *see also Catherine G. Hammond*, 41 ECAB 375 (1990).

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

[8] *Robert Dickinson*, 46 ECAB 1002 (1995).

Dr. DiPaolo's restrictions. As it is the Office's burden of proof to establish that appellant refused a suitable position, the Office did not meet its burden of proof in this case.[9]

The decision of the Office of Workers' Compensation Programs dated July 13, 1996 is hereby reversed.

Date, Washington, D.C.

Dated, Washington, DC
December 14, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

[9] *Barbara R. Bryant*, 47 ECAB 715 (1996).