U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DENNIS R. O'CONNELL and U.S. POSTAL SERVICE, MIDLAND PROCESSING & DISTRIBUTION CENTER, Melville, NY

Docket No. 00-843; Submitted on the Record;
Issued November 16, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective October 26, 1999 on the basis that he refused an offer of suitable work.

On June 24, 1995 appellant, then a 44-year-old clerk, filed a claim for a traumatic injury sustained that day when a truck door jammed and he felt a pop in his back. On July 24, 1995 appellant indicated that he also injured his neck in the June 24, 1995 incident.

Appellant returned to work on August 25, 1995, performing manual distribution while seated for four hours a day with a 10-pound lifting limit. By decision dated February 13, 1996, the Office found that this position -- limited manual distribution clerk -- fairly and reasonably represented appellant's wage-earning capacity.

On April 5, 1996 appellant again stopped work and filed a claim for a recurrence of disability, stating that he was experiencing severe neck pain with headaches and numbness down both arms. After referring appellant for a second opinion evaluation, the Office accepted that appellant's recurrence of disability beginning April 5, 1996 was related to his June 24, 1995 employment injury.

On November 4, 1996 the Office authorized surgery on appellant's neck and on December 13, 1996 Dr. Arnold M. Schwartz performed an anterior discectomy and interbody fusion at C5-6.

On June 10, 1999 the employing establishment offered appellant a position as a general expeditor clerk for four hours a day. The physical requirements were intermittent lifting up to four pounds and intermittent sitting for four hours, standing for two hours and walking for four hours.

By letter dated June 10, 1999, the Office advised appellant that it had found the offered position suitable, that he had 30 days to accept the position or explain why he refused it and that a partially disabled employee who refuses suitable work is not entitled to compensation. On July 6, 1999 appellant refused the employing establishment's offer and submitted a report from his attending physician, Dr. Donald Holzer, who stated: "[Appellant] has severe restricted movement of the cervical spine in all directions which when coupled with his use of pain medication renders him unfit to drive."

By letter dated July 31, 1999, the Office advised appellant that it found his reason insufficient and allotted him 15 days to report to work or have his compensation terminated. By letter dated August 24, 1999, appellant stated that he refused the job offer "strictly on the issue of driving, not because I am not willing to attempt to return to work."

By decision dated October 26, 1999, the Office terminated appellant's compensation effective that date on the basis that he refused an offer of suitable work.

The Board finds that the Office improperly terminated appellant's compensation.

Under section 8106(c)(2) of the Federal Employees' Compensation Act, 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.[1] To justify termination of compensation, the Office must establish that the work offered was suitable.[2] Section 10.516 of the Code of Federal Regulations[3] 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 showing before a determination is made with respect to termination of entitlement to compensation.[4]

The Office did not meet its burden of proof because there is an unresolved conflict of medical opinion regarding appellant's ability to work. In a report dated April 29, 1999, Dr. David M. Leivy, to whom the Office referred appellant for a second opinion evaluation, concluded: "Objectively, the only thing I can find is tightness of the left shoulder top musculature and questionable slight weakness of the left hand. Based on these findings I would indicate that, from an objective standpoint, [appellant] could work at least part time in a sedentary position." Dr. Leivy's work tolerance limitations indicated that appellant could stand two hours, operate a motor vehicle one to two hours, lift up to five pounds and work four hours a day.

[1] 5 U.S.C. § 8106(c)(2) provides in pertinent part: "A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered to, procured by, or secured for him; is not entitled to compensation."

[2] *David P. Camacho*, 40 ECAB 267 (1988).

[3] 20 C.F.R. § 10.516.

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

Appellant's attending physician, Dr. Holzer, in a work tolerance limitations report dated June 7, 1999, indicated that appellant could not perform any of the listed activities. In a report dated February 9, 1999, Dr. Holzer explained the basis of his opinion that appellant was totally disabled. The laminectomy and fusion performed by Dr. Schwartz "did not provide him any significant relief. He continues to have severe pain in the cervical spine radiating into the left upper extremity, paracervical spasm of marked degree with marked restricted motion of the cervical spine in all directions." Dr. Holzer attributed appellant's continued pain to scarring at the operative site seen on a magnetic resonance imaging scan. This opinion is supported by Dr. Scott A. Mayerberger, who, in a January 20, 1998 report, diagnosed "cervical radiculopathy secondary to disc herniation or scar tissue formation at his prior operative site."

Because the opinions of Drs. Leivy and Holzer conflict with regard to appellant's ability to work and to drive to work,[5] the Office has not met its burden of proof to establish that appellant refused an offer of suitable work.

The decision of the Office of Workers' Compensation Programs dated October 26, 1999 is reversed.

Dated, Washington, DC
November 16, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member

[5] An offer of employment is not suitable if it is not in the employee's commuting area and the commuting area is determined by the employee's ability to get to and from the work site. *Glen L. Sinclair*, 36 ECAB 664 (1985).