U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DENNIS A. DANTZLER and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Coatesville, PA

Docket No. 02-647; Submitted on the Record;
Issued August 27, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation on the grounds that he refused suitable work.

This is the second appeal in the present case. In a decision issued on July 20, 1999, the Board reversed the decisions of the Office dated May 19 and January 31, 1997 which terminated appellant's entitlement to compensation based upon his refusal to accept a suitable offer of employment effective July 10, 1995.[1] The facts and the circumstances of the case are set forth in the Board's prior decision and are incorporated herein by reference.

In a report dated November 27, 1998, Dr. Michael J. Maggitti, an attending Board-certified orthopedic surgeon, noted that appellant had a decreased range of motion in his right upper extremity. He stated that appellant "continued to have difficulty with overhead activities, activities of daily living such as dressing and use of the right upper extremity" and "clinically there has been no change in his examination."

Dr. Maggitti indicated that appellant's "overall condition has remained unchanged" in his March 19, 1999 report. He also concluded that appellant had "no improvement regarding return of full use" of his right upper extremity and the restrictions for the right upper extremity remained permanent.

In a November 5, 1999 report, Dr. Maggitti indicated that physical findings included "continued restrictions" with appellant's range of motion in his right upper extremity. He indicated that appellant's job restrictions were the same as the ones noted in his report two years ago.

[1] Docket No. 97-2670 (issued July 20, 1999).

Dr. Maggitti, in a February 4, 2000 report, opined that there was no change in appellant's medical condition. A physical examination revealed "continued restriction of forward elevation and abduction" as well as continued "restricted range of motion" in appellant's right upper extremity.

On February 24, 2000 the Office medical adviser reviewed the proposed position of health aid and found it within the limitations set by the attending physician.

On March 1, 2000 the employing establishment, based upon the February 24, 2000 Office medical adviser report, offered appellant the limited-duty position of Health Aid with a start date of March 13, 2000. The physical requirements of the position included lifting up to 10 pounds, walking up to 2 hours, standing up to 3 hours, sitting for 3 to 8 hours, frequent reaching, frequent fine manipulation and frequent simple grasping. The duties of the position included answering the telephone and taking messages, directing patients and visitors as needed, carrying messages to other parts of the medical center and interfacing with patients. Appellant would also be required to feed patients and straighten up their rooms. The position also was subject to rotating shifts including holidays and weekends.

On March 13, 2000 appellant advised that he could neither accept nor reject the position until he had discussed it with his physician.

In a letter dated April 24, 2000, the Office advised appellant that the light-duty accommodation within his permanent position had been found to be suitable to his capabilities and was currently available. Appellant was advised that he should accept the position or provide an explanation for refusing the position within 30 days. The Office informed appellant that, if he failed to accept the offered position and failed to demonstrate that the failure was justified, his compensation would be terminated. Appellant did not respond to the Office's April 24, 2000 letter.

In a May 2, 2000 letter, appellant's counsel stated that he was responding to the Office's April 24, 2000 letter and enclosed an August 23, 1999 Form CA-1932.

By decision dated May 26, 2000, the Office terminated appellant's entitlement to compensation based upon his refusal to accept a suitable offer of employment.

Subsequent to its May 26, 2000 termination, the Office received a May 26, 2000 treatment note, Dr. Maggitti noted appellant's "range of motion continues to remain restricted to 80 degrees of forward elevation, 70 degrees of abduction, 30 degrees of external rotation." The physician opined appellant's current physical included no carrying or lifting over five pounds and restricted use of his right upper extremity. Appellant also needed to "avoid repetitive push/pull or repetitive activities."

On June 1, 2000 appellant's counsel requested a hearing which was held on February 27, 2001.

In a June 9, 2000 report, Dr. Maggitti noted that he was "in receipt of your fax of June 2, 2000 regarding the light[-]duty position" offered to appellant. The physician opined, after reviewing the position description, that appellant would be unable to perform straightening up a

patient's room if it entailed "moving further." Regarding the duty of escorting patients, Dr. Maggitti indicated that appellant would be unable to assist a patient if the patient fell due to appellant's "chronic right shoulder problem." Dr. Maggitti indicated that there was a "potential for problems as they relate to any carrying of objects over a 10-pound maximum would be a problem." He indicated that the repetitive activity of feeding multiple patients would aggravate appellant's right should condition.

By decision dated May 21, 2001 and finalized on May 22, 2001, the hearing representative affirmed the May 26, 2000 termination. The hearing representative also found that, based upon evidence received subsequent to the May 26, 2000 termination decision, that the Office should have referred appellant for a second opinion to determine the extent of his disability or any continuing work-related condition.

The Board finds that the Office improperly terminated appellant's compensation on the grounds that he refused suitable work.

Once the Office accepts a claim it has the burden of proving that the employee's disability has ceased or lessened before it may terminate or modify compensation benefits. [1] Section 8106(c)(2) of the Federal Employees' Compensation Act[2] 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.[3] The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.[4]

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.[5] 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.[6]

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.[7]

In a November 5, 1999 report, Dr. Maggitti indicated that appellant's restrictions were the same as noted in his January 28, 1997 report. In that report, he stated that appellant cannot lift or carry more than 10 pounds, cannot perform repetitive work using his right upper extremity

[2] 5 U.S.C. § 8106(c)(2); *see also* 20 C.F.R. §§ 10.516, 10.517 (1999).

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

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

[5] 20 C.F.R. § 10.516-517 (1999).

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

[7] *Robert Dickerson*, 46 ECAB 1002 (1995).

and restricted use of his right arm. The Office medical adviser reviewed the employing establishment's proposed offer to appellant of a limited-duty position of Health Aid, which was based on Dr. Maggitti's January 28, 1997 work restrictions, and found the position suitable to appellant's restrictions. Dr. Maggitti, however, did not specifically approve the employing establishment's limited-duty position of Health Aid. Although appellant's treating physician, Dr. Maggitti, advised in his report that appellant was to avoid repetitive work using his right upper extremity and restricted use of his right arm, the employing establishment selected a position whose duties required appellant to perform repetitive work through frequent reaching, frequent fine manipulation and frequent simple grasping. Thus, the job requirements of the modified position are in conflict with several of the restrictions imposed by Dr. Maggitti.

Consequently, 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(c). The medical evidence is insufficient to establish that the offered position was within appellant's physical limitations. 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.[8]

The decision of the Office of Workers' Compensation Programs dated May 21, 2001 and finalized on May 22, 2001 is hereby reversed.

Dated, Washington, DC
August 27, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

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