U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GURCHARAN DEHAL and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Walnut Creek, CA

Docket No. 01-2288; Submitted on the Record;
Issued May 9, 2002

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

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

On November 6, 1996 appellant, then a 56-year-old postal clerk, filed a notice of traumatic injury alleging that he sprained his back in the performance of duty on November 5, 1996. The Office accepted the conditions of low back strain with lumbar laminectomy and discectomy performed on March 18, 1997 as work related and paid appellant appropriate benefits. Appellant's attending physician, Dr. J. Kenneth Jensen, a Board-certified orthopedic surgeon, estimated that appellant could return to light-duty work on August 1, 1997 and later extended it to November 1, 1997. A magnetic resonance imaging scan performed on June 18, 1997 indicated mild L4-5 disc denegeration and bilateral foraminal narrowing, greater on the right. An electromyogram study performed on August 18, 1997 was also abnormal and showed bilateral chronic lumbar radiculopathy.

In a work capacity evaluation dated October 20, 1997, Dr. Clarence A. Boyd, a Board-certified orthopedic surgeon, opined that appellant had reached maximum medical improvement on March 30, 1997 since appellant had denied any change in symptoms since that time. Dr. Boyd stated that appellant could work eight hours per day and should limit bending, stooping and lifting. He stated:

> "No repetitive bending at the waist, bending should be restricted to no more than 30 minutes per day, no repetitive stooping, stooping should be restricted to no more than 30 minutes per day, lifting should be restricted to 20 pounds and restricted to no more than 2 hours per day."

Dr. Boyd stated that these restrictions were permanent.

In a October 22, 1997 report, Dr. Boyd stated that there were no objective residuals of the November 5, 1996 work injury and that appellant's complaints were all subjective. He stated:

> "The reasons for this assessment are as follows. First of all, as discussed above, there are no abnormal objective findings consistent with any ongoing effects of the lumbar strain of November 5, 1996. [Appellant] was noted to have full active range of motion of the lumbosacral spine and normal neurologic functioning of his lower extremities. Again as discussed above, there was no evidence for any atrophy of his left lower extremity or any other neurologic deficit at the left lower extremity, or the right lower extremity for that matter. There are, therefore, no objective findings that would indicate that [appellant] has not healed of the lumbar strain which is now nearly one year old."

Dr. Boyd stated that appellant could work eight hours per day in a job that requires mainly sitting, such as a clerk. He indicated that appellant's restrictions were no repetitive bending or stooping at the waist, no climbing and no lifting or carrying more than 20 pounds. Dr. Boyd noted that he saw no difficulty with appellant performing job duties, which required primarily sitting with occasional walking and standing.

In a report received on November 4, 1997 appellant's attending physician, Dr. Jensen, stated:

> "In my opinion physical requirements of job even modified could not be tolerated. Recurrence of symptoms, standing 15 minutes, sitting 15 minutes, rotation motions, lifting any weight. Psychologically not ready."

Dr. Jensen also indicated in a December 15, 1997 report that appellant's temporary total disability should be extended to March 1, 1998. The Office determined there was a conflict in the medical evidence and referred appellant to an impartial medical specialist.

In a January 18, 1999 report from Dr. Robert B. Hepps, a Board-certified psychiatrist and neurologist, stated that he performed a psychiatric evaluation of appellant on December 28, 1998. Dr. Hepps discussed appellant's social and psychological problems and diagnosed him with "pain disorder associated with both psychological factors and a general medical condition which was caused by the accepted work injury of November 5, 1996." He stated in pertinent part:

> "I believe that an assessment of his level of disability is best left to the appropriate orthopedic and neurologic examiners. Absent his industrially caused back injury, [appellant] would not now be suffering a pain disorder."

The Office referred appellant to a second impartial medical specialist, Dr. Steven J. Holtz, a Board-certified psychiatrist and neurologist. In an April 5, 1999 report,

Dr. Holtz diagnosed appellant with chronic pain syndrome secondary to chronic L5-S1 radiculopathies and depression. He stated:

> "The patient is not able to perform the full duties of a postal distribution clerk because of the amount of time required of him to sit. He is precluded from sitting for longer than 15 minutes at a time without getting up and walking around. I also agree that the patient would not be able to lift more than 20 pounds on an occasional basis and is precluded from any stretching, bending, twisting, stooping or reaching. I do feel that he would qualify for vocational retraining and would be able to work at least [four] hours a day, [five] days a week at a position that would accommodate these restrictions."

Dr. Holtz stated in a March 31, 1999 work capacity evaluation that appellant could sit for two hours at a time with rests, walk and stand for two hours, could do occasional reaching, occasional reaching above the shoulder, occasional twisting and operate a motor vehicle on short trips of 30 minutes or less. He stated that pushing, pulling and lifting was also limited to 2 hours and lifting was restricted to 20 pounds. Appellant could do no squatting, kneeling or climbing. Dr. Holtz also noted that appellant needed a 10- to 15-minute break every 2 hours.

The Office offered appellant a limited-duty job of modified distribution clerk on May 24, 1999 based on Dr. Holtz's April 5, 1999 report. The restrictions of the position included:

> "Sitting, standing, walking, pushing and pulling limited to 2 hours each per day, reaching, reaching above shoulder and twisting limited to occasionally, operating a motor vehicle limited to short trips not more than 30 minutes, lifting limited to 2 hours per day 20 [pounds] max[imum], no squatting, kneeling or climbing. 10- [to] 15-minute break provided every 2 hours."

By decision dated July 7, 1999, the Office notified appellant that this position had been determined to be suitable and that he had 30 days to accept the position or provide an explanation of the reasons for refusing it. The Office also stated that, if appellant refused employment without reasonable cause, failed to report to work when scheduled, or stopped working in the new position, that his compensation benefits for wage loss would be terminated.

Appellant submitted a January 8, 1999 work capacity evaluation from Dr. Jensen and a personal statement explaining why he refused the position. Dr. Jensen also stated in a July 12, 1999 report that he reviewed the duties of the modified distribution clerk and that appellant would be unable to perform those duties.

By decision dated December 21, 1999, the Office terminated appellant's compensation benefits since he refused an offer of suitable work.

The Office received a March 9, 2000 letter from Dr. Holtz, contradicting his earlier statements, stating that he reviewed the July 12, 1999 letter from Dr. Jensen and that he was in complete agreement with Dr. Jensen that appellant would not be able to perform the duties of a modified distribution clerk. Dr. Jensen submitted a March 20, 2000 letter, continuing to assert that appellant remained totally disabled from his previous employment as well as any vocational rehabilitation.

In a decision dated April 27, 2000, the hearing representative reversed the December 21, 1999 decision and remanded the case to the Office for clarification from Dr. Holtz.[1]

In a June 5, 2000 report, Dr. Holtz stated:

> "[Appellant] was precluded from a job that would require him to sit for longer than 15 minutes at a time without getting up and walking around. I also felt that [appellant] would not be able to lift more than 20 pounds on an occasional basis and was precluded from any stretching, bending, twisting, stooping, or reaching. I also stated that he would qualify for vocational retraining and would be able to work at least [four] hours per day, [five] days a week, at a position that would accommodate these restrictions."

Dr. Holtz continued:

> "My concern about the job description that you provided me as a modified distribution clerk is that most of the tasks are performed while sitting at a desk or table. As part of this job description it was stated that there would be a [10- to 15-]minute break provided every two hours. My feeling from reading the job description is that [the appellant] would most likely be sitting continuously for longer than 15 minutes at a time without getting up and walking around, the specific preclusion that I described earlier. [Appellant] has a baseline level of constant, modern left low back pain, which will increase to a moderately severe level with sitting for more than 15 minutes at a time."

The Office revised the job offer to include a break every 15 minutes to prevent sitting over 15 minutes at a time and offered appellant another position within the guidelines set forth by Dr. Holtz. Appellant rejected the job offer on July 25, 2000. By letter dated September 11, 2000, the Office requested that he review the new job description, which included no continuous sitting for more than 15 minutes and opine whether appellant could perform these duties. By letter dated September 29, 2000, Dr. Holtz responded:

> "Certainly if [appellant] would be able to get up and walk around every [15] minutes, I believe it would be in compliance with the job restrictions that I previously described. Therefore, at this time I see no obvious physical reason why [appellant] could not perform the tasks provided in this job description."

By decision dated October 13, 2000, the Office terminated appellant's compensation benefits effective October 10, 2000, since he refused an offer of suitable work.[2] Appellant requested an oral hearing which was held on March 21, 2001. The hearing representative affirmed the Office's decision on June 12, 2001.[3]

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[1] The Office approved attorney's fees on May 23, 2000.

[2] By letter dated November 25, 2000 and received on December 8, 2000 appellant stated that he accepted the job offer.

[3] The Office approved attorney's fees on August 23, 2001.

The Board finds that the Office properly terminated appellant's compensation in this case.

5 U.S.C. § 8106(c) provides in pertinent part, "A partially disabled employee who … (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation." It is the Office's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work. To justify such a termination, the Office must show that the work offered was suitable. An employee who refuses or neglects to work after suitable work has been offered to her has the burden of showing that such refusal to work was justified.

In a duty status report dated April 5, 1999, Dr. Holtz, selected as an impartial specialist, provided a history and results on examination. He completed a work capacity evaluation (Form OWCP-5) dated March 31, 1999, stating that appellant could initially return to work for four hours per day and then resume full time after three months. Dr. Holtz's restrictions included: sitting for two hours with rests, walking and standing for two hours, pushing, pulling and lifting a maximum of 20 pounds for two hours, occasional reaching, occasional reaching above the shoulder, occasional twisting and driving for up to 30 minutes at a time. Dr. Holtz also indicated no squatting, kneeling, or climbing and stated that appellant needed to take a 10- to 15-minute break every two hours. He later amended his restrictions to include no sitting for more than 15 minutes at a time.

The Board finds that Dr. Holtz represents the weight of the medical evidence in this case with respect to appellant's work restrictions. He provided a complete report based on an accurate history that resolved the conflict in the evidence between Drs. Jensen and Boyd. It is well established that when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[4]

The job offered by the employing establishment was a modified clerk job sorting mail. The physical requirements were specifically tailored to the restrictions recommended by Dr. Holtz and the position began at four hours per day. The restrictions included:

> "Sitting, standing, walking, pushing and pulling limited to 2 hours per day, reaching, reaching above shoulder and twisting limited to occasionally; operating a motor vehicle limited to short trips not more than 30 minutes; lifting limited to 2 hours per day, 20 [pounds] max[imum], no squatting, kneeling, or climbing. Breaks every 15 minutes to alternate so that sitting for no more than 15 minutes continuously."

The Office specifically obtained approval from Dr. Holtz regarding the new position description, which included the limitation of no sitting for more than 15 minutes continuously. He stated on September 29, 2000 that if appellant was able to get up and walk around every 15 minutes, that the position would be in compliance with the restrictions he had set forth.

[4] *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

Accordingly, the Board finds that the offered position was medically suitable. Appellant submitted medical evidence after the date of termination but the report did not address appellant's work restrictions. The other evidence from appellant in the record was insufficient to overcome the special weight allotted to Dr. Holtz in resolving the medical conflict and did not constitute a sufficient basis to refuse the offered position in this case. As noted earlier, the opinion of an impartial medical specialist, if sufficiently well rationalized and based on a proper background, must be given special weight.[5]

The Office properly advised appellant that the position was suitable and the reasons offered for refusing was insufficient. Accordingly, the Board finds that the Office properly terminated appellant's compensation based on a refusal of suitable work under 5 U.S.C. § 8106(c).

The June 12, 2001 and October 13, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
May 9, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[5] *Id*.