U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KENNETH A. CRAWFORD and DEPARTMENT OF VETERANS AFFAIRS, MATERIEL PROCUREMENT SECTION, VETERANS ADMINISTRATION MEDICAL CENTER, Miami, FL

Docket No. 02-2306; Submitted on the Record;
Issued September 5, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation under 5 U.S.C. § 8106(c)(2) on the grounds that he refused an offer of suitable work.

On March 30, 1982 appellant, then a 33-year-old purchasing agent, sustained an injury at work while entering the west wing of the hospital building. The electric doors closed suddenly, striking him in the back.[1] The Office accepted his claim for low back contusion and a herniated nucleus pulposus at about the L5 level. The Office later accepted his claim for the additional conditions of low back sprain and lumbar disc displacement. He received compensation benefits. Appellant underwent a lumbar laminectomy on May 18, 1982. He was terminated from the Department of Veterans Affairs (VA) in June 1982, and in October 1982 he went to work for the U.S. Postal Service.

On January 17, 1983 appellant, then a part-time flexible carrier, sustained an injury at work when his postal vehicle overturned in a motor vehicle accident. The Office accepted this claim for cervical strain and contusion to the left knee. He received benefits.

On May 12, 1983 appellant sustained another injury at work when he was involved in an automobile accident and the seat belts "snatched my back out of place." The Office accepted his claim for lumbar strain. He stopped work and did not return. Appellant received compensation for temporary total disability and was eventually placed on the periodic rolls.

On November 16, 1999 appellant's initial employing establishment, the VA notified the Office that it was offering appellant the position of clerk with the Police and Security Service at

[1] Appellant had a service-connected laminectomy in 1975.

the medical center in Miami, Florida. The employing establishment submitted a copy of the position description and asked for a determination of suitability.

The Office advised appellant that it was scheduling him for a medical evaluation and determination of job placement restrictions. The Office also advised that relocation assistance from appellant's residence in Warner Robins, Georgia, was to be negotiated with the employing establishment.

The Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. Joseph N. Saba, a Board-certified neurologist. In a report dated February 10, 2000, Dr. Saba stated that he examined appellant that day. He related appellant's history and complaints. He reviewed a computerized tomography scan of the low back, which appellant had brought to the examination. Dr. Saba reported that the scan showed evidence for a laminectomy and discectomy at the left L5-S1 level and degenerative changes, mild to moderate at L4-5 and L5-S1. He saw no evidence of recurrent disc herniation. Dr. Saba described his findings on physical examination and noted that an electromyogram showed evidence of active acute radiculopathy. He diagnosed the following: (1) surgically treated disc lesion (on two different occasions) with residual and medically-documented pain and rigidity; (2) soft tissue injury to the lumbar spine, superimposed on (1); (3) chronic pain syndrome; (4) unrelated hypertension; and (5) flat feet, of no great significance.

Dr. Saba opined that appellant, disregarding his pain syndrome, was able physically to perform light duty and the physical requirements of an office worker: "He does have restrictions, but he is not totally disabled for work." He repeated that appellant appeared to suffer from a chronic pain syndrome and might benefit from a chronic pain management program. He noted that appellant was obviously very preoccupied with his pain and as a result might have difficulty returning back to work because of his attitude. In Dr. Saba's opinion, appellant was not faking or malingering. Regarding safe physical capabilities and disregarding appellant's mental status and extremely poor motivation, Dr. Saba reported that appellant should be able to perform work requiring frequent lifting up to 10 pounds and occasionally 20 pounds maximum; limited climbing or balancing and infrequent bending, twisting or stooping; no continuous exposure to cold or heat; and short-term five-minute breaks every 30 to 45 minutes of continuous sitting or standing for position change and muscle stretching. Dr. Saba completed a work capacity evaluation form on February 11, 2000.

On March 6, 2000 the employing establishment advised the Office that it could meet any restrictions imposed by Dr. Saba and that the offer of clerk was still available. The employing establishment reconfirmed availability on July 20, 2000.

On July 20, 2000 the Office advised appellant that the offered position of limited-duty clerk was suitable to his work capacities and was still available. He had 30 days either to accept the offer or provide an explanation for refusing it. The Office notified appellant of the provisions of 5 U.S.C. § 8106(c)(2).

On August 1, 2000 appellant, through his authorized attorney, responded that this was not a VA matter because the VA terminated appellant in 1982 and he was now carried on the U.S.

Postal Service rolls. The attorney also noted that Miami, Florida, was not within appellant's commuting area and that appellant's physician had not approved the job offer.

On August 9, 2000 the Office explained that referral to Dr. Saba was necessary because appellant's physician was not responsive. The Office also explained that the employing establishment made the current job offer based on the work restrictions imposed by Dr. Saba and that appellant's other claims were consolidated with his VA claim, which remained the only active file.

On August 27, 2000 appellant's attorney advised that he was submitting a December 14, 1999 report from Dr. Harvey A. Jones, appellant's attending general surgeon. This report postdated other evaluations, he stated and advised appellant with reasons not to accept the job offer.[2] Appellant's attorney noted that the Office did not address the matter of commuting and was required by its own procedures to consider whether relocation was financially prohibitive. He requested a copy of appellant's complete record.

In a letter dated August 28, 2000, the Office advised appellant that it had considered his attorney's reasons for not accepting the job offer and found them unacceptable. The Office gave appellant 15 days to accept the position.

The Office requested and obtained a copy of Dr. Jones' December 14, 1999 report. In that report, Dr. Jones indicated that he had reviewed the offered position. He stated that, although the employing establishment had taken much into consideration, he felt the position would be extremely difficult for appellant to perform:

> "As you know, your condition is unpredictable at least 20 to 30 percent of the time. Since I have been treating you, you have difficulty even getting up in the daytime, you have both good and bad days, but still your bad days are significant and they have not changed to any extent over the period of time of our treatment. In other words, there will be some days that you physically will not be able to get up to go to work. Also there are problems logistically with you having to drive to Miami itself, which will be extremely difficult for you. There will be problems unless you live within the immediate area, for you getting from home to the work place. You are also on chronic medications, which may pose a problem. Also in addition to your chronic back problems from degenerative disc disease and arthritis, you also have significant hypertension which always manifests itself by being uncontrollable whenever you even do sedentary activities. It is for these reasons that I strongly urge you not to accept that position. I do not feel that will be the best thing for you, nor your employer. If you were to accept that position, you would more than likely be absent from your job, unable to attend your job at least 20 to 30 percent of the time. Also during the time that you were able to make it to the workplace, there would be significant periods of time during the day you would be unable to function. In other words you would be in the chair, you would require some periods of bed rest. Also your blood pressure problem, which is significant may be further aggravated and this may lead [to] multi system

[2] No medical report was attached to the attorney's letter.

failure, *i.e.*, kidney and cardiac problems. Again we strongly urge that you not accept this position, however such a position would be a very suitable thing for many people with chronic back and spinal ailments, and I am sure they will be able to fill that vacancy."

The Office also received an August 31, 2000 report from Dr. Jones, who stated that he had reviewed diagnostic studies of appellant demonstrating severe arthritis and degenerative disc disease of the spine: "It is without any conditions that [appellant] is at this time, totally and permanently disabled due to back injuries with resulting degenerative disc disease and arthritis of the spine. This diagnosis has been made repeatedly by both myself, independent radiologists, as well as previous physicians."

On September 15, 2000 the employing establishment advised the Office that it would pay appellant's relocation expenses.

On December 2, 2000 Dr. Jones replied that appellant was not capable of performing any kind of gainful employment. He suffered injury many years ago. He suffered from chronic back pain, chronic pain syndrome. He had diagnostic evidence of degenerative disc disease at the L4-5 and L5-S1 levels. He also had some degree of facet arthritis. Dr. Jones noted that he had seen appellant on numerous occasions, more frequently than did Dr. Saba, and he had seen appellant on both good days and bad. For the most part, appellant was in chronic pain. Dr. Saba continued:

"The patient has severe pain at times and they can be aggravated by things such as doing his dishes. At times even going to the bathroom [has] precipitated extreme pain. The patient does have some emotional problems that almost anyone has with chronic pain syndrome. He does have some degree of depression and I have found that this is something that is almost universal with chronic pain patients over the past 30 years of my practice.

"Again, to answer your question in short, I do feel that [appellant's] problems are certainly legitimate and he remains totally disabled to date."

The Office determined that a conflict in medical opinion existed between Dr. Saba, the Office referral physician, and Dr. Jones, appellant's attending physician. To resolve the conflict, the Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Stella I. Tsai, a Board-certified neurologist, for a referee medical examination pursuant to 5 U.S.C. § 8123(a).

In a report dated July 16, 2001, Dr. Tsai related appellant's history and complaints. She described her findings on physical and neurological examination and diagnosed the following: (1) patient with degenerative joint disease, progressing with superimposed multiple accidents, including motor vehicle accidents; (2) history of substance abuse; (3) chronic pain syndrome; and (4) evidence on February 10, 2000 of possible mild sensory neuropathy. Dr. Tsai reported that appellant was capable of full-time sedentary activity with weight restrictions, the need for frequent breaks and no driving or operating dangerous equipment. She completed a work

capacity evaluation stating there was no reason appellant could not work eight hours a day within the restrictions indicated.

The employing establishment prepared a modified offer for the position of clerk and requested a determination of suitability. The employing establishment confirmed that the position was currently available and that relocation and moving expenses would be authorized.

On January 18, 2002 the Office advised appellant that the offered position of clerk was suitable to his work capacities and was currently available.[3] He had 30 days either to accept the offer or provide an explanation for refusing it. The Office notified appellant of the provisions of 5 U.S.C. § 8106(c)(2).

On February 3, 2002 appellant's attorney repeated his earlier objections. He submitted evidence to show that housing in Miami, Florida, was over 50 percent more expensive than in Warner Robins, Georgia; that the cost of living was more expensive in Miami; and that a person earning $50,000.00 in Warner Robins would need to earn $66,161.00 to have an equivalent lifestyle. The attorney argued that appellant could not accept the offered position because the acceptance would be financially prohibitive.

On February 19, 2002 the Office advised appellant that the reasons given for refusing the position were unacceptable and that he had 15 days to accept the offer without penalty.

Appellant's attorney replied on February 26, 2002. He argued that appellant should have been removed from the VA rolls when he took employment with the U.S. Postal Service, that the Office had previously treated the U.S. Postal Service as the responsible agency, and that the offer was not legally sufficient.

On March 6, 2002 the employing establishment advised the Office that the offer was still available. The employing establishment also advised the Office that it would pay moving and relocation expenses, such as pay subsistence including living expenses and apartment rental until appellant established a permanent residence. There is no evidence that this information was communicated to appellant or his attorney.

In a decision dated March 12, 2002, the Office terminated appellant's compensation pursuant to 5 U.S.C. § 8106(c)(2) for refusing an offer of suitable work. The Office found that the weight of the medical evidence rested with the referee medical opinion of Dr. Tsai and established that appellant was capable of performing light duty. The Office found that the offered position was within appellant's physical limitations and noted that the employing establishment would pay moving and relocation expenses.

[3] The physical demands of the position were described as follows: "The work is completely sedentary. There is no repetitive bending, stooping, or lifting. The employee has freedom to stand or walk around the area as needed. The incumbent will be furnished a special chair, if needed. Rest periods are taken as necessary. Rooms are available if the incumbent needs to lie down. Incumbent is not expected to sit for more than 20 minutes at a time without standing or walking around. There is no pushing, pulling. Lifting, squatting, kneeling or climbing required. Incumbent is not required to operate a motor vehicle or any other motorized or other equipment." The employing establishment explained that the position would require appellant to be stationed at one of the entrances of the medical center to check the identity of all persons who enter the hospital.

The Board finds that the Office improperly terminated appellant's compensation under 5 U.S.C. § 8106(c)(2).

Section 8106(c)(2) of the Federal Employees' Compensation Act states that a partially disabled employee who refuses to seek suitable work, or refuses or neglects to work after suitable work is offered to, procured by or secured for him is not entitled to compensation.[4] The Office has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects suitable work when it is offered. Before compensation can be terminated, however, the Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work, and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.[5] In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused or neglected by appellant was suitable.[6]

A conflict in medical opinion arose between Dr. Saba, the Office referral neurologist, and Dr. Jones, the attending surgeon, on whether appellant was capable of light-duty work. Dr. Saba reported that appellant was physically able to perform light duty as an office worker. "He does have restrictions," the physician reported, "but he is not totally disabled for work." Dr. Saba completed a work restriction evaluation that was consistent with the physical requirements of the offered position.

Dr. Jones disagreed. He reported that appellant was totally and permanently disabled. He also reported that the offered position would be extremely difficult for appellant to perform and strongly urged appellant not to accept it. He noted that there would be some days that appellant would not be physically able to get up to go to work, that he would be absent from work at least 20 to 30 percent of the time, and that when he was at work there would be significant periods of time during the day that he would be unable to function.

Section 8123(a) of the Act provides in part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[7]

To resolve the conflict in opinion between the Office referral physician and appellant's attending physician, the Office properly referred appellant to Dr. Tsai, a Board-certified neurologist, for a referee medical opinion. Dr. Tsai reviewed appellant's record, history and complaints and conducted a physical and neurological examination. She reported that appellant was capable of full-time sedentary activity with weight restrictions, the need for frequent breaks and no driving or operating dangerous equipment. She reported that there was no reason appellant could not work eight hours a day within the restrictions indicated and she completed a

[4] 5 U.S.C. § 8106(c)(2).

[5] *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

[6] *Glen L. Sinclair*, 36 ECAB 664 (1985).

[7] 5 U.S.C. § 8123(a).

work capacity evaluation that was consistent with the physical requirements of the offered position.

The Office provided Dr. Tsai with appellant's record and a statement of accepted facts so that she could base her opinion on a proper history. The Board finds that her opinion is sufficiently well reasoned and that it constitutes the weight of the medical evidence on appellant's capacity to perform the physical requirements of the offered position. The Office has met its burden of establishing that the offered position was within his prescribed work restrictions.[8] Appellant's refusal to accept the offered position, based on the advice of Dr. Jones, is therefore unacceptable.

However, appellant provided other reasons for refusing the offered position. The position in Miami, Florida, was not within his commuting area in Warner Robins, Georgia, but federal regulations permit an offer of suitable employment at the employee's former duty station or location other than where the employee current resides.[9] Although appellant had moved to Warner Robins and was no longer on the VA rolls, the evidence failed to establish that a medical condition contraindicated a return to Miami.[10] Appellant cited no authority for the proposition that only the U.S. Postal Service may make an offer of suitable employment in this case.

Appellant also refused the offered position on the grounds that acceptance would be financially prohibitive. He submitted evidence to show that housing in Miami, Florida, was substantially more expensive than in Warner Robins, Georgia; and that the cost of living was more expensive in Miami.

In the case of *Allen W. Hermes*,[11] the Board held that, although the employing establishment offered to pay for the claimant's relocation expenses, the Office did not consider the costs appellant would incur in establishing a new residence and did not consider his financial situation.[12] Office procedures in effect at that time listed financially prohibitive relocation cost as a reasonable grounds for refusing an offered position. The Board found that, prior to reaching a determination that the offered position was suitable, the Office should have considered appellant's concerns about the costs of finding a home, paying insurance, commuting and

[8] See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.0814.5.a(3)(c) (December 1993) (if, after a referral to an impartial medical specialist, the claimant is found to be medically able to perform the duties of the job in question, the claimant must be advised of this finding and told that the Office will apply the sanctions of section 8106(c) for continued refusal to accept the job).

[9] 20 C.F.R. § 10.508 (1999).

[10] *Carl N. Curts*, 45 ECAB 374 (1994); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.0814.5.b(3) (December 1993) (acceptable reasons for refusal for claimants no longer on the agency rolls may include that the claimant has moved, and a medical condition of the claimant or a family member contraindicates return to the area of residence at the time of injury). Dr. Jones noted that there were problems logistically with having to drive to Miami itself, which would be extremely difficult for appellant, but he did not specify a medical condition or explain how such a condition contraindicated appellant's return to Miami.

[11] 41 ECAB 838 (1990).

[12] The offered position was in Des Moines, Iowa, while appellant lived in Moulton, Texas.

maintaining his current standard of living. The Board also cited to *Ricardo G. Contreras*,[13] which held that "cost of relocation" under the Office procedures necessarily included the cost of finding affordable housing in an new area and not merely the "actual cost of moving."

Although the Office's procedure manual no longer lists financially prohibitive relocation cost among the acceptable reasons for refusal, but its absence from that list in no way suggests that the reason lacks validity.[14] Relocation that is financially prohibitive, once recognized as an acceptable reason for refusing an offer of employment, is just as valid a reason today as it was before.[15] The principle of *Allen W. Hermes* still applies: Before reaching a determination that a position is suitable, the Office must consider a claimant's concerns that relocation would be financially prohibitive.[16]

The present version of the Office procedure manual provides as follows: "If the claimant submits evidence and/or reasons for refusing the offered position, the [claims examiner] must carefully evaluate the claimant's response and determine whether the claimant's reasons for refusing the job are valid."[17] The Office, in its February 19, 2002 letter, addressed appellant's concerns by stating in its entirety, "we have considered any reasons given by you for refusing the position and found them unacceptable." The Board finds that the Office did not carefully evaluate appellant's reason for refusing the offered position as it related to the greater cost of maintaining his standard of living in Miami, including the cost of housing. As in *Allen W. Hermes*, the employing establishment offered to pay for appellant's relocation and moving expenses, but the Office did not consider appellant's financial situation and the costs he would incur in establishing a new residence in Miami, Florida. Since the Office did not carefully evaluate these concerns, the Board finds that the Office improperly determined that the offered position was suitable and, therefore, improperly terminated appellant's compensation under 5 U.S.C. § 8106(c)(2).

---

[13] 39 ECAB 777 (1988).

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.0814.5.a (December 1993) ("Reasons which may be considered acceptable for refusing the offered job include (but are not limited to)).")

[15] *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

[16] Where the distance between the location of the offered job and the location where the employee currently resides is at least 50 miles, the Office may pay such relocation expenses as are considered reasonable and necessary if the employee has been terminated from the agency's employment rolls and would incur relocation expenses by accepting the offered reemployment. The Office may also pay such relocation expenses when the new employer is other than a federal employer. The Office will notify the employee that relocation expenses are payable if it makes a finding that the job is suitable. To determine whether a relocation expense is reasonable and necessary, the Office shall use as a guide the federal travel regulations for permanent changes of duty station. 20 C.F.R. § 10.508 (1999). The federal travel regulation is contained in 41 C.F.R. Chapters 300 through 304, which implements statutory requirements and Executive branch policies for travel by federal civilian employees and other authorized to travel at Government expense.

[17] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.0814.5 (December 1993).

The March 12, 2002 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, DC
September 5, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member