United States Department of Labor
Employees' Compensation Appeals Board

RONALD L. McNETT, Appellant	)	
and	)	**Docket No. 04-805**
	)	**Issued: October 27, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Rockford, IL, Employer	)	

Appearances:
Ronald L. McNett, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On February 6, 2004 appellant filed an appeal from an October 31, 2003 decision of the Office of Workers' Compensation Programs denying modification of its April 30, 1998 decision terminating his wage-loss benefits on the grounds that he refused an offer of suitable work. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has merit jurisdiction over the issues in this case.

ISSUES

The issues on appeal are: (1) whether the Office met its burden of proof to terminate appellant's wage-loss benefits effective April 30, 1998 on the grounds that he refused an offer of suitable work; and (2) whether appellant has established entitlement to continuing wage-loss benefits on or after April 30, 1998. On appeal, appellant contends that the Office abused its discretion and committed other unspecified errors as it failed to follow the Board's May 1, 2003 decision issued on a prior appeal of this case.

FACTUAL HISTORY

This is the second appeal before the Board in this case. By decision dated May 1, 2003, the Board set aside a July 16, 2001 nonmerit decision of the Office denying appellant's request for reconsideration. The case was remanded for consideration of the evidence on the issue of whether appellant had refused an offer of suitable work. The law and the facts of the case as set forth in the Board's prior decision are hereby incorporated by reference.

The Office accepted that appellant sustained bilateral tarsal tunnel syndrome and plantar fasciitis and paid him appropriate compensation for total disability. In 1997 the Office conducted development to determine appellant's work limitations. The Office considered the opinion of Dr. Rokshana Zaheen, an attending Board-certified family practitioner, who stated in June 26, 1996 and February 27, 1997 reports that appellant was totally disabled for work indefinitely due to plantar fasciitis, a history of bipolar disorder and a herniated L4-5 disc. Dr. Forrest H. Riordan, III, a Board-certified orthopedic surgeon and second opinion physician, submitted April 7, 1997 reports finding that appellant's plantar fasciitis was not work related and that he was able to perform full-time sedentary duty. The Office then found a conflict of medical opinion between Dr. Zaheen, for appellant, and Dr. Riordan, for the government. To resolve this conflict, the Office appointed Dr. Richard A. Geline, a Board-certified orthopedic surgeon, as an impartial medical examiner. In an August 15, 1997 report, Dr. Geline reviewed the medical record and a statement of accepted facts. He diagnosed bilateral plantar fibromatosis[1] and a history of 1985 and 1991 episodes of depression requiring continued psychotropic medications. In an August 17, 1997 work capacity evaluation, Dr. Geline indicated that appellant could perform full-time sedentary work but noted that his "psychological status" and L4-5 disc disease must be considered in identifying appropriate employment.[2]

In a November 4, 1997 report, Dr. Zaheen diagnosed panic disorder and agoraphobia superimposed on the preexisting bipolar disorder. Dr. Zaheen opined that, due to appellant's emotional lability and psychiatric status, he could not work in an enclosed environment.

To determine whether appellant was disabled for work due to a psychiatric condition, the Office referred him to Dr. Danilo V. Domingo, a Board-certified psychiatrist, for a second opinion examination. Dr. Domingo submitted a December 17, 1997 report reviewing appellant's psychiatric and medical history. He described appellant's 1985 and 1991 hospitalizations for depression, noting that appellant's wife died of cancer in February 1997 and that he was now the single parent of three young children. Dr. Domingo diagnosed a history of recurrent major depression then in remission, with a history of alcohol and substance abuse treated successfully and in remission for many years. He also diagnosed tarsal tunnel syndrome and plantar fasciitis. Dr. Domingo opined that appellant's depression was not related to the plantar fasciitis as it

[1] Dr. Geline noted in a September 15, 1997 addendum that the etiology of appellant's plantar fibromatosis was neoplastic, distinguishable from plantar fasciitis which is produced by trauma to the foot.

[2] A vocational rehabilitation counselor noted in July and September 1997 reports that appellant did not wish to return to postal employment. Appellant rejected a modified clerk position offered him on September 19, 1997, which the Office found to be suitable work. The Office then conducted development to determine whether appellant was disabled for work due to a psychiatric condition.

predated the onset of his foot problems. Dr. Domingo submitted a December 17, 1997 report stating that appellant's psychiatric conditions were in remission and did not impact his ability to work.

On January 28, 1998 the employing establishment offered appellant a position as a modified clerk, performing sedentary clerical duties. Standing and walking were limited to 10 to 15 minutes an hour intermittently, with a rubber mat provided for him to stand on. The position was available effective February 14, 1998. The Office advised appellant on February 2, 1998 that the offered modified clerk position was suitable work within his physical restrictions. In a March 2, 1998 letter, appellant asserted that Dr. Domingo's opinion was invalid. The Office advised appellant by March 5, 1998 letter that no further reasons for refusal would be considered and afforded him 15 days in which to accept the position or his compensation would be terminated. Dr. Domingo approved the modified clerk position on April 20, 1998. Appellant did not accept the offered position, which remained open and available to him. The Office terminated his wage-loss benefits by April 30, 1998 decision, affirmed by a March 30, 1999 decision of the Office's Branch of Hearings and Review.

On March 30, 2000 appellant requested reconsideration and submitted additional evidence. In reports and chart notes dated March 28, 1991 to February 6, 1992, Dr. Jane C. Smith, an attending Board-certified psychiatrist, diagnosed generalized anxiety disorder with symptoms consistent with post-traumatic stress disorder and agoraphobia. In a March 23, 2000 letter, Dr. Zaheen noted appellant's history of bipolar disorder requiring anti-psychotic medication, as well as noninsulin-dependent diabetes. Dr. Zaheen noted examining appellant every six months.

By nonmerit decisions dated February 14 and July 16, 2001, the Office denied appellant's requests for reconsideration. Appellant then filed an appeal with the Board. As noted, on May 1, 2003, the Board remanded the case to the Office for further review of the evidence accompanying his March 30, 2000 request for reconsideration.

On remand of the case, the Office directed that a merit review be performed in accordance with the Board's decision. By decision dated October 31, 2003, the Office denied modification of the July 16, 2001 decision, finding that appellant had refused an offer of suitable work. The Office found that the new evidence submitted was insufficient to establish either that appellant had sustained a work-related emotional condition or that he was totally disabled for work at the time of the January 28, 1998 modified job offer.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened before it may terminate or modify compensation benefits.[3] This burden of proof applies where the Office terminates compensation under 5 U.S.C. § 8106(c), which provides that a partially disabled employee who refuses or neglects to work after suitable work is offered is not entitled to compensation.[4]

[3] *Raymond W. Behrens*, 50 ECAB 221, 222 (1999); *Bettye F. Wade*, 37 ECAB 556, 565 (1986).

[4] *Tammy L. Flickinger*, 54 ECAB ___ (Docket No. 03-22, issued April 9, 2003).

An employee who refuses or neglects to work after suitable work has been offered to him must show that such refusal to work was justified.[5] The employee shall be provided the opportunity to make such a showing before the Office terminates entitlement to compensation.[6] These requirements apply to determinations regarding both refusal and abandonment of suitable work.[7] To justify termination, the Office must show that the work offered was suitable based on the claimant's work restrictions at that time and that the employee was informed of the consequences of his refusal to accept such employment.[8] Appellant's physical ability to perform the offered modified position is primarily a medical question that must be resolved by medical evidence.[9]

ANALYSIS -- ISSUE 1

In determining that the offered modified clerk position was suitable work, the Office conducted development to ascertain any limitations related to the accepted bilateral foot conditions, as well as L4-5 disc disease and nonoccupational emotional conditions.[10] The Office first considered the opinion of appellant's attending Board-certified family practitioner, Dr. Zaheen, who submitted reports from June 26, 1996 to November 4, 1997 finding appellant totally disabled for work due to plantar fasciitis, L4-5 disc disease and a history of bipolar disorder. Dr. Zaheen also found that appellant could not work in an enclosed environment due to agoraphobia, bipolar disorder, panic disorder and emotional lability.

Regarding appellant's orthopedic limitations, the Office relied on the opinion of Dr. Geline, a Board-certified orthopedic surgeon and impartial medical examiner appointed to resolve a conflict of medical opinion between Dr. Zaheen, an attending Board-certified family practitioner, and Dr. Riordan, a Board-certified orthopedic surgeon and second opinion physician. Dr. Zaheen found appellant totally disabled for work due, in part, to plantar fasciitis.

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[5] 20 C.F.R. § 10.124(c) (1998) 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. This provision is currently found in the Act's implementing regulations at 20 C.F.R. § 517(a) (2003). *See Sandra K. Cummings*, 54 ECAB ___ (Docket No. 03-101, issued March 13, 2003).

[6] 20 C.F.R. § 10.124(c) (1998), currently found at 20 C.F.R. § 10.516 (2003); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[7] *Juan A. Dejesus*, 54 ECAB ___ (Docket No. 03-1307, issued July 16, 2003).

[8] *Joan F. Burke*, 54 ECAB ___ (Docket No. 01-39, issued February 14, 2003); *Maggie L. Moore, supra* note 6.

[9] *Anna M. Delaney*, 53 ECAB ___ (Docket No. 00-2090, issued February 22, 2002); *Gayle Harris*, 52 ECAB 319 (2001) (the Board found that appellant's physician provided insufficient rationale explaining how appellant's accepted condition and residuals prevented her from returning to work in an offered modified-duty position).

[10] The Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position. *Gayle Harris, supra* note 9. Even if a condition preventing an employee from performing an offered position is not employment related and is acquired subsequent to the employment injury, an offered job will be considered unsuitable. *See Kathy E. Murray*, 55 ECAB ___ (Docket No. 03-1889, issued January 26, 2004); *Robert Dickerson*, 46 ECAB 1002 (1995). The Board notes that it is not clear from the record whether or not appellant's lumbar disc disease was accepted as employment related.

But Dr. Riordan opined that the plantar fasciitis was not work related and that appellant was capable of full-time sedentary work. Section 8123(a) of the Act[11] provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.[12] Where the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, is entitled to special weight.[13]

Dr. Geline submitted August 15 and 17, 1997 reports, based on a review of the statement of accepted facts and the medical record. He explained that appellant did not have plantar fasciitis and that he was capable of full-time sedentary duty. Dr. Geline noted that appellant's L4-5 disc disease and history of depression must be considered when identifying an appropriate job. Thus, Dr. Geline found that appellant's bilateral foot conditions and lumbar disc disease would not prevent him from performing full-time sedentary work. The Board finds that Dr. Geline's reports were sufficiently rationalized and based on a complete, accurate history. Therefore, the Office was correct in according his opinion sufficient weight to resolve the conflict of medical opinion regarding appellant's orthopedic limitations.

To determine any psychiatric work limitations, the Office relied on the reports of Dr. Domingo, a Board-certified psychiatrist and second opinion physician. Dr. Domingo submitted a detailed December 17, 1997 report explaining that appellant's depression was in remission and did not affect his ability to work.

Based on Dr. Geline's and Dr. Domingo's reports restricting appellant to sedentary duty, on January 28, 1998 the employing establishment offered appellant a sedentary position as a modified clerk. The physical capacity required for the position was within appellant's work limitations as identified by Dr. Geline and Dr. Domingo.[14] Therefore, the Office properly found that the offered position was suitable work.[15] The Office then followed the appropriate procedures by advising appellant in a February 2, 1998 letter that the offered position was suitable work within his medical restrictions and that he had 30 days in which to accept the position or provide reasons for refusal. After appellant responded without accepting the position, the Office advised appellant of the penalty provision under section 8106(c) of the Act in a March 15, 1998 letter and afforded him an additional 15 days to accept the position or face termination of his wage-loss benefits.[16] Also, the Office properly advised appellant that the suitable work position remained open and available to him.[17] As appellant did not accept the

[11] 5 U.S.C. § 8123(a); *Robert W. Blaine*, 42 ECAB 474 (1991).

[12] *Delphia Y. Jackson*, 55 ECAB ___ (Docket No. 04-165, issued March 10, 2004).

[13] *Guiseppe Aversa*, 55 ECAB ___ (Docket No. 03-2042, issued December 12, 2003).

[14] Dr. Domingo approved the offered modified clerk position on April 20, 1998.

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

[16] 20 C.F.R. § 10.124(c) (1998); *Maggie L. Moore*, *supra* note 6.

[17] 20 C.F.R. § 10.124(c) (1998); *Wayne E. Boyd*, 49 ECAB 202 (1997); *Ronald M. Jones*, 48 ECAB 600 (1997). *See also Maggie L. Moore*, *supra* note 6.

position within the time allotted, the Office properly terminated his compensation on April 30, 1998.

LEGAL PRECEDENT -- ISSUE 2

An employee who refuses or neglects to work after suitable work has been offered has the burden of showing that such refusal was justified.[18]

ANALYSIS -- ISSUE 2

Subsequent to the Office's termination of compensation for refusing suitable work, appellant submitted medical evidence in support of his contention that he was unable to perform the offered position. In reports dated March 28, 1991 to February 6, 1992, Dr. Smith, an attending Board-certified psychiatrist, diagnosed generalized anxiety disorder with symptoms consistent with post-traumatic stress disorder and agoraphobia. In a March 23, 2000 letter, Dr. Zaheen noted that appellant remained under treatment for a history of bipolar disorder requiring anti-psychotic medication. She also diagnosed noninsulin-dependent diabetes.

Dr. Smith's reports are insufficient to warrant modification of the prior decision as they do not address appellant's psychiatric status at the time of the January 28, 1998 job offer. Therefore, they are not relevant to the denial of modification issue. While Dr. Zaheen noted appellant's history of bipolar disorder and diabetes, she did not offer medical rationale explaining how and why these conditions would have prevented appellant from performing the offered position. Therefore, Dr. Zaheen's opinion is insufficient to establish that the psychiatric condition or diabetes rendered appellant incapable of performing the modified clerk position as of January 28, 1998.[19]

The Board notes that Dr. Zaheen is a family practitioner whereas Dr. Domingo is a psychiatrist. The opinions of physicians who have training and knowledge in a specialized medical field have greater probative value concerning medical questions peculiar to that field than the opinions of other physicians.[20] The Office properly found that Dr. Zaheen's opinion was insufficient to warrant modification of the termination decision and that the weight of medical opinion regarding any psychiatric disability continued to rest with Dr. Domingo.[21] The Board finds that the Office properly denied modification of the termination decision, as appellant submitted insufficient rationalized medical evidence establishing that he was disabled from performing the offered modified clerk position on and after April 30, 1998.

[18] *Alfred Gomez*, 53 ECAB ___ (Docket No. 00-1817, issued October 9, 2001).

[19] *Carol S. Masden*, 54 ECAB ___ (Docket No. 02-1667, issued January 8, 2003) (the Board held that to be highly probative, a physician's opinion must be based on a complete medical and factual background, of reasonable medical certainty, and supported by medical rationale).

[20] *Melvina Jackson*, 38 ECAB 43 (1987).

[21] *Id*.

On appeal, appellant contends that the Office committed errors and an abuse of discretion in its October 31, 2003 decision. The Board notes that in the October 31, 2003 decision, the Office found that the evidence submitted was insufficient to warrant modification under section 8121 of the Act[22] as no legal error was established. However, section 8121 does not pertain to the establishment of legal error by the Office, but addresses the timeliness and form of a compensation claim, matters that are not in dispute in appellant's case. The Office's reference to section 8121 appears to be a typographical error, as the remainder of the decision concerns section 8128 of the Act. Although appellant is correct in asserting that the Office's October 31, 2003 decision contains an "error," the Office's reference to section 8121 is harmless error that did not affect the outcome of his claim.

CONCLUSION

The Board finds that the Office met its burden of proof in terminating appellant's wage-loss compensation benefits effective April 30, 1998 on the grounds that he refused an offer of suitable work. The Board further finds that appellant has not established entitlement to continuing wage-loss compensation benefits on or after April 30, 1998.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 31, 2003 is affirmed.

Issued: October 27, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[22] 5 U.S.C. § 8121.