U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT F. ANDERSON and U.S. POSTAL SERVICE,
POST OFFICE, Franklin, MA

Docket No. 00-2609; Submitted on the Record;
Issued April 9, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective September 8, 1999, because he refused an offer of suitable work pursuant to section 8106 of the Federal Employees' Compensation Act.

On October 19, 1996 appellant, then a 49-year-old distribution clerk, filed a claim alleging that on that day his right heel, hip and lower back were injured when mailcarrier equipment ran into him. He stopped work and the Office accepted the claim for sciatica and sprains of the right ankle, hip and lumbar region and paid appropriate compensation.

On June 10, 1997 the Office authorized total right hip replacement caused by the work injury. Subsequently, the Office referred appellant to Dr. R. John Groves, a Board-certified orthopedic surgeon, for evaluation of his condition. In a report dated August 19, 1998, Dr. Groves noted that appellant's complaints of pain in his lumbar back with radiation into the right buttock and "much pain" in his right leg from sciatica. He concluded that appellant was able to work at light duty for eight hours a day, with the following restrictions: walking and standing 1 hour a day, lifting up to 15 pounds, pulling and pushing up to 25 pounds, no squatting or climbing activities and no driving a motor vehicle at work.

Based on Dr. Groves' opinion, the employing establishment offered a modified-duty position within the listed physical restrictions. Duties included answering the telephone, entering data, marking up mail and doing other administrative tasks. On December 12, 1998 the Office found the position to be suitable to appellant's work capabilities and provided him 30 days either to accept the job or explain his reasons for refusal.

Appellant refused the job offer on the grounds that his treating physician, Dr. Donald J. Akikie, a Board-certified orthopedic surgeon, found him to be totally disabled and that he experienced "constant pain" from sciatica and his work injuries. On March 3, 1999 the Office found appellant's reason for refusing the job offer to be unacceptable, noting that he had 15 days

to accept the position. He responded that he would not accept the position on the advice of his physician.

On April 15, 1999 the Office found a conflict in the medical opinion evidence between Drs. Akikie and Groves and referred appellant to Dr. Peter A. Pizzarello, a Board-certified orthopedic surgeon, for an impartial medical examination. In his May 7, 1999 report, Dr. Pizzarello concluded that appellant was capable of light-duty work, which should not include repetitive bending, hip flexion, or stooping, with a weight limitation of 25 to 30 pounds. He recommended that appellant start working half days as a transition to work, with no squatting, kneeling or climbing.

On June 22, 1999 the employing establishment offered appellant a revised job position for four hours, noting that appellant would also sort mail manually and update post office boxes and labels, but could change positions as needed and work at a tolerable pace. The Office again found the offered position to be suitable and gave appellant 30 days to accept the position or explain his refusal.

Appellant rejected the job offer, reiterating that Dr. Akikie found him to be totally disabled. The Office rejected appellant's reasons for refusal in a letter dated August 6, 1999.

By decision dated September 8, 1999, the Office terminated appellant's wage-loss compensation effective that day on the grounds that he refused an offer of suitable work. Appellant timely requested a hearing, which was held on January 26, 2000.

Appellant testified that the job offers were designed without input from Dr. Akikie, who stated in a report dated September 24, 1999 that appellant needed to take Darvocet and Valium for his pain symptoms, that because of these medications he had to rest frequently and occasionally lie down and that it would not be safe for appellant to be working. Appellant added that he could stand an hour of sitting at most.

By decision dated May 23, 2000, the Office hearing representative found that appellant was capable of working in the offered position and that his refusal of suitable work warranted termination of his compensation.

The Board finds that the Office met its burden of proof in terminating appellant's compensation because he refused an offer of suitable work.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation, including cases in which the Office terminates compensation under section 8106(c) for refusal to accept suitable work.[1]

Under section 8106(c)(2) of the Act,[2] the Office may terminate compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by, or

[1] 5 U.S.C. § 8106(c); *Henry W. Sheperd, III*, 48 ECAB 382, 385 (1997); *Shirley B. Livingston*, 42 ECAB 855, 861 (1991).

[2] 5 U.S.C. § 8106(c)(2).

secured for the employee.[3] However, to justify such termination, the Office must show that the work offered was suitable[4] and must inform the employee of the consequences of a refusal to accept employment deemed suitable.[5]

Once the Office establishes that the work offered was suitable, the burden of proof shifts to the employee who refuses to work to show that such refusal was reasonable or justified.[6] The issue of whether an employee has the physical ability to perform the duties of the position offered is a medical question that must be resolved by medical evidence.[7]

Section 10.124(c) of the Code of Federal Regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured shall be provided with the opportunity to show that his actions were reasonable or justified.[8] Thus, before terminating compensation, the Office must review the employee's proffered reasons for refusing or neglecting to work.[9]

In this case, the initial job offer was based on the physical limitations found by Dr. Groves, the second opinion physician to whom the Office referred appellant some time after his hip replacement surgery. He noted appellant's complaints of pain, but opined that appellant was capable of working light duty for eight hours, with specified restrictions on sitting, standing, bending, kneeling and squatting.

On December 12, 1998 and March 3, 1999 the Office complied with the procedural requirements by advising appellant that the position offered was suitable, that the job remained available to him, that the penalty for refusing the offered position was termination of compensation and that he had 30 days to accept the position or explain his refusal. After

[3] *Martha A. McConnell*, 50 ECAB 129, 131 (1998).

[4] *Marie Fryer*, 50 ECAB 190, 191 (1998).

[5] *Ronald M. Jones*, 48 ECAB 600, 602 (1997).

[6] *Deborah Hancock*, 49 ECAB 606, 608 (1998).

[7] *Marilyn D. Polk*, 44 ECAB 673, 680 (1993).

[8] 20 C.F.R. § 10.124(c).

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

appellant refused the offer on the advice of his treating physician, the Office found a conflict in the medical opinion evidence, pursuant to section 8123(a) and referred appellant to an impartial medical specialist.[10]

In situations where opposing medical opinions on an issue are of virtually equal evidentiary weight and rationale, the case shall be referred for an impartial medical examiner to resolve the conflict in medical opinion.[11] The opinion of the specialist properly chosen to resolve the conflict must be given special weight if it is sufficiently well rationalized and based on a proper factual background.[12]

The Board finds that the report of the referee medical specialist is entitled to such weight.[13] Dr. Pizzarello reviewed the entire case record and statement of accepted facts. He examined appellant thoroughly and related clinical findings. Dr. Pizzarello discussed the diagnostic testing, including a magnetic resonance imaging (MRI) scan of appellant's spine, which was "essentially within normal limits." He provided an opinion that was sufficiently well rationalized to resolve the issue of whether appellant was capable of performing the duties of the offered position.

Dr. Pizzarello explained that appellant had osteoarthritis of his hips and ankle that the herniated disc at L1-2 was not producing any symptoms and that appellant presented no findings that would "objectively and impartially correlate" with residuals of his work injury. Thus, he found appellant to be capable of performing light duty, with restrictions on bending, stooping and lifting and completed a physical limitation form, which correlates with the restrictions listed in the June 22, 1999 job offer.

Appellant's attorney argues on appeal that the Board has recognized that consideration of pain symptoms is appropriate in determining disability, citing *Richard Giordano*, 36 ECAB 134, 139 (1984). The attorney contends that the Office ignored the opinion of appellant's treating physician, that appellant was unable to work and failed to consider credibility or the frequency and intensity of his episodes of pain.

The Board finds these arguments unpersuasive. *Giordano* involved a schedule award evaluation in which pain may be a factor of impairment. Dr. Akikie, appellant's attending physician, was on one side of the conflict resolved by Dr. Pizzarello. Therefore, his additional chart notes and report dated September 24, 1999 are insufficient to overcome the special weight accorded the impartial medical examiner's opinion or create a new conflict.[14] Dr. Pizzarello's

[10] 5 U.S.C. § 8123(a) states in pertinent part: "If there is a 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."

[11] *Richard L. Rhodes*, 50 ECAB 259, 263 (1999).

[12] *Sherry A. Hunt*, 49 ECAB 467, 471 (1998).

[13] *See Susan L. Dunnigan*, 49 ECAB 267, 270 (1998) (medical evidence established that appellant was capable of performing the duties of the position offered by the employing establishment).

[14] *See Thomas Bauer*, 46 ECAB 257, 265 (1994), citing *Virginia Davis-Banks*, 44 ECAB 389, 392 (1993)

opinion represents the weight of the medical evidence establishing that appellant is capable of performing the duties of the offered position and the record establishes that the Office followed the requisite procedures in determining that the job offer represented suitable work. Therefore, the Board finds that the Office properly terminated appellant's wage-loss compensation.

The May 23, 2000 and September 8, 1999 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
April 9, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

(additional reports of physicians who was on one side of the conflict resolved by the impartial medical examiner is insufficient to overcome the evidentiary weight accorded to that specialist's report or create a new conflict).