U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HERBERT W. KENWORTHY and U.S. POSTAL SERVICE,
POST OFFICE, Cambridge, OH

Docket No. 01-1423; Submitted on the Record;
Issued March 6, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective June 20, 2000 on the grounds that he refused an offer of suitable work; and (2) whether the Office properly denied appellant's request for a merit review under 5 U.S.C. § 8128.

On February 28, 1989 appellant, then a 57-year-old letter carrier, filed a notice of traumatic injury alleging that he slipped on ice and injured his left knee in the performance of duty. The Office accepted the claim for a left knee strain and deep vein thrombosis in the knee area. The claim was later expanded to include a torn medial meniscus of the left knee and aggravation of degenerative arthritis of the left knee. Appellant was off work from March 4 to April 4, 1989. He continued to work intermittently until September 11, 1992, when he stopped working completely and filed a claim for a recurrence of disability that was also approved. Appellant began receiving compensation on the periodic rolls and has not returned to any form of gainful employment.[1]

On January 8, 1998 appellant underwent a total knee arthroplasty. Following his recovery from surgery, the Office requested that appellant's treating physician, Dr. Kenneth C. Wiencek, an osteopath, provide an opinion regarding that extent of appellant's continuing disability for work.

In an OWCP-5 work restriction form dated November 23, 1998, Dr. Wiencek advised that appellant was capable of sedentary work with no lifting over 20 pounds and no sitting in excess of 8 hours per day.

[1] Appellant received a schedule award for 30 percent permanent impairment of the left lower extremity from January 15, 1991 to September 10, 1992.

Based on the restrictions provided by Dr. Wiencek, the employing establishment offered appellant a job as a distribution/window clerk, PTF on May 5, 1999.

Appellant did not sign either the "accept" or "refuse" option in the job offer. He wrote a note on the bottom of the job offer, stating that he did not believe he could do the job "because of various health conditions." Appellant noted that he had a hearing problem that interfered with his ability to communicate, that his other knee was bothering him and that a Greenfield filter had been implanted to screen possible blood clots from his legs.

The Office subsequently requested that Dr. Wiencek review the job offer and respond as to whether appellant was physically capable of performing the duties of the position.

In a report dated June 28, 1999, Dr. Wiencek stated, "it is my medical opinion that he may be able to perform these duties provided that he was not confined to a chair more than an hour at a time and would have the ability to get up and walk."

Based on the doctor's remarks, the employing establishment revised the job offer to list the physical requirements of the job. It was noted on a revised job offer that: "Employee will be able to sit or stand to perform most duties. Employee will not be required to walk more than 2 hours per tour. Sitting work will be provided whenever the claimants feels it is necessary. Duties will be assigned so that the employee will be able to get up and walk around when necessary."

The Office forwarded the revised job offer to Dr. Wiencek who replied on December 1, 1999 that appellant "can perform the physical duties of the position of distribution/window clerk, PTF."

In a letter dated January 19, 2000, the employing establishment sent appellant a copy of the new job offer with the revised physical requirements as approved by Dr. Wiencek.

Appellant once again did not sign the job offer. He wrote a narrative statement reiterating his argument that he could not return to work due to his age, problems with his other knee, a hearing problem, muscle spasms in his legs and stress involved with performing the duties of the job. No medical evidence was presented to support his inability to do this work.

On February 4, 2000 the Office advised appellant that the offered position was considered to be suitable work. Appellant was informed that he had 30 days to either accept the job offer or provide reasons for his refusal or else he risked termination of his compensation.

In a February 25, 2000 letter, appellant repeated his previous concerns, noting that he would have problems talking on the telephone due to his hearing condition.

On April 13, 2000 the Office determined that the offered job was suitable and gave appellant an additional 30 days to either accept the position or provide medical evidence to support his contention that he could not perform the duties of the position.

In a letter dated May 10, 2000, appellant said, "I am not refusing to go back to work but contesting the decision to do so. Also my conditions for not returning to work are work and nonwork-related."

He then submitted copies of medical treatment records pertaining to treatment of his left knee condition during 1997, the surgical report for his left knee arthroplasty and medical records pertaining to a diagnosis of bilateral sensorineural hearing loss in 1994.

On May 22, 2000 the Office advised appellant that his reasons for refusing the job were unacceptable. The Office further advised appellant that he had 15 days to accept the offered job or his compensation would be terminated.

In a June 2, 2000 letter, appellant argued that he could not return to work because he had been diagnosed with macular degeneration. Appellant, however, did not provide any additional medical evidence. He said he did not want to lose his rights to compensation and would accept retirement after a final ruling and date was given to him.

In a decision dated June 20, 2000, the Office terminated appellant's compensation on the grounds that he refused an offer of suitable work.

Appellant subsequently requested reconsideration and submitted a May 1, 2000 treatment note from Dr. Wiencek, who stated, "Still do n[o]t feel he can go back to full-time employment other than strictly at a desk job. Feel he has reached his maximum medical recovery."

Appellant supplied a November 17, 2000 report from Melinda S. Murphy, an audiologist, indicating that he was wearing bilateral hearing aids due to moderate to severe sensorineural hearing loss. A copy of a November 15, 2000 audiogram was attached to the report.

In a December 18, 2000 report, Dr. Edward L. Colby, a Board-certified internist, noted that appellant had been a patient of his since March 1994. He indicated that he had not been treating appellant for his workers' compensation injury but stated that appellant's current medical problems "may preclude him from continuing to work." He specifically stated:

> "[Appellant] currently is 69 years old and has multiple medical problems which include degenerative arthritis, prior knee replacement surgery, impaired hearing requiring bilateral hearing aids and recent diagnosis of macular degeneration. [His] vision is currently affected by his macular degeneration and this will continue and progress. No specific treatment is available for macular degeneration and it is expected at some time in the future [appellant] will potentially become legally blind from his macular degeneration. Based on above and his age I do not see how [appellant] could continue employment and it would be my recommendation that he not return to work."

In a December 20, 2000 report, Dr. Milton James indicated that appellant had an occult neovascular membrane in the right eye due to macular degeneration. He advised that appellant had deferred laser intervention and would be assessed again in one year.[2]

In a report dated January 10, 2001, Dr. Wiencek stated:

> "[Appellant has] been a patient of mine since [May 17, 1995]. He underwent a total knee arthroplasty [on January 8, 1998]. Has been doing well with this, however because of the nature of his work I do n[o]t feel he would be able to return secondary to him not being able to do any prolonged standing. [Appellant] should n[o]t be doing any squatting or climbing as well. [He] continues to have muscle spasms with any kind of prolonged activities or walking or standing. Feel that he would be unable to perform his duties as described and would recommend him not returning to work."

In a decision dated January 24, 2001, the Office denied modification.

In letters dated March 9 and 21, 2001, appellant requested reconsideration but he did not submit any additional evidence. He argued that his nonworked-related problems prevented him from returning to work.

In an April 6, 2001 decision, the Office denied appellant's request for reconsideration on the merits.

The Board finds that the Office properly terminated 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.[3] Section 8106(c)(2) of the Federal Employees' Compensation Act provides that the Office may terminate the 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. The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.

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.[4] To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his or her refusal to accept such employment.[5]

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[2] There was also a copy of a referral letter to Dr. James from Dr. John Antalis.

[3] *Roberto Rodriquez*, 50 ECAB 124 (1998);

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

[5] *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 8181 (1992).

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 medical evidence.[6] In assessing medical evidence, the number of physicians supporting one position over another is not controlling; the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for and the thoroughness of, physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[7]

In this case, appellant's treating physician stated on a work restriction form dated November 23, 1998 that he could perform sedentary work with no lifting over 20 pounds. Based on Dr. Wiencek's work restrictions, the employing establishment offered appellant a modified job as a distribution clerk, assuring him that he would be able to sit or stand to perform most of his duties depending on his comfort level. Dr. Wiencek specifically reviewed the original and revised description of the position of a distribution clerk as modified by the employing establishment and agreed that appellant could perform the duties of the job.

The older medical reports pertaining to appellant's work injury and the report of hearing loss were of little probative value on reconsideration to show that appellant was unable to perform the offer of suitable work. The Board notes that much of that evidence predated Dr. Wiencek's report releasing appellant to sedentary work. In addition, appellant did submit medical documentation to establish that his eye condition precluded him from returning to work. Dr. Colby's opinion was speculative in that he anticipated a worsening of appellant's eye condition in the future to the extent that appellant would be unable to work. He did not specifically opine that appellant's eye condition as of the date of the job offer was such that appellant could not see to perform his duties. Although Dr. Colby fears that appellant's eye condition will deteriorate over time, the Board has held that fear of future injury is not a basis for finding a claimant disabled from work.[8] Thus, the evidence fails to show that appellant was unable to work or that he was justified in refusing an offer of suitable work.

Because the Office followed its procedures in notifying appellant of the suitability of the offered job and he was given the requisite 15 days to accept the job after his reasons for refusing it were deemed unreasonable, the Board finds that the Office met its burden of proof in terminating appellant's compensation.

The Board finds that the Office properly denied appellant's request for reconsideration on the merits under 5 U.S.C. § 8128.

Section 8128(a) of the Act vests the Office with the discretionary authority to determine whether it will review an award for or against compensation.[9] The regulations provide that a

[6] *Maurissa Mack*, 50 ECAB 498 (1999); *Marilyn D. Polk*, 44 ECAB 673 (1993).

[7] *Maurissa Mack, supra* note 6; *Connie Johns*, 44 ECAB 560 (1993).

[8] *See Joseph G. Cutrufello*, 46 ECAB 285 (1994).

[9] 5 U.S.C. § 8128; *see Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.[10] When an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[11] Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.[12] Where a claimant fails to submit relevant evidence not previously of record or advance legal contentions not previously considered it is a matter of discretion on the part of the Office to reopen a case for further consideration under section 8128 of the Act.[13]

In this case, appellant's reconsideration request did not show that the Office erred in applying or interpreting a specific point of law. Appellant did not advance a relevant legal argument nor did he submit any new and relevant evidence. Because appellant did not satisfy one of the three requirements of section 8128, the Office properly refused to perform a merit review.

[10] 20 C.F.R. § 10.606(b) (1999).

[11] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

[12] *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

[13] *Gloria Scarpelli-Norman*, 41 ECAB 815 (1990); *Joseph W. Baxter*, 36 ECAB 228 (1984).

The decisions of the Office of Workers' Compensation Programs dated April 6 and January 24, 2001 are hereby affirmed.

Dated, Washington, DC
March 6, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member