

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DONNA F. WOOD and U.S. POSTAL SERVICE,  
POST OFFICE, Royal Oak, MI

*Docket No. 01-1772; Submitted on the Record;  
Issued May 20, 2002*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective August 15, 1998 on the grounds that she refused an offer of suitable work.

The Office accepted appellant's claim for acute thoracic sprain, cervical strain, cervical myositis and C6 radiculopathy resulting from the December 21, 1990 employment injury. The statement of accepted facts dated March 9, 1995 noted that appellant had a preexisting condition of cervical disc disease. She underwent a left C5-6 hemilaminectomy and foraminotomy on September 14, 1992, an anterior discectomy and fusion at C5-6 on September 17, 1993 and a cervical facet block C5-6 and C6-7 bilateral on August 31, 1994. The Office accepted these surgeries and paid appellant total disability compensation.

In a report dated January 3, 1996, a second opinion physician, Dr. Sorab A. Colah, a Board-certified neurological surgeon, found that appellant's objective examination was normal and opined that she could return to work with a 30-pound lifting restriction and no excessive pushing or pulling. On April 17, 1997 the employing establishment offered appellant the job of modified distribution clerk which she accepted. Appellant returned to work on May 13, 1996 for three weeks but was unable to continue working and, on May 29, 1996, filed a claim for a recurrence of disability of the December 21, 1990 employment injury. By decision dated August 20, 1996, the Office denied the recurrence claim stating that the evidence of record failed to establish that the accepted work-related conditions had worsened resulting in a recurrence of total disability. By letter dated September 16, 1996, appellant requested an oral hearing before an Office hearing representative. She also submitted additional medical evidence from her treating physicians, Dr. Peter Fragatos, a neurological surgeon and Dr. Fernando G. Diaz, a Board-certified neurological surgeon. In a report dated August 30, 1996, Dr. Diaz diagnosed residual myofascial spasm with ulnar neuritis on the right and opined that appellant was unable to work. In a report dated September 11, 1996, Dr. Fragatos stated that, given the chronicity of her symptomatology and the objective findings, appellant was unable to work.

By decision dated April 17, 1997, the Office hearing representative found that there was a conflict in the medical opinion between Dr. Colah's opinion that appellant could work and Drs. Diaz and Fragatos' opinions that appellant was disabled for work. The case was remanded to refer appellant, with the case record and a statement of accepted facts, to an impartial medical specialist to determine whether appellant had a work-related, disabling medical condition.

The Office referred appellant to an impartial medical specialist, Dr. Neal H. Pollack, an osteopath Board-certified in neurology. In a report dated May 23, 1997, he considered appellant's history of injury, performed a physical examination and reviewed a magnetic resonance imaging (MRI) scan dated March 18, 1997. Dr. Pollack diagnosed chronic pain syndrome, muscle spasm, status post cervical laminectomy, left upper extremity sensory loss and psychogenic, depressive overlay. He stated:

“[Appellant has] reached a healing plateau from the December 1990, trauma. Her symptoms and signs relate to muscle spasm, muscle guarding and individual chronic pain psychogenic-depressive responses rather than any ongoing organic difficulty.

“If the acceptance of facts and medical evidence is valid, preexisting cervical spine disease must be considered a major factor in her disability.”

Dr. Pollack stated that the work injury caused no “lingering disability.” He stated that appellant could return to light-duty activity with a 10-pound lifting limit and avoid reaching above her shoulders. Dr. Pollack stated that appellant should work two hours a day for the first week and then increase by one hour every week until she was working full time. In the work restriction form, Dr. Pollack stated that 50 percent of appellant's limitations were due to the employment injury and 50 percent due to a nonwork-related condition based on the statement of accepted facts. To question No. 4, he checked the “no” box indicating that appellant had no limitations in the fine motor movements of the upper extremities. To question No. 5, he checked the “no” boxes indicating that appellant could not perform repetitive motions of the wrist and elbow.

By letter dated September 3, 1997, the employing establishment offered appellant the position of modified distribution clerk, which was sedentary and did not require any prolonged standing or walking. The job description stated that appellant would begin working two hours a day and increase up to eight hours and there would be no repetitive wrist or elbow motion, no lifting more than ten pounds and no reaching above the shoulder.

By letter dated September 22, 1997, the Office asked Dr. Pollack to clarify his responses to questions No. 4 and No. 5 on the work restriction form as they seemed inconsistent and further, in his May 23, 1997 report, he did not discuss any conditions which indicated that appellant could not perform repetitive motions of the wrist and elbow.

In a supplement report dated September 26, 1997, Dr. Pollack stated that he inadvertently indicated that appellant was incapable of performing repetitive motions of the wrist and elbow. He stated that she was able to perform those activities and should exercise basic self-

administered caution rather than have any specific physical limitations. Dr. Pollack stated that appellant could perform the job of modified distribution clerk.

By letter dated January 2, 1998, the employing establishment reoffered appellant the job of modified distribution clerk but eliminated the restriction of no repetitive wrist and elbow motions from the job description. One part of the job description stated that appellant would stand by a hamper and toss bundles or parcels into mail sacks located in front of the hamper or she could walk to the mail sack and place or drop the parcel into the mail sack. Another part of the job description stated that appellant would stand by a conveyer belt and toss bundles or parcels into a hamper which was located in front of the belt. Another part of the job description stated that appellant would case mail while sitting down.

By letter dated February 6, 1998, the Office advised appellant that the employing establishment offered her the job of modified distribution clerk and that it was found suitable to her work capabilities. The Office gave appellant 30 days to accept the position or provide reasons for refusing it.

Appellant submitted a report from Dr. Fragatos dated February 17, 1998, in which he stated that she was unable to drive and had no preexisting condition. He stated that appellant had an ongoing condition that would require careful monitoring and he would see her again in one month.

By letter dated March 9, 1998, the Office informed appellant that she had 15 days to respond to the job offer or her compensation would be terminated.

Appellant submitted an electromyogram (EMG) dated February 23, 1998 showing left ulnar neuropathy. On June 12, 1998 the Office requested that Dr. Pollack explain whether appellant's left ulnar neuropathy shown on the February 1998 EMG was work related or due to the preexisting nonwork-related cervical disease and whether the finding on the EMG altered his opinion as to whether appellant could perform the job of modified distribution clerk.

In a report dated June 25, 1998, Dr. Pollack stated that he reviewed the February 23, 1998 EMG which indicated a left ulnar problem at the elbow and opined that the ulnar nerve abnormality was "probably secondary to her preexisting cervical spine disease" rather than the December 1990 employment injury. He stated that appellant was capable of performing the job of modified distribution clerk and the EMG result did not alter his opinion. Dr. Pollack stated that on his physical examination he found significant findings of pain behavior rather than other objective criteria.

By letter dated July 28, 1998, appellant refused the job offer contending she was permanently, totally disabled and Dr. Fragatos had so advised her.

In a report dated August 3, 1998, Dr. Fragatos stated that appellant had been followed at the Pontiac Osteopathic Hospital Neurosurgery Clinic on many occasions complaining of increasing pain in the cervical area. He stated that Dr. Diaz was "eminently qualified" to render an opinion on whether appellant required repeat surgery or was able to return to work. Dr. Fragatos stated that he would see her in two weeks.

By decision dated August 14, 1998, the Office terminated appellant's compensation benefits effective August 15, 1998 for her refusal of suitable work.

By letter dated August 21, 1998, appellant requested an oral hearing before an Office hearing representative, which was held on May 11, 1999. At the hearing, appellant's attorney contended that the record did not contain any evidence of a preexisting cervical disease. The attorney noted that x-rays performed on February 26, 1991 were normal indicating that appellant had no cervical disease. Appellant described her job duties at the time of the December 21, 1990 employment injury, her attempts to return to work and her limited lifestyle at home where she watches television, cannot go for long drives and cannot do housework.

In a report dated May 25, 1999, Dr. Fragatos stated that he reviewed the job offer and did not believe that on February 28, 1998 appellant could perform that work. He stated that the work would require repetitive motion of both of her arms of her cervical area, which would cause "a further increase of her symptomatology along with progressive objective findings." He opined that appellant was permanently, totally disabled and could not perform any work that required physical exertion.

By decision dated July 30, 1999 and finalized on August 3, 1999, the Office hearing representative affirmed the Office's August 14, 1998 decision.

By letter dated July 28, 2000, appellant requested reconsideration of the Office's decision and submitted medical reports from Dr. David M. Gast, a Board-certified psychiatrist, dated June 28 and July 26, 2000, Dr. Henry C. Tong, dated December 23, 1999, Dr. Agnes Wallbom, a psychiatrist, dated December 28, 1999 and Dr. Mary Theisen, a clinical psychologist, dated December 22, 1999. Appellant also submitted medical reports from Dr. Stephen M. Papadopoulos, a Board-certified neurological surgeon, dated October 18, 1999, Dr. Fragatos, dated May 5, 1999, Dr. Diaz, dated June 28 and September 16, 1993, March 14 and May 23, 1994 and August 30, 1996 and Dr. Miguel Melgar, a neurological surgeon, dated May 2, 1994. Appellant submitted an MRI scan dated February 22, 1994 and cervical x-rays dated September 17, 1993 and January 11, 1994.

In his report dated June 28, 2000, Dr. Gast stated that appellant was not capable of doing two-thirds of the modified distribution clerk because she was not capable of tossing mail which was required in two of the three paragraphs. In his July 26, 2000 report, Dr. Gast stated that appellant had a myofascial pain condition which was "flared up by repetitive motions" and according to the job description, "placing mail requires repetitive reaching and small parcel sorting, involves repetitive tossing of the mail." He stated that only one portion of the job description allowed for mail bundles to be dropped into the bin which did not have repetitive shoulder motions in the job description.

In his report dated December 23, 1999, Dr. Tong performed a spine assessment and diagnosed chronic neck pain, status post "ACDF" with possible C5-6 pseudoarthrosis." He concluded that appellant should avoid any high velocity maneuvers. In her December 28, 1999 report, Dr. Wallbom diagnosed, in part, status post pseudoarthrosis at C5-6 post fusion with significant myofascial pain component affecting her neck and upper extremity. She prescribed therapy and medicine. In her December 22, 1999 report, Dr. Theisen prescribed treatment for

depression. In his October 18, 1999 report, Dr. Papadopoulos stated that appellant stated that she was “quite debilitated and depressed” from her chronic pain syndrome and opined that appellant had a substantial myofascial component to her pain syndrome. Dr. Fragatos’ May 5, 1999 report is previously in the record and stated that appellant needed a repeat cervical procedure. Dr. Diaz’s August 30, 1996 report in which he stated that appellant was unable to work was previously in the record.

By decision dated August 15, 2000, the Office denied modification of the July 30, 1999 decision.

By letter dated January 31, 2001, appellant requested reconsideration of the Office’s decision and submitted a report of Dr. Gast dated January 24, 2001. In his report, he stated that he reviewed Drs. Fragatos’, Diaz’s and Pollack’s reports. Dr. Gast stated that the tossing of the mail as described in the modified distribution clerk position would be considered repetitious arm motion. He stated that appellant was not capable of doing repetitious reaching and would not have been able to do the modified distribution clerk position at any time. Dr. Gast also stated that he found no record of preexisting cervical disease and noted that the MRI scan performed on March 5, 1991 did not show any cervical degenerative disc disease. He concluded that he would relate all of appellant’s conditions to the C5-6 disc injury, which resulted in cervical laminectomy and “subsequent fusion, which later was rejected, leading to her current condition.”

By decision dated May 2, 2001, the Office denied modification of its prior decision.

The Board finds that the Office properly terminated appellant’s compensation effective August 15, 1998 on the grounds that she refused an offer of suitable work.

Once the Office accepts a claim, it has the burden of justifying termination of modification of compensation benefits by establishing that the accepted disability has ceased or that it is no longer related to the employment.<sup>1</sup> This burden of proof is applicable when the Office terminates compensation under 5 U.S.C. § 8106(c) for refusal to accept suitable work. Under this section of the Federal Workers’ Compensation Act, the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.<sup>2</sup> The Board has recognized that section 8106(c) serves as a penalty provision as it may bar an employee’s entitlement to compensation based on a refusal to accept a suitable offer of employment and, for this reason, will be narrowly construed.<sup>3</sup> 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 the medical evidence.<sup>4</sup>

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<sup>1</sup> *H. Adrian Osborne*, 48 ECAB 556 (1997); *David W. Green*, 43 ECAB 883 (1992).

<sup>2</sup> 5 U.S.C. § 8106(c)(2).

<sup>3</sup> *See Susan L. Dunnigan*, 49 ECAB 267 (1998); *Stephen R. Lubin*, 43 ECAB 564 (1992).

<sup>4</sup> *See John E. Lemker*, 45 ECAB 258 (1993); *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

To resolve the conflict in the medical evidence between the opinions of appellant's treating physicians, Drs. Fragatos and Diaz and the second opinion physician, Dr. Colah, regarding appellant's ability to work, the Office referred appellant to an impartial medical specialist, Dr. Pollack, Board-certified in neurology. In his May 23, 1997 report, Dr. Pollack diagnosed chronic pain syndrome, muscle spasm, status post cervical laminectomy, left upper extremity sensory loss and psychogenic, depressive overlay. He opined that appellant had no lingering disability from her work injury but rather showed symptoms and signs related to muscle spasm, muscle guarding and individual chronic pain psychogenic-depressive responses rather than any ongoing organic disability. Dr. Pollack stated that appellant could return to light-duty activity with a 10-pound lifting limit and no reaching above her shoulders. He stated that appellant could return to work two hours a day and then increase her workday by one hour every week until she was working full time. On the work restriction form, he checked the "no" boxes to indicate that appellant had no limitations in the fine motor movements of the upper extremities but could not perform repetitive motions of the wrist and elbow. In response to the Office's request for clarification, in a September 26, 1997 supplemental report, Dr. Pollack stated that he inadvertently indicated that appellant was incapable of performing repetitive motions of the wrist and elbow. He stated that appellant was able to perform those activities and should exercise basic self-administered caution rather than have any specific limitations. Dr. Pollack stated that appellant could perform the job of modified distribution clerk.

By letter dated January 2, 1998, the employing establishment reoffered appellant the job of modified distribution clerk but eliminated the restriction of no repetitive wrist and elbow motions. The job had a lifting restriction of no more than 10 pounds, no reaching above the shoulder and a gradual increase to full-time work schedule starting with 2 hours a day the first week. The job description also indicated that appellant would be required to toss bundles or parcels into mail sacks or into hampers but she could also walk and place the bundles or parcels into the mail sacks. By letter dated February 6, 1998, the Office informed appellant that the job of modified distribution clerk was suitable and she had 30 days to accept the job offer or give reasons for refusing it. Appellant submitted an EMG dated February 23, 1998 showing left ulnar neuropathy. When asked by the Office to review the EMG, Dr. Pollack stated in his report dated June 25, 1998 that the ulnar nerve abnormality was "probably" secondary to her preexisting cervical spine disease rather than the December 1990 employment injury. He opined, however, that the EMG did not alter his opinion that appellant could perform the job of modified distribution clerk. Appellant rejected the job offer on July 28, 1998.

In situations where there are opposing medical reports of virtually equal weight and rationale and 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, must be given special weight.<sup>5</sup> Dr. Pollack's opinions dated May 23 and September 26, 1997 and June 25, 1998 are complete and well rationalized. In his May 23, 1997 report, he explained that he found no organic disability and appellant's symptoms and signs were related to muscle spasm, muscle guarding and individual chronic pain psychogenic-depressive responses. In his September 26, 1997 report, he clarified what appeared to be an inconsistency in the work restriction form explaining that appellant could perform repetitive motions with her

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<sup>5</sup> *Kathryn Haggerty*, 45 ECAB 383, 389 (1994).

wrist and elbow. In his June 25, 1998 report, he explained that the February 23, 1998 EMG showing ulnar neuropathy did not affect his opinion that appellant could work.

None of the evidence appellant submitted subsequent to Dr. Pollack's report is sufficient to overcome the special weight accorded his medical opinion. In his June 28 and July 26, 2000 reports, Dr. Gast opined that appellant could not perform the job of modified distribution clerk because the job required tossing mail and appellant could not do repetitive reaching and repetitive tossing which the job described. In his January 24, 2001 report, Dr. Gast reiterated that appellant could not toss mail which required repetitive reaching and repetitious arm motion and opined that appellant's condition was related to her C5-6 disc injury and her cervical laminectomy. Dr. Gast's opinion, however, is not probative because he did not provide a rationalized medical explanation for his opinion. The Board has held that a medical opinion not fortified by medical rationale is of little probative value.<sup>6</sup>

In his May 25, 1999 report, Dr. Fragatos opined that appellant was permanently, totally disabled. He opined that she could not perform repetitive motion of her arms and that she could not perform the job of modified distribution clerk. Dr. Fragatos, however, did not provide a medical rationale for his opinion and, therefore, his opinion is not probative. The other medical opinions appellant submitted from Drs. Wallbom, Theisen, Papadopoulos and Melgar do not address appellant's ability to work. In his December 23, 1999 report, Dr. Tong opined that appellant should avoid any high velocity maneuvers but does not specifically address appellant's ability to perform the job of modified distribution clerk. Dr. Diaz's August 30, 1996 report in which he stated that appellant was unable to work was in the record prior to referral of the case to Dr. Pollack. Some of Dr. Fragatos' other reports dated February 17 and August 3, 1998 and June 22 and May 5, 1999 do not address appellant's ability to work and are, therefore, not relevant.

As Dr. Pollack is an impartial medical specialist and his opinion is complete and well rationalized, his opinion constitutes the weight of the medical evidence. The Office, therefore, properly terminated appellant's benefits for her refusal to accept suitable work based on Dr. Pollack's opinion.<sup>7</sup>

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<sup>6</sup> *Annie L. Billingsley*, 50 ECAB 210, 213 n.20 (1998).

<sup>7</sup> Although appellant contended that the evidence does not establish that he had preexisting cervical disease, Dr. Fragatos' May 10, 1991 myelogram stated that she had recurrent "disc" disease. However, appellant is correct that some x-rays and an MRI scan contemporaneous to the myelogram do not show that appellant had cervical disease. Nonetheless, the Office committed no error in this regard because Dr. Pollack did not indicate at any time that appellant's condition was solely due to the preexisting cervical disease and he did not believe that the February 1998 EMG results showing ulnar neuropathy, which he tentatively attributed to the cervical disease, affected her ability to work.

The May 2, 2001 and August 15, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC  
May 20, 2002

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member