

**United States Department of Labor
Employees' Compensation Appeals Board**

JAYNE MACKITTRICK, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Staten Island, NY, Employer**

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**Docket No. 05-31
Issued: March 11, 2005**

Appearances:
Robert J. Helbock, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On September 30, 2004 appellant filed a timely appeal from a November 10, 2003 merit decision of the Office of Workers' Compensation Programs which terminated her compensation benefits on the basis that she abandoned suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation on the grounds that she abandoned suitable work.

FACTUAL HISTORY

On March 31, 2003 appellant, then a 31-year-old clerk, filed a traumatic injury claim alleging that on the same date she was lifting a tray of mail and experienced pain in her back and shoulder. The Office accepted the claim for lumbar sprain and paid appropriate compensation. Appellant stopped work on March 31, 2003 and returned to a light-duty position on April 2, 2003. She continued on light duty until April 23, 2003 when she stopped due to an

increase in symptomology and did not return. She received appropriate compensation for total disability.

Appellant came under the care of Dr. Joseph A. Suarez, a Board-certified orthopedic surgeon, who noted treating appellant from April 4 to 29, 2003. On April 4, 2003 he advised that the physical examination revealed no abnormalities and routine x-rays were normal. Dr. Suarez diagnosed mild lumbosacral sprain. He subsequently reports he noted that appellant's symptoms worsened and he placed her off work. A magnetic resonance imaging (MRI) scan dated May 21, 2003 revealed a herniation of the nucleus pulposus in the midline at L4-5 and at the left paramedian plane at L5-S1.

On May 30, 2003 appellant was referred for a fitness-for-duty examination to Dr. Lawrence E. Miller, an osteopath. In a report dated June 12, 2003, he diagnosed a resolved lumbosacral strain/sprain, stating that there was no orthopedic disability based on clinical examination and that appellant was capable of working in her previous capacity as a clerk with no physical restrictions. Dr. Miller advised that appellant reached maximum medical improvement with regard to the accepted injury.

Appellant continued to submit reports from Dr. Suarez dated June 18 and 25, 2003 who diagnosed lumbar radiculopathy and herniated lumbar disc and advised that appellant could not return to work.

On June 26, 2003 the Office referred appellant for vocational rehabilitation.

In a duty status report dated July 18, 2003, Dr. Suarez returned appellant to light duty with restrictions on sitting, walking, standing, reaching, twisting, pushing, pulling, squatting, kneeling, climbing and lifting no greater than 10 pounds.

In a rehabilitation closure report dated July 28, 2003, the rehabilitation counselor noted that appellant's treating physician returned her to light duty and recommended she continue physical therapy.

On July 30, 2003 the employing establishment offered appellant a modified light-duty position as a mail processing clerk conforming with the restrictions imposed by Dr. Suarez, appellant's treating physician. The job description indicated that appellant would work eight hours per day casing mail with restrictions of no lifting or carrying more than 10 pounds and noted that other duties would be intermittent.

In a letter dated July 29, 2003, the rehabilitation counselor requested that Dr. Suarez indicate the number of hours appellant could work light duty. In a duty status report dated August 20, 2003, Dr. Suarez advised that appellant could work light duty four hours per day with restrictions on sitting, walking, standing, reaching, twisting, pushing, pulling, squatting, kneeling, climbing and lifting no greater than 10 pounds.

In a revised job offer dated September 2, 2003, the employing establishment offered appellant a modified light-duty position as a mail processing clerk conforming with restrictions imposed by Dr. Suarez. The job description indicated that appellant would work 4 hours per day casing mail with no lifting or carrying more than 10 pounds, and no sitting, walking, standing,

reaching above the shoulder, twisting, pushing, pulling, squatting, kneeling, climbing, carrying or lifting for 4 hours per day for more than 4 hours per day.

By letter dated September 3, 2003, the Office informed appellant that it had reviewed the position description and found the job offer suitable with her physical limitations. Appellant was advised that she had 30 days to accept the position or offer her reasons for refusing. She was apprised of the penalty provisions of the Federal Employees' Compensation Act if she did not return to suitable work.¹

In a letter dated September 10, 2003, appellant declined the September 2, 2003 job offer. She indicated that she suffers from essential tremors and could not work. Appellant submitted a letter from Dr. Suarez dated September 17, 2003 who advised that she experienced an exacerbation of her lumbosacral spine pain. He noted findings on physical examination of positive straight leg raises, tenderness in the lumbar spine and spasms in the paralumbar area. Dr. Suarez recommended physical therapy and advised that appellant was disabled for work.

By letter dated October 6, 2003, the Office informed appellant that her refusal of the offered position was found to be unjustified. The Office indicated that the position was within the restrictions as set forth by Dr. Suarez. Additionally, the Office noted that it considered the evidence submitted and found it insufficient to change the determination previously made by the Office. The Office provided appellant with 15 days to accept the job.

Thereafter, appellant submitted a September 26, 2003 an attending physician's report from Dr. Suarez in which he noted that on March 31, 2003 appellant was lifting mail and experienced back pain. He noted current physical findings of positive straight leg raises bilaterally and positive sciatic nerve stretch. Dr. Suarez diagnosed lumbar herniated disc and advised that appellant's condition was caused by her employment activity. He advised that appellant could not return to work. In a duty status report of the same date, Dr. Suarez noted clinical findings of positive straight leg raises, and positive sciatica and diagnosed lumbar strain. He noted that appellant could not resume work at this time. The Office received this evidence on October 8, 2003.

By decision dated November 10, 2003, the Office terminated appellant's compensation pursuant to 5 U.S.C. § 8106(c)(2) on the grounds that she refused a suitable job offer without justification. The Office advised that the employing establishment confirmed that appellant did not return to work.

LEGAL PRECEDENT

Section 8106(c)(2) of the Federal Employees' Compensation Act² provides in pertinent part, "A partially disabled employee who ... refuses or neglects to work after suitable work is offered ... is not entitled to compensation."³ To prevail under this provision, the Office must

¹ 5 U.S.C. § 8106(c)(2).

² 5 U.S.C. §§ 8108-8193.

³ *Supra* note 1.

show that the work offered was suitable and must inform the employee of the consequences of refusal to accept employment. An employee who refuses or neglects to work after suitable work has been offered has the burden of showing that such refusal to work was justified.⁴ Section 8106(c) will be narrowly construed as it serves as a penalty provision which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.⁵ 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.⁶ 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.⁷

The Office's implementing federal regulations⁸ provide that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of establishing that such refusal or failure to return to work was reasonable or justified and shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.⁹ To justify termination of compensation, the Office must show that the work offered was suitable and inform the employee of the consequences of refusal to accept such employment.¹⁰

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.¹¹ In assessing medical evidence, the number of physicians supporting one position or 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.¹²

⁴ See *Michael L. Schaffer*, 46 ECAB 845 (1995).

⁵ See *Robert Dickerson*, 46 ECAB 1002 (1995).

⁶ *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

⁷ *Glen L. Sinclair*, 36 ECAB 664 (1985).

⁸ 20 C.F.R. § 10.517 (1999).

⁹ *Id.*

¹⁰ *Arthur C. Reck*, 47 ECAB 339 (1995).

¹¹ See *Marilyn D. Polk*, 44 ECAB 673 (1993).

¹² See *Connie Johns*, 44 ECAB 560 (1993).

ANALYSIS

Dr. Suarez's September 26, 2003 attending physician's report supported continuing disability for work. Although Dr. Suarez approved the modified-duty position on August 20, 2003, he continued to treat appellant and reported on September 26, 2003 that appellant experienced an exacerbation of back pain and noted physical findings of positive straight leg raises bilaterally and positive sciatic nerve stretch. He diagnosed lumbar herniated disc and advised that appellant could not return to work at this time. Dr. Suarez noted that appellant's condition was due to her work-related injury of March 31, 2003. In a duty status report of the same date, Dr. Suarez noted clinical findings of positive straight leg raises, and positive sciatica and diagnosed lumbar strain. He noted that appellant could not resume work at that time. The Office received this evidence on October 8, 2003, well before reaching a decision on November 10, 2003 under 5 U.S.C. § 8106(c)(2). This medical evidence supports that appellant was totally disabled for work as of September 26, 2003 and was sufficient to support her failure to report to work within the 15-day period referred to in the Office's final notice of October 6, 2003.¹³

When the Office issued its November 10, 2003 decision, the most recent medical evidence supported that appellant remained disabled for work. The Board finds that the Office failed to meet its burden of proof to demonstrate that appellant could work after September 26, 2003 and was capable of performing the duties of the offered position.¹⁴ The Board will reverse the Office's decision terminating appellant's compensation.

CONCLUSION

The Board finds that the Office failed to meet its burden of proof to terminate appellant's compensation pursuant to 5 U.S.C. § 8106(c)(2).

¹³ *Les Rich*, 54 ECAB ___ (Docket No. 01-1995, issued January 2, 2003) (Office regulations 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 showing); *see also Fred H. Rogan*, Docket No. 01-1270 (issued January 7, 2003) (where the Board found that although the treating physician approved the modified-duty position he continued to treat appellant and reported that recent treatment showed a worsening of appellant's condition and that he needed to remain off work. The Office received this evidence after issuing the 15-day letter and well before reaching a decision terminating compensation under 5 U.S.C. § 8106(c)(2). The Board found that this medical evidence supports that appellant was totally disabled for work as of the date of the physician's report and was sufficient to justify appellant's failure to report to work within the 15-day period referred to in the Office's final notice).

¹⁴ *See Galen E. Franklin*, 37 ECAB 478 (1986) (medical evidence showing condition had worsened).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 10, 2003 is reversed.

Issued: March 11, 2005
Washington, DC

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member