

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

SAM D. MORRISON, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
San Diego, CA, Employer**

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**Docket No. 04-426
Issued: June 23, 2004**

Appearances:
Sam D. Morrison, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On December 8, 2003 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated April 8, 2003 in which the Office terminated appellant's compensation benefits for his refusal of suitable work and a merit decision dated October 21, 2003 affirming the termination decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the above-stated merit decisions.

ISSUE

The issue on appeal is whether the Office properly terminated appellant's compensation pursuant to 5 U.S.C. § 8106(c)(2) on the grounds that he refused an offer of suitable work.

FACTUAL HISTORY

The Office accepted that appellant, a letter carrier born September 1, 1952, injured himself on March 6, 1992 while in the performance of duty and sustained a lumbar strain and herniated disc at L5-S1. The Office authorized a laminectomy/disectomy at L5-S1. Appellant stopped work on March 23, 1992 and returned to work part time on March 2, 1996. He later

sustained recurrences of the work-related disability on April 2000 and August 2001, which were both accepted by the Office. Appellant stopped work on September 27, 2001 and was placed on the periodic rolls for workers' compensation benefits.

Dr. Cambiz Baher, appellant's treating physician determined in a report dated July 25, 2002 that appellant was only partially disabled and that he could perform modified duty with the following work restrictions: no pushing/pulling, no climbing, no driving, limited sitting for 45 minutes per hour, limited standing for 15 minutes per hour, limited walking for 10 minutes per hour, alternate sitting and standing and no lifting greater than 10 pounds. On August 22, 2002 the employing establishment offered appellant a sedentary position as a modified distribution clerk and noted that the position complied with work restrictions outlined by Dr. Baher on July 25, 2002.

On August 26, 2002 the Office notified appellant that the position of modified clerk was suitable to his work capabilities and was currently available. The Office gave appellant 30 days either to accept the position or to provide an explanation for refusing it. The Office notified appellant of the provisions of 5 U.S.C. § 8106(c)(2).

On August 28, 2002 appellant refused the job offer and submitted an August 9, 2002 medical report from Dr. Bill McCarberg, a Board-certified family practitioner and one of appellant's treating physicians who provided his opinion as to whether appellant was capable of resuming work activities. The physician stated:

"The symptoms include back pain, pain with bending, fatigue and exhaustion, muscle pain, sciatica radiating down the left leg into the left foot, pain which is uncomfortable with any period [of] time of sitting precluding driving to any activity including activities close at home. He cannot stand for more than a minute at a time without increasing pain and has to constantly move around in order to decrease this pain. He is unable to stretch above his head and walking is limited to very short trips. "Lifting, twisting, sitting, standing, bending, turning, reaching, stretching and any movement in general makes for increased pain and decreased work tolerance."

Dr. McCarberg opined that appellant was unable to return to his letter carrier position or any vacant positions because he felt appellant was unable to be useful or efficient in his service. He recommended that appellant retire from any work.

On August 30, 2002 the Office furnished Dr. Baher, appellant's designated physician, with a copy of Dr. McCarberg's August 9, 2002 report and requested that he comment on the physician's findings and opinion.

In a report dated September 9, 2002, Dr. Baher responded that appellant would not be able to return to work in any capacity in view of his narcotic requirement for pain relief. The physician felt appellant would not be able to perform a sedentary job without risk of falling asleep and that any job with even short-term standing or walking produces increased pain only requiring larger doses of medication. He went on to state: "I believe that [appellant] has had a significant trial of conservative therapy and that his prior permanent and stationary restrictions

probably no longer apply and that he is precluded from return to work even at a full-time sedentary position that would allow him periods of standing and stretching.”

In a letter dated October 3, 2002, the Office advised appellant that based on Dr. Baher’s latest report, it would not make a formal decision regarding the suitability of the job offer. The Office explained that, although Dr. Baher did not provide any medical rationale to support his opinion regarding disability, it determined that further development was warranted and that appellant would be referred for a second opinion evaluation.

In a report dated November 26, 2002, Dr. Blake Thompson, the referral physician Board-certified in pain medicine discussed appellant’s history of injury and his findings on physical examination. Dr. Thompson noted appellant’s complaints of constant dull to occasional sharp pain in the low back and increased pain with lifting over three to four pounds, bending, standing over five minutes, walking over four to five minutes and sitting over five minutes. He related appellant’s reports of weakness and intermittent radiating pain along with numbness in the lower extremity. Dr. Thompson reviewed previous medical reports, diagnostic studies and appellant’s letter carrier position description and then his findings on examination. He diagnosed lumbar strain/sprain with chronic lumbar myofascial pain; lumbar spine disc degenerative disease with minimal disc protrusion at L4-5 and mild disc protrusion at L5-S1 revealed in a magnetic resonance imaging scan on September 22, 2001. Dr. Thompson further diagnosed degenerative disc disease of the lumbar spine with a herniated disc at L4-5 and L5-S1 and left radicular symptoms and chronic low back pain syndrome. He discussed that appellant was made permanent and stationary in 1998 and returned to modified duty, however, since that time appellant has related continual intermittent pain that had significantly worsened in the past one to one and a half years. He noted though that appellant had an element of symptom magnification. Dr. Thompson also discussed appellant’s medication regimen; specifically that he felt it was not optimal and that instead of utilizing a narcotic such as Norco, Oxycontin was a reasonable alternative with an antidepressant. He noted that he reviewed the sedentary job description for the clerk position and opined that appellant was able to return to this type of work if he was allowed to take a break from prolonged sitting and be able to perform some work while sitting and standing as necessary. Dr. Thompson concluded: “In my opinion the patient is not totally disabled and was able to work light duty as noted above with an opportunity to sit and stand with a minimum demand for physical effort.” “... [appellant] is able to walk and stand, drive and get around the house without difficulty as long as he is not required to do so for prolonged periods.” Regarding appellant’s narcotic medication for pain, Dr. Thompson went on to state: “In my opinion, if he is established on a more appropriate regimen of medication this should not significantly impair his ability to do his work activities.”

In a work capacity evaluation, Dr. Thompson listed the following work restrictions: walking, standing, twisting, squatting, kneeling or climbing for no more than 4 hours; sitting for no longer than 6 hours and pushing, pulling and lifting no more than 10 pounds. He reported that there was no reason why appellant should not be able to work for eight hours per day.

On February 7, 2003 the employing establishment offered appellant the modified clerk position in accordance with the medical restrictions outlined by Dr. Thompson. The offered clerk position involved reviewing reports, computer input, making telephone calls, typing correspondence, talking to customers, employees and supervisors, allowing for alternative sitting

and standing as needed and lifting no more than 10 pounds. The employing establishment subsequently revised the job offer to reflect a more stringent lifting restriction of up to five pounds.

On February 21, 2003 appellant refused the job offer pursuant to an off work order which he enclosed with his rejection letter. Appellant further argued that he was not permitted under disability retirement regulations to change crafts from a carrier to a clerk.

On March 4, 2003 the Office notified appellant that the position was suitable and remained available. The Office advised appellant of the provisions of 5 U.S.C. § 8106(c)(2) governing refusal of suitable employment and afforded appellant an additional 30 days to accept the position.

The Office thereafter received a medical report and chart notes from Dr. McCarberg dated January 10, 2003 in which he concluded that appellant was temporarily totally disabled from January 10 through April 10, 2003. The physician did not comment on Dr. Thompson's second opinion report.

In a decision dated April 8, 2003, the Office terminated appellant's compensation pursuant to 5 U.S.C. § 8106(c)(2) on the grounds that he refused suitable work as a modified clerk without justification.

Following the termination decision, appellant submitted additional medical evidence. In a letter dated May 8, 2003, appellant requested review of the written record.

By decision dated October 21, 2003, the Office hearing representative affirmed the April 8, 2003 termination decision. The hearing representative found that the Office properly determined that the weight of the second opinion report submitted at that time established that appellant could work in the sedentary position offered by the employing establishment. The hearing representative further found that the Office took the appropriate steps to determine that the offered position was available and suitable for appellant and appropriately considered appellant's argument in refusing the offered position. However, the hearing representative also remanded the case to the Office for further development regarding appellant's disability, based on newly submitted medical evidence and a referral for a referee evaluation.

LEGAL PRECEDENT

Section 8106(c)(2) of the Federal Employees' Compensation Act states that a partially disabled employee who refuses to seek suitable work, or refuses or neglects to work after suitable work is offered to, procured by, or secured for him is not entitled to compensation.¹ 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,

¹ 5 U.S.C. § 8106(c)(2).

setting forth the specific job requirements of the position.² 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.³

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 refusal to accept such employment.⁵

ANALYSIS

On the issue of suitability, the Office found that the weight of the medical evidence rested with the report of the Office referral physician, Dr. Thompson, a Board-certified specialist in pain medicine, who related appellant's history and symptoms in his November 26, 2002 report and noted his belief that there was an element of symptom magnification in this case. He provided that, while appellant had complained of worsened pain in the low back over the previous year and a half with lifting and prolonged bending, standing and walking, his condition had previously been determined permanent and stationery in 1998 and appellant had returned to modified duty. Dr. Thompson addressed the issue raised by Dr. Baher regarding appellant's requirement for narcotic medication and noted that a narcotic medication regimen was not optimal for him. The specialist reviewed the modified clerk position and opined that with an opportunity to sit and stand with a minimum demand for physical effort and the appropriate medication regimen of Oxycontin and an antidepressant, appellant could work in the sedentary position capable of walking, standing, twisting, squatting, kneeling or climbing for no more than 4 hours; sitting for no longer than 6 hours and pushing, pulling and lifting no more than 10 pounds.

The offered position involved reviewing reports, computer input, making telephone calls, typing correspondence, talking to customers, employees and supervisors. All the duties allow appellant to sit and stand for comfort and required lifting no more than five pounds. Dr. Thompson's second opinion report supported that this position was suitable for appellant.

Inasmuch as the modified clerk position conforms with appellant's work restrictions as outlined by Dr. Thompson, the Office correctly found the job was suitable.

Following the suitability determination, appellant was properly given 30 days to either accept the offer of suitable work or provide reasons for rejecting the offered job. Appellant subsequently submitted a medical report and chart notes from Dr. McCarberg dated January 10,

² *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

³ *Glen L. Sinclair*, 36 ECAB 664 (1985).

⁴ 20 C.F.R. § 10.516 (1999).

⁵ *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

2003 regarding total disability. Because appellant submitted additional evidence within the 30-day period provided by the Office for responding to the suitability determination, he was entitled to have his evidence evaluated to determine whether or not he provided acceptable reasons for refusing the offer of suitable work. Thereafter, he was entitled to an additional 15 days to accept the offered job. The record reflects that the Office did evaluate the new evidence but not until it issued the final decision terminating benefits on April 8, 2003. Thus, the Board finds that the Office did not properly terminate appellant's compensation for the reason that it did not fully afford him the procedural protections set forth in *Maggie L. Moore*.⁶ Specifically, the Office failed to evaluate the newly submitted evidence, inform appellant that his reason for rejecting the offer was unjustified and afford appellant 15 days to accept the position. Without such an opportunity, appellant cannot be held to have refused an offer of suitable work.⁷

CONCLUSION

The Board finds that the Office erred in terminating appellant's compensation.

⁶ *Id.*

⁷ See *Maggie L. Moore*, *supra* note 5; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.8144(c) (December 1993).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 21 and April 8, 2003 are reversed.⁸

Issued: June 23, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

⁸ The Board notes that in the October 21, 2003 decision the Office hearing representative affirmed the prior decision finding that the termination was valid; however, the Board also found that a conflict of medical opinion existed based on medical evidence submitted by appellant subsequent to the termination and remanded the case to the Office for further development including referral to a referee physician. The Board has no jurisdiction to review the hearing representative's action to also remand the case for further development based on an existing conflict of medical evidence, as that action is an interlocutory matter and does not represent a final decision. 20 C.F.R. § 501.2(c).