

On August 2, 1990 appellant filed a claim for compensation for a traumatic injury to his low back sustained on that date by carrying a bag with heavy mail. He stopped work on August 3, 1990 and received continuation of pay from that date until September 16, 1990, after which the Office began paying compensation for temporary total disability.

The Office accepted that appellant sustained a herniated disc at L5-S1, and authorized the surgery performed for this condition on October 17, 1991, which consisted of excision of the extruded disc. On August 28, 1992 Dr. Deepak S. Tandon, a Board-certified neurologist, performed an electromyogram (EMG) and nerve conduction studies for his moderately severe low back pain and bilateral sciatica; he interpreted these studies to show moderate bilateral L5-S1 chronic radiculopathy with evidence of new reinnervating units, no evidence of acute denervation, and no evidence of neuropathy. In a September 30, 1992 report, Dr. Tandon stated that magnetic resonance imaging (MRI) scan of the lumbosacral spine demonstrated postoperative changes with mild fibrosis and scarring but no significant residual or recurrent disc herniation. In an April 3, 1993 report, Dr. Richard Mindess, a Board-certified orthopedic surgeon, stated that appellant had some degree of discogenic problem but that a large amount of his symptoms were related to mechanical low back problems. In a November 19, 1993 report, Dr. Reza Sherkat, a Board-certified neurologist, stated that an EMG and nerve conduction study that date showed no diagnostic findings. In an April 14, 1994 report, Dr. William L. Lipman, a Board-certified orthopedic surgeon, stated that he had followed appellant for some time and was unable to come up with an accurate diagnosis to explain all his symptoms.

On May 3, 1997 Dr. Norman L. Pollock, a Board-certified orthopedic surgeon, performed a fitness-for-duty examination for the employing establishment, and concluded that appellant's symptoms were far out of proportion to any physical findings, given his very normal appearing examination. In a May 5, 1998 report, Dr. Kenneth W. Gregg, a Board-certified orthopedic surgeon, diagnosed failed back syndrome, and stated that appellant's subjective report of his symptoms supported disability in that appellant was unable to stand or sit for significant lengths of time, but that examination "didn't demonstrate any significant, objective findings that would suggest a basis for these symptoms...." Dr. Gregg concluded, "I don't feel that I can comment further on the extent of disability other than to corroborate that his subjective report of symptoms suggests a limited ability to function." In a June 26, 2002 report, Dr. Steven C. Hollis, a Board-certified orthopedic surgeon, set forth appellant's history, symptoms and findings on examination, and stated that appellant had persistent symptomatic complaints for nearly 10 years after his surgery, that these most likely were permanent symptoms, and that the symptoms would "most likely affect what employment he feels capable of performing."

On July 30, 2002 the Office referred appellant, his medical records, and a statement of accepted facts to Dr. Leonard Popowitz, a Board-certified orthopedic surgeon, for an evaluation of his condition and his ability to work. In an August 19, 2002 report, Dr. Popowitz set forth appellant's history, noting that he had another MRI scan after his surgery. On examination appellant had flexion to 35 degrees, intact sensation, a negative straight leg raising test, and normal reflexes and motor power. Dr. Popowitz stated that appellant initially sustained an acute disruption of the discs at L4-5 and L5-S1, that the L5-S1 disc was operated on and subsequently the L4-5 disc began to give him discomfort, that he had continued to have discomfort for the past 12 years, and that his symptoms appeared to be out of proportion to the findings on physical examination. Dr. Popowitz noted that no x-rays or recent MRI scans were available for review, diagnosed chronic low back derangement and chronic disc disease at L4-5 and L5-S1, and stated that appellant's residuals of his August 2, 1990 injury were persistent low back pain with radiation down his leg. He recommended a work-hardening program, and concluded that appellant could work 8 hours per day with restrictions against lifting more than 10 pounds, no excessive climbing, and frequent breaks every 2 hours.

On December 26, 2002 the Office offered appellant permanent full-time limited duty with no excessive climbing, breaks of 10 minutes every 2 hours, and no lifting, carrying, pushing, or pulling over 10 pounds. The offered duties were casing mail, reviewing and updating change of address cards, filing, delivery and pickup of express mail, answering telephones, and other administrative duties as needed. On January 31, 2003 the Office advised appellant that it had found this job suitable, that a partially disable employee who refused an offer of suitable work was not entitled to compensation, and that he had 30 days to accept the offer or provide reasons for refusing it. On March 10, 2003 the Office advised appellant that it had not received a response, and that he had 15 days to accept the offer with no penalty. On March 14, 2003 the Office received a response from appellant dated February 21, 2003, contending that he could not perform the offered position, since twisting, turning or bending at the waist caused irritation and swelling.

By decision dated April 10, 2003, the Office terminated appellant's compensation effective April 19, 2003 on the basis that he refused an offer of suitable work.

Appellant requested a hearing, which was held on March 24, 2004. He submitted a June 17, 2003 report from Dr. Hollis which stated that appellant's "status in terms of symptoms hasn't changed. Appellant leads a sedentary life. He states he can[no]t tolerate standing or walking more than 30 minutes, can[no]t tolerate sitting more than 30 [to] 60 minutes without prohibitive L[eft] leg numbness symptoms." Dr. Hollis diagnosed failed back syndrome, and stated, "Nothing has changed in this man's status. He has been totally disabled from any work in the past 10 years. His status in that regard has n[o]t changed."

By decision dated June 7, 2004, an Office hearing representative found that the Office properly terminated appellant's compensation for refusal of suitable work. On August 18, 2004 appellant requested reconsideration, contending that the Office did not provide his MRI scans or EMGs to Dr. Popowitz, and that he had not undergone the work-hardening program recommended by Dr. Popowitz. He submitted a copy of Dr. Tandon's August 28, 1992 EMG findings, and a copy of a December 26, 1992 MRI scan that showed, at L4-5 and L5-S1, tiny disc herniations that only slightly indented the dural sac, with no compromise of the spinal canal or neural foramina. By decision dated November 19, 2004, the Office refused to modify its prior decisions terminating his compensation.

### **LEGAL PRECEDENT**

Under section 8106(c)(2) of the Federal Employees' 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>1</sup> To justify termination of compensation, the Office must establish that the work offered was suitable.<sup>2</sup> Section 10.516 of the Code of Federal Regulations<sup>3</sup> provides that an employee who refuses or neglects to work after suitable work has

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<sup>1</sup> 5 U.S.C. § 8106(c)(2) provides in pertinent part: "A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered to, procured by, or secured for him; is not entitled to compensation."

<sup>2</sup> *David P. Camacho*, 40 ECAB 267 (1988).

<sup>3</sup> 20 C.F.R. § 10.516.

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 before a determination is made with respect to termination of entitlement to compensation.<sup>4</sup>

### **ANALYSIS**

The issue of whether an employee has the physical ability to perform a limited-duty position offered by the employing establishment is primarily a medical question that must be resolved by the medical evidence.<sup>5</sup> The work tolerance limitations set forth by Dr. Popowitz, a Board-certified orthopedic surgeon, on August 19, 2002 were the ones contained in the employing establishment's December 26, 2002 offer of limited duty. Appellant's opinion that he could not perform the duties of the position is not medical evidence and cannot overcome the weight of Dr. Popowitz's opinion on his ability to work.

The June 17, 2003 report of Dr. Hollis, a Board-certified orthopedic surgeon, stating that appellant was totally disabled, is of less probative value than the report of Dr. Popowitz. Unlike the report of Dr. Popowitz, the June 17, 2003 report of Dr. Hollis did not contain findings on physical examination.<sup>6</sup> Moreover, Dr. Hollis' opinion that appellant is totally disabled appears to be based on nothing more than appellant's complaints that he could not perform certain activities. No physician has attributed appellant's disability to the findings on the EMGs or MRI scans.<sup>7</sup>

The Office properly found that the offered position was suitable, and gave appellant the requisite opportunity to provide reasons for not accepting the offer. It also properly found that the reasons offered by appellant for refusing the offered position, namely that he could not perform the position, did not justify the refusal.

### **CONCLUSION**

The Board finds that the Office properly terminated appellant's compensation for refusing an offer of suitable work.

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<sup>4</sup> See *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

<sup>5</sup> *Kathy E. Murray*, 55 ECAB \_\_\_\_ (Docket No. 03-1889, issued January 26, 2004).

<sup>6</sup> The opportunity for and thoroughness of examination are important factors in determining the weight of medical opinions. *James R. Taylor*, 56 ECAB \_\_\_\_ (Docket No. 05-135, issued May 13, 2005); *Anna C. Leanza*, 48 ECAB 115 (1996).

<sup>7</sup> The record does not support appellant's contention that Dr. Popowitz did not have results of these tests available for review. Although Dr. Popowitz stated that there were no recent MRI scans to review, this does not show that he did not review the most recent MRI scan, which was done 10 years earlier in 1992, and which he referred to in his report.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 19 and June 7, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 5, 2005  
Washington, DC

Alec J. Koromilas  
Chairman

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member