

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

NANCY BRATHWAITE, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
New York, NY, Employer**

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**Docket No. 06-737
Issued: July 20, 2006**

Appearances:
Nancy Brathwaite, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 7, 2006 appellant filed a timely appeal from September 8 and December 14, 2005 decisions of the Office of Workers' Compensation Programs, which terminated of her monetary compensation based on her refusal of 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 refused an offer of suitable work.

FACTUAL HISTORY

On August 29, 2001 appellant, then a 37-year-old clerk, filed a traumatic injury claim alleging that on August 29, 2001 she injured her left knee in the performance of duty. The Office accepted the claim for left knee sprain, a torn medial meniscus and aggravation of a lumbar sprain. Appellant stopped work on August 31, 2001 and returned to full-time work on

October 9, 2001. On January 29, 2002 appellant stopped work to undergo arthroscopic surgery which was authorized by the Office. Thereafter, she received appropriate compensation.

Appellant sought treatment from Dr. Howard J. Levy, a Board-certified orthopedic surgeon. In a report dated September 26, 2001, he noted that appellant recently twisted her left knee at work. A magnetic resonance imaging (MRI) scan revealed a tear of the posterior horn of the medial meniscus, radial tear of the body of the lateral meniscus and moderate tricompartmental osteoarthritis. On January 29, 2002 Dr. Levy performed left knee arthroscopy, partial medial meniscectomy, partial lateral meniscectomy, chondroplasty, medial, lateral and patellofemoral compartments and extensive tricompartmental synovectomy. In a duty status report dated April 12, 2002, Dr. Levy advised that appellant could return to work eight hours per day with limitations on pushing, pulling, lifting, squatting, kneeling and climbing.

Appellant continued to submit reports from Dr. Levy dated December 5, 2001 to November 19, 2003. He noted that she was progressing well post surgery but still experienced residual pain and weakness. Dr. Levy advised that appellant experienced radiating back pain and was referred to a spine specialist. He opined that appellant was totally disabled from work due to her left knee injury. Dr. Levy indicated that an MRI scan of the lumbar spine revealed a mid-line disc herniation at L4-5 and L5-S1.

On March 2, 2004 the Office referred appellant for a second opinion to Dr. Bert S. Horwitz, a Board-certified orthopedic surgeon, to determine whether she had any residuals of her work-related condition. The Office provided him with appellant's medical records, a statement of accepted facts and a detailed description of her employment duties. In a report dated March 30, 2004, Dr. Horwitz reviewed the records and appellant's history of treatment. He diagnosed internal derangement of the left knee with aggravation of preexisting degenerative arthritis and chronic lumbosacral strain, consequential to the accident of August 29, 2001 with aggravation of preexisting degenerative disease and herniated discs. Dr. Horwitz noted that the accepted condition had not resolved but that her continued disability was primarily due to nonwork-related conditions of preexisting and degenerative conditions in the left knee and spine. He opined that appellant could work within specified restrictions of being able to alternately sit and stand for specified periods of time and avoiding prolonged walking, squatting and lifting over 10 pounds.

Appellant was seen in consultation with Dr. Joyce Goldenberg, Board-certified in physical medicine and rehabilitation. In a report dated March 22, 2004, she noted a history of injury and diagnosed lumbar sprain, lumbar myositis/muscle spasms, possible lumbar radiculopathy and internal derangement of the left knee. In a June 1, 2004 report, Dr. Levy opined that appellant remained totally disabled for work.

On July 6, 2004 the Office expanded appellant's claim to include aggravation of lumbosacral sprain.

On July 12, 2004 the Office found that a conflict of medical opinion existed between Dr. Levy, appellant's treating physician, who indicated that she was disabled due to residuals of her accepted conditions and Dr. Horwitz, an Office referral physician, who determined that appellant could return to work subject to specified restrictions.

The Office referred appellant to Dr. Norman M. Heyman, a Board-certified orthopedic surgeon, selected as the impartial medical specialist. In a report dated August 25, 2004, he reviewed the records and listed findings on examination. Dr. Heyman diagnosed internal derangement of the left knee, status post arthroscopic surgery to the left knee, residual anterior knee pain/patellofemoral syndrome with quadriceps atrophy and subjective complaints of low back pain with a normal examination and no abnormalities. He noted that the physical examination was essentially normal with some deconditioning of the muscle, poor patellofemoral glide and retropatellar crepitation with tenderness over the anterior and medial femoral condyle. Dr. Heyman indicated that appellant's left knee condition had resolved and opined that her lumbosacral sprain had also resolved. He advised that appellant was not totally disabled and could return to work within restrictions. Dr. Heyman found that appellant did have residuals of her injury with atrophy of the thigh on the left side, anterior knee pain and decreased conditioning which could be treated with a work-hardening program. Dr. Horwitz opined that appellant could not perform her regular duties but could work eight hours a day in a sedentary position while sitting. In an August 12, 2004 work capacity evaluation, he listed appellant's activity restrictions on walking, standing, reaching and reaching above shoulder for 1 to 2 hours per day. Dr. Horwitz indicated that appellant could not engage in twisting, bending, stooping, operating a motor vehicle, pushing, pulling, lifting, squatting, kneeling or climbing. Dr. Heyman advised that appellant could sit for eight hours daily. He indicated that the restrictions would apply until appellant was reconditioned.

On October 15, 2004 the employing establishment offered appellant a full-time limited-duty position as a modified distribution clerk effective November 6, 2004 with a tour of duty from 12:01 a.m. to 8:50 a.m. and an annual salary of \$44,496.00. The offer noted that appellant would work eight hours per day in conformance with Dr. Heyman's restrictions. The duties included casing letters in the manual aisle for four to eight hours per day and handling patch-up and hards in the manual section for four to eight hours per day. The job was subject to Dr. Heyman's limitations, including: sitting for eight hours per day, repetitive movements of the wrist and elbow sitting for eight hours per day, one to two hours per day of walking, standing reaching and reaching above the shoulder, no twisting, bending, stooping, operating a motor vehicle, pushing, pulling, lifting, squatting, kneeling or climbing.

In a November 4, 2004 letter, the Office advised appellant that the job offer constituted suitable work. Appellant was informed that she had 30 days to accept the position or provide reasons for refusing it; otherwise, she risked termination of her compensation benefits.

Appellant submitted an election of benefits form noting that she was applying for disability retirement. In a report dated February 9, 2004, Dr. Levy noted that appellant's left knee gave out causing her to twist her right knee and he diagnosed patellofemoral syndrome of the right knee. In a report dated November 17, 2004, he advised that appellant continued to have left knee pain and swelling with back pain. Dr. Levy diagnosed right knee patellofemoral pain syndrome and a possible meniscus tear which was causally related to her accepted work injury.

On December 6, 2004 the Office advised appellant that the position of a modified distribution clerk was suitable work. The Office noted that it considered the reasons given by appellant for refusing the position and found them to be unacceptable. The Office afforded appellant 15 days to accept the job offer.

In a December 8, 2004 letter, appellant informed the Office that she was electing to receive disability retirement benefits. She submitted a report from Dr. Goldenberg dated November 15, 2004. She noted appellant's complaints of persistent pain of the lower back and diagnosed herniated disc and internal derangement of the left leg and recommended continued physical therapy.

In a decision dated December 30, 2004, the Office terminated appellant's compensation benefits on the grounds that she refused an offer of suitable work.

By letter dated January 5, 2005, appellant requested an oral hearing before an Office hearing representative. The hearing was held on July 20, 2005. Appellant submitted reports from Dr. Goldenberg dated March 22, 2004 to August 22, 2005. She diagnosed left knee internal derangement, status post arthroscopic surgery and lumbar myofascial pain syndrome with lumbar disc herniation. Dr. Goldenberg opined that appellant was unable to work due to these injuries due to increasing pain in her left knee and lumbar spine associated with left knee muscle weakness and pain, lumbar pain and spasm and decreased active ranges of motion in her left knee and lumbar spine. In a January 24, 2005 attending physician's report, Dr. Levy diagnosed status post left knee arthroscopy and patellofemoral pain syndrome. He noted with a checkmark "yes" that appellant's condition was caused by an employment activity noting appellant was unable to work as she could not stand or ambulate for long periods of time. In a report dated April 11, 2005, Dr. Levy noted that appellant presented with bilateral knee and back pain which were causally related to her work injuries and opined that she was unable to perform her job duties. Appellant was seen in consultation with Dr. Vadim Kushnerik, a Board-certified anesthesiologist, dated April 28, 2005. He noted that appellant underwent surgery on her knee and continued to have back pain and spasms. Dr. Kushnerik diagnosed low back pain, lumbar facet syndrome and left leg radiculopathy and recommended lumbar facet joint injections. An electromyogram dated May 11, 2005 revealed L5-S1 radiculopathy. The Office of Personnel Management approved appellant's application for disability retirement.

In a decision dated September 8, 2005, the hearing representative affirmed the Office's December 30, 2004 decision.

In a letter dated September 22, 2005, appellant requested reconsideration. She submitted a report from Dr. Goldenberg dated August 4, 2005 who noted that appellant was status post work-related injury of August 29, 2001. She diagnosed herniated disc and left knee derangement. Dr. Goldenberg indicated that appellant had pain in multiple joints and was not working. In a September 6, 2005 decision, the Social Security Administration found appellant to be disabled.

In a decision dated December 14, 2005, the Office denied modification of the September 8, 2005 decision.

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, 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

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 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.⁷ Office procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer, medical evidence of inability to do the work or travel to the job or the claimant found other work which fairly and reasonably represents his or her earning capacity (in which case compensation would be adjusted or terminated based on actual earnings). Furthermore, if medical reports document a condition which has arisen since the compensable injury and the condition disables the employee, the job will be considered unsuitable.⁸

¹ 5 U.S.C. § 8106(c)(2).

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

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

⁴ 20 C.F.R. § 10.517(a) (1999); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(5) (July 1997).

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

⁶ *See Marilyn D. Polk*, 44 ECAB 673 (1993).

⁷ *See Connie Johns*, 44 ECAB 560 (1993).

⁸ *Id.* at Chapter 2.814.4(b)(4) (July 1997).

ANALYSIS

The Office accepted that appellant sustained a left knee sprain, torn medial meniscus tear of the left knee and aggravation of a lumbar sprain. The Office terminated appellant's compensation effective December 30, 2004 based on appellant's refusal of suitable work. The Board finds that the Office established that the offered position of October 15, 2004 was suitable.

The Office reviewed the medical evidence and determined that a conflict in medical opinion existed between appellant's attending physician, Dr. Levy, a Board-certified orthopedist, and the Office referral physician, Dr. Horwitz, a Board-certified orthopedist, regarding whether appellant's accepted conditions had resolved and whether she was totally disabled from work.⁹ Consequently, the Office properly referred appellant to Dr. Heyman to resolve the conflict.

Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.¹⁰

In an August 25, 2004 report, Dr. Heyman indicated that he reviewed the entire case record and statement of accepted facts. He examined appellant thoroughly and related his clinical findings. Dr. Heyman diagnosed internal derangement of the left knee, status post arthroscopic surgery to the left knee, residual anterior knee pain/patellofemoral syndrome with quadriceps atrophy and subjective complaints of low back pain with a normal examination and no abnormalities. He indicated that appellant's left knee condition had resolved and also opined that the lumbosacral sprain had resolved. Dr. Heyman advised that appellant was not totally disabled and could return to work in a sedentary position eight hours per day sitting. He reported restrictions on walking, standing, reaching and reaching above the shoulder for one to two hours per day, and no twisting, bending, stooping, operating a motor vehicle, pushing, pulling, lifting, squatting, kneeling or climbing.

The Board finds that the opinion of Dr. Heyman is sufficiently well rationalized and based upon a proper factual background such that it is entitled to special weight and establishes that appellant could work a modified position subject to the restrictions set forth above. He reviewed the entire case record and statement of accepted facts and had examined appellant. Dr. Heyman's opinion as set forth in his report of August 25, 2004 is found to be probative evidence and reliable. The Board finds that his opinion represents the weight of the medical evidence. Dr. Heyman clearly opined that appellant could return to work subject to the restrictions set forth in his work restriction report of August 12, 2004. His opinion therefore must be considered reliable. The Board finds that Dr. Heyman's opinion with respect to

⁹ 5 U.S.C. § 8123(a), in pertinent part, provides: "If there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

¹⁰ *Solomon Polen*, 51 ECAB 341 (2000).

appellant's work limitations is based on a proper factual background and is sufficient to establish that the position is medically suitable to her work restrictions.¹¹

The record reflects that the physical restrictions of the modified position offered to appellant on October 15, 2004 conformed with the limitations provided by Dr. Heyman. In his report of August 25, 2004, Dr. Heyman advised that appellant could work a sedentary position eight hours per day sitting, repetitive movements of the wrist and elbow sitting for eight hours per day, one to two hours per day of walking, standing, reaching and reaching above the shoulder, no twisting, bending, stooping, operating a motor vehicle, pushing, pulling, lifting, squatting, kneeling or climbing. The job specifically indicated that appellant would work eight hours per day as a modified clerk and the duties included casing letters in the manual aisle for four to eight hours per day and working with patch-up and hards in manual section for four to eight hours per day. The physical requirements of the position included standing and walking one to two hours per day, reaching and reaching above the shoulder one to two hours per day and repetitive movement of the wrist and elbow up to eight hours per day. The job offer advised that appellant could sit for eight hours, repetitive movements of the wrist and elbow while sitting for eight hours, one to two hours walking, standing, reaching and reaching above the shoulder, no twisting, bending, stooping, operating a motor vehicle, pushing, pulling, lifting, squatting, kneeling or climbing. The Board finds that the physical requirements of the offered position are consistent with the work restrictions set forth by Dr. Heyman and that the offered position is medically suitable to appellant's work restrictions.

To terminate compensation under section 8106(c), the Office must provide appellant notice of its finding that an offered position is suitable and give her an opportunity to accept or provide reasons for declining the position.¹² The Office properly followed its procedural requirements in this case. By letter dated November 4, 2004, the Office advised appellant that a partially disabled employee who refused suitable work was not entitled to compensation, that the offered position had been found suitable and allotted her 30 days to either accept or provide reasons for refusing the position.¹³ Appellant responded by submitting reports from Dr. Levy dated February 9 and November 17, 2004 who noted that appellant continued to have left and right knee pain and swelling with back pain. He diagnosed right knee patellofemoral pain syndrome, possible meniscus tear which was causally related to her accepted work injury. This evidence was insufficient to show that the offered position was not medically suitable. Dr. Levy's treatment note merely noted appellant's symptoms but did not address the suitability of the offered position. His opinion did not explain how appellant's medical conditions prevented her return to work in the modified position on October 15, 2004 when the Office notified her of the offered position and its finding that it was suitable. The reports of Dr. Levy are not sufficient to establish that appellant could not perform the offered position at the time the job was offered or at any time prior to the termination of benefits.¹⁴ The medical evidence of

¹¹ See generally *Melvina Jackson*, 38 ECAB 443, 450 (1987) (discussing the factors that bear on the probative value of medical opinions).

¹² See *Maggie L. Moore*, *supra* note 5.

¹³ See *Bruce Sanborn*, 49 ECAB 176 (1997).

¹⁴ See *Gayle Harris*, 52 ECAB 319 (2001).

record thus establishes that, at the time the job offer was made, appellant was capable of performing the modified position.

On December 6, 2004 the Office advised appellant that the reasons given for not accepting the job offer were unacceptable. The Office advised that appellant had 15 days to accept the offer and, if she did not, a final decision under 5 U.S.C. § 8106(c)(2) would be made. On December 8, 2004 appellant advised that she was electing disability retirement. Appellant also submitted a report from Dr. Goldenberg dated November 15, 2004, who noted appellant's complaints of persistent pain of the lower back and diagnosed herniated disc and internal derangement of the left leg and recommended continued physical therapy. This evidence was insufficient to show that the offered position was not medically suitable. Dr. Goldenberg's treatment note merely noted appellant's symptoms but did not address the suitability of the offered position. She did not explain how appellant's conditions prevented her return to work in the offered position. The report of Dr. Goldenberg is not sufficient to establish that appellant could not perform the offered position at the time the job was offered or at any time prior to the termination of benefits.¹⁵ Therefore, appellant did not submit any medical evidence to show that the offered position was not medically suitable.¹⁶ Thus, under section 8106(c) of the Act, her compensation was properly terminated.

As the Office met its burden of proof to terminate appellant's compensation based on her refusal of suitable work, the burden then shifted to appellant to show that her refusal to work in that position was justified.¹⁷

Appellant argued that Dr. Heyman based his medical opinion on false information as his report dated August 25, 2004 incorrectly noted that appellant had a history of diabetes and hypertension and was a Housing and Urban Development (HUD) loan officer. The Board finds this argument to be without merit. The Board has reviewed Dr. Heyman's report and cannot fault it on this ground. In his report of August 25, 2004, Dr. Heyman accurately noted that appellant worked as a clerk with the employing establishment and that her medical history revealed no serious illnesses. The Office decision dated December 30, 2004 incorrectly noted that appellant had a history of diabetes and hypertension and was a HUD loan officer; however, there is no evidence that Dr. Heyman was provided with this information or that he based his report on incorrect information. This evidence was insufficient to show that the offered position was not medically suitable and is therefore insufficient to meet appellant's burden of proof.

After wage-loss benefits were terminated appellant submitted an attending physician's report dated January 24, 2005 prepared by Dr. Levy who diagnosed status post left knee arthroscopy and patellofemoral pain syndrome. He noted with a checkmark "yes" that appellant's condition was caused by an employment activity noting appellant was unable to work at this time as she could not stand or ambulate for long periods of time. In a report dated April 11, 2005, Dr. Levy noted that appellant presented with bilateral knee and back pain which

¹⁵ *Id.*

¹⁶ *See Les Rich*, 54 ECAB 290 (2003).

¹⁷ *See Ronald M. Jones*, 52 ECAB 190 (2000).

were causally related to her work injuries and opined that she was unable to perform her job duties. However, these reports are insufficient to establish that the position offered appellant was unsuitable as the physician did not provide a reasoned opinion explaining how or why appellant's diagnosed conditions prevented her from performing the job duties of the selected position at the time her compensation was terminated.

Also submitted were reports from Dr. Goldenberg dated March 22, 2004 to August 22, 2005, who noted treating appellant since March 22, 2004. She rendered diagnoses and opined that appellant was unable to work due to increasing pain in her left knee and lumbar spine. However, these reports are insufficient to establish that the position offered appellant was unsuitable as the physician did not explain how any particular diagnosed conditions prevented her from performing specific job duties of the modified position. This evidence is insufficient to meet appellant's burden of proof.

A report from Dr. Kushnerik dated April 28, 2005 noted treating appellant for a work-related injury sustained on August 29, 2000 while moving equipment. He noted that appellant underwent surgery on her knee and continued to experience back pain and spasms and diagnosed low back pain, lumbar facet syndrome and left leg radiculopathy. However, this report is insufficient to establish that the position offered appellant was unsuitable as the physician offered no explanation of how or why appellant's conditions prevented her from performing the job duties of the selected position at the time prior to the time her benefits were terminated.

Additionally, appellant asserted that a Social Security Administration determination on a claim for Social Security benefits supported her contention that she was disabled due to her accepted work-related conditions and could not return to work. However, this argument is insufficient to establish entitlement to monetary benefits under the Act as the Board has held that entitlement to benefits under another act does not establish entitlement to benefits under the Act.¹⁸ Furthermore, the Board has held that electing to receive retirement benefits is not an acceptable reason for refusing suitable work.¹⁹

CONCLUSION

The Board finds that the Office met its burden of proof in terminating appellant's disability compensation under 5 U.S.C. § 8106(c)(2) for refusal of suitable employment.

¹⁸ *Freddie Mosley*, 54 ECAB 255 (2002) (noting that the Federal Employees' Compensation Act and the Social Security Act have different standards of medical proof on the question of disability).

¹⁹ *See Robert P. Mitchell*, 52 ECAB 116 (2000).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 14 and September 8, 2005 are affirmed.

Issued: July 20, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board