



In an August 18, 2003 work capacity evaluation form (OWC-5c), Dr. Mark M. Sugimoto, an attending Board-certified family practitioner, indicated that appellant was capable of returning to work for four hours per day with restrictions. The restrictions included 30 minutes of sitting at a time, walking up to 4 hours per day, 15 minutes of standing at a time, reaching from the waist or above for up to 4 hours per day, minimal twisting, no bending or stooping up to 20 pounds pushing and pulling, 5 to 10 pounds lifting, minimal squatting, kneeling and climbing and breaks of 2 to 3 minutes every 30 minutes.

On September 12, 2003 the Office referred appellant for vocational rehabilitation.

On March 15, 2004 the Office received a January 22, 2004 physical work performance evaluation summary performed by Stephen A. Galt, a physical therapist, who reported restrictions including no floor to waist lifting; up to 12 pounds lifting from waist to eye level; up to 12 pounds carrying with two hands; up to 5 pounds one hand carrying, pushing and pulling; no overhead reaching; no stooping, kneeling, crouching, over-standing, squatting, climbing and repetitive squatting. The evaluation was terminated prior to an assessment of appellant's twisting ability "due to extreme lumbar and [R] LE symptoms." In concluding, Mr. Galt opined that appellant "does not appear to be a good candidate for returning to work at this time" due to her inability "to perform work at the sedentary level or less" and was unable to work an eight-hour day.

On March 3, 2004 the Office received a psychological evaluation by Michael R. O'Leary, Ph.D., a clinical psychologist, who diagnosed depression and anxiety disorder due to her medical condition. The psychologist concluded that appellant's "symptoms are of sufficient severity that they should be considered to be a functional limitation with respect to employment; at least at this time." Dr. O'Leary recommended referral for pain management and indicated that she "may require some work hardening physical therapy."

On April 19, 2004 the Office received a March 31, 2004 report by Dr. Sugimoto, who disagreed with Mr. Galt regarding a work hardening program for appellant.

On April 21, 2004 the Office received a March 2, 2004 report, April 10, 2004 addendum and April 10, 2004 Form OWCP-5c by Dr. Patrick N. Bays, a second opinion Board-certified osteopath, a March 23, 2004 performance-based physical capacity evaluation performed by Keith M. Reagan, a physical therapist, and a March 23, 2004 summary by Mr. Reagan which was reviewed by Dr. Bays.

Dr. Bays reviewed the medical evidence, statement of accepted facts and set forth findings on physical examination. He diagnosed L5-S1 disc herniation. Dr. Bays also reported that appellant had high blood pressure, depression, anxiety, loneliness, difficulty sleeping, worthlessness and "significant for blurred or change in vision, severe or frequent headaches" under a review of systems. As to appellant's ability to work, he opined "[i]t does appear that this patient is perhaps suitable for gainful employment" and recommended a functional capacity evaluation as he was uncertain as to what level.

Dr. Bays reviewed and concurred with the results of a March 23, 2004 summary detailing appellant's physical restrictions. In an April 14, 2005 addendum, Dr. Bays reported the following restrictions based upon the March 23, 2004 physical capacity evaluation stating:

“Under conclusions and recommendations, it was noted that this patient would be able to function in the sedentary category of work on a part-time basis within the tolerances described in the therapist's summary. Please see the therapist's summary which indicates that the patient is able to sit for 17 minutes at a time without restriction 2 to 3 hours in an 8-hour day, stand 22 minutes at a time without restriction 2 to 3 hours in an 8-hour day, walk 15 minutes at a time without restriction 2 to 3 hours in an 8-hour day, alternatively sit, stand and walk 72 minutes at a time 6 hours in an 8-hour day. Under lifting, the patient was able to lift approximately 14 pounds on an occasional basis, approximately 10 pounds on a frequent basis, was able to push/pull 18 pounds on an occasional basis, and 13 pounds on a frequent basis. The patient was never able to squat, frequently able to bend or stoop, frequently able to crouch, showed normal crawling, ladder climbing and stair climbing, occasionally able to reach above shoulder, and kneeling was within normal limits.”

In an April 10, 2004 work capacity evaluation form (OWCP-5C), Dr. Bays indicated that appellant had permanent restrictions and indicated as “N/A” the number of hours appellant was capable of working. The restrictions report by Dr. Bays included sitting 2 to 3 hours a day; walking 2 to 3 hours a day; standing 2 to 3 hours a day; occasional reaching above the shoulder; occasional twisting; frequent bending/stooping; occasional pushing and pulling up to 18 pounds, and occasional lifting up to 14 pounds and no squatting.

In a May 13, 2004 report, Dr. Sugimoto noted that he had reviewed the information from Dr. Bays and noted that he “did not get a definitive recommendation from Dr. Bays regarding the patient's ability to return to work regarding what type of work to do.” He noted that appellant “was not able to complete an eight-hour full day of activities and was felt to be worked to the best capacity the patient was able to achieve.”

In a June 1, 2004 report, Dr. Michael S. McManus, an examining Board-certified occupational physician, diagnosed “status post L5-S1 laminotomy and discectomies x 2 with chronic mild residual, right L5 and/or S1 deficit (work related).” He indicated that he agreed with the recommendations of Dr. Bays and that appellant had reached maximum medical improvement. Dr. McManus indicated that appellant was capable of working full time within the restrictions set forth by Dr. Bays.

On October 15, 2004 the employing establishment offered appellant a limited-duty position as a modified general clerk in Orchard Park. The position involved eight hours of answering the telephone, paging personnel, taking messages, light filing, maintain route files, take out light express mail, maintain APC machine, perform light sweeps, do second notices, hot case and assist with dispatch and box mail. The physical requirements included 2 to 3 hours of sitting, walking and standing, occasional reaching and reaching above the shoulder, frequent stooping and bending, occasional pushing and pulling of 18 pounds, occasional lifting of 14 pounds and no squatting. The hours were from 8:30 a.m. to 5:30 p.m.

On October 23, 2004 appellant stated that she neither accepted nor rejected the offered position.

On November 29, 2004 the Office received a November 19, 2004 on-job site analysis. The analysis noted that the physical requirements of the position included occasional walking, standing, sitting crouching and stooping; no crawling, twisting, balancing, climbing or kneeling; frequent lifting up of less than 10 pounds, occasional lifting of 10 to 14 pounds; frequent carrying up of less than 10 pounds, occasional carrying of 10 to 14 pounds; occasional pushing and pulling of between 5 and 18 pounds; rarely above shoulder and at reaching; frequent handling and fingering and occasional operation of hand and foot controls. The report noted that appellant could request assistance for carrying or lifting anything over 14 pounds. The job description noted duties of the position included 30 minutes of light data entry of time cards on the computer; 30 minutes of enter information from rural carriers regarding start time, break time and completion of their route; maintaining office files; maintaining information on vehicle repair work and schedule for vehicles requiring to be brought in; answering the telephone, transferring telephone calls and paging individuals; occasionally taking messages; sweeping the lobby; restocking the automated postal center; delivering light express mail and perform other duties as assigned within her restrictions. The position noted the hours were from 8:30 a.m. to 5:30 p.m. with one-hour lunch. The term "occasional" was defined as "up to 33 percent of the shift spent in this activity."

On February 14, 2005 the Office received a February 1, 2005 addendum from Dr. Bays indicating he had reviewed and approved the November 19, 2004 job analysis. He checked and appellant was released with no restriction to perform this position.

On February 16, 2005 the Office received a February 8, 2005 report from Dr. Sugimoto. He reviewed the limitations set by Dr. Bays and recommended "more rare stooping if at all because of the underlying dis[c] disease and the risk for reherniation of her lumbar dis[c]." In concluding he reported an examination revealed continued "right foot weakness to dorsiflexion and residual numbness in the lateral dorsal foot and the plantar aspect of the foot."

On May 10, 2005 the employing establishment offered appellant a limited-duty position as a modified general clerk in Orchard Park. The position involved answering the telephone, paging personnel, taking messages, light filing, maintain route files, "annotate leave records for all employees on a daily basis while seated at a desk, perform light sweeps, do second notices for undeliverable items; help with paperwork for audits, light computer work to assist supervisor and check-in carriers with accountable mail. The physical requirements of the position included 2 to 3 hours of sitting, walking and standing, occasional reaching and reaching above the shoulder, frequent stooping and bending, occasional pushing and pulling of 18 pounds, occasional lifting of 14 pounds and no squatting, bending or crouching. The hours were from 8:30 a.m. to 5:30 p.m. The employing establishment indicated that appellant would initially return to work for four hours per day on June 2, 2005 and by June 20, 2005 she would be working eight hours a day.

In a May 26, 2005 report, Dr. Sugimoto indicated that appellant was capable of working 8 hours a day. He noted indicated that her physical restrictions included occasional lifting/carrying and pushing/pulling of 10 to 15 pounds, occasional sitting, standing and walking

for 1/2 to 1 hour at a time, seldom for stair climbing, never for kneeling, bending, stooping/squatting and kneeling were checked as seldom. Dr. Sugimoto defined the term “occasional” as 10 to 30 percent the shift was spent in this activity.

In a letter dated June 3, 2005, appellant stated that she neither accepted nor rejected the position. Appellant noted that the job offer did not provide a geographical address for the offered position.

On June 24, 2004 the Office received an amended job offer dated June 22, 2005 which included the location of the offered position. The employing establishment indicated that appellant would initially return to work for four hours per day on June 30, 2005 and by July 18, 2005 she would be working eight hours a day.

In a letter dated June 28, 2005, appellant’s counsel stated that he recommended that appellant accept the job offer with a few changes.

On June 30, 2005 the Office advised appellant that it considered the May 10, 2005 job offer suitable to her work capabilities. The Office informed appellant that physical restrictions of the position were consistent with the work limitations set forth in Dr. Sugimoto’s May 26, 2005 report. Appellant was advised that she had 30 days to accept the position or submit any medical documentation in support of his inability to perform the duties.

On July 5, 2005 appellant rejected the job offer on the grounds that it was not suitable as offered.

On August 8, 2005 the Office advised appellant that her reasons for rejecting the May 10, 2005 job offer were not justified. The Office informed appellant that she had 15 days to accept the position otherwise compensation benefits would be terminated.

On August 16, 2005 the Office received a July 15, 2005 treatment report by Dr. Sugimoto regarding appellant’s hip bursitis.

In a decision dated August 25, 2005, the Office terminated appellant wage-loss compensation based on her refusal to accept an offer of suitable employment. The Office found that the position of general clerk (modified) was consistent with her medical limitations.

### **LEGAL PRECEDENT**

The Federal Employees’ Compensation Act provides at section 8106(c)(2) that a partially disabled employee who refuses or neglects to work after suitable work is offered is not entitled to compensation.<sup>1</sup> Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits under section 8106 for refusing to accept or neglecting to perform suitable work.<sup>2</sup> The Board has recognized that section 8106(c) serves as a penalty

---

<sup>1</sup> 5 U.S.C. § 8106(c)(2).

<sup>2</sup> See *Bryant F. Blackmon*, 56 ECAB \_\_\_ (Docket No. 04-564, issued September 23, 2005); *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

provision as it may bar an employee's entitlement to future compensation and, for this reason, will be narrowly construed.<sup>3</sup> To establish that a claimant has refused or abandoned suitable work, the Office must substantiate that the position offered was consistent with the employee's physical limitations and that the reasons offered for stopping work were unjustified.<sup>4</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 of record.<sup>5</sup> Additionally, it is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.<sup>6</sup>

### ANALYSIS

In this instance, the Office relied upon a May 26, 2005 report by Dr. Sugimoto. While the May 10, 2005 modified general clerk position appears consistent with Dr. Sugimoto's noted restrictions which included occasional lifting/carrying, sitting and push/pulling, there is an unresolved question as to the definition of the term "occasional" with regards to the percentage of time spent performing an activity during a shift. The on-job site analysis form defined "occasional" as "up to 33 percent of the shift spent in this activity." Dr. Sugimoto defined the term "occasional" as 10 to 30 percent of the shift was spent in this activity. As the on-job site analysis defined occasional as requiring a higher percentage of time spent in certain activities than that imposed by Dr. Sugimoto in his definition, there is a question as to whether the physical requirements of offered position complies with the restrictions set by Dr. Sugimoto. As it is not established whether the offered position is suitable and complies with appellant's physical restrictions, the Board finds that the offered position is not consistent with the restrictions imposed by Dr. Sugimoto. Accordingly, the May 10, 2005 position is not suitable for appellant and the Office failed to carry its burden to justify termination of compensation.

### CONCLUSION

The Board finds that the Office improperly terminated appellant's compensation.

---

<sup>3</sup> See *Richard P. Cortes*, 56 ECAB \_\_\_\_ (Docket No. 04-1561, issued December 21, 2004); *H. Adrian Osborne*, 48 ECAB 556 (1997).

<sup>4</sup> See *Lizzie M. Greer*, 49 ECAB 681 (1998).

<sup>5</sup> See *John E. Lemker*, 45 ECAB 258 (1993); *Camillo R. DeArcangelis*, 42 ECAB 941 (1991); see also *Gayle Harris*, 52 ECAB 319, 321 (2001); *Maurissa Mack*, 50 ECAB 498 (1999).

<sup>6</sup> See *Gayle Harris*, *supra* note 5; *Martha A. McConnell*, 50 ECAB 129 (1998).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 25, 2005 is reversed.

Issued: May 16, 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