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

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| **M.S., Appellant** | ) | |
| **and** | ) | **Docket No. 06-797** |
| | ) | **Issued: January 31, 2007** |
| **U.S. POSTAL SERVICE, POST OFFICE, Coppell, TX, Employer** | ) | |

*Appearances:*
*Appellant, pro se*
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On February 8, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' March 14, 2005 merit decision concerning the termination of her compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

### ***ISSUE***

The issue is whether the Office properly terminated appellant's compensation benefits effective June 12, 2004 on the grounds that she refused an offer of suitable work.

### ***FACTUAL HISTORY***

On March 19, 1999 appellant, then a 36-year-old mail handler, filed a traumatic injury claim alleging that she sustained neck and shoulder injuries on March 11, 1999 due to lifting

trays of mail and pushing mail containers. The Office accepted that appellant sustained cervical and thoracic sprains and paid appropriate compensation for periods of disability.[1]

The findings of a January 9, 2003 magnetic resonance imaging scan revealed mild disc space narrowing and posterior spondylitic ridging at C5-6 with more focal right uncovertebral spurring but without significant stenosis, foraminal encroachment or focal disc protrusion. The findings also showed mild posterior spondylitic ridging at C4-5 and C6-7 without significant stenosis or foraminal encroachment.

In a report dated May 29, 2003, Dr. Clarence J. Brooks, an attending Board-certified family practitioner, listed the date of injury as March 11, 1999 and determined that appellant continued to have a cervical radiculopathy due to this injury. He recommended daily physical therapy with electric muscle stimulation and indicated that appellant was partially disabled from November 5, 2001 to May 14, 2003 and totally disabled beginning May 14, 2003 due to the March 11, 1999 employment injury.

The Office referred appellant to Dr. Robert Chouteau, a Board-certified orthopedic surgeon, for further evaluation of his condition. In a report dated October 14, 2003, Dr. Chouteau indicated that diagnostic testing showed spondylosis at C5-6 and C6-7. On examination appellant exhibited cervical tenderness on palpation with mild limitation of cervical motion. Dr. Chouteau indicated that appellant continued to have some cervical residuals of the March 11, 1999 employment injury but that he was capable of light-duty work for eight hours per day with some restrictions such as lifting no more than 15 pounds and pushing, pulling and lifting for no more than four hours per day.

The Office determined that there was a conflict in the medical opinion between Dr. Brooks and Dr. Chouteau regarding appellant's ability to work. In order to resolve the conflict, the Office referred appellant, pursuant to section 8123(a) of the Federal Employees' Compensation Act, to Dr. Thomas E. Rapp, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the matter.

In a report dated March 1, 2004, Dr. Rapp provided a description of appellant's factual and medical history, including the findings of diagnostic testing. He reported that on examination appellant exhibited full range of head and shoulder motion with only mild discomfort at the far extremes. Dr. Rapp noted that appellant did have some slight muscle spasm in the left trapezius and the left cervical paravertebral muscles which continued to be related to the March 11, 1999 employment injury. He further indicated that deep tendon reflex testing and the strength and sensory examinations yielded normal results. Dr. Rapp concluded that appellant could perform light-duty work for eight hours per day with restrictions including reaching (below shoulder level) for up to a half hour per day, operating a motor vehicle for up to an hour

[1] Appellant also filed an occupational disease claim on November 6, 2000 alleging that on October 30, 2000 she realized that she had sustained neck and shoulder injuries due to dispatching mail and lifting and moving heavy tubs of mail. It does not appear that any additional conditions have been accepted in connection with this claim. The file for this claim has been doubled with the file for the traumatic injury claim filed on March 19, 1999.

per day, pushing up to 20 pounds for up to a half hour per day, pulling up to 30 pounds for up to a half hour per day, and lifting up to 20 pounds for up to a half hour per day.[2]

On March 4, 2004 the employing establishment offered appellant a job as a modified mail handler. The position involved hand stamping and facing mail for eight hours per day, a task which required sitting, standing or walking for eight hours per day and engaging in simple grasping or fine manipulation for eight hours per day. The job also required other duties as long as they were within her physical requirements.

By letter dated May 12, 2004, the Office advised appellant of its determination that the modified mail handler position offered by the employing establishment was suitable. The Office provided appellant with 30 days to accept the position or provide good cause for refusing it. In a note received by the Office on May 13, 2004, appellant refused the offered position indicating that her attending physician had not released her to return to work. By letter dated May 21, 2004, the Office advised appellant that her reasons for refusing the offered position were not valid and provided her with 15 days to accept the position or face termination of her compensation.

By decision dated June 7, 2004, the Office terminated appellant's compensation effective June 12, 2004 on the grounds that she refused an offer of suitable work.

Appellant requested reconsideration of her claim and argued that the termination of her compensation was improper because she was totally disabled. She submitted numerous copies of therapy records and treatment notes from 2003 and 2004. In a report dated May 28, 2004, Dr. Miguel B. Banta, Jr., an attending Board-certified anesthesiologist, indicated that he agreed that appellant could return to light-duty work. In a report dated June 18, 2004, he described appellant's return to light-duty work at the employing establishment on June 16, 2004 and advised her to continue that work. The record also contains numerous brief notes of Dr. Brooks indicating that appellant was disabled for various periods beginning June 23, 2004.

By decision dated March 14, 2005, the Office denied modification of its June 7, 2004 decision.[3]

## ***LEGAL PRECEDENT***

Section 8106(c)(2) of the Act provides in pertinent part, "A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation."[4] However, to justify such termination, the Office must show that the work

[2] Dr. Rapp indicated that appellant could stand, sit or walk for eight hours per day.

[3] Appellant submitted additional evidence after the Office's March 14, 2005 decision, but the Board cannot consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

[4] 5 U.S.C. § 8106(c)(2).

offered was suitable.[5] An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.[6]

Section 8123(a) of the Act provides in pertinent part: "If there is 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."[7] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.[8] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[9]

## ***ANALYSIS***

The Office accepted that appellant sustained cervical and thoracic sprains and paid appropriate compensation for periods of disability. The Office terminated appellant's compensation effective June 12, 2004 on the grounds that she refused an offer of suitable work.

The Office presented medical evidence which shows that appellant was capable of performing the modified mail handler position offered by the employing establishment in March 2004 and determined to be suitable by the Office in May 2004. The position involved hand stamping and facing mail for eight hours per day, a task which required sitting, standing or walking for eight hours per day and engaging in simple grasping or fine manipulation for eight hours per day. The job also required other duties as long as they were within her physical requirements. The record does not reveal that the modified mail handler position was temporary or seasonal in nature.[10]

The Office properly based its determination that appellant could perform the modified mail handler position on the opinion of Dr. Rapp, a Board-certified orthopedic surgeon who served as an impartial medical specialist. The Office properly determined that there was a conflict in the medical opinion between Dr. Brooks, an attending Board-certified family

[5] *David P. Camacho*, 40 ECAB 267, 275 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341, 345 (1981).

[6] 20 C.F.R. § 10.124; *see Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

[7] 5 U.S.C. § 8123(a).

[8] *William C. Bush*, 40 ECAB 1064, 1975 (1989).

[9] *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

[10] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4b (July 1997).

practitioner, and Dr. Chouteau, a Board-certified orthopedic surgeon who served as an Office referral physician, regarding appellant's ability to work.[11] In order to resolve the conflict, the Office properly referred appellant, pursuant to section 8123(a) of the Act, to Dr. Rapp, for an impartial medical examination and an opinion on the matter.

In a well-rationalized March 1, 2004 report, Dr. Rapp concluded that appellant could perform light-duty work for eight hours per day with restrictions including reaching (below shoulder level) for up to a half hour per day, operating a motor vehicle for up to an hour per day, pushing up to 20 pounds for up to a half hour per day, pulling up to 30 pounds for up to a half hour per day, and lifting up to 20 pounds for up to a half hour per day.[12] He explained his opinion on work restrictions by noting that, although appellant did have some slight muscle spasm in the left trapezius and the left cervical paravertebral muscles which continued to be related to the March 11, 1999 employment injury, her other findings on examination were normal. The Board notes that the requirements of the modified mail handler position are within the work restrictions delineated by Dr. Rapp.[13]

The Board finds that the Office has established that the modified mail handler position offered by the employing establishment was suitable at the time it was offered. As noted above, once the Office has established that a particular position is suitable, an employee who refuses or neglects to work after suitable work has been offered to her has the burden of showing that such refusal to work was justified. The Board has carefully reviewed the evidence and argument submitted by appellant in support of her refusal of the modified mail handler position and notes that it is not sufficient to justify her refusal of the position.

Appellant argued that her refusal of the position was justified by the fact that her attending physician, Dr. Brooks, had not released her to return to work. After the termination, she submitted numerous brief notes of Dr. Brooks indicating that she was disabled for various periods beginning June 23, 2004.[14] However, as Dr. Brooks was on one side of the conflict which was resolved by Dr. Rapp, his later reports are essentially duplicative of his prior reports on disability which helped to create the conflict and would be insufficient to give rise to a new conflict or otherwise show that the termination was improper.[15]

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[11] In a report dated May 29, 2003, Dr. Brooks determined that appellant continued to have a cervical radiculopathy due to the March 11, 1999 employment injury and that she was totally disabled beginning May 14, 2003 due to this injury. In contrast, Dr. Chouteau determined in an October 14, 2003 report that appellant continued to have some cervical residuals of the March 11, 1999 injury but that she was capable of light-duty work for eight hours per day with some restrictions such as lifting no more than 15 pounds and pushing, pulling and lifting for no more than four hours per day.

[12] Dr. Rapp indicated that appellant could stand, sit or walk for eight hours per day.

[13] The job required "other duties" as long as they were within appellant's physical requirements, but this appears to mean that these other duties would be within the physical requirements delineated by Dr. Rapp.

[14] The Board notes that, after the Office established that the work offered was suitable, the burden shifted to appellant to show that such refusal of suitable work was reasonable or justified. *Bryan O. Crane*, 56 ECAB ___ (Docket No. 05-232, issued September 2, 2005).

[15] *See Richard O'Brien*, 53 ECAB 234 (2001).

After the termination of her compensation, appellant submitted numerous copies of treatment notes from 2003 and 2004, but none of this medical evidence showed that she could not perform the offered position around the time her compensation was terminated. In reports dated May 28 and June 18, 2004, Dr. Banta, an attending Board-certified anesthesiologist, indicated that he agreed that appellant could perform light-duty work.[16]

For these reasons, the Office properly terminated appellant's compensation effective June 12, 2004 on the grounds that she refused an offer of suitable work.[17]

## ***CONCLUSION***

The Board finds that the Office properly terminated appellant's compensation effective June 12, 2004 on the grounds that she refused an offer of suitable work.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' March 14, 2005 decision is affirmed.

Issued: January 31, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[16] It appears that appellant return to light-duty work at the employing establishment on June 16, 2004, but this later return to work would not change the fact that appellant refused suitable work in May 2004 and did not provide good cause for that refusal prior to the issuance of the Office's June 7, 2004 decision.

[17] The Board notes that the Office complied with its procedural requirements prior to terminating appellant's compensation, including providing appellant with an opportunity to accept the file clerk position after informing her that her reasons for initially refusing the position were not valid; *see generally Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).