

returned to a light-duty job and filed a traumatic injury claim for a back injury on July 21, 1999 when she was getting onto a bus. Appellant stated that the step was high and she had to pull herself up using the hand rail, causing back pain. The case records were administratively combined and, following development of the evidence, the Office accepted aggravation of spondylosis with myelopathy.

Appellant filed a recurrence of disability claim (Form CA-2a) commencing November 7, 2001. She indicated that the date of the original injury was January 8, 1997. Appellant began receiving compensation for wage loss as of November 7, 2001.

The attending physician, Dr. Gary Dennis, a neurosurgeon, opined that appellant was totally disabled for work. He diagnosed lumbosacral radiculopathy and chronic pain syndrome. The Office referred appellant for a second opinion examination by Dr. Robert Smith, an orthopedic surgeon. In a report dated July 3, 2002, Dr. Smith provided a history and results on examination. He diagnosed degenerative spondylosis and he opined that the employment-related aggravations had resolved. Dr. Smith indicated that appellant could work full time with restrictions as outlined in an OWCP-5c form. According to Dr. Smith, appellant was limited to 10 pounds lifting, 6 hours sitting and 4 hours of intermittent walking.

The Office determined a conflict in the medical evidence existed with respect to appellant's ability to work. Appellant was referred to Dr. Joseph Fermaglich, a Board-certified neurologist, for a referee examination. By report dated February 3, 2003, Dr. Fermaglich provided a history and reviewed medical evidence. He provided results on physical and neurologic examination, diagnosing degenerative disease of the lumbar spine. Dr. Fermaglich noted that appellant was taking pain medication and drove occasionally to the supermarket. He stated, "No objective findings are present to confirm disability because only her subjective complaints preclude her physical activities. My opinion is that objectively she should be able to stand, walk, sit, turn and twist." Dr. Fermaglich indicated that he had reviewed a job offer for a secretary position and "no evidence for discogenic disease is present and the attached job offer for secretary is an acceptable offer and should be satisfied in its entirety." A work capacity evaluation (Form OWCP-5c) was completed and indicated that appellant could work full time with limitations.

In a letter dated February 24, 2004, the employing establishment offered appellant a full-time position as a secretary (office automation). The Office, by letter dated April 14, 2004, advised appellant that the offered position was considered suitable. Appellant was informed of the provisions of 5 U.S.C. § 8106(c) and provided an opportunity to accept the position or provide reasons for refusing within 30 days. Her representative submitted a May 20, 2004 letter stating that appellant could not physically perform the position as she could not sit or walk for extended periods. The representative also stated that appellant was using medication that diminished her ability to concentrate and rendered her unable to drive.

By letter dated September 16, 2004, the Office found the reasons were insufficient and appellant had 15 days to accept the position or her entitlement to compensation would be terminated. Appellant submitted a September 26, 2004 letter stating that she was medically unable to return to work.

In a decision dated October 15, 2004, the Office terminated compensation for wage loss effective October 2, 2004 on the grounds that appellant had refused an offer of suitable work. Appellant requested a hearing, which was held on September 20, 2005. She continued to submit reports from Dr. Dennis, who opined that appellant remained totally disabled. In a July 12, 2005 report, submitted on September 22, 2005, Dr. Dennis stated that appellant was taking large doses of Neurontin, which contributed to an inability to concentrate because of the sedative effects. He continued to opine that appellant was totally disabled.

By decision dated November 22, 2005, the hearing representative affirmed the October 15, 2004 decision. The hearing representative found that Dr. Fermaglich represented the weight of the evidence regarding appellant's work capacity and the offered job was suitable.

LEGAL PRECEDENT

5 U.S.C. § 8106(c) 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." It is the Office's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.¹ To justify such a termination, the Office must show that the work offered was suitable.² 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.³

With respect to the procedural requirements of termination under section 8106(c), the Board has held that the Office must inform appellant of the consequences of refusal to accept suitable work and allow appellant an opportunity to provide reasons for refusing the offered position.⁴ If appellant presents reasons for refusing the offered position, the Office must inform the employee if it finds the reasons inadequate to justify the refusal of the offered position and afford appellant a final opportunity to accept the position.⁵

It is well established that when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.⁶

ANALYSIS

The initial question presented is whether the offered job was medically suitable. There was a conflict in the medical evidence between the attending physician, Dr. Dennis, and the

¹ *Henry P. Gilmore*, 46 ECAB 709 (1995).

² *John E. Lemker*, 45 ECAB 258 (1993).

³ *Catherine G. Hammond*, 41 ECAB 375, 385 (1990); 20 C.F.R. § 10.517(a).

⁴ *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

⁵ *Id.*

⁶ *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

second opinion physician, Dr. Smith, regarding appellant's ability to work.⁷ Dr. Dennis opined that appellant was totally disabled, while Dr. Smith found appellant could work full time with restrictions.

Dr. Fermaglich, the referee examiner, provided results on examination and indicated that he had reviewed the job offer for a secretary. He provided an unequivocal opinion that appellant was capable of performing the job offered. Dr. Fermaglich explained that there were no objective findings and no evidence of discogenic disease. The Board finds that he provided a reasoned medical opinion indicating that the offered position of secretary was medically suitable. As a referee examiner, his report is entitled to special weight and represents the weight of the evidence.

The Office notified appellant of its finding that the secretary job offered was suitable and offered appellant an opportunity to accept the position or provide reasons for refusing. Appellant argued that she was not physically able to perform the position. This is a medical issue that was resolved by Dr. Fermaglich. Appellant also asserted the medication she was taking rendered her unable to concentrate or drive a vehicle. Dr. Fermaglich noted that appellant was taking medications, including Neurontin, but he did indicate that appellant had been driving and he provided no indication that the medications would prevent appellant from performing the job duties.

In accord with established procedures, the Office notified appellant the offered reasons were insufficient and provided appellant an additional 15 days to accept the position prior to termination of compensation. The Board finds that the job offered was medical and vocationally suitable, and the Office followed its procedures prior to termination of compensation. Accordingly, the Board finds that the Office met its burden of proof to terminate compensation for wage loss effective October 2, 2004 pursuant to 5 U.S.C. § 8106(c).

CONCLUSION

The Office met its burden of proof to terminate compensation October 2, 2004 on the grounds that appellant had refused an offer of suitable work.

⁷ The Federal Employees' Compensation Act provides that, 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 the examination. 5 U.S.C. § 8123(a). The implementing regulation states that if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case. 20 C.F.R. § 10.321 (1999).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 22, 2005 is affirmed.

Issued: January 24, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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