

The Office accepted that on January 23, 1992 appellant, then a 33-year-old city carrier, sustained a lumbosacral sprain and displacement of lumbar intervertebral discs due to reaching out with her arms in an attempt to stop some mail from falling. She stopped work for intermittent periods and worked in modified positions at the employing establishment on a part-time basis. On April 10, 1996 Dr. Richard Maxwell, an attending Board-certified orthopedic

surgeon, performed foraminotomy, laminectomy and fusion surgery at L4-5 and L5-S1 with instrumentation. The surgery was authorized by the Office.

On December 26, 1997 appellant fell while working in a limited-duty job at the employing establishment.<sup>1</sup> The Office accepted that she sustained neck and lumbar sprains and a pain disorder related to psychological factors. On September 15, 1998 Dr. Terry McLean, an attending Board-certified orthopedic surgeon, performed an authorized fusion surgery with an iliac bone graft and instrumentation replacement.

Beginning in February 2002, appellant received treatment from Dr. Joseph D. Curletta, an attending Board-certified anesthesiologist, who noted that appellant reported pain in her low back, legs and neck and provided such diagnoses as lumbar radiculopathy, lumbar postlaminectomy syndrome, cervicalgia/cervical radiculitis and sleep issues.<sup>2</sup> She was working in a limited-duty position for the employing establishment for four hours a day, two or three days a week, at the time she stopped work in December 2004. On March 25, 2005 Dr. Curletta stated that appellant's condition, which included right lower extremity weakness, had worsened to the point that she was totally disabled. On June 5, 2005 he advised that her disability was supported by May 2005 diagnostic testing which showed radiculopathies in both arms and legs extending from her C5, C6, L4, L5 and S1 discs.

On June 28, 2005 a functional capacity evaluation found that appellant could perform sedentary work duties and on July 15, 2005 Dr. Curletta stated that, based on his clinical impressions of appellant and the results of the functional capacity evaluation, she could work 4 hours a day for three days a week and engage in 4 hours of intermittent sitting and 1 to 2 hours of intermittent standing and walking in up to 30-minute increments with 1 to 2 minutes of stretching before moving to other activities. Dr. Curletta indicated that appellant could lift up to 20 pounds but lifting should be kept between her mid thigh and upper abdominal levels. Appellant should have two breaks lasting 15 minutes each a day, which could be extended to 30 minutes if needed.

On September 20, 2005 the employing establishment offered appellant a job as a modified general clerk for four hours a day, three days a week with a gradual progressive return to eight hours a day, five days a week. The position involved greeting and assisting customers in the lobby, answering telephones, handling vacation mail holds, accepting postage due money and collection box keys for carriers returning from their routes, checking carrier cases, handling simple customer service inquiries *via* telephone calls or written correspondence and maintaining the filing system for the unit safety program. The position required appellant to engage in 4 hours of intermittent sitting and 1 to 2 hours of intermittent standing and walking in up to 30-minute increments with 1 to 2 minutes of stretching before moving to other activities. She would have to intermittently lift up to five pounds for two to three hours a day but lifting would be kept between her mid thigh and upper abdominal levels. Appellant should have two breaks and a

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<sup>1</sup> Appellant was working for six hours a day at the time.

<sup>2</sup> In 2005 Dr. Curletta began to diagnose anxiety disorder and psycho-social factors (related to finances and chronic pain). He noted that appellant took such medications as Methadone, Hydrocodone and Trazadone.

lunch. The position required simple grasping with the hands but did not require climbing, kneeling, bending, stooping or twisting.

In a September 23, 2005 letter, the Office advised appellant of its determination that the modified general clerk position offered by the employing establishment was suitable. It informed her that her compensation could be terminated if she did not accept the position or provide good cause for not doing so within 30 days of the date of the letter.

On September 30, 2005 the Office received a copy of the offer for the modified general clerk position on which appellant made a notation dated September 29, 2005 that she was neither refusing nor accepting the offer. On another copy of the job offer received by the Office on October 24, 2005, appellant indicated that she was accepting the modified general clerk position. She requested transportation to and from work because her physician prescribed narcotics which made her drowsy. Appellant submitted a September 28, 2005 report in which Dr. Curletta noted that she continued to complain of pain in her low back and legs down to her feet. Dr. Curletta diagnosed lumbar radiculopathy, lumbar postlaminectomy syndrome, cervical radiculitis, sleep issues (improved), anxiety disorder and psychosocial factors (related to finances and chronic pain). He indicated that appellant was taking several medications, including methadone, hydrocodone, xanax, lexapro, imitrex and trazadone.

In an October 24, 2005 letter, the Office advised appellant that she had not supported her refusal to accept the modified general clerk position offered by the employing establishment. It advised that her compensation would be terminated if she did not accept the position within 15 days of the date of the letter. The modified general clerk position remained open to appellant but she did not return to work. In an October 26, 2005 report, Dr. Curletta reported no notable change in her condition.

In a November 22, 2005 decision, the Office terminated appellant's compensation effective November 26, 2005 on the grounds that she refused an offer of suitable work.

Appellant requested reconsideration of her claim and submitted a November 29, 2005 report of Dr. Kevin S. Ladin, an attending Board-certified physiatrist, who detailed appellant's medical history and noted that she reported pain in her low back and legs down to her feet, worse on the right. Dr. Ladin stated that, given appellant's condition (including severe pain) and her use of opioid medications and sedative hypnotics, it was extremely unlikely she would be capable of functioning in any type of work environment. Any attempts at returning her to work would be met by either an unwillingness on her part to work or by a marked increase in her subjective pain complaints. Dr. Ladin stated, "I would therefore consider her in all probability to be permanently and totally disabled at this time from any type of reasonably gainful employment."

In a December 16, 2005 report, Dr. Curletta reported findings similar to those noted in his prior reports. He stated that, after reviewing Dr. Ladin's report and speaking with appellant, he seriously doubted that she would tolerate working four hours a day, three days a week with accommodations. Dr. Curletta stated that appellant would need transportation and that there would be times when she would be unable to work due to her severe pain, which would create problems for both her and the employer. He advised that there seemed to be no point in

continuing with return to work efforts, especially if there were any expectations of increasing appellant's hours and/or weaning her off pain medication. Dr. Curletta stated, "I therefore withdraw my previous recommendation of working 12 hours/week and my updated recommendation is total disability." In a January 20, 2006 report, he stated, "I agreed to four hours, three times a week of work as a post office greeter; this allows her to change positions." In several reports from mid 2006, Dr. Curletta indicated that appellant was "on total disability."

In a November 17, 2006 decision, the Office affirmed its November 22, 2005 decision. It indicated that the July 15, 2005 report of Dr. Curletta established that appellant could perform the modified general clerk position when it was offered and that his subsequent report changing his opinion regarding her ability to work was not well rationalized.<sup>3</sup>

In a November 15, 2007 letter, appellant's attorney contended that Dr. Curletta had provided an opinion that appellant would not ever be able to work more than 12 hours a week, but noted that the modified general clerk position required her to increase her hours to 40 hours a week. He indicated that appellant would not be able to tolerate the trip to work of more than an hour even if she used public transportation.

Appellant submitted numerous reports dated between late 2006 and late 2007 in which Dr. Curletta found that she was totally disabled. In an October 15, 2005 letter to an employing establishment official, Dr. Curletta stated that he had reviewed the modified general clerk position which was partially based on his recommendations. He stated:

"I think the current recommendations of working four hours three days a week are quite reasonable. However, I do not realistically think that the patient could progress from there to any significant degree and I see that you are hoping for a gradual progression to eight hours daily five days a week. This is quite unrealistic. I also see that there is a desire to gradually wean the patient off of all narcotic pain medication, and once again, I think this is an unreasonable expectation."<sup>4</sup>

In a February 19, 2008 decision, the Office affirmed its November 17, 2006 decision.

### **LEGAL PRECEDENT**

Section 8106(c)(2) of the Federal Employees' Compensation 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."<sup>5</sup> However, to justify such termination, the Office must show that the work offered was suitable.<sup>6</sup> An employee who refuses or neglects to work

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<sup>3</sup> The Office indicated that transportation to and from work should not be an issue because appellant lived in Phoenix and the offered position was also in Phoenix.

<sup>4</sup> It does not appear that this letter was included in the record prior to November 2007.

<sup>5</sup> 5 U.S.C. § 8106(c)(2).

<sup>6</sup> *David P. Camacho*, 40 ECAB 267, 275 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341, 345 (1981).

after suitable work has been offered to him has the burden of showing that such refusal to work was justified.<sup>7</sup>

The Board has held that finding a medical opinion not fortified by medical rationale is of little probative value.<sup>8</sup> The opinions of physicians whose training and knowledge in a specialized medical field have greater probative value concerning medical questions peculiar to that field than the opinions of other physicians.<sup>9</sup>

### ANALYSIS

The Office accepted that on January 23, 1992 appellant sustained a lumbosacral sprain and displacement of lumbar intervertebral discs. On April 10, 1996 she underwent foraminotomy, laminectomy and fusion surgery at L4-5 and L5-S1 with instrumentation. On December 26, 1997 appellant fell while working in a limited-duty job at the employing establishment and the Office accepted that she sustained neck and lumbar sprains and a pain disorder related to psychological factors. On September 15, 1998 she underwent fusion surgery with an iliac bone graft and instrumentation replacement. Appellant stopped working at the employing establishment in December 2004.

On September 20, 2005 the employing establishment offered appellant a job as a modified general clerk for four hours a day, three days a week with a gradual progressive return to eight hours a day, five days a week. The position involved greeting and assisting customers in the lobby, answering telephones and performing various clerical duties. It required appellant to engage in 4 hours of intermittent sitting and 1 to 2 hours of intermittent standing and walking in up to 30-minute increments with 1 to 2 minutes of stretching before moving to other activities. She would have to intermittently lift up to five pounds for two to three hours a day but lifting would be kept between her mid thigh and upper abdominal levels. Appellant neglected to work in the offered position and the Office terminated her compensation effective November 26, 2005 on the grounds that she refused an offer of suitable work.

In determining that the modified general clerk position was suitable, the Office relied on a July 15, 2005 report of Dr. Curletta, an attending Board-certified anesthesiologist, who stated that, based on his clinical impressions of appellant and the results of the functional capacity evaluation, she could work four hours a day for three days a week. Appellant could engage in 4 hours of intermittent sitting and 1 to 2 hours of intermittent standing and walking in up to 30-minute increments with 1 to 2 minutes of stretching before moving to other activities. Dr. Curletta indicated that appellant could lift up to 20 pounds but lifting should be kept between her mid thigh and upper abdominal levels. Appellant should have two breaks lasting 15 minutes each a day, which could be extended to 30 minutes if needed.

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<sup>7</sup> 20 C.F.R. § 10.517; see *Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

<sup>8</sup> See *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (finding that a medical opinion not fortified by medical rationale is of little probative value).

<sup>9</sup> *Lee R. Newberry*, 34 ECAB 1294, 1299 (1983).

The Board finds that Dr. Curletta's July 15, 2005 report is of limited probative value regarding appellant's ability to work at the time the modified general clerk was offered because he did not provide adequate medical rationale in support of his opinion. He did not clearly explain how appellant's medical condition allowed her to perform the work duties he recommended. Dr. Curletta had previously indicated that appellant was totally disabled for an extended period but he did not present findings on examination or diagnostic testing showing that her condition had improved to the point that she could perform such work duties. Moreover, despite the fact that appellant had been treated with multiple opioid medications on a regular basis, he did not explain how she would be able to work under these medications.

Such medical rationale is especially necessary in the present case in that Dr. Curletta's medical specialty is anesthesiology and appellant's medical problems are mostly orthopedic in nature.<sup>10</sup> In addition, his July 2005 opinion is equivocal in nature. In a December 2005 report, Dr. Curletta withdrew his previous recommendation that appellant perform various work duties. He posited that appellant's various medical conditions and her use of opioid medications caused her to be totally disabled.<sup>11</sup>

The Board further notes that the description of the modified general clerk position indicated that appellant would start work for four hours a day, three days a week and would undergo a gradual return to work for up to eight hours a day, five days a week. Dr. Curletta did not state that such a progression in work ability would be feasible. It should also be noted that appellant's claim had been accepted for a pain disorder related to psychological factors, but there is no opinion in the record regarding appellant's ability to work given her emotional condition.

For these reasons, the Office did not meet its burden of proof to show that the modified general clerk position offered by the employing establishment in September 2005 was suitable. Therefore, it improperly terminated appellant compensation effective November 26, 2005 on the grounds that she refused an offer of suitable work.<sup>12</sup>

### **CONCLUSION**

The Board finds that the Office improperly terminated appellant's compensation effective November 26, 2005 on the grounds that she refused an offer of suitable work.

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<sup>10</sup> See *supra* note 9.

<sup>11</sup> The record also contains a November 29, 2005 report in which Dr. Ladin, an attending Board-certified psychiatrist, stated that, given appellant's condition (including severe pain) and her use of opioid medications and sedative hypnotics, it was extremely unlikely she would be capable of functioning in any type of a work environment.

<sup>12</sup> 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 modified general 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).

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' February 19, 2008 decision is reversed.

Issued: December 29, 2009  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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