

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

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**R.S., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Flushing, NY, Employer**

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**Docket No. 08-1158  
Issued: January 29, 2009**

*Appearances:*  
*Paul Kalker, Esq., for the appellant*  
*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 March 11, 2008 appellant timely appealed a February 5, 2008 merit decision of the Office of Workers' Compensation Programs denying modification of the termination of his entitlement to wage-loss and schedule award benefits effective July 9, 2007. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

**ISSUE**

The issue is whether the Office properly terminated appellant's compensation benefits, effective July 9, 2007, pursuant to 5 U.S.C. § 8106(c)(2) on the grounds that he refused an offer of suitable work.

**FACTUAL HISTORY**

The case was previously before the Board. By decision dated September 12, 2002, the Board determined a conflict in the medical opinion evidence existed between appellant's treating physician, Dr. Emilio Oribe, a Board-certified neurologist, and an Office medical adviser

regarding the causal relationship of appellant's herniated cervical intervertebral discs.<sup>1</sup> Accordingly, the Board set aside the Office's December 10, 2001 decision and remanded the case for referral to an impartial medical specialist to resolve the conflict. The facts and the circumstances of the case as set forth in the Board's prior decision and order are incorporated herein. The facts relevant to the present appeal are set forth.

Following additional medical development, the Office accepted appellant's claim for herniated cervical discs at C3-4 and C4-5. It also accepted a recurrence of disability of August 28, 2005, in which appellant was found to be partially disabled for work for four hours a day in his modified job as a letter carrier. The Office paid appropriate medical and partial disability compensation benefits.

Dr. Oribe submitted treatment records dated February 2 and June 26, 2006, noting that appellant could only work four hours a day with restrictions. He recommended that appellant take a 20-minute break every 2 hours of driving to allow time to rest and perform exercises to prevent exacerbation of his neck and shoulder pains. Dr. Oribe advised that appellant continue delivering small packages of less than 40 pounds each, limit bending (*i.e.*, to less than 90 degrees), turning (*i.e.*, less than 45 degrees) and pushing/pulling (*i.e.*, less than 40 pounds) and avoid repetitive movements such as racking letters. Physical therapy notes were also provided.<sup>2</sup>

In a March 27, 2006 report, Dr. Hubert Pearlman, a Board-certified orthopedic surgeon and Office referral physician, opined that appellant had residuals from the cervical disc herniations arising from his job duties. Appellant had objective findings of mild muscle spasms and tenderness and complaints of pain with all ranges of motion. Dr. Pearlman indicated that appellant's computerized tomography (CT) scan revealed herniated discs with no evidence of preexisting degeneration. He advised that appellant's delay in recovery might be due to lack of benefit from physical therapy and recommended consultation with a pain management specialist. Dr. Pearlman opined that, while appellant's prognosis was undetermined, he was capable of returning to work full time as a mail carrier with 15- to 20-minute breaks every 4 hours from driving and lifting no greater than 40 pounds.

On September 13, 2006 the Office informed appellant that he was being sent for a referee examination with Dr. David Zitner, a Board-certified orthopedic surgeon, on October 16, 2006. It found that Dr. Pearlman's opinion conflicted with his physician's opinion regarding his diagnosis and whether he had continuing disability due to the accepted work injury. Dr. Zitner was provided with a statement of accepted facts, a list of questions and appellant's medical file.

In an October 19, 2006 report, Dr. Zitner reviewed the history of injury and appellant's medical record. He diagnosed degenerative disc disease of the cervical spine with a left-sided disc herniation at C3-4. Dr. Zitner noted that, while the disc herniation and foraminal stenosis

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<sup>1</sup> Docket No. 02-894 (issued September 12, 2002).

<sup>2</sup> The evidence reflects that appellant received treatment from Central Nassau Guidance and Counseling Services, Inc., in September and October 2005. In a February 16, 2006 letter, Martin Merget advised that appellant was fit to return to work as of February 6, 2006 and that he continued to be treated. No other reports are of record.

were on the left side, appellant's complaints of pain were on the right side. He stated that a CT scan revealed a central disc herniation at C4-5 but caused no impression on the spinal cord or nerves. Dr. Zitner advised that, while appellant had been treated by a neurologist, he was never found to have any neurologic deficit or had ever undergone an electromyogram. He opined that there was no medical evidence that appellant's degenerative disc disease or disc herniations were work related and that he had not seen any reports that patients with appellant's particular job or similar job had a higher incidence of this condition. Dr. Zitner advised appellant's symptoms were mild and he required no ongoing medical treatment or medication. He explained that the physical examination was essentially normal except for voluntary restrictions in appellant's motion and subjective changes in sensation. Dr. Zitner noted x-rays revealed mild degenerative changes and the CT scan from six years ago revealed degenerative changes with one level of disc herniation on the opposite side of his symptoms and a small central disc herniation at the C4-5 level. He opined that the degenerative changes were not work related that appellant's condition was not work related and that appellant had no significant disability. Dr. Zitner further opined that appellant was capable of performing his regular duty as a full-time letter carrier.

In a March 8, 2007 letter, the Office advised Dr. Zitner that it had accepted appellant's cervical disc herniations as employment related and requested him to address whether he had any work restrictions due to the accepted condition and whether further medical treatment was necessary. In a March 13, 2007 work capacity evaluation form, Dr. Zitner found that appellant was capable of performing his regular-duty job as a letter carrier full time with restrictions. Limitations included reaching, reaching above the shoulder, pushing, pulling, lifting and climbing. Dr. Zitner advised that appellant could reach and climb six hours a day, could push, pull, reach above the shoulder and lift for four hours a day and push/pull 30 pounds and lift 20 pounds. He further advised that appellant required 30-minute breaks every 4 hours. Dr. Zitner opined no further medical treatment was required. On March 27, 2007 the Office asked Dr. Zitner if appellant could perform his regular duties and if he required further medical treatment. In a report received April 5, 2007, Dr. Zitner advised that appellant could perform his regular duties within the restrictions that he set forth on March 13, 2007. He amended the March 13, 2007 report to note appellant's weight restrictions. Dr. Zitner advised that appellant required no further medical treatment due to his current condition.

Dr. Oribe submitted additional treatment records noting that appellant could only work four hours a day within his restrictions.

On May 10, 2007 the employing establishment offered appellant a full-time modified letter carrier position effective May 14, 2007. The position required appellant to lift no more than 20 pounds for four hours a day, reach above the shoulders for 4 hours a day and push/pull no more than 30 pounds for four hours a day. The job offer included a 30-minute break every 4 hours. Appellant declined the position on May 12, 2007 on the basis of his work-related disability.

In a May 16, 2007 letter, the Office advised appellant that the offered position was suitable work within his medical restrictions based on the reports of Dr. Zitner and the employing establishment confirmed that the position remained available. It afforded him 30 days to either accept the offer or provide good cause for refusal. The Office advised appellant that he would lose his entitlement to wage-loss compensation if he refused suitable work.

In response, appellant submitted copies of reports from Dr. Oribe, statements dated April 22 and May 19, 2007 and an April 26, 2007 letter from his attorney. He contended that he had residuals of his work injury and was unable to perform his regular duties full time. Appellant asserted he was productive in his current position of four hours a day with limitations and there was no need to call in sick or have a recurrence. He also submitted a statement from his wife, a nurse.

Appellant's attorney argued that the proposed termination of appellant's benefits was procedurally improper and not supported by the medical evidence. He contended that the Office's acceptance of a displacement of cervical discs was unduly narrow as an Office referral physician, Dr. Donald Goldman, found in January 2003 that the discs were fully herniated at C3-4 with left foraminal stenosis and at C4-5 as well. Dr. Goldman stated that appellant's condition had not resolved and that he was limited on his capacity for work. He noted that Dr. Zitner confirmed this diagnosis in October 2006, but failed to acknowledge that the condition was employment related. On June 13, 2007 counsel argued that, since Dr. Zitner's reports predated the May 10, 2007 job offer, the physician's opinion was of no value in evaluating appellant's current medical ability to perform the job duties offered. He contended that the reliance on Dr. Zitner's opinion was improper.

On June 14, 2007 the employing establishment verified that the offered position remained available.

In a June 18, 2007 letter, the Office informed appellant that his reasons for refusing the position were unacceptable. It provided him 15 days in which to accept the position or his entitlement to wage-loss and schedule award benefits would be. On July 6, 2007 the employing establishment verified that the offered position remained available.

By decision dated July 9, 2007, the Office terminated appellant's entitlement to wage-loss compensation on the grounds that he refused an offer of suitable work under 5 U.S.C. § 8106(c)(2). It found that the weight of the medical evidence rested with Dr. Zitner's reports.

On July 25, 2007 appellant filed a recurrence claim indicating that on July 17, 2007 his four-hour-a-day limited-duty assignment was withdrawn. On August 6, 2007 the Office advised him that, since his entitlement to wage-loss benefits was terminated as of July 9, 2007 for refusing suitable work, he could not file a recurrence for disability.

On November 28, 2007 counsel requested reconsideration. He contended that the opinions of Dr. Pearlman and Dr. Zitner were not valid as the Office did not acknowledge that appellant's herniated discs were employment related. Counsel argued that the Office engaged in doctor shopping as it was unreasonable for the Office to obtain additional medical evaluation as evidence of record supported "permanent and continued work-related disability."

In a November 1, 2007 report, Dr. Oribe reviewed appellant's history, noted diagnoses and set forth his reasons as to why he disagreed with Dr. Zitner's reports. He argued that Dr. Zitner's opinions and recommendations did not fully reflect the record and medical literature. Dr. Oribe opined that appellant was unable to work full time and that any attempt to return to work would likely cause a recurrence of disability.

By decision dated February 5, 2008, the Office denied modification of its July 9, 2007 decision.

### **LEGAL PRECEDENT -- ISSUE 1**

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation, including cases in which the Office terminates compensation under section 8106(c) for refusal to accept suitable work.<sup>3</sup> Section 8106(c)(2) of the Federal Employees' Compensation Act, which provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee is not entitled to compensation.<sup>4</sup> To justify termination of compensation, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.<sup>5</sup> Section 8106(c) will be narrowly construed as it serves as a penalty provision, which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.<sup>6</sup>

Office regulations provide that in determining what constitutes suitable work for a particular disabled employee, the Office should consider the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work and other relevant factors.<sup>7</sup> It is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.<sup>8</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.<sup>9</sup>

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.<sup>10</sup>

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<sup>3</sup> Y.A., 59 ECAB \_\_\_\_ (Docket No. 08-254, issued September 9, 2008).

<sup>4</sup> 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

<sup>5</sup> *Ronald M. Jones*, 52 ECAB 190 (2000); *Arthur C. Reck*, 47 ECAB 339, 341-42 (1995).

<sup>6</sup> *Joan F. Burke*, 54 ECAB 406 (2003); *see Robert Dickerson*, 46 ECAB 1002 (1995).

<sup>7</sup> 20 C.F.R. § 10.500(b).

<sup>8</sup> *Richard P. Cortes*, 56 ECAB 200 (2004).

<sup>9</sup> *Id.*; *Bryant F. Blackmon*, 56 ECAB 752 (2005).

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(4) (July 1997).

Section 10.516 of the Code of Federal Regulations states that the Office will advise the employee that the work offered is suitable and provide 30 days for the employee to accept the job or present any reasons to counter the Office's finding of suitability.<sup>11</sup> Thus, before terminating compensation, the Office must review the employee's proffered reasons for refusing or neglecting to work.<sup>12</sup> If the employee presents such reasons and the Office finds them unreasonable, the Office will offer the employee an additional 15 days to accept the job without penalty.<sup>13</sup>

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.<sup>14</sup> 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.<sup>15</sup>

### ANALYSIS

The Office accepted the conditions of herniated cervical disc at C3-4 and C4-5 and displacement of cervical intervertebral discs without myelopathy and paid appropriate compensation for periods of disability. It terminated appellant's entitlement to wage-loss compensation effective July 9, 2007 on the grounds that he refused an offer of suitable work. The Board finds that the Office met its burden of establishing that the work offered was suitable and that appellant failed to establish that his refusal to accept the job offer was justified.

The Office properly determined that that a conflicts in medical opinion arose regarding appellant's ability to work between Dr. Oribe, a treating physician, who opined that appellant could only work four hours within restrictions, and Dr. Pearlman, an Office referral physician, who opined that appellant could work full time within restrictions. The Office referred appellant to Dr. Zitner for an impartial medical examination.

In an October 19, 2006 report, Dr. Zitner opined that appellant had degenerative disc disease and herniation in the cervical spine. He opined that appellant's symptoms were relatively mild and required no treatment. Dr. Zitner determined that appellant had no significant disability and could work full time. He initially opined that appellant's degenerative disc disease and disc herniations were not work related and that appellant was capable of performing his regular duty as a full-time letter carrier. However, Dr. Zitner subsequently acknowledged that

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<sup>11</sup> 20 C.F.R. § 10.516.

<sup>12</sup> See *Sandra K. Cummings*, 54 ECAB 493 (2003); see also *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992) and 20 C.F.R. § 10.516, which codifies the procedures set forth in *Moore*.

<sup>13</sup> *Id.*

<sup>14</sup> 5 U.S.C. § 8123(a).

<sup>15</sup> *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

appellant's conditions were work related in a March 13, 2007 work capacity evaluation form and his report received on April 5, 2007. He advised that residuals of appellant's accepted cervical disc herniations did not preclude him from working modified duty for eight hours a day, in a limited capacity with specified restrictions on reaching, reaching above the shoulder, pushing, pulling, lifting and climbing for four hours a day. Dr. Zitner noted specific weight limits for different activities. He found no further medical treatment was required. Dr. Zitner reiterated his determination that appellant could work full time within restrictions in a supplemental report received on April 5, 2007.<sup>16</sup> He explained his opinion on work restrictions by noting that, although appellant had residuals of the accepted condition, he did not require any further medical treatment. The Board finds that the opinion of Dr. Zitner is entitled to the special weight of the medical evidence because it is sufficiently well rationalized and based on proper factual background. The Board notes that the work requirements of the modified letter carrier position are within the work restrictions specified by Dr. Zitner.<sup>17</sup>

The Board finds that the Office has established that the modified letter carrier position offered by the employing establishment was suitable at the time it was offered. As noted 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 him has the burden of showing that such refusal to work was justified.<sup>18</sup> The Board has carefully reviewed the medical evidence and appellant's arguments in support of his refusal of the modified letter carrier position and notes that they are not sufficient to support his refusal of the position.

Appellant contended that he could not work eight hours a day and submitted reports from Dr. Oribe and a statement from his wife, a nurse. The issue of whether he is able to perform an offered position is primarily a medical one and must be resolved by probative medical evidence.<sup>19</sup> The Board finds that the opinion of Dr. Oribe, who was on one side of the conflict in medical opinion, does not overcome the special weight of the medical evidence given to the opinion of Dr. Zitner.<sup>20</sup> Dr. Oribe did not provide any opinion with respect to appellant's ability to perform the offered position. Appellant also submitted a letter from his wife, a nurse. The Board has held that the reports of a nurse are not considered medical opinion because they are not physicians as defined by the Act.<sup>21</sup> Thus, this letter cannot be considered medical evidence.

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<sup>16</sup> It was proper for the Office to secure supplemental reports from Dr. Zitner as the Board has held that, when the Office obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, the Office must secure a supplemental report from the specialist to correct the defect. *V.G.*, 59 ECAB \_\_\_ (Docket No. 07-2179, issued July 14, 2008).

<sup>17</sup> The position required appellant to lift no more than 20 pounds for four hours a day, reach above the shoulders for four hours a day and push/pull no more than 30 pounds for four hours a day. The job offer additionally included 30-minute break every 4 hours.

<sup>18</sup> *Brian O. Crane*, 56 ECAB 713 (2005).

<sup>19</sup> *Kathy E. Murray*, 55 ECAB 288, 290 (2004).

<sup>20</sup> *See Jaja K. Asaramo*, 55 ECAB 200, 205 (2004) (the additional report of the physician who had been on one side of the conflict resolved by the impartial medical examiner was insufficient to overcome the weight accorded to the opinion of the impartial medical examiner or create a new conflict).

<sup>21</sup> 5 U.S.C. § 8101(2); *Lyle E. Dayberry*, 49 ECAB 369 (1998).

The weight of the medical opinion evidence establishes that appellant is capable of performing the duties of the offered position.

Appellant's other contentions are without merit. He argued that the termination of his wage-loss benefits was based on an erroneous view of the medical evidence. Appellant cites to medical evidence from 2003 from Dr. Goldman who concluded that appellant had herniated discs at C4-5 and at C3-4 with left foraminal stenosis and argued that his conditions have not resolved and he could not perform the listed work duties. However, the medical evidence, as noted, germane to appellant's current medical status at the time of the suitable work determination established that he was capable of performing the duties of the offered position. Dr. Zitner acknowledged appellant's accepted cornered disc conditions in his supplemental reports but reiterated that he could work full time within prescribed limitations that are consistent with the offered position. Appellant has not shown that his refusal to work was justified. The weight of the medical evidence continues to support that appellant's accepted conditions did not prevent him from performing the job he was offered on May 10, 2007.

The medical reports received subsequent to the evaluation by Dr. Zitner are insufficient to either overcome his opinion or create a new conflict in the medical evidence. On November 1, 2007 Dr. Oribe repeated his opinion that appellant was only able to work four hours a day with limitations and argued that Dr. Zitner's opinion did not fully reflect the record or medical literature. As noted, he was on one side of the conflict of medical opinion regarding appellant's ability to work and he offered no new rationale for his stated conditions.<sup>22</sup> Dr. Oribe's report is insufficient to outweigh the well-rationalized medical opinion assessment provided by Dr. Zitner or to create a new medical conflict.<sup>23</sup> Furthermore, he did not provide any opinion with respect to appellant's ability to perform the offered position. Nor did Dr. Oribe provide any findings or rationale to support that appellant would have been unable to perform the limited-duty position during the time period it was offered and available to him. Following the termination of his weight benefits, appellant has not established that the offered position was outside his physical recommendations. The Board finds that appellant did not meet his burden of proof to show that his refusal to accept suitable work was justified.

Appellant also contended that the Office was "doctor shopping" when it obtained additional medical evaluations since the medical evidence supported "permanent and continued work-related disability." The statute and implementing federal regulations provides the Office with the authority to develop the medical evidence as it deems necessary.<sup>24</sup> There is no evidence showing that the Office acted unreasonably in developing the medical evidence regarding appellant's capacity for work. Appellant's attorney further contends that the job duties in the

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<sup>22</sup> See *Dorothy Sidwell*, 41 ECAB 857 (1990) (The Board has held that a doctor on one side of conflict in medical opinion that is resolved cannot come back and create a new conflict without submitting new rationale or medical evidence to support his opinion).

<sup>23</sup> *Id.*

<sup>24</sup> See 5 U.S.C. § 8123(a); *Lynn C. Huber*, 54 ECAB 281 (2002) (section 8123(a) authorizes the Office to require an employee who claims compensation to undergo a physical examination as it deems necessary; the determination of the need for an examination, the choice of locale and the choice of medical examiners are matters within the province and discretion of the Office).

May 10, 2007 job offer should be the same as those appellant previously performed as he is older and his herniated discs were not surgically repaired. However, appellant's ability to work is a medical issue and the medical evidence establishes that he has the ability to perform the duties of the offered position.

The Board finds that appellant did not establish that his refusal to accept the position was justified.

**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 effective July 9, 2007 and that appellant did not, thereafter, establish that his refusal of suitable work was justified.

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' decisions dated February 5, 2008 and July 9, 2007 are affirmed.

Issued: January 29, 2009  
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