

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

V.C., Appellant)

and)

U.S. POSTAL SERVICE, CONNECTICUT)
PERFORMANCE CLUSTER, Hartford, CT,)
Employer)

Docket No. 11-275
Issued: September 21, 2011

Appearances:
Thomas S. Harkins, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 16, 2010 appellant filed a timely appeal from the June 30, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) terminating her compensation. Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly terminated appellant's compensation effective November 23, 2008 on the grounds that she refused an offer of suitable work.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On February 5, 2000 appellant, then a 49-year-old clerk, injured her neck due to throwing a mail parcel and OWCP accepted that she sustained a cervical strain.² She stopped work on February 5, 2000 and periodically returned to work in limited-duty positions. Appellant stopped work on April 11, 2007 and received compensation for total disability.³

On June 18, 2007 Dr. Vincent Carlesi, an attending Board-certified pain management physician, provided a discussion of appellant's medical history and diagnosed cervical facet syndrome, myofascial pain syndrome, chronic cervical radiculopathy and spasmodic torticollis. He indicated that her condition was related to the February 5, 2000 work injury, noted that repetitive activity exacerbated her pain and opined that she was totally disabled from work.

In a September 12, 2007 report, Dr. Carlesi discussed August 2007 MRI scan testing which showed small disc herniations at C3-4 and C4-5, without cord compression and spondylitic ridging and stenosis at C5-6 and C6-7. He opined that appellant might need surgery to decompress the stenosis at C5-6 which was the major cause of her problems. Dr. Carlesi recommended a neurosurgical evaluation and changed his diagnosis to cervical spondylosis with cervical radiculopathy and myelopathy, spasmodic torticollis and cervical spine stenosis.

On January 25, 2008 appellant was examined by Dr. Cory Rosenstein, a Board-certified neurosurgeon, who noted that she exhibited diffuse tenderness primarily on the right paracervical region with no palpable spasm. Dr. Rosenstein found that she was not a surgical candidate and that she would be best served by a pain management approach. In a June 18, 2008 form report, Dr. Carlesi indicated that appellant was totally disabled.

OWCP referred appellant for a second opinion evaluation with Dr. Edward Staub, a Board-certified orthopedic surgeon. On July 24, 2008 Dr. Staub discussed her work injury and medical history, including the findings of past physical examinations and diagnostic testing. He reported findings on physical examination, noting good cervical range of motion with perhaps a slight loss of movement, a component of symptom magnification, full range of motion of the extremities, intact motor and sensory examination and swollen fingers unrelated to the neck condition. Dr. Staub made no objective findings on examination and opined that there was no medical or orthopedic reason appellant could not work at her usual job. He noted that she was subject to a restriction of lifting no more than 20 pounds on an occasional basis. Dr. Staub advised that appellant had degenerative disc changes and disc bulges consistent with her age, but it would be difficult to attribute this condition to tossing mail parcels eight years prior.

Dr. Staub completed a work restriction form indicating that appellant could work for eight hours per day but was restricted from reaching for more than four hours, twisting or

² Magnetic resonance imaging (MRI) scan testing from June 23, 2000 showed that appellant had mild disc bulges at C4-5 and C5-6.

³ Appellant periodically returned to work in limited-duty positions and received compensation for partial disability.

squatting for more than four hours, operating a motor vehicle for more than six hours, engaging in repetitive movement with more than 20 pounds and engaging in pushing, pulling or lifting for more than four hours.

On September 19, 2008 the employing establishment offered appellant a job as a modified mail processing clerk. The position involved sorting and distributing mail and required her to lift up to 20 pounds and engage in reaching, bending, stooping, pushing, pulling or lifting for up to four hours per day. On September 25, 2008 appellant advised the employing establishment by telephone that she would not accept the position because she still had pain.

In a September 30, 2008 letter, OWCP advised appellant of its determination that the modified mail processing clerk position offered by the employer was suitable. It informed her that her compensation would 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, 2008 appellant indicated on the job offer form that she was refusing the modified mail processing clerk position. She disagreed with the second opinion physician and that she was being treated by her attending physician.

OWCP requested that Dr. Staub clarify his opinion and he responded in a supplemental report dated September 24, 2008. Dr. Staub stated that, while appellant sustained an injury on February 5, 2000, her on-going complaints and treatment were totally out of proportion to the type of injury she sustained, *i.e.*, a cervical sprain. He stated that several MRI scan reports showed mild disc bulging, but noted that it was impossible to tell if these were related to the work incident. Dr. Staub reiterated that appellant was capable of returning to work in her usual job. Appellant reported that she continued to have subjective residuals of the injury, but Dr. Staub opined that she should have recovered within a few months and should not be having residual complaints related to the February 5, 2000 injury.

In an October 30, 2008 letter, OWCP advised appellant that her reasons for not accepting the position offered by the employing establishment were unjustified noting that Dr. Carlesi had not provided rationale for his belief that she was totally disabled. It informed her that her compensation would be terminated if she did not accept the position within 15 days of the date of the letter.

In a November 5, 2008 report, Dr. Scott Simon, an attending Board-certified neurosurgeon, noted that on examination appellant's neck was very sensitive to even light touch but that it had normal range of motion. He reported a positive Spurling's along with aggravation of her neck and arm pain with movement. Dr. Simon indicated that the MRI scan testing showed cervical spondylosis and multilevels of cervical foraminal stenosis and provided a diagnosis of cervical radiculopathy and back pain.

On November 21, 2008 OWCP contacted the employing establishment and confirmed that the modified mail processing clerk position remained available to appellant.

In a November 21, 2008 decision, OWCP terminated appellant's compensation effective November 23, 2008 on the grounds that she refused an offer of suitable work. It found that the

well-rationalized opinion of Dr. Staub showed that she could perform the modified job offered by the employing establishment.

Appellant underwent MRI scan testing on December 5, 2008, which showed reversal of cervical lordosis, multilevel degenerative changes from C3-4 through C6-7 (worse at C5-6) and probable left-sided fat cyst. Electromyogram (EMG) and nerve conduction velocity (NCV) testing obtained on December 12, 2008 showed a normal electrodiagnostic study of both arms. There was no electrodiagnostic evidence of cervical radiculopathy, generalized peripheral neuropathy or nerve entrapment.

On December 12, 2008 Dr. Simon noted that the most recent MRI scan testing showed moderate spondylosis and stenosis and probable left-sided fat cyst. He opined that much of appellant's pain was due to persistent cervical musculoligamentous sprain/strain, but noted that the radicular component might stem from aggravation and progression of her cervical spondylosis. In the physical examination portion of the report, Dr. Simon stated, "[Appellant] is still obviously uncomfortable due to her neck pain. Her strength remains 5/5 although she has persistent give in her right upper extremity. [Appellant's] gait is smooth." He opined that appellant could return to work with restrictions, which included avoiding excessive repetitive upper extremity motion. Dr. Simon felt that she should also refrain from lifting anything greater than 15 pounds and avoid any excessive reaching, pushing, pulling or bending. On December 16, 2008 he indicated that appellant could work with no lifting of more than 15 pounds, no repetitive movements and no reaching.

The employing establishment advised that appellant returned to work on December 29, 2008 but refused to work in the modified job.⁴

Dr. Carlesi examined appellant on January 7, 2009 and noted that she did return to work at the employing establishment with restrictions on repetitive movements, reaching and lifting more than 15 pounds. He indicated that she reported experiencing a lot of pain and diagnosed cervical spondylosis, degenerative disc disease and myofascial pain syndrome. Appellant was treated by Dr. Simon on January 21, 2009 who noted persistent pain and recommended facet block injections by Dr. Carlesi. She underwent a series of injections by Dr. Carlesi who indicated that she was totally disabled from work starting on February 5, 2000 due to her chronic neck pain, headaches and decreased range of motion in the neck and shoulders. On March 1, 2009 Dr. Carlesi stated that appellant continued to have persistent pain due to discogenic disease and posited that she was not a surgical candidate.

Appellant requested a review of the written record by an OWCP's hearing representative. In an April 16, 2009 decision, the hearing representative affirmed OWCP's November 21, 2008 decision noting that the opinions of Dr. Carlesi and Dr. Simon were not well rationalized.

Dr. Carlesi continued to perform facet block injections and find that appellant was totally disabled. Upon physical examination on September 21, 2009, he indicated that the strength in

⁴ Appellant stopped work after two weeks and remained out of work until January 27, 2009 when she accepted the modified job offer and returned to work in this position. However, she stopped work on January 29, 2009 and filed a claim for wage loss.

her arms was 5/5 with some pain when lifting the arms. Sensory testing in the arms was normal and range of cervical motion was restricted. Dr. Carlesi diagnosed such conditions as spasmodic torticollis, myofascial pain syndrome and cervical facet syndrome.

In a February 18, 2010 decision, OWCP affirmed its April 16, 2009 decision noting that the additional reports of Dr. Carlesi did not show that appellant could not perform the offered position.

Appellant continued to argue that she was not physically capable of performing the modified mail processing clerk position. She asserted that the injury she sustained on February 5, 2000 was more serious than a cervical strain. OWCP received periodic treatment reports from Dr. Carlesi which contained examination findings similar to those found in earlier reports.

Appellant submitted an October 12, 2009 letter from Dr. Carlesi to her counsel. Dr. Carlesi provided an extensive discussion of his provision of medical treatment since June 2007 and stated:

“I would like to make a comment on the offered position that [appellant] had on November 23, 2008. I did not feel at that time and continued to feel the same that [she] is not capable of performing these duties of the offered position from November 23, 2008 and current. My explanation at this juncture is that [appellant] has a significant restriction of range of motion of the cervical spine as well as inability to use her upper extremities because of the significant pain that she is experiencing from her neck and shoulders. [Appellant’s] need for chronic opioid medications on a daily basis will also inhibit her from working of full-time position or even a part-time position because of the effects of the medications as well as her pain. Again, all of this is in my opinion due to the incident of February 5, 2000.

“As you can see by the progression of the changes on her MRI [scan] from 2000 to 2008, there was a definite progression of the disease of the cervical spine due to the past repetitive injuries that she sustained. It is well known and documented that spinal disease will progress after initial injury due to a degenerative process of immobility secondary to pain. It is my medical opinion with a reasonable degree of medical probability that the symptoms that she is experiencing as well as her current diagnoses are secondary to her February 5, 2000 injury. Because of the severity of her pain, [appellant] has not been able to perform any major activities of daily living and it is my opinion that her underlying degenerative processes is a sequelae of the initial injury. Because of the significance of her pain, she has not been able to be active in any major activity over the last [nine] years.”

On June 30, 2010 OWCP’s affirmed its February 18, 2010 decision noting that Dr. Carlesi’s opinion was not well rationalized.

LEGAL PRECEDENT

Section 8106(c)(2) of FECA 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.”⁵ However, to justify such termination, OWCP must show that the work offered was suitable.⁶ 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.⁷

ANALYSIS

On February 5, 2000 appellant injured her neck due to throwing a mail parcel and OWCP accepted that she sustained a cervical strain. On September 19, 2008 the employing establishment offered her a job as a modified mail processing clerk. Appellant refused the offered position and, in a November 21, 2008 decision, OWCP terminated her compensation effective November 23, 2008 on the grounds that she refused an offer of suitable work.⁸

The evidence of record shows that appellant is capable of performing the modified mail processing clerk position offered by the employing establishment and determined to be suitable by OWCP in September 2008. The position involved sorting and distributing mail and required appellant to lift up to 20 pounds and engage in reaching, bending, stooping, pushing, pulling or lifting for up to four hours per day. The record does not reveal that the modified mail processing clerk position was temporary or seasonal in nature.⁹

In determining that appellant is physically capable of performing the modified mail processing clerk position, OWCP properly relied in the opinion of Dr. Staub, a Board-certified orthopedic surgeon serving as an OWCP referral physician.

In a July 24, 2008 report, Dr. Staub discussed appellant’s medical history and reported his findings on physical examination noting good cervical range of motion with perhaps a slight loss of movement, a component of symptom-magnification, full range of motion of the extremities and intact motor and sensory examination. He indicated that he found no objective findings on examination and opined that there was no medical or orthopedic reason she could not work at her usual job. Dr. Staub completed a work restriction form indicating that appellant could work for eight hours per day but was restricted from reaching for more than four hours, twisting or squatting for more than four hours, operating a motor vehicle for more than six hours, engaging in repetitive movement with more than 20 pounds and engaging in pushing, pulling or

⁵ 5 U.S.C. § 8106(c)(2).

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

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

⁸ Appellant later accepted the offered position and returned to work on January 27, 2009. However, she did not perform the position for any notable period as she stopped work on January 29, 2009.

⁹ *See* Federal (FECA) Procedure Manual, Part 2 -- Claim, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4b (July 1997). Moreover, there is no indication in the record that appellant was not vocationally capable of performing the modified mail processing clerk position.

lifting for more than four hours. In a September 17, 2008 report, he further explained that his assessment of her level of disability was supported by the findings on diagnostic testing and physical examination.

The Board finds that the work restrictions provided by Dr. Staub would allow appellant to perform the duties of the modified mail processing clerk position offered by the employing establishment.

Before OWCP and on appeal to the Board, appellant argued that the opinions of her attending physicians showed that she could not perform the modified mail processing clerk position.

Beginning in June 2007, appellant received treatment for her cervical condition from Dr. Carlesi, a Board-certified pain management physician, who repeatedly asserted that she had been totally disabled since February 5, 2000 due to her cervical condition. The Board notes that these reports are of limited on the relevant issue of the present case in that Dr. Carlesi did not provide adequate medical rationale in support of his conclusions.¹⁰ Dr. Carlesi did not provide a rationalized explanation of why appellant would have such a high level of disability. Such medical rationale is especially necessary in the present case as she exhibited limited findings on diagnostic testing and physical examination. For example, repeat MRI scan testing only showed mild cervical disc bulging with no clear evidence of nerve impingement. EMG and NCV testing obtained on December 12, 2008 showed a normal electrodiagnostic study of both arms with no electrodiagnostic evidence of cervical radiculopathy, generalized peripheral neuropathy or nerve entrapment. While Dr. Carlesi observed some limitation of neck motion on physical examination, he generally noted that appellant had 5/5 strength and normal sensation in her arms. In light of these findings, his opinion that she was totally disabled and could not perform the modified mail processing clerk position is not supported by adequate medical rationale.¹¹

The Board notes that, therefore, OWCP has established that the modified mail processing clerk position offered by the employing establishment is suitable. As noted above, once OWCP 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 processing clerk position and notes that it is not sufficient to justify her refusal of the position.¹²

¹⁰ See *Leon Harris Ford*, 31 ECAB 514, 518 (1980) (finding that a medical report is of limited probative value on a given medical issue if it is not supported by medical rationale).

¹¹ In reports dated beginning in late 2008, Dr. Simon, an attending an attending Board-certified neurosurgeon, indicated that appellant should only lift up to 15 pounds and should avoid repetitive movements and reaching. However, he did not provide a rationalized opinion explaining the need for these work restrictions.

¹² After the termination of her compensation, appellant continued to argue that the reports of attending physicians, particularly those of Dr. Carlesi, showed that she could not perform the offered position. The Board notes that none of these reports contains a rationalized opinion showing that she could not perform the position. Appellant asserted that the injury she sustained on February 5, 2000 was more serious than a cervical strain, but she did not submit sufficient medical evidence to support this claim.

For these reasons, OWCP properly terminated appellant compensation effective November 23, 2008 on the grounds that she refused an offer of suitable work.¹³

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP properly terminated appellant's compensation effective November 23, 2008 on the grounds that she refused an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the June 30, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 21, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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

¹³ The Board notes that OWCP complied with its procedural requirements prior to terminating appellant's compensation, including providing her with an opportunity to accept the modified mail processing 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).