

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

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**STEPHEN A. PASQUALE, Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Boston, MA, Employer**

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**Docket No. 05-614  
Issued: February 8, 2006**

*Appearances:*  
*Stephen A. Pasquale, 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

**JURISDICTION**

On January 18, 2005 appellant filed a timely appeal of a January 4, 2005 merit decision in which the Office of Workers' Compensation Programs terminated appellant's compensation for refusing an offer of suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>1</sup>

**ISSUE**

The issue on appeal is whether the Office properly terminated appellant's compensation effective January 4, 2005 on the basis that he abandoned suitable work under 5 U.S.C. § 8106(c).

**FACTUAL HISTORY**

On February 9, 2001 appellant, then a 50-year-old letter carrier, filed a traumatic injury claim alleging that, after picking up a tub of mail, he experienced pain in his lower back which worsened over time. Appellant stopped work on February 9, 2001. The Office accepted the

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<sup>1</sup> The record also contains an August 25, 2004 decision, which denied his claim for a recurrence of disability and a November 9, 2004 decision, which denied his request for a hearing before an Office hearing representative. Appellant did not appeal these decisions and they are not presently before the Board.

claim for strains to the cervical, lumbar and lumbosacral spine. He returned to limited duty for four hours a day on February 27, 2001, stopped work from March 3 to 27, 2001 and returned to limited duty for four hours a day on March 29, 2001. Appellant filed a claim for a recurrence on March 2, 2001 which the Office accepted.

A May 18, 2001 magnetic resonance imaging (MRI) scan of the lumbar spine, read by Dr. Robert Richter, a Board-certified diagnostic radiologist, noted moderate degenerative central spinal stenosis at L3-4; borderline mild degenerative central spinal stenosis at L2-3 and small central posterior L4-5 and L5-S1 disc protrusions without definite neural compromise and degenerative changes at L3-4 and L5-S1.

On September 26, 2002 the employing establishment provided appellant with a modified letter carrier position from 8.00 a.m. to 2.00 p.m. The duties of this position included answering telephones, correcting loop mail, reviewing computerized forwarding systems mail, inputting data and other duties assigned by management within appellant's restrictions. The employing establishment noted appellant's restrictions of no prolonged walking or standing over an hour, no twisting, pushing, pulling, lifting, squatting, kneeling or climbing, no routing (casing) mail, no carrying mail and no driving.

In a December 19, 2002 report, Dr. Louis Maggio, Board-certified in internal medicine and a treating physician, advised that appellant was permanently disabled. He indicated that the medications that appellant was taking, which included Percocet, Flexiril and Vioxx, made it unsafe for him to work.

The record reflects that appellant returned to work for limited duty for four hours a day on February 3, 2003.

By letter dated February 6, 2003, the Office requested that Dr. Stanley Hom, a Board-certified orthopedic surgeon, provide a second opinion regarding whether appellant could work, despite being on medications such as Percocet, Flexiril and Vioxx.<sup>2</sup>

In a February 10, 2003 report, Dr. Hom indicated that the effects of Percocet included light-headedness, dizziness, sedation, nausea and vomiting. He opined that these medications might make it unsafe for him to perform the duties of a modified carrier and advised that appellant utilize nonsteroidal and anti-inflammatory agents and other nonnarcotic pain medications and antidepressants.

By letter dated February 25, 2003, the Office requested clarification from Dr. Hom regarding whether appellant could perform his modified duties without medication.

In a March 13, 2003 report, Dr. George B. McManama, Jr., a Board-certified orthopedic surgeon and fitness-for-duty physician, noted appellant's history of injury and treatment. He indicated that the injury of February 9, 2001 was "superimposed on significant underlying lumbar spondylosis." He advised that the employment injury combined with the underlying

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<sup>2</sup> The record reflects that Dr. Hom had previously examined appellant on May 29, 2002 on behalf of the Office for a second opinion examination regarding appellant's status and ability to work.

injury produced a disability greater than appellant's underlying injury alone. He advised that appellant's current subjective complaints were greater than any objective findings. Dr. McManama noted that there was no evidence of neurocompressive dysfunction and opined that appellant was clearly capable of continuing his work duties with the current restrictions of four hours per day. He opined that appellant's current restrictions were based on his underlying degenerative condition and not based upon the February 9, 2001 employment injury.

In a report dated March 20, 2003, Dr. Hom advised that appellant could perform the duties of a modified letter carrier for six hours a day, five days a week. He recommended that appellant begin with working four hours per day and progress to six hours per day as tolerated.

Dr. Maggio continued to submit reports and opined that appellant was permanently disabled and could not work.

On August 1, 2003 the Office determined that there was a conflict in medical opinion between Dr. Maggio and Dr. Hom, regarding appellant's work capacity. Appellant was referred to Dr. Arthur L. Boland, a Board-certified orthopedic surgeon, for an impartial medical examination.<sup>3</sup>

In a report dated August 28, 2003, Dr. Boland noted appellant's history of injury and treatment. He conducted a physical examination and determined that appellant walked with a very unusual, awkward gait, which did not fit into any one neuromuscular pattern and that there was an antalgic component to his gait, but it was difficult to interpret. Dr. Boland advised that appellant had significant restrictions of lateral bending, extension and flexion of his spine and a diffuse pain in the back. He indicated that a neurologic examination showed symmetrical 1+ reflexes and that appellant had pain in the back when he plantar flexed and dorsi-flexed his foot in the sitting position. Dr. Boland also noted that appellant experienced pain on resistance to all muscle testing. He diagnosed chronic low back pain with spinal stenosis, degenerative disc disease and possible chronic addiction to Percocet. Dr. Boland recommended further evaluation with an MRI scan. He found that appellant could work four hours a day at limited duty, despite appellant's claim that he could not sit for four to six hours at a time. Dr. Boland expressed concern regarding appellant's addiction to Percocet and advised that this should be evaluated. He filled in restrictions for four hours a day and advised that appellant needed to be off Percocet.

Dr. Maggio continued to opine that appellant was disabled. In a January 29, 2004 treatment note, Dr. Maggio advised that appellant had chronic back pain, lumbar radicular and hypertension. He continued to submit periodic treatment notes and opine that appellant could not safely work in any capacity. Dr. Maggio explained that, as a result of his injury, appellant required significant amounts of pain medications to maintain a level of comfort, without totally relieving his symptomatology.

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<sup>3</sup> By letter dated July 22, 2003, the Office advised appellant that it was paying appellant compensation for 40 hours of leave without pay from May 31 to June 30, 2003. However, the Office did not compensate appellant for the eight hours he claimed for the period beginning June 9, 2003 and ending June 13, 2003, because the file contained insufficient medical evidence to support more than four hours of compensation per work shift.

On March 23, 2004 appellant accepted an employing establishment offer of a modified job assignment with work hours of 9:30 a.m. to 1:30 p.m.

An MRI scan of the lumbar spine dated April 1, 2004, read by Dr. Mark A. Lipsky, a Board-certified diagnostic radiologist, revealed mild degenerative changes and disc bulges without significant neural compromise. An MRI scan of the cervical spine dated May 12, 2004, read by Dr. Patricia Donahue, a Board-certified diagnostic radiologist, noted that appellant had degenerative changes with effacement of the cerebrospinal fluid space at C4-5 and C5-6, without evidence of significant cord compromise.

On May 26, 2004 Dr. Maggio advised that appellant was totally disabled and unable to work. On June 16, 2004 appellant filed a recurrence of disability claim, for which he stopped work on April 30, 2004.

In a June 23, 2004 report, Dr. Anthony Jabre, a Board-certified neurosurgeon and a treating physician, reviewed the diagnostic reports of April 1 and May 12, 2004 and concluded that appellant's symptoms were rather diffuse. He noted that there was no clinical evidence of myelopathy and advised that appellant might have a mild right ulnar neuropathy at the elbow. Dr. Jabre advised that appellant would benefit from physical therapy and possibly a referral to a pain clinic.

In a July 21, 2004 report, Dr. Maggio advised that appellant had chronic pain involving his neck and lower back. He referred to prior MRI scan reports, which he advised were abnormal and opined that appellant continued to be disabled. In a separate report also dated July 21, 2004, Dr. Maggio advised that appellant was unable to work and that his work restrictions were permanent.

By letter dated July 22, 2004, the Office referred appellant to Dr. Richard Alemian, a Board-certified orthopedic surgeon, for a second opinion examination to determine whether appellant could continue to work four hours a day. In an August 16, 2004 report, Dr. Alemian diagnosed chronic low back pain secondary to spinal stenosis, spondylosis and central L4-5 disc herniation. He advised that appellant could work four hours a day, but noted that "one would have to see if he could tolerate this." Dr. Alemian indicated that appellant's restrictions were most likely permanent. He also advised that, regarding further treatment, he would recommend referral to a neurologist and a pain management facility.

In an August 17, 2004 attending physician's report, Dr. Maggio checked the box "yes" in response to whether appellant's condition was caused or aggravated by his employment activity and advised that appellant was unable to work due to anti-inflammatory pain medications and that his period of disability was ongoing.

In an August 30, 2004 report, Dr. Rizkalla Mouchati, a Board-certified neurologist, diagnosed chronic low back pain, chronic cervical pain and possible radiculopathy. He advised that appellant seemed to have chronic spinal pain following his work injury. He indicated that an MRI scan of the spine revealed arthritic changes but without a definite nerve compression and explained that his neurological examination showed extensive weakness and sensory loss which

“could not be explained by the MRI [scan] findings.” Dr. Mouchati recommended further studies to determine whether appellant had polyneuropathy or polyradiculopathy.

In a September 17, 2004 report, Dr. Maggio repeated his previous findings, stating that the MRI scan findings were a direct progression from appellant’s employment injuries of February 9, 2001. He indicated that appellant could not perform any meaningful physical activities, including sedentary work.

By letter dated September 30, 2004, the employing establishment advised appellant that the modified job was still available and complied with his medical restrictions.

On October 26, 2004 the Office advised appellant that he had started the position of a modified letter carrier on February 3, 2003 and abandoned it on April 26, 2004 with no apparent valid cause.<sup>4</sup> The Office confirmed with the employing establishment that the position remained available. The Office explained that the position of modified letter carrier at the employing establishment was suitable and in accordance with his medical conditions and that he had 30 days to accept the position. The Office also advised appellant that, if he failed to report to the offered position and failed to demonstrate that the failure was justified, his right to compensation would be terminated.

In an undated letter received November 30, 2004, appellant indicated that he was unable to do any type of work.

In a November 30, 2004 letter, the Office advised appellant that his reasons for abandoning the position were insufficient. The Office advised appellant that the weight of the medical evidence rested with the impartial medical examiner’s report of August 28, 2003. The Office afforded appellant 15 days in which to return to the position without penalty, noting that no further reasons for refusal would be considered. If appellant still refused the offered position, he would face termination of his wage-loss compensation benefits.

In a December 10, 2004 treatment note, Dr. Maggio advised that appellant was seen regarding his work-related disability and prescribed Percocet.

In a decision dated January 4, 2005, the Office terminated appellant’s monetary benefits finding that he had abandoned suitable employment. The Office advised appellant that he was offered a position as a modified letter carrier, but that he stopped working on April 26, 2004. The Office found that appellant was provided 30 days to return to the position or provide a valid reason for abandoning the offered position. However, the information provided by appellant was not sufficient to support his abandonment of the offered position.

### **LEGAL PRECEDENT**

The Federal Employees’ Compensation Act provides at section 8106(c)(2) that a partially disabled employee who refuses or neglects to work after suitable work is offered is not entitled to

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<sup>4</sup> The record reflects that appellant filed CA-7 forms for leave without pay from February 2, 2003 to October 15, 2004.

compensation.<sup>5</sup> Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits under section 8106 for refusing to accept or neglecting to perform suitable work.<sup>6</sup> The Board has recognized that section 8106(c) serves as a penalty provision as it may bar an employee's entitlement to future compensation and, for this reason, will be narrowly construed.<sup>7</sup> To establish that a claimant has abandoned suitable work, the Office must substantiate that the position offered was consistent with the employee's physical limitations and that the reasons offered for stopping work were unjustified.<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 of record.<sup>9</sup>

### ANALYSIS

The Board finds that the Office did not meet its burden of proof in terminating appellant's compensation effective January 4, 2005, on the grounds that he abandoned suitable work. Appellant's claim was accepted for strains to the cervical, lumbar and lumbosacral spine.

On March 23, 2004 appellant accepted an employing establishment offer of a modified job assignment with work hours of 9:30 a.m. to 1:30 p.m. He subsequently filed a recurrence of disability claim on June 16, 2004, commencing on April 26, 2004. Appellant stopped work on April 30, 2004. In a letter dated September 28, 2004, appellant explained that his pain became worse in April 2004 and he stopped work on April 30, 2004 due to pain. The Office terminated appellant's compensation, finding that appellant abandoned suitable work.

The Office procedure manual provides that in situations in which a claimant stops work after reemployment, further action is required depending on whether a wage-earning capacity determination has been made.<sup>10</sup> Where no wage-earning capacity decision has been issued, the claims examiner is to inquire as to the employee's reasons for stopping work and make a suitability determination.<sup>11</sup> If the reasons stated by the employee amount to an argument for a recurrence of disability, the claims examiner is to develop and evaluate the evidence upon receipt of a (Form CA-2a) under the standards of *Terry R. Hedman*.<sup>12</sup> When no claim for a recurrence

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<sup>5</sup> 5 U.S.C. § 8106(c)(2).

<sup>6</sup> See *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

<sup>7</sup> See *H. Adrian Osborne*, 48 ECAB 556 (1997).

<sup>8</sup> See *Wayne E. Boyd*, 49 ECAB 202 (1997).

<sup>9</sup> See *John E. Lemker*, 45 ECAB 258 (1993); *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9 (December 1995).

<sup>11</sup> *Id.* at subsection b.

<sup>12</sup> 38 ECAB 222 (1986).

of disability is filed and a retroactive wage-earning capacity determination is not appropriate, the claims examiner should consider the application of the penalty provision of section 8106(c)(2).<sup>13</sup>

The Office erred in this case by proceeding with an adjudication of the suitable work issue. Appellant filed a Form CA-2a, for a recurrence of disability and alleged a change in the nature of his injury-related condition. There is no evidence that the Office developed or evaluated the evidence regarding the recurrence claim as contemplated by its procedures. Consequently, the Office did not meet its burden of proof to terminate benefits under 5 U.S.C. § 8106(c).

The Board finds that the Office did not properly terminate appellant's wage-loss compensation benefits under section 8106(c)(2) and will reverse the January 4, 2005 decision.

### **CONCLUSION**

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation effective January 4, 2005.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the January 4, 2005 decision of the Office of Workers' Compensation Programs is reversed.

Issued: February 8, 2006  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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<sup>13</sup> Federal (FECA) Procedure Manual, *supra* note 10 at subsection b(2).