



## **FACTUAL HISTORY**

This case has previously been on appeal before the Board.<sup>1</sup> In an October 21, 2004 decision, the Board reversed a January 20, 2004 decision by an Office hearing representative who affirmed the termination of appellant's compensation effective April 8, 2003 on the grounds that he refused an offer of suitable work.<sup>2</sup> The Board found that there was an unresolved conflict in the medical opinion evidence between Dr. Henry W. Snead, an attending Board-certified internist, that opined appellant was permanently disabled from working and Dr. Douglas M. Cooper, a second opinion Board-certified orthopedic surgeon, who concluded that appellant was capable of working eight hours per day with restrictions. The facts and the history contained in the prior appeal are incorporated herein by reference.

The Office referred appellant to Dr. Michael Charles H. Longley, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence as to whether appellant was capable of working with restrictions. On May 6, 2005 Dr. Longley reviewed a history of injury and reported results on examination. He diagnosed lumbar spine degenerative disc disease, lumbar spine stenosis, degenerative scoliosis, lumbosacral spondylolysis, acquired spondylolisthesis, right leg pain, lumbago, low back pain and adult onset diabetes. Dr. Longley concluded that appellant was capable of working with restrictions. He noted that appellant would have problems with prolonged walking or standing "[g]iven his comorbidity of his left ankle fusion." Based upon appellant's "significant lumbar dis[c] degeneration and moderate lumbar spinal stenosis, Dr. Longley opined that he was able to perform light-duty work eight hours a day with restrictions, which included occasional twisting and bending and no lifting more than 20 pounds. With respect to his ability to drive, Dr. Longley noted:

"Given the fact that [appellant] is driving and appears to have normal mentation despite his present medical usage, I do not believe that his present medical usage should significantly impede his ability to return to gainful employment."

In an attached work capacity evaluation form (OWCP-5C), Dr. Longley indicated that appellant was capable of walking, bending/stooping and standing for up to two hours per day, pushing and pulling up to 50 pounds, lifting up to 20 pounds and was able to drive to and from work.

In letters dated June 23 and July 18, 2005, the Office requested clarification from Dr. Longley regarding appellant's ability to drive and whether the conditions he diagnosed were employment related.

On August 2, 2005 Dr. Longley responded that it was "difficult to directly relate [appellant's] present lumbar condition to a discrete work-related injury." He opined that it was

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<sup>1</sup> Docket No. 04-1857 (issued December 21, 2004).

<sup>2</sup> On June 19, 2000 appellant, a 55-year-old postmaster, filed an occupational disease claim alleging that his back injury was employment related. He indicated that he had prior employment-related back injuries in 1978 and 1983. The Office accepted appellant's June 19, 2000 claim for bilateral aggravation of spinal stenosis at L3-4, L4-5 and subsequently placed him on the periodic rolls for temporary total disability. The Office of Personnel Management approved appellant's disability retirement application on April 24, 2001. On February 10, 2002 appellant filed an election form opting to receive benefits under the Act effective May 20, 2001.

more probable that appellant's current back condition was more likely "secondary to progressive disc degeneration" associated with his prior spinal problems. As to the work restrictions, Dr. Longley stated that appellant's "ankle fusion significantly restricts his ability to stand and walk" and he "continues to take significant narcotic medications." He indicated that appellant's ability to drive safely could potentially be impaired by the use of the narcotic medications. Dr. Longley related that, "while his mentation may be unaffected it is undoubtable that [appellant's] reaction time would be significantly affected." He stated that he could not recommend that appellant be allowed to return to regular and consistent driving activities as part of his occupation. On September 28, 2005 appellant elected to receive benefits effective April 9, 2003 under Federal Employees' Compensation Act.

In a report dated October 10, 2005, Dr. Snead referred appellant to the Mayo Clinic for evaluation due to his pain which has "become progressively worse and debilitating.

On January 5, 2006 the Office requested clarification from Dr. Longley on the issue of whether appellant would be able to drive 25.32 miles to work one way.

In a report dated February 24, 2006, Dr. Snead indicated that appellant was using Duragesic and that he had been advised not to drive while using this medication.

On April 18, 2006 the employing establishment offered appellant the position of modified part-time flexible (PTF) clerk. The hours were 8:00 p.m. to 4:30 a.m. with Sunday and Wednesday as nonscheduled workdays. The position was located at 300 Sycamore, Waterloo, IA. Physical requirements of the position included intermittent sitting up to 8 hours per day, intermittent walking, standing and bending up to 2 hours per day, pushing and pulling up to 50 pounds, no squatting, climbing, kneeling or twisting and no lifting more than 20 pounds.

In a letter dated April 28, 2006, appellant declined the offered position. He noted that the date of injury was incorrect. Appellant contended that it would be wrong for him to accept the position of modified clerk as he had been a postmaster when he left the employing establishment. On May 3, 2006 the Office requested clarification from Dr. Longley on the issue of whether appellant would be able to drive 50.64 miles going to and from work. On April 25 and May 5, 2006 Dr. Longley checked "yes" that appellant was able to drive the 50.64 miles to and from work.

In a May 25, 2006 letter, the Office advised appellant that the offered modified mailing requirements clerk position was suitable work within his medical restrictions. The Office afforded appellant 30 days in which to either accept the position or provide good cause for refusal. The Office also advised appellant that, under section 8106(c) of the Act, he would lose his entitlement to monetary compensation if he refused suitable work.

In a June 13, 2006 letter, appellant reiterated that it would be unjust for the employing establishment to force him to accept the position and work nights. He also stated that he was having back surgery in September/October of that year.

In a September 14, 2006 letter, the Office advised appellant that the offered position was found to be suitable work and remained available. It afforded appellant 15 days to accept the position or incur the termination of his compensation benefits. The Office stated that no further

reasons for refusal would be considered. In response, appellant noted that he was unable to work nights due to his diabetes and having to take his pain patches at night if he was working.

By decision dated October 23, 2006, the Office terminated appellant's monetary compensation benefits effective October 28, 2006 under section 8106(c) of the Act, on the grounds that he refused an offer of suitable work. The Office found that the weight of the medical evidence rested with Dr. Longley, who opined that appellant could return to limited-duty work and was capable of driving to and from work. The Office further found that the offered modified PTF clerk position was in keeping with the restrictions of Dr. Longley.

On January 3, 2007 appellant requested reconsideration. He noted that he was not supposed to drive while wearing his pain patches which he used at night.

On January 12, 2007 the Office denied appellant's request for reconsideration without reviewing the merits of the case.

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

The 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 compensation.<sup>3</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>4</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>5</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>6</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>7</sup>

Section 10.517(a) of the Act's implementing regulation provides that an employee who refuses or neglects to work after suitable work has been offered or secured by the employee, has

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<sup>3</sup> 5 U.S.C. § 8106(c)(2).

<sup>4</sup> See *Bryant F. Blackmon*, 56 ECAB \_\_\_\_ (Docket No. 04-564, issued September 23, 2005); *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

<sup>5</sup> See *Richard P. Cortes*, 56 ECAB \_\_\_\_ (Docket No. 04-1561, issued December 21, 2004); *H. Adrian Osborne*, 48 ECAB 556 (1997).

<sup>6</sup> See *Wayne E. Boyd*, 49 ECAB 202 (1997).

<sup>7</sup> See *John E. Lemker*, 45 ECAB 258 (1993); *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

the burden of showing that such refusal or failure to work was reasonable or justified.<sup>8</sup> Pursuant to section 10.516, the employee shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.<sup>9</sup>

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.<sup>10</sup>

### **ANALYSIS -- ISSUE 1**

The initial question presented is whether the offered job was medically suitable. In the prior appeal, the Board found a conflict in the medical evidence between Dr. Snead, the attending physician, and the second opinion physician, Dr. Cooper, regarding appellant's ability to work. Dr. Snead opined that appellant was totally disabled, while Dr. Cooper found that he could work full time within specified restrictions. The 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.<sup>11</sup> The Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.<sup>12</sup>

Dr. Longley, the impartial medical specialist, diagnosed lumbar spine degenerative disc disease, lumbar spine stenosis, degenerative scoliosis, lumbosacral spondylolysis, acquired spondylolisthesis, right leg pain, lumbago, low back pain and adult onset diabetes. He provided an unequivocal opinion that appellant was capable of working eight hours in a light-duty position and capable of driving to and from work. Dr. Longley attributed appellant's condition to progressive disc degeneration related to prior spinal problems. He indicated that appellant should not lift more than 20 pounds, no more than 2 hours per day of standing, bending/stooping and walking, pushing and pulling up to 50 pounds and was within 25.32 miles of his home. The Board finds that he provided a reasoned medical opinion that is entitled to the special weight accorded to a referee examiner.

The offered position did not require more than 20 pounds lifting. The restrictions for the position included no lifting more than 20 pounds, 2 hours per day of standing, bending/stooping, walking and pushing and pulling up to 50 pounds. Also, the position was located within 25.32 of appellant's home. The offered position conforms to the restrictions noted by Dr. Longley. The Board finds that, based on the weight of the medical evidence, the offered position of modified mail processing clerk was medically suitable.

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<sup>8</sup> 20 C.F.R. § 10.517(a); *Richard P. Cortes*, 56 ECAB \_\_\_\_ (Docket No. 04-1561, issued December 21, 2004); *Ronald M. Jones*, 52 ECAB 190 (2000).

<sup>9</sup> 20 C.F.R. § 10.516; *Mary E. Woodard*, 57 ECAB \_\_\_\_ (Docket No. 05-1023, issued November 14, 2005).

<sup>10</sup> *R.C.*, 58 ECAB \_\_\_\_ (Docket No. 06-1676, issued December 26, 2006).

<sup>11</sup> 5 U.S.C. § 8123(a). *See S.G.*, 58 ECAB \_\_\_\_ (Docket No. 07-30, issued February 26, 2007).

<sup>12</sup> 20 C.F.R. § 10.321. *See R.C.*, 58 ECAB \_\_\_\_ (Docket No. 06-1676, issued December 26, 2006).

The Office notified appellant of its finding that the modified secretary job offer was suitable and of the consequences for not accepting a suitable offer. Appellant contended that the position was not suitable as he had been a postmaster and it would be unjust to force him to accept the position. The Office found that appellant's reasons for refusing the position were not in accord with established procedures, the Office provided appellant an additional 15 days to accept the position prior to termination of compensation. Appellant alleged that the position was not suitable because his medication made him unable to drive to work and his diabetes precluded him from working at night. The Board notes that the duties of the offered position were within his restrictions provided by Dr. Longley. Appellant did not submit medical evidence to establish that working nights or duties of the position were outside his physical restrictions. The employing establishment complied with the restrictions noted by Dr. Longley by offering the job with restrictions on lifting, standing and the driving distance to and from work. The Office obtained an additional opinion from Dr. Longley that appellant was capable of driving to work. As the job complied with his physical restrictions, appellant failed to submit medical evidence to establish that he was physically unable to perform the duties of the offered position or was impaired from performing the job due to his medication or diabetes. The record is devoid of any medical evidence supporting appellant's contention that the medication he takes would prevent him from performing the duties of the offered position or precluded him from driving to work or working nights. The record is also devoid of any medical evidence supporting his allegation that his diabetes precludes him from working a night shift. The Office properly terminated appellant's wage-loss compensation effective October 28, 2005 on the grounds that he refused an offer of suitable work.<sup>13</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

The Act<sup>14</sup> provides that the Office may review an award for or against payment of compensation at any time on its own motion or upon application.<sup>15</sup> The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.<sup>16</sup>

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.<sup>17</sup>

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<sup>13</sup> *Mary E. Woodard*, 57 ECAB \_\_\_\_ (Docket No. 05-1023, issued November 14, 2005); *Joyce M. Doll*, 53 ECAB 790 (2002).

<sup>14</sup> 5 U.S.C. § 8101 *et seq.*

<sup>15</sup> 5 U.S.C. § 8128(a). *See Tina M. Parrelli-Ball*, 57 ECAB \_\_\_\_ (Docket No. 06-121, issued June 6, 2006).

<sup>16</sup> 20 C.F.R. § 10.605.

<sup>17</sup> 20 C.F.R. § 10.606. *See Susan A. Filkins*, 57 ECAB \_\_\_\_ (Docket No. 06-868, issued June 16, 2006).

An application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.<sup>18</sup> A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.<sup>19</sup>

### **ANALYSIS -- ISSUE 2**

Appellant disagreed with the finding that he refused an offer of suitable work and the termination of his benefits. He requested reconsideration on January 3, 2007. However, appellant did not make any specific argument in support of his request for reconsideration. He did not submit any relevant and pertinent new evidence in support of his request. Appellant's reconsideration request failed to show that the Office erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by the Office.

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied his January 3, 2007 request for reconsideration

### **CONCLUSION**

The Board finds that the Office met its burden of proof to terminate appellant's compensation effective October 28, 2006. The Board further finds that the Office properly denied his request for reconsideration pursuant to 5 U.S.C. § 8128(a).

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<sup>18</sup> 20 C.F.R. § 10.607(a). *See Joseph R. Santos*, 57 ECAB \_\_\_\_ (Docket No. 06-452, issued May 3, 2006).

<sup>19</sup> 20 C.F.R. §10.608(b). *See Candace A. Karkoff*, 56 ECAB \_\_\_\_ (Docket No. 05-677, issued July 13, 2005)

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated January 12, 2007 and October 23, 2006 are affirmed.

Issued: July 13, 2007  
Washington, DC

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

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

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