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

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| **L.J., Appellant** | ) | |
| **and** | ) | **Docket No. 08-1283** |
| | ) | **Issued: December 3, 2008** |
| **U.S. POSTAL SERVICE, POST OFFICE, Staten Island, NY, Employer** | ) | |

*Appearances:*
*Appellant, pro se*
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

### *JURISDICTION*

On March 31, 2008 appellant filed a timely appeal from the June 8 and December 28, 2007 merit decisions of the Office of Workers' Compensation Programs, which terminated her compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

### *ISSUE*

The issue is whether the Office properly terminated appellant's compensation for refusing an offer of suitable work.

### *FACTUAL HISTORY*

On November 25, 2005 appellant, then a 44-year-old mail processing clerk sustained an injury in the performance of duty while lifting mail. The Office accepted her claim for cervical radiculitis and paid compensation for temporary total disability on the periodic rolls.

A conflict in medical opinion arose over the extent of appellant's disability for work. Dr. Raul P. Sala, appellant's physiatrist, diagnosed cervical radiculopathy and right shoulder

strain and reported that appellant was totally disabled. Dr. Gregory Montalbano, appellant's orthopedic surgeon, diagnosed cervical radiculopathy and right rotator cuff disorder. He also found total disability. Dr. Stanley Ross, the Office referral orthopedic surgeon, disagreed. He diagnosed resolving cervical radiculopathy and found that appellant could return to work eight hours a day with restrictions.

To resolve the conflict, the Office referred appellant, together with her case record and a statement of accepted facts, to Dr. Stanley Soren, a Board-certified orthopedic surgeon. On October 23, 2006 Dr. Soren related appellant's history of injury and chief complaint. He reviewed her medical record, including the reports of Drs. Sala, Montalbano and Ross. Dr. Soren described his findings on physical examination and diagnosed right cervical radiculopathy. He explained that the November 25, 2005 employment injury had aggravated appellant's preexisting cervical degenerative disc disease. Dr. Soren explained that it was too soon to tell whether the aggravation was permanent. He advised that appellant could work eight hours a day with restrictions: no lifting over 25 pounds and no excessive reaching or stretching or working with her arms overhead. Dr. Soren also recommended two 15-minute breaks per day.

On February 14, 2007 the employer offered appellant a modified assignment based on the limitations Dr. Soren outlined. Because of these limitations, the employer was able to provide only six hours of work for appellant. On March 27, 2007 the Office notified appellant that the offered position was suitable and currently available. It gave appellant 30 days to accept the offer or provide an explanation for refusing it. The Office notified her of the statutory penalty for refusing an offer of suitable work.

On April 30, 2007 appellant checked both "I accept" and "I reject" on the offer of modified assignment: "I am only able to work 4 hours as per doctor a day with straight back chair." She submitted an April 26, 2007 report from Dr. Sala, who informed the Office that diagnostic studies showed bilateral cervical radiculopathy. Dr. Sala advised that appellant was temporarily partially disabled for work: "It is my professional opinion that the injuries are causally related to the work accident on November 26, 2005. At this time [appellant] is disabled and any work should be four hours a day with limitations due to persistent neck and shoulder pain."

On May 17, 2007 the Office notified appellant that her reason for refusing the offer was unacceptable. It advised that she had 15 days to accept the offer.

In a decision dated June 8, 2007, the Office terminated appellant's compensation effective June 10, 2007 for refusing suitable work.

Appellant requested an oral hearing before an Office hearing representative. She claimed that Dr. Soren did not examine her on October 23, 2006 and that Dr. Sala knew more about her condition than anyone else and knew what was best for her. Dr. Sala continued to report that appellant was able to work four hours a day with restrictions. At a hearing on November 14, 2007, appellant appeared and testified on her own behalf.

In a decision dated December 28, 2007, the Office hearing representative affirmed the termination of appellant's compensation. The hearing representative found that Dr. Soren's

opinion represented the weight of the medical evidence and established that appellant could work eight hours a day. The hearing representative found that the offered position, which required appellant to work only six hours a day, was suitable and that appellant did not provide a valid reason for refusing it.[1]

## ***LEGAL PRECEDENT***

Section 8106(c)(2) of the Federal Employees' Compensation Act states that a partially disabled employee who refuses to seek suitable work, or refuses or neglects to work after suitable work is offered to, procured by, or secured for her is not entitled to compensation.[2] The Office has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects suitable work when it is offered. Before compensation can be terminated, however, it has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.[3] To justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused or neglected by appellant was suitable.[4]

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.[5] When 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.[6]

## ***ANALYSIS***

A conflict in medical opinion arose between appellant's physicians, who reported total disability for work, and an Office referral physician, who found that she could return to work eight hours a day with restrictions. The Office properly referred appellant to an impartial medical specialist to resolve the matter. It provided Dr. Soren, a Board-certified orthopedic surgeon, with the entire case record and a statement of accepted facts so he could base his opinion on a proper factual and medical background. Dr. Soren reviewed the record, detailed his findings on physical examination and concluded that appellant could work eight hours a day with

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[1] Appellant argued that she did not receive the Office's May 17, 2007 notice giving her 15 days to accept the offer, but the hearing representative found that the Office properly mailed the notice to her address of record.

[2] 5 U.S.C. § 8106(c) (2).

[3] *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

[4] *Glen L. Sinclair*, 36 ECAB 664 (1985).

[5] 5 U.S.C. § 8123(a).

[6] *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

certain restrictions. The Board finds that Dr. Soren's opinion is based on a proper history and is sufficiently rationalized that it must be accorded special weight in establishing the extent of appellant's disability for work.

The weight of the medical evidence, as represented by the opinion of the impartial medical specialist, established that appellant could work up to eight hours a day so long as she did not lift over 25 pounds and avoided excessive reaching or stretching or working with her arms overhead. The employer offered her a modified assignment tailored to those restrictions. Dr. Soren also recommended that appellant have two 15-minute breaks during the day and the employer accommodated that as well. The Board finds that the Office offered appellant a modified assignment that was suitable to her medically established work restrictions.

Appellant refused this offer contending that she could work only four hours a day, based on the opinion of her physiatrist, Dr. Sala, who did not directly address the restrictions noted in Dr. Soren's report. Dr. Sala did not explain why appellant could work only four hours and not the six hours required by the modified assignment. For this reason, his opinion is of diminished probative value and is insufficient to outweigh or to create a conflict with the opinion of the impartial medical specialist.[7] As the opinion of the impartial medical specialist to represents the weight of the medical evidence, the Board finds that appellant's reason for refusing the modified assignment was not acceptable.

The Office notified appellant that the modified assignment was suitable and it notified her of the consequences she would face if she refused. By statute, a partially disabled employee who refuses to work after suitable work is offered to her is not entitled to compensation. The Board therefore finds that the Office has met its burden to justify the termination of appellant's compensation.[8]

## ***CONCLUSION***

The Board finds that the Office properly terminated appellant's compensation for refusing an offer of suitable work.

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[7] Appellant argued on appeal that she can work four hours "but who is going to pay me for the other four hours." The Office would have compensated her for the two hours her employment injury prevented her from working each day in the modified assignment, as determined by the weight of the medical evidence.

[8] Moreover, Dr. Sala was on one side of the conflict of medical opinion resolve by the report of the impartial specialist. *See Daniel F. O'Donnell,* 54 ECAB 456 (2003).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the December 28 and June 8, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 3, 2008
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