



## **FACTUAL HISTORY**

On January 27, 2000 appellant, then a 58-year-old painter, injured his back and knees when he slipped and fell on ice in a parking lot at work. The Office accepted that he sustained bilateral knee strains and a back contusion. It authorized left total knee replacement surgery performed on May 9, 2001. On May 2, 2002 Dr. Michael J. Barnum, a Board-certified orthopedic surgeon, performed a laminectomy at C3-7. The Office accepted cervical spondylosis with myelopathy. On December 26, 2002 appellant was granted a schedule award for a 37 percent loss of use of the left leg. He worked intermittently until March 24, 2003 when he sustained a recurrence of disability. Appellant returned to work on October 6, 2003 in a modified position casing mail. He stopped on March 20, 2004 and has not returned. On April 22, 2004 Dr. Barnum performed an L5 laminectomy, partial S1 laminectomy and repair of an incidental dural tear. The Office accepted an L5-S1 disc herniation. Appellant was placed on the periodic compensation rolls.

In reports dated August 16 and September 27, 2004, Dr. James E. Dowd, Board-certified in orthopedic surgery, advised that appellant had significant right knee inflammation and would need a right total knee replacement. On September 29, 2004 he advised that, given the significance of appellant's multiple orthopedic and spinal problems, it was unlikely that he would be able to return to gainful employment. On January 26, 2005 Dr. Dowd performed a right total knee replacement surgery.

On September 29, 2005 the Office referred appellant to Dr. Edward W. Gold, a Board-certified orthopedic surgeon, for a second opinion evaluation. Dr. Gold was asked to address whether the right total knee replacement surgery was related to the accepted conditions, whether appellant was capable of returning to work and, if so, what physical restrictions were recommended. In a November 3, 2005 report, he reviewed the history of injury and medical treatment, including the surgical reports of record. Dr. Gold noted that diagnostic studies of March 14, 2002 revealed a meniscus tear of the right knee with advanced degenerative joint disease. On examination appellant had complaints of diffuse discomfort in the lumbar spine with no muscle spasm. There was subjective weakness to both lower extremities, symmetrical deep tendon reflexes, no atrophy and no deformity noted. Straight leg raising was negative bilaterally. Dr. Gold found that appellant had subjective decreased sensation below the elbow on the right and in the entire hand on the left. He diagnosed status post cervical spine decompression and fusion, status post decompression and discectomy of the lumbar spine and bilateral knee sprains with bilateral total knee replacements. Dr. Gold advised that the degenerative changes in the right knee were a preexisting condition. While the accepted injury may have aggravated pain in the right knee, the need for surgery was not due to the work injury. Dr. Gold advised that the right total knee replacement would have been required even without aggravation by the accepted injury. He concluded that appellant was not totally disabled and could work at a sedentary job with permanent restrictions of no prolonged sitting or walking and no kneeling or squatting with a 15-pound lifting restriction.

On February 15, 2006 the employing establishment offered appellant a modified processing clerk position. The duties included picking up letter mail from a tray and placing it into the correct destination bin with walking, standing, squatting and kneeling limited to one

hour daily, no climbing and pushing, pulling and lifting limited to 15 pounds intermittently.<sup>1</sup> By report dated March 1, 2006, Dr. Barnum noted his review of Dr. Gold's report, stating that he left out the fact that appellant had significant dexterity problems with his hands and an ataxic gait pattern. He advised that appellant could return to some form of gainful employment but would require extensive rehabilitation, to be followed by a functional capacity evaluation. On March 9, 2006 appellant declined the offered position.

By decision dated July 28, 2006, the Office found that the total knee replacement surgery was not due to the accepted condition and denied authorization for the procedure.

A functional capacity evaluation was performed on December 7, 2006. It noted that appellant completed a work-conditioning program on November 17, 2006 and still had complaint of increased back and knee pain. The evaluation demonstrated that he could not perform the duties of his date-of-injury position as a painter but was capable of work at the sedentary-to-light physical demand level for an eight-hour day and was capable of lifting up to 15 pounds. The study recommended infrequent bending, squatting, kneeling, stair climbing and overhead reaching and advised that appellant could constantly sit, stand and walk. In a December 8, 2006 report, Dr. Barnum found that appellant had reached maximum medical improvement and adopted the functional capacity findings as to appellant's work limitations.

On May 14, 2007 the Office ascertained that the offered modified position was still available and, by letter that day, advised appellant that it was found suitable to his physical limitations.

On June 11, 2007 appellant refused the offered position, contending that he was disabled due to his physical conditions. He submitted medical reports from the Veterans Administration Medical Center in Hampton, Virginia, including a September 23, 2005 electromyographic (EMG) study that was interpreted as abnormal with evidence of mild carpal tunnel syndrome involving the motor branch of the median nerves, right more than left. In a November 14, 2003 report, Dr. Jamal Ghazinour, a Board-certified physiatrist who performed the EMG study, reviewed appellant's history of back and knee problems. Based on his medical conditions, appellant was considered permanently unemployable. On October 25, 2005 Dr. Ghazinour stated that appellant had surgery on his right wrist with a current complaint of urinary frequency. In reports dated March 27 and November 15, 2006, Dr. Young B. Kwon, Board-certified in urology, diagnosed prostatism due to a mild neuropathic bladder from the many disc procedures and medication. December 11, 2006 x-rays demonstrated bilateral degenerative arthrosis of the shoulders and severe degenerative changes of the lumbar spine. In a January 9, 2007 report, Dr. Albert J. Pepe, a Board-certified orthopedic surgeon, diagnosed impingement syndrome of both shoulders with rotator cuff tendinitis and clinically significant symptoms on the right. A January 17, 2007 magnetic resonance imaging (MRI) scan of the right shoulder demonstrated an

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<sup>1</sup> On February 23, 2006 the Office asked Dr. Gold to provide an opinion on the suitability of the offered position. The position descriptions differed, however, in that the description provided Dr. Gold stated that appellant would place trays or bundles of mail weighing less than 15 pounds on a case ledge, would place letters one by one in the correct destination bin and would remove mail from bins for dispatch. On February 24, 2006 Dr. Gold advised that the position was suitable.

incomplete full thickness tear of the supraspinatus tendon and interstitial tear of the infraspinatus tendon.

On January 17, 2007 Dr. Mikiso Mizuki, a Board-certified physiatrist, noted appellant's history of multiple medical problems. He advised that there was no evidence of lumbar radiculopathy and that appellant's severe degenerative joint disease was likely the cause of his chronic pain. A January 18, 2007 MRI scan of the lumbar spine demonstrated central and lateral spinal stenosis, nuclear herniations at T12-L1 and L5-S1 and severe degenerative spondylosis of the lumbar spine. On February 22 and March 22, 2007 Dr. Pepe and Dr. James J. Chimento, a Board-certified orthopedic surgeon, advised that appellant had pain in his right shoulder but wished to avoid surgery.

On June 16, 2007 the Office referred appellant to Dr. Steven C. Blasdell, also Board-certified in orthopedic surgery, for an opinion regarding the need for right total knee replacement surgery. The set of questions provided to Dr. Blasdell referred to him as a referee physician; however, the referral letter to appellant did not identify a conflict in medical opinion or Dr. Blasdell as a referee physician.

In a July 10, 2007 report, Dr. Blasdell noted the history of injury and provided examination findings of the right knee. He diagnosed status post right total knee replacement for severe degenerative joint disease and advised that the surgery was due to preexisting severe right knee osteoarthritis, stating that the January 27, 2000 employment injury had no impact on the ultimate need for knee replacement surgery. By letter dated July 27, 2007, the Office asked that Dr. Blasdell comment on appellant's work restrictions, specifically asking that he review the February 15, 2006 job offer and whether he concurred with Dr. Gold's opinion that appellant was capable of working a sedentary job with a 15-pound lifting restriction. In an August 2, 2007 response, Dr. Blasdell advised that Dr. Gold's restrictions were consistent with the December 7, 2006 functional capacity evaluation and that appellant was capable of performing the modified position offered on February 15, 2006. He provided permanent restrictions that appellant could sit, reach, bend, stoop and operate a motor vehicle for eight hours; walk, stand, push, pull, lift, squat and kneel for one hour each; and provided a 15-pound restriction on pushing, pulling and lifting.

In an August 29, 2007, the Office affirmed the July 28, 2006 decision denying authorization for right knee surgery, based on Dr. Blasdell's opinion.

On November 19, 2007 the employing establishment requested that the Office determine if the February 15, 2006 job offer remained suitable. In a December 7, 2007 letter, the Office advised appellant that the position offered was suitable. Appellant was notified that, if he failed to report to work or failed to demonstrate that such failure was justified, pursuant to section 8106(c), his right to monetary compensation would be terminated. Appellant was provided 30 days to respond.

On December 27, 2007 appellant declined the modified-duty position. He addressed his various medical conditions, including spinal stenosis of the lumbar and cervical region; bilateral carpal tunnel syndrome; tendinitis and rotator cuff tears; L5 nerve root damage; muscle spasms in the cervical and lumbar area; numbness to all extremities; chronic neck, back and bilateral

knee pain; bilateral total knee replacements; surgery to the cervical and lumbar spines; and right wrist decompression surgery. Appellant contended that his medical conditions made it unsafe to climb steps, maintain his balance or perform the duties of the offered position. He resubmitted reports of record. In a June 20, 2007 report, Dr. Harold Smuckler, an osteopath, diagnosed status post laminectomy from C3 through C6 with asymmetry noted due to muscle spasm.

On January 20, 2008 the Office advised appellant that the reasons given for refusing to accept the offered position were not sufficient. Appellant was provided an additional 15 days to accept the offered position. On February 21, 2008 the employing establishment noted that the position was still available.

In a February 28, 2008 decision, the Office terminated appellant's monetary compensation benefits effective February 17, 2008 on the grounds that he refused an offer of suitable work.

On September 2, 2008 appellant requested reconsideration, reiterating that he was disabled from working the offered position. He submitted a March 11, 2008 report from Dr. Nathan L. Riles, Board-certified in family medicine, who noted appellant's complaint of back pain worsening over the prior three months. Dr. Riles provided findings on physical examination and diagnosed chronic lumbar back pain with radiation to the legs and cervical neck pain with radiation to the hands. In an April 2, 2008 report, Dr. Ghazinour noted appellant's complaint of mid-back pain radiating to the lower extremities. He found that appellant ambulated with a slow gait with the assistance of a cane and that a lower extremity EMG was abnormal with evidence of right lumbar radiculopathy at the L5-S1 level. There was also left lumbar radiculopathy at the S1 level with no evidence of peripheral neuropathy. Dr. Ghazinour also noted severe spinal stenosis at multiple levels of the spine.

A functional capacity evaluation of May 19, 2008 demonstrated that appellant was functioning at a sedentary-to-light physical demand level where nonrepetitive force and exertion was encountered and postural positions were maintained as neutral with minimal elongation of the extremities. Static positioning was to be avoided with alteration of sitting position at will and intermittent floor to waist lifting restricted to 15 pounds. Appellant was restricted to no crawling and kneeling with intermittent lifting, pushing, pulling, carrying, stair and ladder climbing, elevated work, forward bending from the sitting and standing position, twisting, stooping and squatting. The report concluded that his reduced tolerances for any postural deviation or elongation of the trunk or extremities limited his capabilities for competitive activity to a significant degree.

In a June 11, 2008 report, Dr. Riles noted that appellant had an extensive medical history and that physical examination was noteworthy for a stooped posture, a broad-based gait and pain with changing position from sitting to standing. Cervical neck range of motion was limited; the lumbar spine was tender to touch and range of motion was painful. Straight leg raising was positive bilaterally. Dr. Riles addressed the May 2008 functional capacity findings, stating that, while appellant was able to lift 15 to 20 pounds, if he had to do so repeatedly his ability would go to zero and he could do no more. He advised that appellant was totally disabled from not only his job as a painter but also sedentary repetitive work.

By decision dated December 5, 2008, the Office denied modification of the February 28, 2008 decision, noting that the prior decision was modified to reflect that Dr. Blasdell was a second opinion physician and not an impartial specialist, as he only referenced surgical issues and not physical limitations. It found that the medical evidence was insufficient to modify the prior termination.

### **LEGAL PRECEDENT**

Section 8106(c) of the Federal Employees' Compensation Act 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."<sup>2</sup> It is the Office's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.<sup>3</sup> The implementing regulations provide that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of showing that such refusal or failure to work was reasonable or justified and shall be provided with the opportunity to make such a showing before entitlement to compensation is terminated.<sup>4</sup>

To support termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.<sup>5</sup> In determining what constitutes "suitable work" for a particular disabled employee, it considers 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>6</sup> Office procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.<sup>7</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>8</sup> It is well established under this section of the Act, the Office must consider both preexisting and subsequently acquired conditions in the evaluation of the suitability of an offered position.<sup>9</sup>

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<sup>2</sup> 5 U.S.C. § 8106(c).

<sup>3</sup> *Joyce M. Doll*, 53 ECAB 790 (2002).

<sup>4</sup> 20 C.F.R. § 10.517(a).

<sup>5</sup> *Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

<sup>6</sup> 20 C.F.R. § 10.500(b); *see Ozone J. Hagan*, 55 ECAB 681 (2004).

<sup>7</sup> Federal (FECA) Procedure Manual, Part -- Claim, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5.a(1) (July 1997); *see Lorraine C. Hall*, 51 ECAB 477 (2000).

<sup>8</sup> *Gloria G. Godfrey*, 52 ECAB 486 (2001).

<sup>9</sup> *Richard P. Cortes*, 56 ECAB 200 (2004).

## ANALYSIS

The Office accepted bilateral knee strains for which appellant underwent an authorized left knee replacement on May 9, 2001. It also accepted cervical spondylosis and myelopathy for which a surgical laminectomy was performed at C3-7. Surgery was also authorized for an accepted disc herniation at L5-S1. The Office denied appellant's request to authorize his surgery on January 26, 2005 for a total right knee replacement. It terminated his compensation benefits on the grounds that he refused an offer of suitable work. The Board finds that the Office did not meet its burden of proof to establish that the modified clerk position was suitable based on consideration of appellant's various medical conditions.

The medical record contains numerous diagnostic studies and medical reports from physical examination that diagnosed conditions other than those accepted by the Office. These include a September 23, 2005 upper extremity EMG that diagnosed carpal tunnel syndrome, the April 2, 2008 lower extremity EMG finding lumbar radiculopathy and a January 2007 MRI scan documenting a full thickness tear of the right shoulder supraspinatus tendon and infraspinatus tendon and central and lateral spinal stenosis of the lumbar spine with disc herniations and severe degenerative spondylosis. Evidence from appellant's attending physician, Dr. Barnum, found that appellant had significant dexterity problems regarding his hands and ataxic gait. He noted that these were conditions not considered by Dr. Gold. Dr. Pepe addressed appellant's impingement syndrome to both shoulders with rotator cuff tendinitis and significant clinical symptoms to the right upper extremity. Dr. Mizuki discussed appellant's lumbar radiculopathy and severe degenerative arthritis of the lumbar spine. None of these medical conditions were addressed in consideration of whether appellant could perform the modified duties of the offered position.

In the initial referral to Dr. Blasdell, the physician was asked to address whether appellant was a candidate for right total knee replacement surgery and whether the need for surgery was related to the accepted injury. He was not asked to provide a comprehensive medical opinion addressing appellant's various other diagnosed conditions or his capacity for employment. In a July 10, 2007 report, Dr. Blasdell advised that he examined appellant's right knee and diagnosed status post right total knee replacement for severe degenerative joint disease. The Office subsequently asked Dr. Blasdell to review the February 15, 2006 job offer and Dr. Gold's listed restrictions. On August 2, 2007 Dr. Blasdell responded in a one-page letter, noting that lifting no greater than 15 pounds was consistent with the December 7, 2006 functional capacity evaluation and responding "yes" that appellant was capable of performing the modified position. As noted, however, his opinion was not based on a comprehensive physical examination or accurate history of the accepted conditions and other diagnosed physical conditions. The reports of Dr. Blasdell provide woefully insufficient medical opinion on which to base the termination of appellant's monetary compensation for refusal of suitable work.

Moreover, Dr. Riles examined appellant following the termination of benefits and diagnosed chronic lumbar back pain with radiation to the legs and cervical neck pain with radiation to the hands. On April 2, 2008 Dr. Ghazinour addressed complaints of mid-back pain radiating to the lower extremities. He advised that appellant ambulated with a slow gait with the assistance of a cane and that a lower extremity EMG was abnormal with evidence of right lumbar radiculopathy at the L5-S1 level and left lumbar radiculopathy at the S1 level with no

evidence of peripheral neuropathy. The May 2008 functional capacity evaluation did not support appellant's capacity for repetitive force or exertion and reduced capacity for any postural deviation. Dr. Riles reviewed the findings, stating that appellant was disabled not only from his job as a painter but also for sedentary work. The Board finds that the Office failed to establish that the modified-duty job offer constituted suitable work based on consideration of appellant's preexisting and subsequent medical conditions.<sup>10</sup> As a penalty provision, section 8106(c)(2) must be narrowly construed.<sup>11</sup>

### **CONCLUSION**

The Board finds that the Office failed to meet its burden of proof to terminate appellant's compensation benefits on the grounds that he refused an offer of suitable work.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated December 5 and February 28, 2008 be reversed.

Issued: July 21, 2010  
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

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<sup>10</sup> 5 U.S.C. § 8106(c)(2); *see R.B.*, 60 ECAB \_\_\_\_ (Docket No. 08-2154, issued May 8, 2009).

<sup>11</sup> *J.F.*, 60 ECAB \_\_\_\_ (Docket No. 08-439, issued October 24, 2008).