

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JOHN E. RYS and U.S. POSTAL SERVICE,  
POST OFFICE, Springfield, Mass.

*Docket No. 95-3116; Submitted on the Record;  
Issued July 23, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation because he refused an offer of suitable employment.

Appellant sustained a back injury in the performance of duty on September 3, 1982 which the Office accepted for low back strain, a herniated disc at L4-5, a subsequent disc excision L4-5 and lumbosacral fusion. Appellant subsequently suffered recurrences of disability in February 1986 and March 1993 and received appropriate compensation.

On January 3, 1994 Dr. Donald S. Pierce, appellant's treating physician and a Board-certified orthopedic surgeon, indicated that appellant was incapable of performing his regular duties.

On April 25, 1994 the Office referred appellant, along with the case record and a statement of accepted facts, to Dr. Jacques Archambault, a Board-certified orthopedic surgeon, to review the case.

On May 17, 1994 Dr. Archambault reviewed appellant's history and x-rays, and conducted a physical examination. He diagnosed appellant as status-post fusion and instrumentation of L4-S1. He stated that there was a causal relationship between appellant's injury in 1982 and his present condition. Dr. Archambault indicated that appellant could return to administrative work starting maybe 20 hours per week and gradually progress to 40 hours per week. He indicated that appellant was permanently limited to lifting no more than 10 to 15 pounds. Finally, he stated that with a sitting job and a little bit of walking, appellant should do well, as he can use his hands and upper extremity without problem.

On May 20, 1994 Dr. Pierce again indicated that appellant was incapable of returning to his regular work.

On July 21, 1994 Dr. Pierce stated that appellant was totally disabled.

On August 11, 1994 Dr. Pierce stated that appellant had undergone an instrumented spinal fusion from L4-S1 which was healing slowly. He further stated that x-rays established that the fusion was not yet solid. Dr. Pierce noted subjective complaints of improving left-sided leg pain and back pain. He found that objectively appellant's neurological examination was within normal limits. Dr. Pierce indicated that the prognosis was good, but that appellant required rest until the fusion was completed followed by a course of physical therapy. He estimated that appellant would probably recover by January 1, 1995.

On August 15, 1994 the Office requested that Dr. Archambault review a job offer in which appellant would work four hours per day as a BMC Mail Handler (REWRAP). The position required that appellant patch or rewrap damaged mail; that he stand and take mail from a cart, with assistance if necessary, that he sit while patching or rewrapping the mail, that he gradually increase his work day to eight hours. The position precluded appellant from lifting over 10 pounds.

On August 26, 1994 the employing establishment offered appellant the limited-duty position.

On August 27, 1994 Dr. Archambault indicated that he had reviewed the job offer and that appellant was capable of performing the duties described in it.

Appellant rejected the position on September 6, 1994.

By letter dated September 9, 1994, the Office advised appellant that he had 30 days within which to accept the limited-duty position offered by the employing establishment which it had found to be suitable for his work capabilities or provide an explanation of his reasons for refusing it. The Office advised appellant that 5 U.S.C. § 8106 provided that a partially disabled employee who refused or neglected to work after suitable work was offered to, procured by or secured for him was not entitled to compensation. Appellant was advised that, if he failed to accept the offered position and failed to demonstrate that his failure to accept was justified, his compensation would be terminated.

On September 13, 1994 appellant wrote that pursuant to the opinion of his treating physician, he was incapable of performing the duties of the job offered.

On October 18, 1994 the Office indicated that it had reviewed appellant's reasons for refusing the job offer and that they were not justified. Appellant was given another 15 days to accept the offered position.

By decision dated November 4, 1994, the Office terminated appellant's compensation effective November 12, 1994 because the employing establishment made a suitable job offer and the reasons appellant provided for refusing it were unjustified.

On November 16, 1994 appellant accepted the limited-duty position and returned to work. Appellant subsequently received compensation for partial temporary disability.

Pursuant to appellant's request, a hearing was held on April 20, 1995. At the hearing, appellant's representative urged that the Office erred in failing to consider and rely on the opinion of appellant's treating physician, Dr. Pierce, who indicated that appellant was incapable of performing the duties listed in the job offer.

By decision dated June 13, 1995, the Office hearing representative found that Dr. Archambault's well-rationalized opinion, indicating that appellant could perform the duties listed in the job offer, constituted the weight of the medical evidence because it was not contradicted by the opinion of appellant's treating physician or other medical evidence of record. The Office terminated appellant's compensation because he failed to accept suitable employment.

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation under section 8106(c)(2) of the Federal Employees Compensation Act for failure to accept suitable work.

Section 8106 of the Act provides that a partially disabled employee who: (1) refuses to seek suitable work; or (2) refuses or neglects to work after suitable work is offered is not entitled to compensation.<sup>1</sup> Under 5 U.S.C. § 8106(c)(2), the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by or secured for him.<sup>2</sup> However, to justify such termination, the Office must show that the work offered was suitable.<sup>3</sup>

In the instant case, the Office terminated appellant's compensation benefits based on the opinion of Dr. Archambault, a Board-certified orthopedic surgeon. The Office determined that this uncontradicted opinion established that appellant was physically capable of performing the duties of the modified position offered by the employing establishment. Pursuant to section 8106(2) of the Act, the Office then terminated appellant's compensation upon his failure to accept the offered position.

Dr. Archambault's report, however, was contradicted by the well-rationalized opinion of appellant's treating physician, Dr. Pierce. Dr. Pierce, a Board-certified orthopedic surgeon, explained that appellant remained totally disabled from an instrumented spinal fusion from L4-S1 which was healing slowly. He based his opinion on x-ray evidence establishing that the fusion was not yet solid. Dr. Pierce indicated that the prognosis was good, but that appellant required rest until the fusion was completed followed by a course of physical therapy. He estimated that appellant would probably recover by January 1, 1995.

When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial specialist, pursuant to section 8123(a) of the Act,<sup>4</sup> to resolve the

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<sup>1</sup> 5 U.S.C. § 8106(c)(2).

<sup>2</sup> *David P. Camacho*, 40 ECAB 267 (1988).

<sup>3</sup> *Id.*

<sup>4</sup> 5 U.S.C. § 8123(a); see *Martha A. Whitson (Joe D. Whitson)*, 36 ECAB 370 (1984).

conflict in the medical opinion. As an unresolved conflict exists in the medical opinion evidence, the Office did not meet its burden to terminate compensation under section 8106(c)(2) of the Act.

The decisions of the Office of Workers' Compensation Programs dated June 13, 1995 and November 4, 1994 are hereby reversed.

Dated, Washington, D.C.  
July 23, 1998

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member