

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of COLETTE M. BROWN and U.S. POSTAL SERVICE,  
POST OFFICE, Dallas, Tex.

*Docket No. 96-289; Submitted on the Record;  
Issued June 12, 1998*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issues are (1) whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation benefits effective November 13, 1994 on the grounds that appellant refused suitable work; and (2) whether the Office abused its discretion by refusing to reopen appellant's claim for a merit review on September 12, 1995.

On December 13, 1988 appellant, then a 30-year-old letter carrier, filed a notice of traumatic injury alleging that on December 10, 1988 she injured her right arm, head and neck when her vehicle turned over in the course of her federal employment. The Office accepted the claim for cervical strain, right elbow contusion, a lumbar herniated nucleus pulposus and a lumbar laminectomy, which was performed on August 3, 1992. Appellant subsequently received appropriate compensation benefits.

On March 7, 1994 Dr. Bennie B. Scott, a Board-certified neurological surgeon and appellant's treating physician, stated that appellant's continued, chronic complaints made it unlikely she would be able to return to her previous employment. Dr. Scott stated that appellant could "possibly" do sedentary work if she was limited from lifting weights over 10 to 15 pounds.

Pursuant to the Office's request, Dr. Scott completed a work capacity evaluation form on March 21, 1994. He stated that appellant should limit kneeling, standing, bending, twisting, reaching and lifting. Dr. Scott elaborated that appellant should limit lifting to 10 to 15 pounds repeatedly for 2 to 3 hours, should avoid all standing longer than 5 minutes and should avoid all kneeling, bending and reaching. He further stated that appellant could work six to eight hours a day. Finally, he stated appellant reached maximum improvement on March 2, 1994.

On April 18, 1994 Dr. Carl E. Noe, a Board-certified anesthesiologist, stated that appellant functioned at a light duty level and that her impairment rate was 10 percent. He indicated that appellant was a possible candidate for retraining for a light-duty type job.

On April 27, 1994 Dr. Scott indicated that appellant continued to be symptomatic with pain across her back, which radiated into the left hip and occasionally down the left leg, with numbness in the leg and foot. Dr. Scott indicated that these symptoms were present to a lesser extent in the right leg. He noted subjective limitation in range of motion for all planes. On motor performance, he found appellant could support weight on tiptoes and heels.

On May 9, 1994 Dr. Charles D. Mitchell, a Board-certified orthopedic surgeon, indicated that appellant had reached maximum medical improvement and that appellant should pursue work options. On June 13, 1994 Dr. Mitchell documented continued leg pain and stated it was a neuropathy.

In a letter dated August 24, 1994, the employing establishment indicated that based on the recent medical evidence appellant was eligible for a modified job assignment. Accordingly, it offered appellant a modified job as a city carrier pursuant to the limitations documented by Dr. Scott in his work capacity evaluation form dated March 21, 1994. Appellant was to begin this job on September 6, 1994.

On August 26, 1994 Dr. Scott reiterated his work restrictions, but noted that appellant continued to complain of pain in her back and left leg and numbness in her left calf and toes.

On August 29, 1994 appellant accepted the position offered pending a medical release from her physician.

By letter dated September 22, 1994, the Office advised appellant that she had 30 days within which to accept the limited-duty position offered by the employing establishment, which it had found to be suitable for her work capabilities or provide an explanation of her 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 she failed to accept the offered position and failed to demonstrate that her failure to accept was justified, her compensation would be terminated.

On September 26, 1994 Dr. Noe indicated that appellant could operate machinery and work while taking her medication.

Appellant did not return to work.

By decision dated November 2, 1994, the Office terminated appellant's compensation effective November 13, 1994 on the grounds that the evidence established that appellant had refused an offer of suitable work.

On November 10, 1994 Dr. Scott treated appellant for pain to her low back and legs.

On February 8, 1995 Dr. R. Stephen Curtis, a Board-certified orthopedic surgeon, diagnosed degenerative disc disease with continued back and leg pain. He recommended a decompressive laminectomy with foraminotomies and partial pediclelectomies at the L5-S1 levels, followed by lateral mass fusion from 5 to the sacrum.

On March 17, 1995 Dr. Scott indicated that appellant had been unable to work since October 1994 and that it was undetermined when she could return to work as surgery had been recommended.

The Office referred the case along with a statement of accepted of facts to Dr. Luis A. Mignucci, a Board-certified neurological surgeon. On April 12, 1995 Dr. Mignucci diagnosed mechanical low back pain secondary to degenerative disc disease at the L5-S1 level with left lower extremity symptoms suggestive of a chronic L-5 nerve root entrapment that could be explained by the foraminal disc herniation at the L5-S1 level on the left side. He also diagnosed benign chronic pain behavior.

On April 28, 1995 the Office authorized a decompressive laminectomy at the L5-S1 level.

On April 28, 1995 appellant requested reconsideration.

By decision dated May 8, 1995, the Office reviewed the merits of the case and found that the evidence submitted in support of the application was not sufficient to warrant modification of the prior decision. In an accompanying memorandum, the Office noted that, although the Office approved surgery for appellant's back on April 28, 1995, the medical evidence indicated that appellant was capable of performing the duties specified in her limited-duty job at the time it was offered. The Office, therefore, terminated appellant's benefits for refusing to work when suitable work was offered pursuant to section 8106(c)(2) of the Federal Employees' Compensation Act.

On May 22, 1995 appellant requested reconsideration. In support, she submitted a May 15, 1995 letter from Dr. Scott. He stated that when appellant received her job offer she was undergoing a work evaluation endeavor, which increased her symptoms and precluded any type of employment. Dr. Scott stated that he indicated that his statement was supported by a contemporaneous office notation.

By decision dated June 26, 1995, the Office reviewed the merits of the case and found that the evidence submitted in support of the application was not sufficient to warrant modification of the prior decision. In an accompanying memorandum, the Office indicated that Dr. Scott did not offer an opinion in his May 15, 1995 letter, regarding whether appellant was able to perform the restricted job duties indicated at the time the job was offered. It further stated that Dr. Scott did not offered an explanation for his change of opinion regarding whether appellant was then capable of performing the duties in the job offer.

On June 9, 1995 appellant requested reconsideration. In support, she resubmitted medical reports from Drs. Mitchell, Curtis, Plum, Fulmer and Scott which were previously part of the record. Appellant also submitted counseling records from the Baylor University Medical Center which did not address her ability to perform the duties specified in her limited duty job offer.

By decision dated September 12, 1995, the Office denied the request for review, because the evidence submitted in its support was repetitious and insufficient to warrant review of the prior decision.

The Board finds that the Office improperly terminated appellant's compensation benefits under 5 U.S.C. § 8106(c)(2) of the Act.

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 USC § 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 March 21, 1994 work capacity evaluation form completed by appellant's treating physician, Dr. Scott. The Office determined that this report established that appellant was physically capable of performing the duties of the modified position offered by the employing establishment. Pursuant to section 8106(c)(2) of the Act, the Office then terminated appellant's compensation upon her failure to report to that position.

Dr. Scott, however, indicated in his May 15, 1995 letter, that he was still evaluating appellant at the time appellant received the modified job offer. The weight of the evidence supports Dr. Scott's assertion. In his March 27, 1994 report, Dr. Scott indicated only that appellant could "possibly" do sedentary work, with limited weight lifting of 10 to 15 pounds. It was this report that resulted in Dr. Scott's completion of the March 21, 1994 work capacity evaluation form. Moreover, appellant accepted the modified job offer pending a medical release from her physician. Dr. Scott subsequently indicated that appellant was unable to work. This opinion was bolstered by the opinions of Drs. Curtis, a Board-certified orthopedic surgeon and the Office's referral physician, Dr. Mignucci, a Board-certified neurological surgeon, who diagnosed degenerative disc disease. Based on these opinions, the Office authorized surgery for a decompressive laminectomy at the L5-S1 level.

The Office has the burden to establish that the limited-duty work offered was suitable in order to terminate compensation benefits. The Office, however, relied solely on Dr. Scott's March 21, 1994 work evaluation form to establish the suitability of the limited-duty position. Because the evidence of record reveals that Dr. Scott had yet to fully evaluate appellant and that she remained disabled from all employment, the Office failed to meet its burden. The Board, therefore, finds that pursuant to the penalty provision of 5 U.S.C. § 8106, the Office improperly terminated appellant's compensation benefits effective November 13, 1994.

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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.*

In light of the Board's resolution of the first issue, it need not address the second issue.

The decisions of the Office of Workers' Compensation Programs dated September 12, June 26, and May 8, 1995 are reversed.

Dated, Washington, D.C.  
June 12, 1998

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member