U. S. DEPARTMENT OF LABOR
Employees' Compensation Appeals Board

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In the Matter of LYNN A. DWYER and U.S. POSTAL SERVICE,
MID-ISLAND POST OFFICE, Melville, N.Y.

*Docket No. 97-2164; Submitted on the Record;*
*Issued May 19, 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, effective January 7, 1995 on the grounds that she refused an offer of suitable work.

The Board has reviewed the case record and finds that the Office met its burden of proof in terminating appellant's compensation.[1]

Once the Office accepts a claim it has the burden of proving that the employee's disability has ceased or lessened before it may terminate or modify compensation benefits.[2] Section 8106(c)(2) of the Federal Employees' Compensation Act[3] provides that the Office may terminate the compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.[4] The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.[5]

The implementing regulation[6] provides 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

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[1] The Board's scope of review is limited to those final decisions issued within one year prior to the filing of the appeal. 20 C.F.R. §§ 501.2(c), 501.3(d)(2). Inasmuch as appellant filed her notice of appeal on June 11, 1997, the Board has jurisdiction only of the Office's merit decision dated March 21, 1997.

[2] *Karen L. Mayewski*, 45 ECAB 219, 221 (1993); *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

[3] 5 U.S.C. §§ 8101-8193 (1974); 5 U.S.C. § 8106(c)(2).

[4] *Camillo R. DeArcangelis*, 42 ECAB 941, 943 (1991).

[5] *Stephen R. Lubin*, 43 ECAB 564, 573 (1992).

[6] 20 C.F.R. § 10.124(c).

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.[7] To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his or her refusal to accept such employment.[8]

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 medical evidence.[9] In assessing medical evidence, the number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value, and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for, and the thoroughness of, physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.[10]

In cases where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[11]

In this case, appellant, then a 26-year-old mail handler, filed a notice of traumatic injury on March 10, 1989 claiming that she felt sharp pain in her right hip, back, groin and leg while lifting magazines into containers at work. The Office accepted a strain of the right hip flexor and paid appropriate compensation. Appellant returned to work for four hours a day on limited duty.[12]

On June 30, 1993 the Office wrote to appellant's treating physician, Dr. P. Warwick Green, a Board-certified orthopedic surgeon, authorizing magnetic resonance imaging (MRI) scans of her lumbosacral spine and right knee and requesting that he consider whether appellant could return to full-time work.[13] Dr. Green responded on October 12, 1993 that appellant could

[7] *John E. Lemker*, 45 ECAB 258, 263 (1993).

[8] *Maggie L. Moore*, 42 ECAB 484, 487 (1991), *aff'd on recon.*, 43 ECAB 818 (1992).

[9] *Marilyn D. Polk*, 44 ECAB 673, 680 (1993).

[10] *Connie Johns*, 44 ECAB 560, 570 (1993).

[11] *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

[12] Appellant filed recurrences of disability on May 17, June 8 and August 7, 1989 due to "extreme pain" which forced her to quit work. Appellant filed another recurrence of disability on January 31, 1990, which was denied. Appellant timely requested an oral hearing, accepted a light-duty position on May 9, 1991, and returned to work for four hours a day. Following the hearing on September 21, 1991, the hearing representative denied the claim on the grounds that the weight of the medical evidence, as represented by the opinion of the impartial medical examiner, Dr. Dwight C. Blum, a Board-certified orthopedic surgeon, established that appellant was not totally disabled. The hearing representative noted that Dr. Blum, who diagnosed chronic lumbosacral derangement with radiculopathy in the lumbosacral spine and right sciatica, stated that appellant could do the limited-duty work.

[13] On September 29, 1993 appellant filed a notice of traumatic injury, claiming that she hurt her back and stomach when a passing mail container pushed her desk into her. Appellant continued working four hours a day.

not return to full-time work, that she had reflex sympathetic dystrophy[14] (RSD) in the right lower extremity, and that the MRI scan showed three herniated discs.

The Office referred appellant for a second opinion evaluation to Dr. Abraham Cohen, an orthopedic surgeon, who concluded that appellant should continue working four hours a day, and to Dr. Donald Holzer, a Board-certified neurologist, who stated that she could work full time and suggested a work hardening program. In response to the Office's inquiry, Dr. Green stated that work hardening would not help appellant's RSD, which needed to be evaluated further.

Because of a conflict of opinion between Drs. Green and Holzer, the Office referred appellant to Dr. Roger Dee, a Board-certified orthopedic surgeon, for an impartial medical examination.[15] Dr. Dee stated in a report dated May 23, 1994, that appellant walked and moved completely normally, was able to undress and dress freely without any apparent restrictions and put on her own shoes and socks, and showed no indication of an antalgic or abnormal gait in any way. Dr. Dee added that the symptoms appellant described did not fit any organic pain pathology and he was "quite sure" that she did not have RSD, based on the normal physical examination. He indicated that a possible chronic prolapse of the lumbosacral disc would not preclude her return to full duty. He concluded that appellant was "capable of full duties while seated as a postal clerk."

On June 21, 1994 the employing establishment offered a modified mail handler position to appellant, which consisted of intermittent sitting for 8 hours with standing and walking to retrieve mail and for comfort, a lifting restriction of 10 pounds. On June 30, 1994 the position was found to be suitable and was offered to appellant; the Office informed appellant she had 30 days to either accept the offer or provide a reasonable, acceptable explanation for refusing.

In response, appellant submitted an August 1, 1994 report from Dr. Green, who stated that appellant could increase her light-duty work to six hours a day, with the same restrictions, but was "by no means asymptomatic" and was not able to handle an eight-hour day, although she might attempt that in four to six months.[16] The Office stated in a letter dated December 22, 1994 that, the job had been found to be suitable and within the restrictions identified by the medical evidence, and that Dr. Green's opinion was insufficient to change that determination. The Office added that if appellant refused the offer or failed to report to work, her compensation would be terminated within 15 days.

[14] Reflex sympathy dystrophy is defined as a disturbance of the craniosacral portion of the autonomic nervous system marked by pallor or rubor (redness), pain, sweating, edema, or skin atrophy following a sprain, fracture, or injury to the nerves or blood vessels. *Dorland's Illustrated Medical Dictionary* (27th ed. 1988).

[15] Section 8123(a) of the Act provides that if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination. *Shirley L. Steib*, 46 ECAB 309, 317 (1994); *see Craig M. Crenshaw, Jr.*, 40 ECAB 919, 923 (1989) (finding that Office failed to meet its burden of proof because a conflict in the medical evidence was unresolved).

[16] In this report, Dr. Green stated that appellant remained under his care for the diagnoses of low back syndrome, disc herniation at L3 through S1, right leg radiculopathy, right knee chondromalacia patellae and RSD.

On January 31, 1995 the Office terminated appellant's wage-loss compensation, effective January 7, 1995, on the grounds that appellant failed to respond to the 15-day warning letter. The Office noted that Dr. Green failed to provide any objective findings or medical rationale in support of his conclusion that appellant could not work full time.

Appellant timely requested a written review of the record. In a decision dated February 1, 1996, the hearing representative denied wage-loss compensation on the grounds that the weight of the medical evidence, as represented by the opinion of the impartial medical examiner, Dr. Dee, established that appellant was capable of full-time work. The hearing representative noted that appellant had not met her burden of showing that her refusal to work full time was reasonable or justified.[17]

On December 30, 1996 appellant requested reconsideration on the grounds that the Office failed to provide appellant with a copy of Dr. Dee's report for Dr. Green to review, that there was no conflict of medical opinion sufficient to require referral to an impartial medical examiner, and that new medical evidence established that appellant was unable to work an eight-hour day. In support appellant submitted medical reports from Dr. Jacques L. Winter, a Board-certified neurologist; Dr. Paul E. Schulman, Board-certified in internal medicine; and Dr. Green.

On March 21, 1997 the Office denied appellant's request after a merit review on the grounds that the new medical evidence submitted in support of reconsideration was insufficient to warrant modification of the prior decision. The Office noted that none of the medical reports explained why appellant was unable to perform the limited-duty position full time.[18]

The Board finds that the Office met its burden of proof in terminating appellant's compensation because the evidence of record establishes that the Office complied with the required procedures and that the offered position was medically suitable. The reports dated July 21, 1995 and August 21, 1996 from Dr. Schulman do not address the issue of whether appellant is capable of working an eight-hour day, which was the basis for the January 31, 1995 termination of wage-loss compensation. Dr. Schulman's latest report stated that appellant's fibromyalgia in the left upper extremity "represented the evolution" of the 1989 injury and added that she could not return to her former duty as a mail handler, but he did not discuss the full-time, light-duty position offered to appellant in 1994. Therefore, his reports have no probative value on the relevant issue.

The July 9, 1996 report from Dr. Winter stated that appellant was able to return to "secretarial" work for several hours a day and "had been back to work for a two-year period sorting mail" but was disabled from "anything which requires significant exertion or significant

[17] Subsequently, appellant filed notices of recurrences of disability on February 26 and March 19, 1996, claiming that the trauma from her original injury had spread to her left upper extremity. On December 13, 1996 the Office denied the claim on the grounds that the medical evidence failed to establish a causal relationship between the claimed recurrences of disability and the accepted work injury. These claims are not before the Board.

[18] The record is replete with CA-8 forms completed by appellant claiming wage-loss compensation from 1995 onward. In a letter dated March 21, 1997, the Office stated that no action would be taken on appellant's claims for wage loss after January 7, 1995.

amounts of movement." He added that she may be able to do limited work, "perhaps several hours a day," but failed to address the specific duties of the limited-duty position offered to appellant, that is, repairing damaged mail for eight hours while sitting and standing and walking as needed for comfort. Therefore, his report has no probative value.

Finally, Dr. Green's May 14, 1996 report recounted in detail appellant's treatment from March 13, 1989 onward, including the notation on July 18, 1994 that appellant would try to increase her work load to six hours a day and if she could handle that, then go to eight hours. However, Dr. Green did not discuss in his latest report appellant's return to work full time or the specific job duties of repairing damaged mail.

In his January 22, 1997 report, Dr. Green again diagnosed RSD, which had spread to appellant's left upper extremity and fibromyalgia. He stated that these conditions were very painful and rendered appellant "unable to sit or stand for long periods, to push, pull, lift [or] perform activities above the shoulder level, and thus unable to accept any ruminative employment at this time." Again, however, Dr. Green failed to address the relevant issue. Therefore, his reports are of diminished probative value.[19]

Appellant argues that Dr. Green was unable to comment on Dr. Dee's report because the Office failed to provide a copy in a timely manner, thus violating its statutory duty to assist appellant in developing her claim. The Board notes that Dr. Dee's report was dated May 23, 1994, and that appellant's attorney requested a copy of the file on May 15, 1996, which at that time contained Dr. Dee's report.

The Office, upon review of the file in March 1997, informed appellant that it had received her July 7, 1994 request for a copy of the report and sent her a copy on March 21, 1997. However unfortunate the Office's delay in complying specifically with appellant's request, the pertinent issue is whether Dr. Green's reports submitted in support of reconsideration of the hearing representative's decision dated February 1, 1996, were sufficient to overcome the probative weight accorded to Dr. Dee's opinion as impartial medical examiner. As the Office indicated in its March 21, 1997 decision, Dr. Green's only comment on Dr. Dee's report -- that he disagreed over the diagnosis of RSD -- was irrelevant to Dr. Dee's conclusion that appellant was capable of working full time.[20]

Appellant's attorney argues that there was no conflict in medical opinion sufficient to require appellant's referral to an impartial medical examiner because Dr. Holzer did not have a complete and accurate medical history and therefore his opinion was not as probative as Dr. Green's. The Board finds that, inasmuch as both physicians are Board-certified specialists

[19] *See Thomas Bauer*, 46 ECAB 257 (1994) (finding that an attending physician's report which critiqued the impartial medical examiner's opinion was insufficiently comprehensive or rationalized to create a conflict with the specialist's conclusion).

[20] The Board notes that the fact that Dr. Green commented on Dr. Dee's opinion that appellant did not have RSD indicates that Dr. Green in fact was familiar with the contents of Dr. Dee's report.

and disagreed over whether appellant was capable of full-time work, a proper conflict was created.[21]

Finally, appellant argues that she did not refuse an offer of suitable work but rather followed the advice of her treating physician. The Board finds that the medical evidence of record establishes that appellant is capable of full-time, light-duty work, based on the opinion of Dr. Dee. Accordingly, the Office properly terminated appellant's wage-loss compensation.[22]

The March 21, 1997 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
May 19, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[21] Contrary to appellant's argument on appeal, the opinion of Dr. Cohen, who is not Board-certified, is irrelevant to creating the conflict.

[22] *See Michael I. Schaffer*, 46 ECAB 845 (1995) (finding the medical evidence sufficient to establish that appellant was physically capable of performing the duties of the offered modified position).