

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ETHEL M. PRESTON and U.S. POSTAL SERVICE,  
POST OFFICE, Bluefield, W.Va.

*Docket No. 95-2473; Submitted on the Record;  
Issued September 21, 1998*

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DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,  
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits on the grounds that she refused an offer of suitable work pursuant to section 8106(c)(2) of the Federal Employees' Compensation Act.

On July 3, 1985 appellant, then a 57-year-old postmaster, filed a claim alleging that on July 2, 1985 she broke her right hip when she slipped and fell off a loading dock. Appellant stopped work on July 2, 1985 and underwent hip surgery on that date.<sup>1</sup> Appellant was treated by Dr. Prakob Srichai, a Board-certified general surgeon, who diagnosed a transcervical fracture of the right hip and postoperative hip pinning. On August 9, 1985 the Office accepted appellant's claim for transcervical fracture of the right hip.

The record reveals that, following surgery, Dr. Srichai found appellant totally disabled for work. He noted that he had treated appellant for chronic sinusitis, hypertension, irritable bowel syndrome and chronic obstructive pulmonary disease. Dr. Srichai opined that appellant was totally disabled and stated that her right hip required continuing treatment.

In a June 9, 1986 letter, the employing establishment advised that appellant was scheduled to return to work on June 2, 1986 based on physical restrictions set forth by Dr. Samuel C. Dotson, an internist and employing establishment physician, in a May 16, 1986 medical report. In his report, Dr. Dotson indicated that appellant could return to limited duty with the restrictions of lifting no more than 10 to 15 pounds, and minimum bending and stooping. The employing establishment requested that the Office terminate appellant's compensation benefits based on Dr. Dotson's report.

On August 4, 1986 the Office referred appellant to Dr. Syed A. Zahir, a Board-certified orthopedic surgeon, for a second opinion examination. Dr. Zahir submitted an August 26, 1986 medical report in which he reviewed the employment injury and medical treatment and set forth

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<sup>1</sup> Appellant retired from the employing establishment on disability under the civil service retirement system.

his findings on physical and x-ray examination. Dr. Zahir opined that appellant could return to her position as postmaster.

The Office found a conflict in the medical opinion evidence between Dr. Zahir and Dr. Srichai as to appellant's disability for work. The Office referred appellant to Dr. H.M. Hills, a Board-certified orthopedic surgeon, for an impartial medical examination. Dr. Hills submitted a November 6, 1986 medical report which reviewed appellant's employment injury, medical treatment and previous medical conditions. He also reviewed medical records and set forth his findings on physical and x-ray examination. Dr. Hills opined that appellant had a left shoulder condition and that appellant could not work due to the condition. Dr. Hills also opined that appellant could perform sedentary work with limited activities based on her hip and low back conditions. Dr. Hills noted that appellant suffered from many physical conditions and indicated that it was questionable whether she would recover sufficiently to return to work. Dr. Hills' report was accompanied by a work restriction evaluation which provided appellant's physical restrictions and that appellant could not work eight hours per day, but that she could start performing sedentary work for four to five hours per day.

In a February 2, 1987 letter, the Office advised the employing establishment that, based on Dr. Hills' November 6, 1986 medical report, appellant had a left shoulder condition that was to be taken into consideration for the purpose of determining whether she could return to work.

In a May 29, 1987 letter, the employing establishment offered appellant the position of modified postmaster which involved working four hours per day for five days per week. The record reflects that, on June 10, 1987, appellant declined the modified postmaster position and reemployment efforts were unsuccessful.

In a September 18, 1990 letter, the employing establishment again offered appellant the modified postmaster position.

On September 21, 1990 Dr. Ramanathan Padmanaban, an orthopedic surgeon, indicated that appellant could perform the offered position.<sup>2</sup>

In a September 29, 1990 response, appellant rejected the offer.

By letter dated January 30, 1991, the Office advised appellant that the employing establishment had offered her suitable work within her physical restrictions. The Office also advised appellant that she had 30 days in which to accept the offered modified postmaster position or to provide an explanation of the reasons for refusing the job along with relevant medical reports supportive of the refusal. The Office further advised appellant of the penalties for refusing an offer of suitable work.

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<sup>2</sup> By letter dated January 14, 1988, the Office advised Dr. Srichai that he was no longer authorized to treat appellant. Her care was transferred to Dr. Padmanaban.

In a February 28, 1991 letter, appellant noted her previous injuries and the resultant conditions. Appellant stated:

“I am having severe pain in my right hip, lower back, legs and feet. Medical tests show I have poor circulation. Because of pain, I have trouble getting to sleep and when I awaken, I am stiff with pain. I am allergic to several pain relievers and antibiotics and try to avoid people, smoke and odors.”

Appellant also stated that Dr. Padmanaban would be submitting a medical report.

By letter dated October 9, 1991, the Office requested Dr. Padmanaban to submit a medical report regarding appellant’s condition and her ability to perform the offered position accompanied by a description of that position.<sup>3</sup> In a January 15, 1992 report, Dr. Padmanaban indicated his findings on physical and x-ray examination. He opined that appellant was not able to return to work due to her back and hip conditions. However, Dr. Padmanaban submitted a June 2, 1992 letter indicating that, based on his review of the description of the offered position, appellant could perform the job with restrictions which included no lifting over 10 pounds, and full restrictions regarding stooping, kneeling and repeated bending and climbing.

By letter dated August 25, 1992, the Office advised appellant that the employing establishment had offered her suitable work within her physical restrictions as set forth by Dr. Padmanaban. The Office also advised appellant that she had 30 days in which to explain in writing why she did not accept this offer of employment.

In a September 21, 1992 letter, appellant rejected the employing establishment’s offer. Appellant noted her previous injuries and stated that these injuries resulted in bursitis on the left side and arthritis in the lower spine and a foot condition. Appellant also stated that she was allergic to several medications, especially for pain, and that she had trouble sleeping and resting. Appellant further stated that the July 2, 1985 employment injury “added to the numbing, burning pain in my hip, lower back and foot. This has affected my walking and stability. At times, my foot swells and I can’t wear shoes. Therefore; I am reusing the job offer.”

By letter dated January 15, 1993, the Office advised appellant that, regarding her 1977 injury, the files were no longer in its possession and that regarding the 1984 injury, the files had been “retired” since 1989. The Office further advised appellant that if she refused the offered position or failed to report to work at the scheduled time, then her compensation benefits would be terminated within 15 days pursuant to section 8106(c) of the Act.

On January 29, 1993 appellant rejected the employing establishment’s offer. Appellant stated that she was found to be totally disabled under the civil service retirement system. Appellant also stated that her joints and muscles would become stiff due to her arthritis and that she was allergic to most pain medicines.

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<sup>3</sup> In an internal note dated September 23, 1991, the Office indicated that Dr. Padmanaban’s original report was no longer in the file and that an updated report was necessary to determine whether appellant could still perform the offered position.

By decision dated May 17, 1993, the Office terminated appellant's compensation benefits on the grounds that she refused suitable work pursuant to section 8106(c) of the Act accompanied by a memorandum.

In a June 15, 1993 letter, appellant requested an oral hearing before an Office representative. Appellant submitted an August 13, 1994 report from Dr. Srichai which reviewed a history of appellant's May 14, 1984 injury and July 2, 1985 employment injury, and appellant's other medical conditions and treatment. Dr. Srichai noted his findings on physical and x-ray examination, and diagnosed chronic low back pain syndrome, old fracture of the right hip, multiple degenerative joint disease, anxiety, hypertension, irritable bowel syndrome, chronic obstructive pulmonary disease, gout and rhinitis. Dr. Srichai concluded that appellant was unable to perform any type of work.

By decision dated September 15, 1994, the hearing representative remanded the case to the Office, finding a conflict in the medical opinion evidence between Dr. Srichai and Dr. Padmanaban.

The Office referred appellant to Dr. Paul Bachwitt, a Board-certified orthopedic surgeon, for an impartial medical examination along with a statement of accepted facts and a list of specific questions. The appointment was scheduled for Tuesday, February 21, 1995 at 11:00 a.m.

On February 22, 1995 Dr. Bachwitt advised the Office that appellant failed to keep her scheduled appointment.

By letter dated March 7, 1995, the Office advised appellant to submit the reasons why she had failed to keep the appointment with Dr. Bachwitt. The Office also advised appellant of the penalties for failure to keep, refusal to submit or obstruction of an examination pursuant to section 8123(d) of the Act.

In a March 16, 1995 response, appellant stated that she telephoned Dr. Bachwitt's office on February 20, 1995 to cancel her appointment due to a prediction of snow. Appellant also stated that she was in pain due to an acute sinus infection, that she saw the physician on February 23 and March 3, 1995 for acute bronchitis. Appellant noted that she had chronic obstructive pulmonary disease and that it became worse during cold and damp weather. Appellant then stated that she expected to obtain another appointment made by the Office, but that she only went to the post office once a week.

By decision dated March 30, 1995, the Office terminated appellant's compensation benefits on the grounds that she refused suitable work pursuant to section 8106(c) of the Act. In an accompanying memorandum incorporated by reference, the Office found that the evidence of record was insufficient to substantiate appellant's reasons for failing to keep the scheduled appointment with Dr. Bachwitt.

In an undated letter, appellant reiterated her reasons for not keeping the appointment with Dr. Bachwitt as provided in her March 16, 1995 letter. In addition, appellant stated that when she telephoned Dr. Bachwitt's office, his receptionist told her that she would have to contact the Office before scheduling another appointment and that the receptionist had not returned her call. Appellant then stated that she wanted to comply with the Office's decision to refer her to

Dr. Bachwitt. By letter dated May 9, 1995, the Office advised appellant to exercise her appeal rights.

The Board finds that the Office improperly terminated appellant's compensation benefits on the grounds that she refused an offer of suitable work pursuant to section 8106(c) of the Act.

It is well settled that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>4</sup> This includes cases in which the Office terminates compensation under section 8106(c)(2) of the Act for refusal to accept suitable work.

The Office invoked section 8106(c) of the Act in terminating appellant's compensation benefits, but based its decision on improper grounds under this section. In its March 30, 1995 decision, the Office terminated appellant's compensation benefits on the grounds that she refused suitable work pursuant to section 8106(c). Section 8106(c)(2) provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee is not entitled to compensation benefits.<sup>5</sup> However, in an accompanying memorandum incorporated by reference, the Office terminated appellant's compensation benefits on the grounds that she failed to undergo a physical examination by Dr. Bachwitt, a Board-certified orthopedic surgeon. Section 8123(d) of the Act covers the situation where an employee refuses to undergo or obstructs an examination. Section 8123(d) provides:

“If an employee refuses to submit to or obstructs an examination, his right to compensation under this subchapter is suspended until the refusal or obstruction stops. Compensation is not payable while a refusal or obstruction continues, and the period of the refusal or obstruction is deducted from the period for which compensation is payable to the employee.”<sup>6</sup>

The determination of the need for an examination, the type of examination, the choice of locale, and the choice of medical examiners are matters within the province and discretion of the Office.<sup>7</sup> The only limitation on this authority is that of reasonableness.<sup>8</sup> The Office's regulation, 20 C.F.R. § 10.407(a), provides that an injured employee “shall be required to submit to examination by a U.S. Medical Officer or by a qualified private physician approved by the Office as frequently and at such times and places as in the opinion of the Office may be reasonably necessary.”

The Board has recognized that section 8106(c) serves as a penalty provision as it may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment and, for this reason, will be narrowly construed.<sup>9</sup> Although section 8106(d) is also

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<sup>4</sup> *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

<sup>5</sup> 5 U.S.C. § 8106(c)(2).

<sup>6</sup> 5 U.S.C. § 8123(d).

<sup>7</sup> *James C. Talbert*, 42 ECAB 974, 976 (1991); *Dorine Jenkins*, 32 ECAB 1502, 1505 (1981).

<sup>8</sup> *Id.*; *William B. Saviolidis*, 35 ECAB 283, 286 (1983); *Joseph W. Bianco*, 19 ECAB 426, 428 (1968).

<sup>9</sup> *Stephen R. Lubin*, 43 ECAB 564 (1992).

recognized by the Board as a penalty provision,<sup>10</sup> it merely suspends appellant's compensation benefits until she stops refusing to undergo or obstructing an examination. In this case, the Board notes that the hearing representative, in a September 15, 1994 decision, improperly found a conflict in the medical opinion evidence between appellant's treating physicians, Dr. Srichai, a general surgeon who performed surgery in 1985 and who has supported her claim of continuing employment-related disability, and Dr. Padmanaban, an orthopedic surgeon who treated appellant for her accepted hip condition but disagreed on appellant's ability to perform the offered modified postmaster position.<sup>11</sup> Consequently, the referral to Dr. Bachwitt constitutes a second opinion referral and not an impartial medical evaluation. Moreover, the evidence of record from Dr. Srichai has supported appellant's continuing disability for work and the hearing representative was in error in finding that appellant had merely expressed her own opinion, without supporting medical evidence, that she was unable to perform the duties of the modified postmaster position when rejecting the offered position.

For these reasons, the Board finds that the Office failed to meet its burden of proof in this case to terminate appellant's compensation under section 8106(c)(2) of the Act.

The March 30, 1995 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, D.C.  
September 21, 1998

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member

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<sup>10</sup> *Ester C. Lynch*, 39 ECAB 193, 197-98 (1987).

<sup>11</sup> See *John H. Taylor*, 40 ECAB 1228 (1989) (no conflict in medical opinion as no physician acting on behalf of the United States disagreed with the reports of appellant's physicians).