

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of PLACENTHIA A. HASSAN and U.S. POSTAL SERVICE,  
BENT TREE POST OFFICE, Dallas, TX

*Docket No. 03-1675; Submitted on the Record;  
Issued September 22, 2003*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation on the grounds that she abandoned suitable work.

The Office accepted that appellant, then a 39-year-old clerk, sustained a cervical sprain in the performance of duty on March 20, 1993. The Office subsequently expanded its acceptance to include herniated nucleus pulposus at C3-4 and C5-6, with surgical correction, as well as anxiety state. Appellant stopped work on the date of injury. She returned to a modified part-time job on April 7, 1997 but after working only part of the day, stopped work again. She was paid appropriate compensation for temporary total disability and placed on the periodic rolls. In 1998 and 1999, appellant underwent a series of tests, including magnetic resonance imaging (MRI) scan, computerized tomography and x-rays, which revealed the presence of a bilateral broad based disc bulge at L4-5 and multifocal mild central stenosis L4-5 and associated with degenerative disc disease and bilateral foraminal stenosis at this level below the exiting nerve roots. Appellant filed a claim for a recurrence of disability, which was accepted by the Office on December 7, 2001.

In a decision dated September 10, 2001, the Office denied appellant's claim for compensation benefits for her lumbar condition, on the grounds that the medical evidence of record did not establish that her lumbar condition was causally related to her accepted 1993 cervical condition.

In order to clarify appellant's condition, the Office scheduled a second opinion examination with Dr. Rajendra P. Gandhi, a Board-certified neurologist. In a report dated July 25, 1996, Dr. Gandhi reviewed the medical evidence of record and listed his findings on physical examination. The physician stated that there were no objective findings to suggest that appellant's accepted cervical condition was causing any severe disability, but noted that she may have some problem lifting heavy weights because of the neck surgeries. Dr. Gandhi stated that appellant could not return to work in her prior position with the employing establishment, but should be able to return to a job, which did not require heavy lifting. In an accompanying work

capacity evaluation form, Dr. Gandhi indicated that appellant could work four hours a day initially, slowly increasing, in a position that did not require that she lift more than 20 pounds or perform more than occasional bending, twisting, reaching or lifting.

On September 12, 2001 the Office determined that a conflict existed in the medical evidence between the opinion of Dr. Gandhi, the Office referral physician, who found appellant able to return to part-time work and appellant's treating physician, Dr. John A. Sazy, an orthopedic surgeon, who continued to maintain that appellant was totally disabled. In order to resolve this conflict, the Office referred appellant for an impartial medical examination with Dr. John C. Milani, a Board-certified orthopedic surgeon, pursuant to section 8123(a).<sup>1</sup> On the statement of accepted facts sent to Dr. Milani, the Office noted that appellant's claim had been accepted for cervical sprain, cervical disc displacement, cervical surgery and an emotional condition, but had not been accepted for a degenerative lower back condition and disc bulge at L4-5. The Office asked that if Dr. Milani found appellant to be totally or partially disabled, he specify whether the disability was caused by appellant's lumbar condition, her cervical condition, her emotional condition, or something else. The Office further asked Dr. Milani to answer the following question: "If [she] did not have a concurrent lower back condition, taking into consideration her cervical condition only, what would her work restrictions be? Would she be able to work as a modified distribution clerk?"

In a report dated September 28, 2001, Dr. Milani reviewed the statement of accepted facts and appellant's medical records, noting that appellant's low back condition was not accepted as part of her workplace injury. Dr. Milani stated that his findings on examination and concluded that appellant had probable degenerative disc pain at C4-5, which appeared to be a somewhat degenerative level localized between two solid fusions. He stated that neurologically, appellant appeared to be intact, except for a feeling of diffuse numbness in the left arm and hand, which could not be further defined. Dr. Milani stated that these conditions were related to appellant's 1993 employment injury. With respect to appellant's ability to work and need for future treatment, Dr. Milani stated, in pertinent part:

"She is capable of performing sedentary work activities and I would suggest a four-hour workday would be appropriate. A [10]-pound lifting restriction would be reasonable. As would restrictions against overhead work. The specific restrictions are outline[d] in the [F]orm OWCP-5C that was filled out for her today.<sup>2</sup>

"I would generally agree with Dr. Gandhi's assessment of her work status with the exception of suggesting a [10]-pound lifting restriction.

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<sup>1</sup> 5 U.S.C. § 8123(a).

<sup>2</sup> On the accompanying OWCP-5C, Dr. Milani indicated that appellant could work four hours a day and could possibly increase her hours if C4-5 fusion was performed and was successful. He stated that appellant could perform only occasional reaching above the shoulder and could not lift, push, or pull more than 10 pounds for more than 2 hours a day.

“I believe the work restrictions are likely permanent, whether or not she does require any additional procedures such as fusion of the degenerative C4-5 disc.

“Her disability is caused by the residuals of the cervical injury specifically.

“The low back injury does not enter into my assessment as to her work level restrictions.

“I believe it would be reasonable to give serious consideration of anterior cervical discectomy and fusion at C4-5. The patient has had a prior fusion at C3-4 and C5-6. This generally exerts significant pressure and the onset of degenerative changes at the intervening single disc space, which in her case is C4-5.”

By letter dated May 9, 2002, the employing establishment offered appellant a four-hour, limited-duty position as a modified distribution clerk based on the restrictions outlined by Dr. Milani. The job offer delineated both the restrictions set by Dr. Milani, as well as the specific physical requirements of the job.

By letter dated June 17, 2002, the Office informed appellant that the employing establishment had made an offer of work as a modified distribution clerk consistent with the physical limitations and work restrictions outlined by Dr. Milani, the impartial examiner. The Office stated that it had reviewed the offer of employment and had compared it with the medical evidence concerning her ability to work and had found the offer to be suitable. The Office advised appellant that if she refused the employment or failed to report for work when scheduled without reasonable cause then her compensation benefits would be terminated. The Office stated the case would be kept open for 30 days. It instructed appellant to either accept the position or provide an explanation for the reasons for refusing it. The Office informed appellant that if she failed to accept the offered position, any explanation or evidence, which she provided would be considered prior to determining whether or not her reasons for refusing the job were justified.

By letter dated July 16, 2002, appellant through her representative, informed the Office that she was refusing the offer. Appellant asserted that Dr. Milani had only considered her cervical condition and that her lumbar condition disabled her from performing the position. Appellant further stated that the Office’s procedures provided that if the medical reports in the file document a condition, which has arisen since the compensable injury and this condition disables the claimant from the offered job, then the job will be considered unsuitable, even if the subsequently acquired condition is not work related.

By letter dated July 17, 2002, the Office informed appellant that her reasons for refusing the position were unacceptable and allowed her an additional 15 days to accept the position.

On August 2, 2002 appellant returned to work, but after only a few hours she stopped work and returned home, claiming severe lumbar pain.

By decision dated August 9, 2002, the Office found that appellant was not entitled to compensation benefits, effective August 10, 2002, on the grounds that she had abandoned a suitable job.

Appellant requested an oral hearing, which was held on March 25, 2003. Appellant testified that she had stumbled on her way from the car to the employing establishment, triggering severe lumbar pain. Appellant stated that she was unable to stand to perform her duties and after leaving work, she visited the emergency room for a lumbar injection. In addition, appellant submitted a report dated December 3, 2002 from her treating physician, Dr. Sazy, which contained a diagnosis of degenerative cervical and lumbar discs, noted that appellant was restricted from twisting and bending and further noted that she was medically retired and not working. Dr. Sazy did not provide an opinion as to whether appellant was able to work. Finally, appellant submitted a cervical spine series, which simply revealed evidence of her prior fusion surgeries.

In a decision dated June 3, 2003, an Office hearing representative affirmed the August 9, 2002 decision.

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits on the grounds that she refused an offer of suitable work.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits. 5 U.S.C. § 8106(c) 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." 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> To justify such a termination, the Office must show that the work offered was suitable.<sup>4</sup> An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.<sup>5</sup> The Office did not meet its burden in the present case.

The initial question in this case is whether the Office properly determined that the position offered to appellant was suitable. 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 the medical evidence.<sup>6</sup> In referring the case to Dr. Milani, the impartial medical examiner, the Office asked the physician to address whether any disability appellant had was due to her cervical condition, her lumbar condition, or some other condition. The Office also asked Dr. Milani to address what appellant's work restrictions would be if appellant did not have a concurrent lower back condition, taking into consideration her cervical condition only. In his report, Dr. Milani stated: "The low back injury does not enter into my assessment as to her work level restrictions." A review of Dr. Milani's report reveals that other than a notation that appellant's lumbar conditions had not been accepted by the Office, the report contains no discussion or review of the medical evidence concerning appellant's additional lumbar spine conditions, nor does it appear to contain any physical examination

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<sup>3</sup> *Henry P. Gilmore*, 46 ECAB 709 (1995).

<sup>4</sup> *John E. Lemker*, 45 ECAB 258 (1993).

<sup>5</sup> *Catherine G. Hammond*, 41 ECAB 375, 385 (1990); 20 C.F.R. § 10.517(a).

<sup>6</sup> *Robert Dickinson*, 46 ECAB 1002 (1995).

results regarding appellant's lumbar spine. The Office is required to consider additional conditions arising after the accepted employment injury in determining whether an offered position is suitable.<sup>7</sup>

In rejecting the job offer, appellant explained that she was doing so because of her lumbar spine condition and noted that Dr. Milani had not examined her lumbar spine. In support of her refusal, appellant submitted additional medical evidence, consisting of medical reports from her treating physicians and the results of MRI scan, which indicates that she does have a bulging disc at L4-5, as well as degenerative disc disease. The Office did not consider appellant's response regarding this issue, or specifically address this aspect of appellant's claim in its decisions.<sup>8</sup>

The Board has held that once the Office advises a claimant that his or her reasons for refusing an offered position are unacceptable and that he or she has 15 days to accept the position or have compensation terminated, the claimant submits further reasons and supporting evidence at his or her own risk. Nevertheless, the Office must consider the reasons and evidence and can then concurrently reject them as unacceptable and terminate compensation.<sup>9</sup> A review of the Office's decisions indicates that the Office did not address the allegation of a subsequently arising condition raised by appellant, which disabled her from the selected position and did not offer any reasoning explaining why appellant's reason for refusing the offered position was unacceptable.<sup>10</sup>

Appellant submitted evidence of an additional physical condition impacting on her ability to perform the offered position. As the Office is required to consider all the evidence submitted by appellant prior to termination for a refusal of suitable work and to consider subsequently arising conditions in determining the suitability of an offered position, the Board finds that the Office failed to meet its burden of proof to terminate appellant's compensation benefits.

For these reasons, the Board finds that the position of modified distribution clerk has not been established as suitable. As it is the Office's burden of proof to establish that appellant

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<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4b(4) (June 1996).

<sup>8</sup> In an internal memorandum dated July 22, 2002, which was sent to the claims examiner who initially denied appellant's claim, a senior claims examiner noted that if appellant felt she could not perform the offered position because of her lower back condition, she needed to submit a current medical report that explained objectively how the current back condition is still related to the 1993 work injury as opposed to being a preexisting degenerative condition and if the condition was work related, how that condition made her incapable of performing the offered job. The Office is required to consider additional conditions arising after the accepted employment injury in determining whether an offered position is suitable.

<sup>9</sup> *Kenneth R. Love*, 50 ECAB 193, 198 (1998).

<sup>10</sup> In the June 3, 2003 decision, the Office hearing representative did note that appellant claimed that she had stumbled on the day she attempted to return to work, triggering severe lumbar pain. The Office hearing representative did not mention, however, that appellant had an additional diagnosed lumbar condition, supported by diagnostic testing, or that she had asserted that this lumbar condition prevented her from performing the offered job.

refused a suitable position, the Office did not meet its burden of proof in this case to terminate appellant's compensation benefits pursuant to 5 U.S.C. § 8106.<sup>11</sup>

The decisions of the Office of Workers' Compensation Programs dated June 3, 2003 and August 9, 2002 are hereby reversed.

Dated, Washington, DC  
September 22, 2003

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>11</sup> *Barbara R. Bryant*, 47 ECAB 715 (1996).