

FACTUAL HISTORY

The Office accepted that on August 9, 1999 appellant, then a 31-year-old rural carrier, sustained a lumbar strain lifting a heavy package.² Appellant stopped work on August 12, 1999 and did not return. She received compensation for temporary total disability from August 12, 1999 to November 3, 2002.

Dr. David J. Conaway, an attending osteopath and orthopedic surgeon, held appellant off work from August 12, 1999, onward due to the lumbar strain and a suspected herniated L5 disc. Following a May 4, 2001 lumbar magnetic resonance imaging scan showing no disc herniations or other abnormalities, Dr. Conaway diagnosed a chronic lumbar sprain/strain. He noted as of May 17, 2001, that he would lift appellant's work restrictions as he could not find an organic basis for her symptoms. On December 4, 2001 Dr. Conaway again diagnosed a ruptured L5 disc but reverted on March 13, 2002 to the diagnosis of a lumbar sprain/strain. He referred appellant to a chiropractor,³ rheumatologist and pain management specialist.⁴

Dr. Harold H. Alexander, a Board-certified orthopedic surgeon and second opinion physician, submitted January 8 and 11, 2002⁵ reports, diagnosing a chronic lumbosacral strain with symptom exaggeration due to emotional factors. Dr. Alexander found no disability due to sequelae of the August 9, 1999 injury, noting that her subjective complaints did not correlate with any objective physical findings. He recommended 2 to 3 months of restricted duty with sitting limited to 6 to 8 hours per day, walking and standing to 2 to 4 hours, twisting, pushing, pulling and lifting up to 10 pounds for 3 hours per day and no squatting, kneeling or climbing. Appellant could then return to her date-of-injury job. Dr. Conaway approved these restrictions on March 6, 2002.

² The Office initially denied the claim by January 14, 2000 decision, on the grounds that fact of injury was not established, in part due a discrepancy as to whether the injury was sustained while lifting packages on August 9 or 12, 1999. Appellant's March 30, 2000 request for an oral hearing was denied by decision dated June 6, 2000, as it was not timely filed. On September 29, 2000 appellant requested reconsideration. By decision dated April 3, 2001, the Office vacated the January 14, 2000 decision, finding that appellant had established that she sustained a lumbar strain in the performance of duty on August 9, 1999.

³ The record contains August and October 2001 notes by Dr. Phillip R. Carson, a chiropractor. Section 8101(2) of the Act provides that the term "physician" includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist. 5 U.S.C. § 8101(2); *Brenda C. McQuiston*, 54 ECAB ___ (Docket No. 03-1725, issued September 22, 2003). As Dr. Carson did not diagnose a subluxation of the spine, the Office advised him by May 15, 2002 letter, that it would not authorize payment for his services.

⁴ Dr. John E. Maxa, Jr., an attending Board-certified anesthesiologist, submitted a June 11, 2001 report, diagnosing sacroiliitis, myofascial pain syndrome and depression, but did not address causal relationship or work restrictions.

⁵ On its face, the work-capacity evaluation is dated January 8, 2001. However, as the Office requested this report in December 2001 and Dr. Alexander's narrative report was dated January 8, 2002, the record indicates that the work-capacity evaluation should have been dated January 8, 2002.

On May 21, 2002 the employing establishment offered appellant a position as a modified rural carrier associate, with assigned duties of casing and sorting mail, delivering express mail weighing less than 10 pounds and clerical tasks. The position required sitting 6 to 8 hours per day, standing and walking 2 to 4 hours, twisting for up to 2 hours and no squatting, bending or climbing. The employing establishment noted the Act's penalty provision for refusing suitable work. Appellant refused the position on June 7, 2002 asserting that she remained disabled for work due to lumbar pain, headaches and a two-month history of seizures. She noted a pending appointment with a rheumatologist.

In a June 17, 2002 report, Dr. Joe B. Linker III, an attending Board-certified internist specializing in rheumatology, noted appellant's belief that her low back problems were related to the August 9, 1999 incident. On examination, Dr. Linker found widespread paraspinal hyperalgesia, lumbar stiffness, pain with hip extension and lumbar flexion and deconditioning due to a lack of exercise. He diagnosed "chronic back pain evolving into a widespread generalized pain syndrome," noting that there was no "specific test" to verify this diagnosis. Dr. Linker stated that the "chronicity of [appellant's] pain and problems" prevented her to return work as she could not sit for prolonged periods, bend, twist or lift. He opined that an exercise program might enable an eventual return to some type of work.

In a July 8, 2002 letter, the Office advised appellant that the offered position was suitable work within medical restrictions approved by Dr. Alexander and Dr. Conaway. The Office afforded appellant 30 days, in which to accept the offer or submit her reasons for refusal. The Office also advised appellant of the Act's penalty provisions for refusing suitable work. Appellant did not respond. Thus, in a September 10, 2002 letter, the Office advised appellant that she had 15 days, in which to either accept the offer or face termination of her compensation. The Office noted that any reasons for refusal offered thus far were unacceptable and that no further reasons would be considered. The record indicates that appellant did not respond to this letter and did not report for work.

By decision dated November 4, 2002 and finalized November 5, 2002, the Office terminated appellant's wage-loss compensation benefits effective November 4, 2002, on the grounds that she refused an offer of suitable work. The Office found that appellant submitted no medical evidence establishing that the proposed duties exceeded her work restrictions.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened before it may terminate or modify compensation benefits.⁶ This burden of proof applies where the Office terminates compensation under 5 U.S.C. § 8106(c), which provides that a partially disabled employee who refuses or neglects to work after suitable work is

⁶ *Raymond W. Behrens*, 50 ECAB 221, 222 (1999); *Bettye F. Wade*, 37 ECAB 556, 565 (1986).

offered is not entitled to compensation.⁷ The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.⁸

To justify termination, the Office must show that the work offered was suitable based on the claimant's work restrictions at that time and that the employee was informed of the consequences of his refusal to accept such employment.⁹ An employee who refuses or neglects to work after suitable work has been offered to him must show that such refusal to work was justified.¹⁰ The employee shall be provided the opportunity to make such a showing before the Office terminates entitlement to compensation.¹¹ These requirements apply to determinations regarding both refusal and abandonment of suitable work.¹²

ANALYSIS

The Office determined appellant's work limitations by referral to Dr. Alexander, a Board-certified orthopedic surgeon, who submitted restrictions on January 8, 2002 that were also approved by Dr. Conaway, an attending orthopedic surgeon, on March 6, 2002. The employing establishment offered appellant a modified position within those restrictions on May 21, 2002, which the Office found to be suitable work. Appellant refused the position on June 7, 2002 asserting that she remained disabled. Appellant's physical ability to perform the offered modified position is primarily a medical question that must be resolved by medical evidence.¹³ Thus, to justify her refusal, appellant submitted a June 17, 2002 report from Dr. Linker, an attending Board-certified rheumatologist, diagnosing chronic back pain and the new condition of a "generalized pain syndrome" which disabled her for work. While the Office must consider subsequently acquired conditions in evaluating the suitability of an offered position,¹⁴ Dr. Linker admitted that there was no objective test to verify the existence of the new pain syndrome. Therefore, Dr. Linker's opinion is insufficient to establish either the presence of the pain

⁷ *Tammy L. Flickinger*, 54 ECAB ____ (Docket No. 03-22, issued April 9, 2003).

⁸ *Linda D. Guerrero*, 54 ECAB ____ (Docket No. 03-267, issued April 28, 2003); *Stephen R. Lubin*, 43 ECAB 564 (1992).

⁹ *Joan F. Burke*, 54 ECAB ____ (Docket No. 01-39, issued February 14, 2003); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

¹⁰ 20 C.F.R. § 517(a) 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 such refusal or failure to work was reasonable or justified. See *Sandra K. Cummings*, 54 ECAB ____ (Docket No. 03-101, issued March 13, 2003).

¹¹ 20 C.F.R. § 516; *Maggie L. Moore*, *supra* note 9.

¹² *Juan A. Dejesus*, 54 ECAB ____ (Docket No. 03-1307, issued July 16, 2003).

¹³ *Anna M. Delaney*, 53 ECAB ____ (Docket No. 00-2090, issued February 22, 2002); *Gayle Harris*, 52 ECAB 319 (2001) (the Board found that appellant's physician provided insufficient rationale explaining how appellant's accepted condition and residuals prevented her from returning to work in an offered modified-duty position).

¹⁴ *Gayle Harris*, *supra* note 13.

syndrome or that it would disable appellant for work.¹⁵ The Board notes that Dr. Conaway and Dr. Alexander also observed that there were insufficient objective findings to explain appellant's pain symptoms.

Additionally, Dr. Linker did not provide sufficient rationale connecting any of appellant's symptoms or findings to the accepted injury. He noted that appellant attributed her continuing condition to the August 9, 1999 injury, but did not provide his own opinion supporting causal relationship. Without medical rationale explaining how and why the August 9, 1999 lumbar strain would disable appellant from performing the offered modified position, Dr. Linker's opinion is insufficient to meet appellant's burden of proof.¹⁶

On July 8, 2002 the Office provided appellant appropriate notice of the suitability and availability of the offered position and of the Act's penalty provisions for refusing suitable work. As she did not respond, the Office again advised appellant of the Act's penalty provisions and the continued availability of the offered position on September 10, 2002. As appellant failed to respond, the Office terminated her wage-loss compensation.

Therefore, the Board finds that the Office's termination of appellant's compensation was proper. The Office met its procedural burden of proof and appellant submitted insufficient medical evidence to justify her refusal of the offered suitable work position.

¹⁵ *Carol S. Masden*, 54 ECAB ___ (Docket No. 02-1667, issued January 8, 2003) (the Board held that to be highly probative, a physician's opinion must be based on a complete medical and factual background, of reasonable medical certainty and supported by medical rationale).

¹⁶ *Carol S. Masden*, *supra* note 15. See also *Lucrecia M. Nielsen*, 42 ECAB 583 (1991).

CONCLUSION

The Board finds that the Office met its burden of proof in terminating appellant's wage-loss compensation under section 8106(c) of the Act, on the grounds that she refused an offer of suitable work and submitted insufficient medical evidence establishing that she was disabled from performing the offered modified duty position.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 4, 2002 and finalized November 5, 2002 is affirmed.

Issued: February 12, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member