



improperly terminated appellant's compensation effective February 24, 2002 because she neglected to work after suitable work was offered to her.<sup>2</sup> The Board found that the evidence of record did not show that appellant was capable of performing the medical clerk position offered by the employing establishment in June 2001 and determined to be suitable by the Office in December 2001. The Board noted that the record did not contain any medical evidence from around the time that the medical clerk position was offered to appellant and the time that the Office determined that the medical clerk position was suitable. The facts and the circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

In March 2003 the Office referred appellant and the case record to Dr. Terry J. Beal, a Board-certified orthopedic surgeon, for a second opinion examination and an opinion regarding the extent of her employment-related disability.<sup>3</sup> In a report dated April 16, 2003, Dr. Beal reported the history of appellant's February 17, 1991 injury and her medical treatment since that time. He indicated that appellant did not have any neurological or range of motion deficits in her upper extremities. Dr. Beal stated that appellant exhibited some minor irritability in the subacromial aspect of her left shoulder without instability or subluxation and noted that she had residuals of her February 17, 1991 injury in the form of tendinitis involving the supraspinatus tendon of the left shoulder in the rotator cuff area.<sup>4</sup> He opined that this condition was symptomatic, but did not cause disability. Dr. Beal indicated that appellant's cervical strain had resolved, but that she had some minor residuals of her congenital cervical stenosis. He concluded that appellant could return to her nursing assistant position for eight hours per day with reaching above her shoulder with her left arm limited to two hours per day.<sup>5</sup>

In a report dated April 12, 2003, Dr. Thomas R. Dempsey, an attending Board-certified orthopedic surgeon, indicated that appellant continued to report neck and shoulder pain. He noted that appellant had no muscle atrophy or upper extremity weakness and diagnosed neck and shoulder pain.

On July 16, 2003 the employing establishment offered appellant a position as a nursing assistant.<sup>6</sup> On July 22, 2003 the Office advised appellant of its determination that the nursing assistant position was suitable and gave her 30 days to accept the position or provide a written explanation of her reasons for failing to accept it. In documents received by the Office in mid to

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<sup>2</sup> On February 17, 1991 appellant, then a 32-year-old nursing assistant, sustained cervical and left arm strains when she lifted a patient into a wheelchair. She stopped work on February 17, 1991 and received compensation for periods of disability.

<sup>3</sup> The Office had determined that it did not appear from the record that appellant was receiving any significant treatment from an attending physician at that time.

<sup>4</sup> Dr. Beal also indicated that appellant had experienced chronic impingement syndrome of the left shoulder.

<sup>5</sup> The Office provided Dr. Beal with a description of a nursing assistant position. The position involves extensive walking and standing as well as bending, stooping, pulling, carrying (classified as moderate -- between 15 and 44 pounds) and lifting (classified as heavy -- 45 pounds and over).

<sup>6</sup> The position contained the same duties and requirements as contained in the position description provided to Dr. Beal, with the exception that reaching above the shoulder with the left arm was limited to two hours.

late August 2003, appellant indicated that she could not accept the offered position because her medical condition prevented her from performing its duties.<sup>7</sup> By letter dated August 27, 2003, the Office advised appellant that her reason for refusing to accept the nursing assistant position was not valid and provided her with 15 days to accept to position.

In a report dated August 28, 2003, Dr. Dempsey indicated that appellant reported some pain in her neck and arms on compression during examination, but did not show any pain when distracted. He noted that she had full range of motion of her neck and arms and diagnosed degenerative disc disease and shoulder pain. In a note dated August 25, 2003, Dr. Dempsey indicated that she was disabled for the following six weeks.

In a letter dated September 4, 2003, the Office requested that Dr. Dempsey provide an opinion on appellant's ability to work as a nursing assistant. The Office requested that the report be submitted within 15 days.<sup>8</sup>

By decision dated October 6, 2003, the Office terminated appellant's compensation effective that date on the grounds that she refused an offer of suitable work.

### **LEGAL PRECEDENT**

Section 8106(c)(2) of the Federal Employees' Compensation Act 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."<sup>9</sup> However, to justify such termination, the Office must show that the work offered was suitable.<sup>10</sup> An employee who refuses or neglects to work after suitable work has been offered to her has the burden of showing that such refusal to work was justified.<sup>11</sup>

### **ANALYSIS**

The evidence of record shows that appellant is capable of performing the nursing assistant position offered by the employing establishment and determined to be suitable by the Office in July 2002. The position involves extensive walking and standing as well as bending, stooping, pulling, carrying (classified as moderate -- between 15 and 44 pounds) and lifting

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<sup>7</sup> Appellant indicated that she did not "decline the position," but the content of these documents shows that she, in fact, was refusing to accept the position.

<sup>8</sup> Dr. Dempsey did not submit any report within this allotted time period.

<sup>9</sup> 5 U.S.C. § 8106(c)(2).

<sup>10</sup> *David P. Camacho*, 40 ECAB 267, 275 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341, 345 (1981).

<sup>11</sup> 20 C.F.R. § 10.124; *see Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

(classified as heavy -- 45 pounds and over). The position limits reaching above the shoulder with the left arm to two hours per day. The record does not reveal that the position is temporary or seasonal in nature.<sup>12</sup>

In determining that appellant is physically capable of performing the nursing assistant position, the Office properly relied on the detailed and well-reasoned opinion of Dr. Beal, a Board-certified orthopedic surgeon who served as an Office referral physician. In a report dated April 16, 2003, Dr. Beal stated that appellant did not have any instability, neurological deficits or range of motion limitations in her upper extremities, although she did exhibit some minor irritability in the subacromial aspect of her left shoulder without instability or subluxation. He noted that appellant had residuals of her February 17, 1991 injury in the form of tendinitis involving the supraspinatus tendon of the left shoulder, but determined that this condition did not cause disability.<sup>13</sup> Dr. Beal concluded that, given these limited findings, appellant could return to her nursing assistant position for eight hours per day with reaching above her shoulder with her left arm limited to two hours per day.

In reports dated in April and August 2003, Dr. Dempsey, an attending Board-certified orthopedic surgeon, indicated that appellant continued to report neck and shoulder pain, but noted essentially normal findings on examination. He did not, however, provide any assessment of appellant's ability to work in these reports. In notes dated in August 2003, Dr. Dempsey indicated that appellant had disability for several weeks in August and September 2003. However, he did not provide a diagnosis or explain what findings on examination supported a finding of disability.

The Board finds that, therefore, the Office has established that the nursing assistant position offered by the employing establishment is suitable. As noted above, once the Office has established that a particular position is suitable, 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. The Board has carefully reviewed the evidence and argument submitted by appellant in support of her refusal of the nursing assistant position and notes that it is insufficient to justify her refusal of the position.<sup>14</sup>

### **CONCLUSION**

The Board finds that the Office properly terminated appellant's compensation effective October 6, 2003 on the grounds that she refused an offer of suitable work.

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<sup>12</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4b (July 1997).

<sup>13</sup> Dr. Dempsey also indicated that appellant's cervical strain had resolved and she only had some minor residuals of her congenital cervical stenosis.

<sup>14</sup> The Board notes that the Office complied with its procedural requirements prior to terminating appellant's compensation, including providing appellant with an opportunity to accept the nursing assistant position after informing her that her reasons for initially refusing the position were not valid; *see generally Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 6, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 4, 2004  
Washington, DC

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member