

**United States Department of Labor  
Employees' Compensation Appeals Board**

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JOSEPH J. WHITAKER, Appellant )  
and ) Docket No. 05-1639  
U.S. POSTAL SERVICE, POST OFFICE, ) Issued: December 20, 2005  
Hialeah, FL, Employer )  
Hialeah, FL, Employer )  
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)

*Appearances:*

*Paul H. Felser, Esq.*, for the appellant  
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
WILLIE T.C. THOMAS, Alternate Judge

**JURISDICTION**

On August 2, 2005 appellant filed a timely appeal from the April 28, 2005 merit decision of the Office of Workers' Compensation Programs which purportedly denied his request for reconsideration of the termination of his compensation, but which found that he was entitled to some additional compensation as he had argued. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the Office's termination of compensation.

**ISSUE**

The issue is whether the Office properly terminated appellant's compensation benefits under 5 U.S.C. § 8106(c)(2) on the grounds that he neglected suitable work.

**FACTUAL HISTORY**

On August 30, 1984 appellant, then a 42-year-old special delivery messenger, sustained an injury in the performance of duty when his postal vehicle was struck by an oncoming car and overturned. The Office accepted his claim for contusions to the right shoulder, arm, hip and leg; for abrasions of the left leg and lower back; for a torn lateral meniscus, right; and for post-

traumatic arthritis. Appellant underwent a total right knee replacement arthroplasty. He received compensation for temporary total disability and a schedule award for a 20 percent impairment of the right lower extremity.

On April 23, 2002 appellant formally accepted a rehabilitation job offer to work as a modified clerk. He returned to work in the modified position for eight hours a day beginning April 29, 2002. On May 20, 2002, however, his attending orthopedic surgeon, Dr. John J. Jennings, restricted him to six hours a day for an expected period of four weeks. Appellant advised the Office rehabilitation counselor on June 26, 2002 that his knee was still swelling after five hours of work. On July 3, 2002 Dr. Jennings reported that he needed to continue the six-hour restriction. Appellant claimed and the Office paid compensation for continuing partial disability.

On July 19, 2002 an Office rehabilitation counselor advised the Office as follows: "Manager at [employing establishment] said he really does [not] need or want IW full time, but he would give IW the hours to help out IW if he had to. IW does [not] even feel he can work part time, but he is keeping the 6 hours." Time analysis forms, certified as accurate by the employing establishment show that on or about October 1, 2002 appellant began working four hours a day and taking four hours of leave without pay because -- authorized leave and doctor's appointments aside -- "no work [was] available."<sup>1</sup>

On December 20, 2002 Dr. D. Barry Lotman, an orthopedic surgeon and Office second-opinion physician, reported that appellant could perform the duties of the modified position for eight hours daily. To resolve the conflict between Dr. Jennings and Dr. Lotman, the Office referred him to Dr. Ubaldo S. Rodriguez, a Board-certified orthopedic surgeon, for impartial medical evaluation. On February 26, 2003 he reported that appellant was able to work eight hours a day as a modified clerk.

On March 31, 2003 the Office called the employing establishment and was informed that appellant was working four hours a day. On that same date the Office notified him that the job he was offered as a modified clerk<sup>2</sup> was suitable and currently available and that he had 30 days to accept the position working eight hours a day or provide reasons for refusing. The Office advised that, upon acceptance of this position for eight hours a day he would be paid compensation based on the difference, if any, between the pay of the offered position and the pay of his position on the date of injury.

The Office received an April 10, 2003 follow-up treatment note from Dr. Jennings. On April 30, 2003 the Office notified appellant that this evidence did not explain the reason he had been working six hours a day. The Office advised that he had 15 additional days to accept the position. Appellant did not respond. On May 15, 2003 the Office called the employing establishment and was informed that he was currently working six hours a day.<sup>3</sup> In a decision

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<sup>1</sup> Appellant continued working four hours a day through at least June 6, 2003.

<sup>2</sup> The employing establishment made no new offer to appellant.

<sup>3</sup> Time analysis forms from May 2003 show that appellant was working four hours a day.

issued on May 22, 2003, the Office terminated appellant's compensation benefits effective May 15, 2003, on the grounds that the employing establishment had offered him a suitable position that he failed to work for eight hours a day.<sup>4</sup>

Appellant, through his attorney, argued that he had already returned to work and, therefore, the offer of that position and the imposition of the penalty were inappropriate. He requested an oral hearing before an Office hearing representative. At the hearing, which was held on November 14, 2003, appellant argued that, given the severity of his injury the issue was not one to be solved by a functional mobility examination as the impartial medical specialist performed; he needed a functional capacity evaluation. Because neither the second opinion physician nor the impartial medical specialist obtained such an evaluation, their conclusions were not supported by rationale. Both physicians identified atrophy, muscle loss, loss of mass and weakness, but neither explained how they were able to determine, based on these findings, that appellant could perform the modified position for eight hours a day, as opposed to six. Appellant testified that he started working four hours a day in January 2003 and that the employing establishment accommodated him:

“They should have accommodated that in a round about way by saying we have -- when you go in they create a job. You're moving some of their irregulars back and they're not getting their hours so they said, okay, maybe you can work four hours a day and I said, yes, I'll take the four instead of trying to take the six because I'm having problems trying to do the six.”

Appellant further testified that he had other medical conditions -- hypertension, inflammatory arthritis and carpal tunnel syndrome -- that should have been considered in determining whether a position was suitable.

In a decision dated April 16, 2004, an Office hearing representative affirmed, finding that the decision to terminate appellant's entitlement to compensation benefits was justified. The hearing representative also found, however, that the medical evidence established that he was unable to work more than six hours a day after his initial return to work due to residuals of the accepted work-related condition and subsequent surgical procedures. So she held that appellant was entitled to compensation for two hours of daily wage loss from June 22, 2002 through January 14, 2003.<sup>5</sup>

On April 14, 2005 appellant requested reconsideration. He argued, through his attorney, that he did not refuse suitable employment, that he timely accepted the job offer, that the true issue was residual work capacity and not refusal of suitable work. Counsel argued that the penalty applied in this case was improper under the circumstances. He argued that he was entitled to specific notice that he had to increase his hours to eight a day in order to avoid the

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<sup>4</sup> Appellant last worked on June 30, 2003. He retired after 40 years of service.

<sup>5</sup> On January 15, 2003 Dr. Jennings reported that appellant's knee was stable and had at least 105 degrees of motion. He stated that appellant continued to use a cane on an as-needed basis, which he deemed reasonable. Dr. Jennings reported that he would see him again on an annual basis. The hearing representative noted that she did not report that appellant was experiencing any swelling or acute pain.

penalty, which notice was not given. Counsel also argued that he was entitled, at the very least, to continuing compensation for wage loss from January 13 to May 22, 2003:

“The Office did not meet its burden to reduce or terminate [appellant’s] benefits until May 22, 2003. However, the Office only compensated [him] for his loss of wages from June 22, 2002 through January 13, 2003. Job suitability was not determined until the final decision was rendered on May 22, 2003, therefore, [appellant] was eligible for compensation benefits of two hours per day from January 13, 2003 until the final [d]ecision was rendered. Up until that point, the [d]istrict Office had not met its burden to prove that [he] could perform eight hours of modified duty per day.”

In a decision dated April 28, 2005, the Office denied appellant’s request for reconsideration, stating: “We have not reviewed the merits of your claim.” The Office found that he failed to submit medical evidence to establish that the offered position was not suitable. Further, the Office found that the evidence appellant did submit was repetitious, cumulative or immaterial. The Office noted the arguments put forth in his request for reconsideration but found them irrelevant, given the medical evidence that appellant could perform the modified job for eight hours a day. The Office added: “You will be entitled to compensation for the additional two hours of compensation until the date that your compensation benefits were terminated on May 22, 2003.”

#### **LEGAL PRECEDENT**

Section 8106(c)(2) of the Federal Employees’ Compensation Act states that a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or secured for him is not entitled to compensation.<sup>6</sup> The Office has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects suitable work when it is offered. Before compensation can be terminated, however, the Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee’s ability to work and has the burden of establishing that a position has been offered within the employee’s work restrictions, setting forth the specific job requirements of the position.<sup>7</sup> In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused or neglected by appellant was suitable.<sup>8</sup>

Office procedures require a preliminary assessment of the offered position, following which the Office “must telephone the agency, confirm that the job remains open to the claimant,

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<sup>6</sup> 5 U.S.C. § 8106(c)(2).

<sup>7</sup> *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

<sup>8</sup> *Glen L. Sinclair*, 36 ECAB 664 (1985).

document the file using Form CA-110 and then advise the claimant in writing” that, among other things, the job remains open.<sup>9</sup>

### **ANALYSIS**

First, a matter of jurisdiction: When the Office hearing representative affirmed the termination of appellant’s compensation under 5 U.S.C. § 8106(c)(2), she found that appellant was entitled to compensation for two hours of daily wage loss from June 22, 2002 through January 14, 2003. In his April 14, 2005 request for reconsideration, appellant disagreed with this finding and argued that he was entitled, at the very least, to compensation for two hours of daily wage loss to May 22, 2003, the date the Office issued its decision to terminate compensation. In its April 28, 2005 decision, which was purportedly a nonmerit decision denying his request for reconsideration, the Office found that appellant was indeed entitled to compensation for the additional two hours of compensation until the date that his compensation benefits were terminated on May 22, 2003. Because the Office cannot make such a finding without addressing the merits of the case and modifying the hearing representative’s April 16, 2004 decision, the Board finds that the Office’s April 28, 2005 decision constitutes a merit review, giving the Board jurisdiction to review the termination of appellant’s compensation benefits.<sup>10</sup>

The Board finds that the Office improperly applied 5 U.S.C. § 8106(c)(2). The evidence in this case does not establish that the modified position was currently available to appellant on a full-time basis when the Office terminated his compensation. The Office rehabilitation counselor reported on July 19, 2002 that the manager of the employing establishment did not need or want appellant full time. Time analysis forms showed that he began working four hours a day on or about October 1, 2002 because, as the employing establishment certified, no work was available. Appellant testified that it was the employing establishment that suggested maybe he could work four hours a day, so that irregulars could get their hours and that he agreed because he was having trouble working six hours a day. The record shows that the employing establishment accommodated these reduced hours until he retired in June 2003. So there appears to have been an arrangement between appellant and the employing establishment whereby the parties agreed that appellant would continue to work only four hours a day in the modified position.

When the Office called the employing establishment on March 31 and May 15, 2003, as documented on Forms CA-110, the employing establishment did not confirm that the modified position originally offered and accepted in 2002 remained open to appellant on a full-time basis. The only information the Office obtained from these calls was that he was still working less than eight hours a day. Where it is not established that suitable work remains open to the claimant, there can be no “neglect” under 5 U.S.C. § 8106(c)(2). For this reason the Board finds that the

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<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4.c (July 1997).

<sup>10</sup> See, e.g., *Shelly A. Paolinetti*, 52 ECAB 391 (2001) (where the Office decision stated that the evidence was not sufficient to warrant review of the prior decision, but the accompanying memorandum reviewed the evidence submitted and found that it was of insufficient probative value to establish continuing residuals of the employment injury, the Board found that the decision represented a merit review of the claim).

Office did not meet its burden of proof to justify terminating appellant's compensation benefits under section 8106(c)(2). The Board will reverse the Office's April 28, 2005 merit decision on the issue.

The due process rights that apply to cases involving refusal of an offered position also apply to cases involving abandonment of a light-duty position. The abandonment of a light-duty position, the Board has explained, is no less a refusal of suitable work under 5 U.S.C. § 8106(c)(2).<sup>11</sup> The present case, however, presents a different situation. Appellant did not abandon the modified position. He continued his employment and claimed only partial disability for work. After the Office was satisfied that the weight of the medical evidence established no continuing injury-related disability, the Office did not terminate compensation for wage loss in the usual fashion.<sup>12</sup> It attempted, instead, to impose the penalty set forth in section 8106(c)(2), one that denies any further compensation for wage loss or schedule award for permanent impairment resulting from the accepted injury. The Board makes no finding in this case of whether the Office may properly expand the application of 5 U.S.C. § 8106(c)(2), to cases involving something less than abandonment of suitable work. The Board confines its holding to the issue of current availability, without which there can be no "neglect" under the statute.

### **CONCLUSION**

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits under 5 U.S.C. § 8106(c)(2).

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<sup>11</sup> *Tobey Rael*, 46 ECAB 231, 236 (1994).

<sup>12</sup> See generally Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400 (March 1997).

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 28, 2005 merit decision of the Office of Workers' Compensation Programs is reversed. The case is remanded for appropriate action.

Issued: December 20, 2005  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge  
Employees' Compensation Appeals Board