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

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| **JOHN W. GEARY, Appellant** | ) | |
| **and** | ) | **Docket No. 04-2121** |
| | ) | **Issued: February 16, 2005** |
| **U.S. POSTAL SERVICE, POST OFFICE, Ardmore, PA, Employer** | ) | |

*Appearances:*
*Jeffrey P. Zeelander, Esq.,* for the appellant
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

### *JURISDICTION*

On August 31, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions dated March 8 and July 19, 2004 terminating his entitlement to compensation and schedule award benefits effective March 21, 2004 on the grounds that he refused an offer of suitable work. Pursuant to 20 C.F.R. §§ 501.2 and 501.3, the Board has jurisdiction over the merits of this case.

### *ISSUE*

The issue is whether the Office met its burden of proof to terminate appellant's compensation and schedule award benefits effective March 21, 2004 on the grounds that he refused an offer of suitable work.

### *FACTUAL HISTORY*

On January 13, 1997 appellant, then a 49-year-old distribution window clerk, filed an occupational disease claim for a back injury causally related to his employment. He first realized that his condition was caused or aggravated by his employment on August 12, 1996. The Office

accepted appellant's claim for lumbar disc displacement. He has not returned to work since he stopped working on September 9, 1996.

In a second opinion evaluation dated April 22, 2003, Dr. Anthony Salem, a Board-certified orthopedic surgeon, opined that appellant was no longer totally disabled as a result of his employment. He stated that appellant's restricted lumbosacral motion and significant underlying arthritis was secondary to nonwork-related surgery and not causally related to his accepted condition. Dr. Salem found him capable of returning to work in a position that did not require bending or heavy lifting.

On May 2, 2003 Dr. George L. Rodriguez, an attending Board-certified physiatrist, provided diagnoses of: HNP -- lumbar (L2-3); spondylolisthesis -- Lumbar (L1-2); chronic strain/sprain -- lumbosacral; and gait abnormality. He opined that these conditions were secondary to the 1996 work-related injury.[1] Dr. Rodriguez also diagnosed two preexisting conditions, namely HNP -- lumbosacral (L4-5 and L5-S1) and radiculopathy -- lumbosacral (B/L L4 and L5). He stated that appellant should refrain from bending, prolonged sitting or standing and lifting greater than 10 pounds but could squat, kneel, crawl, climb, push, pull and reach occasionally and could stand/walk and sit/drive 15 minutes at a time up to 1 to 3 hours daily.

The Office found a conflict in medical opinion between Dr. Rodriqez and Dr. Salem and referred appellant, together with a statement of accepted facts and the entire medical record, to Dr. Roy Lefkoe, a Board-certified orthopedic surgeon, for an impartial medical examination, which occurred on November 4, 2003. In a 15-page report, he opined that the effects of the work injury were still present and that appellant could return to work in accordance with the restrictions as outlined by Dr. Rodriguez.

By letter dated January 20, 2004, the employing establishment offered appellant a limited-duty position as a distribution clerk based on the restrictions provided by Dr. Rodriguez and Dr. Lefkoe. By letter dated February 3, 2004, the Office informed appellant and his attorney that it had reviewed the position description and found the job offer suitable with his physical limitations. Appellant was advised that he had 30 days to accept the position or offer his reasons for refusing. He was apprised of the penalty provisions of the Federal Employees' Compensation Act if he did not return to suitable work. Appellant did not respond to the Office's letter.

By decision dated March 8, 2004, the Office terminated appellant's compensation and schedule award benefits effective March 21, 2004, finding that he refused an offer of suitable work.[2]

[1] According to the statement of accepted facts dated April 15, 1999, appellant filed a claim for an occupational injury on August 12, 1996 which was accepted for "aggravation, HPN, lumbar." However, the case record does not contain a copy of the August 12, 1996 CA-2 form.

[2] On January 29, 2004 appellant elected to receive Civil Service Retirement System benefits in lieu of compensation benefits effective March 1, 2004.

On March 16, 2004 appellant, through his attorney, requested a written review of the record, stating that neither he nor appellant received the Office's February 3, 2004 letter contending that the mailbox rule presumption did not apply and that the March 8, 2004 decision should be vacated.

By decision dated July 19, 2004, an Office hearing representative affirmed the March 8, 2004 decision, finding that it had complied with its procedural requirements by advising appellant and his attorney that the position offered by the employing establishment was found suitable and providing him with the opportunity to accept the position or provide reasons for refusing. The decision further found that the job offer was suitable and met the restriction requirements recommended by appellant's physician, the second opinion physician and the impartial medical specialist.

## ***LEGAL PRECEDENT***

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[3] The Office has authority under section 8106(c)(2) of the Act to terminate compensation for any partially disabled employee who refuses or neglects to work after suitable work is offered.[4] To justify termination, the Office must show that the work offered was suitable, that appellant was informed of the consequences of his or her refusal to accept such employment and that he was allowed a reasonable period to accept or reject the position or submit evidence or reasons why the position is not suitable and cannot be accepted.[5] Office regulation provide that, in determining what constitutes "suitable work" for a particular disabled employee, the Office considers the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work and other relevant factors.[6]

Once the Office has demonstrated that the job offered is suitable, the burden shifts to the employee to show that his or her refusal to work is reasonable or justified.[7]

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 medical evidence.[8] The factors that comprise the evaluation of medical evidence include the

[3] *Willa M. Frazier*, 55 ECAB ___ (Docket No. 04-120, issued March 11, 2004); *see also Roberto Rodriguez,* 50 ECAB 124 (1998).

[4] 5 U.S.C. § 8106(c).

[5] *See Ronald M. Jones*, 52 ECAB 190, 191 (2000); *see also Maggie L. Moore*, 42 ECAB 484, 488 (1991), *reaff'd on recon*., 43 ECAB 818, 824 (1992). *See also* 20 C.F.R. § 10.516. (The Office shall advise the employee that it has found the offered work to be suitable and afford the employee 30 days to accept the job or present any reasons to counter the Office's finding of suitability.)

[6] *Rebecca L. Eckert*, 54 ECAB ___ (Docket No. 01-2026, issued November 7, 2002).

[7] 20 C.F.R. § 10.517. *See Kathy E. Murray*, 55 ECAB ___ (Docket No. 03-1889, issued January 26, 2004); *see also Ronald M. Jones, supra* note 5.

[8] *See Kathy E. Murray, supra* note 7*; see also Maurissa Mack*, 50 ECAB 498, 502 (1999).

opportunity for and the thoroughness of, physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the level of analysis manifested and the medical rationale expressed in support of the physician's opinion.

## ***ANALYSIS***

The Board finds that the Office properly terminated appellant's compensation and schedule award benefits under 5 U.S.C. § 8106(c)(2) for refusing an offer of suitable work.

An impartial medical examination was performed by Dr. Lefkoe, who opined that appellant could return to work in a position which accommodated the restrictions outlined by his treating physician, Dr. Rodriguez. On this basis, the employing establishment developed a limited-duty assignment in appellant's commuting area that did not require bending, prolonged sitting or standing and lifting greater than 10 pounds, but permitted squatting, kneeling, crawling, climbing, pushing, pulling, reaching occasionally and standing/walking and sitting/driving 15 minutes at a time for 1 to 3 hours daily. The record thus, establishes that the position offered was within appellant's work restrictions. Furthermore, the offer was in writing, included a description of the duties of the position, the physical requirements of those duties and the date by which appellant was to either accept the offer or submit his reasons for refusal.[9] The Board finds that the Office met its burden to establish that the position was suitable.

The issue of whether an employee has the physical ability to perform the duties of a modified position offered by the employing establishment is primarily a medical question that must be resolved by the medical evidence.[10] In this case, the medical evidence provided by Dr. Lefkoe establishes the suitability of the offered position, in that the job offered satisfied his physical limitations.

Because appellant was offered a suitable job he had the burden to demonstrate that his refusal was justified. The Board finds that the Office complied with its procedural requirements in advising him that the position was found suitable and providing him with the opportunity to accept the position or provide his reasons for refusing. The record reflects that appellant did not respond to the Office's February 3, 2004 notice; therefore, he failed to submit any evidence or argument to show that the offered position was not medically suitable. Accordingly, the Office met its burden of proof to terminate his compensation based on his refusal of suitable work.

Appellant's attorney argues that, because neither he nor appellant received a copy of the Office's February 3, 2004 letter, the decision terminating appellant's benefits should be vacated. The Board finds, however, this argument to be without merit. Under the "mailbox rule," it is presumed in the absence of evidence to the contrary that a notice mailed to an individual in the ordinary course of business was received by that individual. This presumption arises when it appears from the record that the notice was properly addressed and duly mailed. The appearance of a properly addressed copy in the case record, together with the mailing customs or practices of

[9] *See* 20 C.F.R. § 10.507.

[10] *See Maurissa Mack*, *supra* note 8 at 502.

the Office itself will raise the presumption that the original was received by the addressee.[11] There is no indication in the record that the Office's February 3, 2004 letter was not received by appellant or his attorney. The letter was addressed to appellant at his current address, with a copy to his attorney. The Office regularly corresponded with appellant and his attorney prior and subsequent to the issuance of its March 8, 2004 decision. The Board finds that counsel has not submitted sufficient evidence to rebut the presumption that he and appellant received the Office's letter.

## ***CONCLUSION***

The Board finds that the Office properly terminated appellant's compensation and schedule award benefits effective March 21, 2004, on the grounds that he refused an offer of suitable work.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated July 19 and March 8, 2004 are affirmed.

Issued: February 16, 2005
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[11] *See Joseph R. Giallanza*, 55 ECAB ___ (Docket No. 03-2024, issued December 23, 2003). *See also Marlon G. Massey*, 49 ECAB 650, 652 (1998); *Charles R. Hibbs*, 43 ECAB 699, 700-01 (1992).