



## **FACTUAL HISTORY**

On June 8, 2001 appellant, then a 66-year-old rural letter carrier, filed an occupational disease claim alleging that activities of her federal employment resulted in cervical and right shoulder conditions. She stopped work on February 5, 2001.<sup>1</sup> The Office accepted appellant's claim for aggravation of cervical disc disease and subsequently expanded the claim by decision dated January 10, 2003, to include permanent aggravation of cervical disc disease and spinal stenosis. The Office also authorized a cervical laminectomy, which was performed on April 1, 2003.<sup>2</sup> Appellant was placed on the periodic rolls and received appropriate compensation.

In a May 16, 2003 report, Dr. Richard K. Simpson, Jr., a Board-certified neurological surgeon and appellant's treating physician, advised that she could resume activity as tolerated with no heavy lifting, no pushing/pulling of heavy objects. In a September 17, 2003 reply, he advised that appellant could perform sedentary work for 8 hours per day with no lifting over 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers and small tools. He indicated that the job was sedentary if sitting was required most of the time and walking and standing were required occasionally.

By letter dated October 2, 2003, the employing establishment offered appellant a position as a modified clerk. The position was comprised of sedentary work for eight hours a day with a two-hour lunch break.<sup>3</sup>

In a letter dated October 6, 2003, the Office found the position to be suitable and allowed appellant 30 days to accept the position or offer her reasons for refusal.

By letters dated November 7 and 8 2003, appellant refused the offered position. She alleged that she had a heart condition which she developed in December 1999. Appellant indicated that her cardiologist advised plenty of rest and the position, which was eight hours a day with a two-hour break in the middle of the shift, would not allow her to come home to rest as

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<sup>1</sup> The record reflects that appellant had preexisting spinal stenosis, supraspinatous tendon disease, multiple herniated discs and subluxations. Additionally, she received treatment for severe anemia and cardiac conditions.

<sup>2</sup> The record contains medical records which suggest that appellant developed a stress condition and a November 21, 2002 letter from the Office advising her to file a separate claim.

<sup>3</sup> The duties of the position included distributing letter, flat and parcel mail 2 to 3 hours a day; boxing letter, flat and parcel mail, 1 hour per day; picking up miscellaneous throw mail from carriers, 5 minutes a day; pallotizing empty equipment, performing scans for 1 hour a day; verifying shipments for 15 minutes a day; accepting bulk mail per doctor's restrictions, 30 minutes to 1 hour a day; notifying accountable mail for 1 hour per day; general delivery and record keeping for 1 hour per day; lobby sweeps multiple times per day for 5 minutes; answering telephone and assisting customers via telephone, ongoing; holding mail, 20 minutes a day; express mail, 1 hour a day; collection box duty, 30 minutes occasionally; dropping test boards, 20 minutes daily, editing book work, 20 to 30 minutes daily; retail auditing, 2 hours a month; servicing vending machines for 3 hours a month, acquiring change for the retail window 10 minutes a day; computer data entry, for 1 to 2 hours a day and other duties as assigned by the supervisor as per doctor's restrictions.

she lived 16 miles from the employing establishment. She also indicated that she had lupus and would have more frequent flare ups with the stress brought on by lack of sufficient rest. Appellant provided a disability certificate dated February 11, 2003 from her cardiologist, Dr. Madaiah Revana, a Board-certified internist, who advised that she was permanently disabled and mobility impaired.

By decision dated November 17, 2003, the Office terminated appellant's compensation benefits effective November 30, 2003, on the grounds that she refused an offer of suitable work. The Office noted that she had not responded to the October 6, 2003 letter.

By letter dated December 12, 2003, appellant requested reconsideration. She alleged that her file contained adequate medical documentation to support that her heart condition and severe anemia, which she developed after her accepted condition, prevented her from working.

In a merit decision dated January 15, 2004, the Office found the evidence insufficient to warrant modification of the November 17, 2003 prior decision.

In a letter dated January 28, 2004, Ralph Linkenhoker, the postmaster, advised that appellant was instructed to report for duty on October 8, 2003 pursuant to the modified job offer. He indicated that she did not report to work or provide documentation explaining why she was unable to report.

By letter dated February 25, 2004, appellant requested reconsideration. She repeated her previous arguments and enclosed a copy of the procedure manual relating to the provisions that would make a job unsuitable.

By letter dated March 4, 2004, Betty Chambers, a manager, advised that appellant had recently returned to work and that her compensation payments would be terminated. She was also advised that she would be responsible for an overpayment.

By letter dated March 10, 2004, the employing establishment advised that appellant returned to work on November 17, 2003.

On March 24, 2004 the Office made a preliminary finding that appellant had received an overpayment in the amount of \$4,681.33 for the period November 17, 2003 to January 24, 2004 because she had failed to notify the Office of her return to work. The Office made a preliminary finding that appellant was at fault in creating the overpayment, as she had not notified the Office of her return to work.

By letter dated April 14, 2004, appellant alleged that the March 4, 2004 letter indicating she had returned to work was in error as she had not returned to work. She further advised that she had not received a reply to her request for reconsideration.

By decision dated April 29, 2004, the Office found that appellant received an overpayment in the amount of \$4,681.33 and that she was at fault in creating the overpayment. The Office determined that she returned to work, but failed to notify the Office of her return to work and continued to receive compensation payments when she should have notified the Office and returned any overpaid compensation payments.

## LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>4</sup> In this case, the Office terminated appellant's compensation under section 8106(c)(2) of the Federal Employees' Compensation Act, which provide that, "a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee is not entitled to compensation."<sup>5</sup> To justify termination of compensation, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.<sup>6</sup> Section 8106(c) will be narrowly construed as it serves as a penalty provision, which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.<sup>7</sup>

Section 10.517(a) of the Act's implementing regulation provides that, an employee who refuses or neglects to work after suitable work has been offered or secured by the employee, has the burden of showing that such refusal or failure to work was reasonable or justified.<sup>8</sup> Pursuant to section 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. If the employee presents such reasons and the Office determines such reasons are unacceptable, it will notify the employee of that determination and that he or she has 15 days within which to accept the offered work without penalty.<sup>9</sup>

## ANALYSIS

Following the Office's suitability determination, appellant was given 30 days to either accept the offer of suitable work or provide reasons for rejecting the offered job. She submitted letters dated November 7 and 8, 2003 stating her reasons for not being able to perform the modified duty position and a February 11, 2003 disability certificate from Dr. Revana, who indicated that she was permanently disabled.

In the November 17, 2003 decision, the Office advised that no response was received from appellant, in writing or telephonically. The Board finds that this was error as she responded to the Office's October 6, 2003 letter with reasons for not accepting the modified position. The

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<sup>4</sup> *Linda D. Guerrero*, 54 ECAB \_\_\_\_ (Docket No. 03-267, issued April 28, 2003); *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

<sup>5</sup> 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB \_\_\_\_ (Docket No. 02-66, issued February 28, 2003).

<sup>6</sup> *Ronald M. Jones*, 52 ECAB 190 (2000); *Arthur C. Reck*, 47 ECAB 339, 341-42 (1995).

<sup>7</sup> *Joan F. Burke*, 54 ECAB \_\_\_\_ (Docket No. 01-39, issued February 14, 2003); *see Robert Dickerson*, 46 ECAB 1002 (1995).

<sup>8</sup> 20 C.F.R. § 10.517(a); *see Ronald M. Jones*, *supra* note 6.

<sup>9</sup> 20 C.F.R. § 10.516.

record reflects that this evidence was received by the Office on November 10 and 11, 2003 respectively. Not only did the Office fail to carry out the procedural requirements of informing appellant if the reasons she offered for refusing the position were adequate, the Office did not acknowledge that she responded to the job offer within the time allowed. The Board finds that appellant was entitled to have her evidence evaluated to determine whether or not she provided acceptable reasons for refusing the offer of suitable work.<sup>10</sup> The Board finds that the Office did not properly terminate her compensation for the reason that it did not fully afford her the procedural protections set forth in *Maggie L. Moore*.<sup>11</sup> The Office failed to evaluate the newly submitted evidence, inform appellant that her reason for rejecting the offer was unjustified and afford her 15 days to accept the position. Without such an opportunity, she cannot be held to have refused an offer of suitable work.<sup>12</sup>

For these reasons, the Office improperly terminated appellant's compensation benefits effective November 30, 2003 on the grounds that she refused an offer of suitable work and, therefore, the November 17, 2003 decision is reversed.<sup>13</sup>

### CONCLUSION

The Board finds that the Office failed to meet its burden of proof in terminating appellant's wage-loss compensation and medical benefits effective November 30, 2003 on the grounds that she refused or neglected an offer of suitable work.

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<sup>10</sup> See *Tammy L. Flickinger*, 54 ECAB \_\_\_\_ (Docket No. 03-22, issued April 9, 2003).

<sup>11</sup> *Maggie L. Moore*, 42 ECAB 484 (1991); *reaff'd on recon.*, 43 ECAB 818 (1992).

<sup>12</sup> *Id.*

<sup>13</sup> Due to the resolution of the first issue, any issues regarding an overpayment of compensation are moot and will not be addressed in this decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated April 29 and January 15, 2004 and November 17, 2003 are reversed.

Issued: January 28, 2005  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member