



Upon development of the claim by the Office, medical reports were received. In a May 13, 2003 report, Dr. Robert J. Schiess, III, a treating Board-certified neurologist, indicated that appellant remained disabled from working and recommended hydrotherapy.

In an August 5, 2003 report, Dr. Harold Alexander, a second opinion Board-certified orthopedic surgeon, diagnosed no evidence of residual radiculopathy and status post L5-S1 fusion with degenerative disc disease with posterior bulging disc. He recommended a functional capacity evaluation to determine appellant's work capability.

An August 25, 2003 functional capacity evaluation summary report indicated that appellant was capable of working four hours per day five days per week in a sedentary position.

In a September 2, 2003 addendum, Dr. Alexander opined that appellant was capable of working in a sedentary position based upon an August 21, 2003 functional capacity evaluation.

The Office found that a conflict existed between Dr. Schiess and Dr. Alexander and appellant was referred to Dr. C. Lyn Crooms, a Board-certified orthopedic surgeon, as an impartial medical examiner on May 28, 2004.

On June 28, 2004 the Office received a June 1, 2004 report from Dr. Dennis C. Doherty, a treating Board-certified anesthesiologist and pain medicine specialist. He diagnosed mood and affective disorder and postlaminectomy lumbar syndrome with mechanical neuropathic pain components. Dr. Doherty indicated that appellant was "to remain out of work until we seek further improvement and/or capacity." He stated that appellant had complaints "of persistent pain and spasm." Appellant reported her pain was "made worse by prolonged sitting, standing, menstrual cycle, barometric changes." A physical examination revealed upper extremity and cervical range of motion within normal limits, "significant paraspinal trigger points, tenderness over the spinous processes" upon palpation, exacerbation of pain "with flexion to 30 degrees and extension to 10 degrees" and normal straight leg raising.

In a June 29, 2004 pain management note, Dr. Doherty stated that appellant was "to remain out of work until she obtains physical therapy" and a functional capacity evaluation. He reported "[s]teady improvement status post posterior lumbar interbody fusion." A physical examination revealed normal gait and station, good sitting tolerance, symmetrical and one fourth lower extremity reflexes, negative straight leg testing and no evidence of clonus or Babinski's.

In a report dated June 30, 2004, Dr. Crooms stated that a physical examination revealed bilateral strength testing within normal limits, no wasting or atrophy of the lower extremity muscles, tenderness over her left lower back in the sacroiliac joint area, "no real sciatic notch tenderness" and severely restricted range of motion for flexion, extension, rotation and later side bending. She noted that "[w]ith this rather significant restriction of motion, I again, feel there may be significant psychological overlay." In concluding, Dr. Crooms stated that he agreed "with Dr. Alexander that this patient's objective findings certainly outweigh her subjective complaints." She opined that appellant could not return to her date-of-injury position, but was capable of working in a sedentary position with restrictions. He also concluded that appellant "has a well-ingrained sense of her own disability and I feel it will be difficult to adequately motivate her to return to the work force." In a work restriction evaluation (Form OWCP-5a),

Dr. Crooms indicated that appellant had permanent restrictions, but was capable of working four hours per day with restrictions and a 15 minute break four times a day.

On July 26, 2004 the employing establishment offered appellant a modified rural carrier position at four hours per day six days a week. The job duties indicated that she would answer the telephone, assist with customer inquiries, prepare CFS mail, deliver express mail and have miscellaneous filing duties. The physical requirements of the position included limited lifting, alternating sitting, walking and standing, repetitive movements of elbows and wrists, driving a motor vehicle and fine manipulation and simple grasping.

In a letter dated August 10, 2004, the Office advised appellant that it found the offered position of modified rural carrier to be suitable. The Office noted provision of 5 U.S.C. § 8106(c)(2) of the Federal Employees' Compensation Act and advised appellant that she had 30 days to accept the position or provide reason for refusing the position.

Subsequent to the August 10, 2004 letter the Office received an August 3, 2004 prescription for massage therapy and pain management and office notes dated August 16 and 30, 2004 by Dr. Doherty, who reported that appellant was "status post lumbar fusion with persistent pain." He reported that she was "intolerant to therapies to date." Dr. Doherty stated that appellant "had increasing anxiety and increasing dysfunctional response to pain in my opinion." A physical examination revealed limited lumbar range of motion in the flexion and extension, 5/5 lower extremity strength, limited sitting tolerance and Achilles and patellar levers were symmetrical and 1/4. In notes dated August 30, 2004, Dr. Doherty diagnosed postlaminectomy lumbar syndrome with persistent leg and back pain and a work release was pending review of a magnetic resonance imaging scan. He noted that appellant was unchanged neurologically.

By decision dated October 4, 2004, the Office terminated appellant's compensation effective October 3, 2004 on the grounds that she refused an offer of suitable work.<sup>1</sup> The Office noted that it had considered the medical evidence she had submitted, but found the weight of the medical evidence remained with Dr. Crooms, the impartial medical examiner.

### **LEGAL PRECEDENT**

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>2</sup> 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.<sup>3</sup> To justify termination, the Office must show that the work offered was suitable, that appellant was informed of the consequences of her refusal to accept such employment and that she was allowed a reasonable period to accept or reject the position or

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<sup>1</sup> The Board notes that, subsequent to the Office's October 4, 2004 decision, it received additional evidence. The Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c).

<sup>2</sup> *Willa M. Frazier*, 55 ECAB \_\_\_\_ (Docket No. 04-120, issued March 11, 2004); *see also Roberto Rodriguez*, 50 ECAB 124 (1998).

<sup>3</sup> 5 U.S.C. § 8106(c).

submit evidence or reasons why the position is not suitable and cannot be accepted.<sup>4</sup> Office regulations 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.<sup>5</sup>

The implementing regulations provide 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 and shall be provided with the opportunity to make such a showing before entitlement to compensation is terminated.<sup>6</sup> To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of her refusal to accept such employment.<sup>7</sup>

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.<sup>8</sup> The factors that comprise the evaluation of medical evidence include the 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.<sup>9</sup>

### ANALYSIS

On the issue of suitability the Office found that the weight of the medical evidence rested with the report of the impartial medical examiner, Dr. Crooms, a Board-certified anesthesiologist and pain medicine specialist, selected to resolve a conflict in medical opinions between appellant’s attending physician Dr. Schiess and the second opinion medical specialist Dr. Alexander. Dr. Crooms related appellant’s history and symptoms in her June 30, 2004 report and findings on physical examination and diagnosed low back pain which she advised was due to the October 7, 1993 employment injury. She opined that appellant could not perform the position of mail carrier but could perform sedentary work. In a work capacity evaluation dated June 30, 2004, Dr. Crooms provided specific restrictions to appellant’s physical activity. The offered position involved answering the telephone, assisting with customer inquiries, preparing CFS mail, delivering express mail and miscellaneous filing duties and it comported with the

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<sup>4</sup> 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).

<sup>5</sup> *Rebecca L. Eckert*, 54 ECAB \_\_\_\_ (Docket No. 01-2026, issued November 7, 2002).

<sup>6</sup> 20 C.F.R. § 10.517(a).

<sup>7</sup> *Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, *supra* note 4.

<sup>8</sup> See *Kathy E. Murray*, 55 ECAB \_\_\_\_ (Docket No. 03-1889, issued January 26, 2004); see also *Maurissa Mack*, 50 ECAB 498 (1999).

<sup>9</sup> *Maurissa Mack supra* note 8.

restrictions provided by Dr. Crooms. The Board finds that inasmuch as the modified rural carrier position conformed with appellant's work restrictions as outlined by Dr. Crooms, the Office correctly found that the job was suitable.<sup>10</sup>

In order to properly terminate appellant's compensation under section 8106, the Office must provide her notice of its finding that an offered position is suitable and give her an opportunity to accept or provide reasons for declining the position.<sup>11</sup> The record in this case indicates that the Office did not follow the procedural requirements. By letter dated April 10, 2004, the Office advised appellant that a partially disabled employee who refused suitable work was not entitled to compensation and that the offered position had been found suitable. She was notified of the penalty provisions of section 8106 and allotted 30 days to either accept or provide reasons for refusing the position. Appellant thereafter submitted pain management notes dated August 16 and 30, 2004 by Dr. Doherty and an August 3, 2004 massage therapy. The record next reflects that the Office issued a final termination decision on October 4, 2004 and for the first time advised appellant that the submitted evidence was insufficient to overcome the special weight of the medical opinion evidence as represented by Dr. Crooms, the impartial medical specialist. The Board, therefore, finds that, as appellant submitted additional evidence prior to the final Office decision in which she responded to the suitability determination, she was entitled to have this evidence evaluated to determine whether she provided an acceptable reason for refusing the offer of suitable work and to be so apprised by the Office. Thereafter, appellant was entitled to an additional 15 days to accept the offered job. Thus, 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>12</sup> Specifically, 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, appellant cannot be held to have refused an offer of suitable work.

### CONCLUSION

The Board finds that the Office erred in terminating appellant's compensation, based on her refusal to accept suitable work.

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<sup>10</sup> See *Ronald M. Jones*, 52 ECAB 190 (2000).

<sup>11</sup> See *Maggie L. Moore*, *supra* note 4.

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated October 4, 2004 be reversed.

Issued: June 2, 2005  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

A. Peter Kanjorski  
Alternate Member