

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

STEVEN L. THORMAHLEN, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Bellevue, WA, Employer**

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**Docket No. 05-105
Issued: October 19, 2005**

Appearances:
Gordon Reiselt, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 12, 2004 appellant, through counsel, filed a timely appeal of a July 12, 2004 decision of an Office of Workers' Compensation Programs' hearing representative, which affirmed the termination of his compensation based on a refusal of suitable work. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation benefits on the basis that he refused an offer of suitable work.

FACTUAL HISTORY

On October 2, 1999 appellant, then a 35-year-old window clerk, sustained injury to his low back while placing a 65-pound parcel onto a scale. His claim was accepted by the Office for a lumbar strain and L5-S1 disc, with left lumbar radiculopathy of S1. Appellant stopped work on October 4, 1999 and returned to limited duty on October 12, 1999. On August 16, 2001 appellant filed a notice of recurrence of disability, noting that he stopped work on

August 15, 2001. The claim was accepted by the Office on November 19, 2001. Appellant did not return to work. On May 1, 2002 he underwent surgery for a left L5-S1 laminotomy and discectomy, which was approved by the Office. He received appropriate compensation benefits for total disability.

Appellant was treated by Dr. John L. Thayer, Board-certified in physical medicine and rehabilitation, who performed the May 1, 2002 surgery. On August 8, 2002 the physician noted that appellant had been making progress following surgery until a month prior, when he experienced a spontaneous onset of increasing pain across his back. Dr. Thayer noted appellant's complaint of difficulty getting up and down off the bed, that he remained overweight and listed a positive straight leg raise with buttock pain. He stated that appellant's complaint of persistent pain was largely nonphysiologic. On September 30, 2002 Dr. Thayer noted that appellant's complaints of back pain consisted of the burning in the buttock region with a stinging sensation and jolt of pain into the right posterior leg. He indicated that appellant moved well and listed chronic nonphysiologic low back pain. Dr. Thayer discussed appellant's pain complaints and the lack of tension signs, noting that appellant needed job retraining and work hardening.¹

On October 10, 2002 a magnetic resonance imaging (MRI) scan was obtained for Dr. Thayer. It noted the L5-S1 left-sided laminectomy and listed a residual left paracentral annular deformity without evidence of disc extrusion or free fragment and persistent mild posterior displacement of the S1 nerve root without signal intensity changes. On November 5, 2002 Dr. Thayer reviewed the MRI findings, stating that they were negative and did not show any new mechanical problem. He noted appellant's complaint of vague numbness of both feet in all dermatomes.

Appellant was referred by the Office to Dr. Lewis B. Almaraz, a Board-certified neurologist, for a second opinion evaluation. In a December 14, 2002 report, Dr. Almaraz reviewed appellant's history of injury and medical treatment. He noted appellant's complaint of bilateral leg and foot pain and noted that appellant described global areas of pain through the low back and lower extremities. Dr. Almaraz listed findings on physical examination, and stated that the pain complaints appeared "overly somatically focused." Appellant was described as overweight and deconditioned, with significant pain behavioral mannerisms on examination, consisting of frequent moaning, groaning and deep sighing and breathing. Straight leg raising in the seated position was to 90 degrees bilaterally with the lower extremities revealing normal tone and bulk without atrophy or other trophic changes of the feet. Dr. Almaraz stated that the neurological examination did not reveal any definite objective findings of lumbosacral radiculopathy or any localized lesion of the nervous system to account for appellant's pain complaints. He indicated that he reviewed appellant's position description as a window clerk and that he could perform these duties, noting physical restrictions in an attached OWCP-5 work limitation form. Dr. Almaraz found that appellant could work for 8 hours a day, subject to 1 hour limitations on sitting, walking, and standing with lifting restricted to a maximum of 30 pounds.

¹ The record reflects that appellant underwent physical therapy and a pain-management program, under the direction of Dr. Thayer.

By letter dated February 11, 2003, the Office forwarded the report of Dr. Almaraz to Dr. Thayer for review and comment. In a February 18, 2003 response, Dr. Thayer stated his agreement with the evaluation and assessment of Dr. Almaraz. He noted that there were no objective findings but that a return to work “would be extremely difficult to accomplish.”

On April 16, 2003 the employing establishment offered appellant a position as a modified duty window clerk based on the physical restrictions set forth by Dr. Almaraz. On April 25, 2003, appellant rejected the job offer.

On April 29, 2003 the Office notified appellant that it found the full-time modified-duty position to be suitable to his work capabilities. Appellant was advised of the penalty restrictions of section 8106(c)(2) and that he had 30 days in which to accept the position or provide his reasons for rejecting the job offer. It was noted that, if he did not provide a reason for justifying refusal of the job offer, his compensation could be terminated.

On May 19, 2003 Dr. Thayer indicated that appellant’s physical examination remained unchanged, with no tension signs, good sensation and good hip range of motion. He commented that appellant presented a job offer and that he placed a copy in his charts. Dr. Thayer noted that appellant complained that he could not perform within the physical limitations due to right leg pain. He noted that he did not have anything more to offer.

In a May 22, 2003 report, Dr. Candace L. Smith, Board-certified in internal medicine, stated that appellant was not ready to return to work with the duties as outlined in the April 16, 2003 job offer. She indicated that he needed continued physical therapy and a chronic pain program, stating: “I recommend he return to work on a half[-]time basis so that he can pursue physical therapy and the pain program and because his back condition i[s] not sufficiently resolved to allow for full[-]time work as described.” She listed alternative physical limitations, restricting appellant to 30 minutes standing, walking and sitting with lifting limited to 30 pounds up to four times an hour.

The record contains a memorandum of a May 29, 2003 telephone call from appellant to the Office inquiring about the receipt of any medical notes from Dr. Thayer. Appellant was advised of the May 1, 2003 treatment note and that further pain management was not worthwhile as he had already undergone this form of treatment, but that further consultation with a medical adviser would be obtained. Appellant was asked if he was going to comply with the April 29, 2003 Office letter concerning the suitable work offer and he said he would try but was afraid of getting injured again.

On May 29, 2003 the Office advised appellant that the modified-duty job offer was consistent with his physical restrictions and that the reasons expressed in this telephone call were not sufficient to justify his rejection of the position. He was advised that he had 15 days in which to accept the position or the Office would proceed to terminate compensation under section 8106(C)(2). In a June 1, 2003 letter, appellant addressed his continuing complaints of

pain and of his reservation in returning to full-time work. He requested that a new job offer be sent which included the additional restrictions specified by Dr. Smith.²

In a June 19, 2003 decision, the Office terminated appellant's wage-loss benefits, finding that he refused an offer of modified suitable work. Appellant was advised of his continuing entitlement to medical treatment for the accepted conditions.

On July 7, 2003 appellant requested an oral hearing before an Office representative, which was held on May 4, 2004.³ He submitted additional medical evidence, including a July 10, 2003 note from Dr. Thayer, who addressed appellant's surgery and persistent complaints of back pain. The physician noted the negative EMG studies and MRI and that he would benefit from further pain management. In treatment records of Dr. Smith dated December 18, 2002 to September 15, 2003, she noted that she had rewritten appellant's physical restrictions and recommended work for four hours a day initially. Dr. Jill Enright, Board-certified in internal medicine, treated appellant on February 17, 2004 and noted complaints of leg pain with cramping. She noted that appellant could discuss a disabled parking pass with Dr. Smith at the next visit. Appellant was seen by Dr. David H. Chang, a Board-certified anesthesiologist, who noted that a December 16, 2003 MRI of the lumbar spine did not explain his discomfort to the lower extremities. Dr. Chang noted that appellant insisted on proceeding with an epidural steroid injection, which would be scheduled. An August 19, 2003 report from Dr. Thayer to appellant's attorney reiterated that he agreed with the assessment and evaluation of Dr. Almaraz, noting that the work restrictions were reasonable. He noted that, from an orthopedic standpoint, the studies were negative and that he did not believe "medically anything is going on." Dr. Thayer indicated that appellant could have a somatoform or other psychosomatic pain disorder, but that was not for him to determine and he would leave that to other specialists.

By decision dated July 12, 2004, the Office hearing representative affirmed the June 19, 2003 termination decision.

LEGAL PRECEDENT

Section 8106(c)(2) of the Federal Employees' Compensation Act provides that a partially disabled employee who refuses to seek suitable work, or who refuses or neglects to work after suitable work is offered to, procured by or secured for him, is not entitled to compensation.⁴ Before compensation can be terminated, however, the Office has the burden of establishing that the employee can work, setting forth the specific restrictions, if any, on the appellant's ability to work and of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.⁵ To justify termination,

² On June 3, 2003 the Office received the May 23, 2003 treatment note of Dr. Thayer who reiterated appellant subjective complaint of chronic back and leg pain, the lack of objective findings and that he had nothing else to offer from an orthopedic standpoint.

³ Appellant stated that he returned to work with the employing establishment in February 2004, performing modified duty for four hours a day in the box section stuffing letters.

⁴ 5 U.S.C. § 8106(c)(2).

⁵ See *Charles A. Jackson*, 53 ECAB 671 (2002).

the Office must show that the work offered was suitable and refused by the employee was suitable and inform the employee of the consequences for his or her refusal of such employment.⁶

ANALYSIS

Appellant's claim was accepted by the Office for a lumbar strain, L5-S1 disc, with radiculopathy of S1. He was treated by Dr. Thayer, who performed surgery on May 1, 2002 for an L5-S1 laminectomy and discectomy. The postsurgical reports of Dr. Thayer noted appellant's complaints of persistent pain in the buttock region, extending into the right lower extremity. He treated appellant on a conservative basis, with a referral to physical therapy and pain management. Dr. Thayer noted that appellant's complaints were of a nonphysiologic basis and he obtained an October 12, 2002 MRI scan which was reported as negative for any disc lesion or compression of the nerve root. He described appellant's complaints of pain to both feet as vague and in all dermatomes.

Appellant was referred for evaluation by Dr. Almaraz, a specialist in neurology. He provided a narrative report which detailed appellant's history of injury, medical treatment and diagnostic test results. Dr. Almaraz noted appellant's complaint of bilateral leg and foot pain, which was described as global areas of pain through the low back and lower extremities. He reported his findings on neurological examination, noting that there were no objective findings of lumbosacral radiculopathy or any localized lesion of the nerve system to account for appellant's complaints. Dr. Almaraz advised that appellant could return to full-time modified duty, setting forth physical limitations on sitting, standing, and walking with lifting, pushing and pulling restricted to a maximum of 30 pounds.

The record reflects that the modified-duty window clerk position offered to appellant on April 16, 2003 conformed to the work restrictions set by Dr. Almaraz. Moreover, these physical restrictions were reviewed by Dr. Thayer, appellant's attending physician, who stated that he agreed with the evaluation and assessment of Dr. Almaraz. The clear weight of the medical opinion evidence, as represented by the reports of Dr. Thayer and Dr. Almaraz, establish that appellant was no longer totally disabled for work due to residuals of his accepted back condition and that he had the physical capacity to perform the full-time modified duties as listed in the April 16, 2003 job offer.

Appellant was notified by the Office on April 29, 2003 that the job offer was found suitable with his work limitations and capabilities. On May 19, 2003 Dr. Thayer noted that he saw appellant that date and was provided a copy of the job offer. However, he did not make any findings that the modified-duty position was not suitable to appellant's limitations nor did he withdraw or retract his stated agreement with Dr. Almaraz as to appellant's work capacity. On May 29, 2003 appellant discussed the job offer with a claims examiner, indicating his fear that he might be injured upon his return to modified duty. However, it is well established that a fear of future injury is not a sufficient basis on which to reject an offer of suitable work.⁷ The

⁶ See *John E. Lemker*, 45 ECAB 258 (1993).

⁷ See, e.g., *Antoinette Florian*, Docket No. 04-2227, issued May 4, 2005, citing *Edward P. Carroll*, 44 ECAB 331 (1992).

determination of whether an employee is physically capable of performing a modified position is a medical question that must be resolved by probative medical evidence.⁸ Appellant's contention that the proposed modified duty as a window clerk would aggravate his condition is of no probative value absent supporting medical evidence and is not a reasonable justification for refusing suitable work where the medical evidence establishes that the position is consistent with his recommended physical limitations.⁹ As to appellant's capacity for modified duty, the Board notes the agreement of appellant's attending physician with the work limitations imposed by the Office second opinion specialist.

On May 29, 2003 the Office properly advised appellant that his reason for refusing the job offer was not sufficient and provided an additional 15 days in which he could accept the position without penalty. On June 1, 2003 he described his continuing back complaints and indicated that a new job offer should be sent, which incorporated the restrictions set forth by Dr. Smith. In this regard, Dr. Smith indicated in a report received by the Office on May 19, 2003 that appellant was not capable of returning to the position offered at the employing establishment and listed recommendations for modified duty at four hours a day. As noted, the Office had obtained medical opinion from Dr. Almaraz, which was reviewed by Dr. Thayer, setting forth appellant's physical limitations due to residuals of his accepted conditions. Dr. Smith indicated that appellant was not capable of working eight hours a day and imposed physical limitations for a four-hour workday. The Board finds that her report is of diminished probative value. Dr. Smith did not provide any findings on physical examination of appellant to explain the basis for her recommendation a four-hour workday restriction. This was especially important, as Dr. Thayer had repeatedly commented on the fact that his physical examination and the diagnostic tests were negative for objective orthopedic residuals. The neurological evaluation of Dr. Almaraz was similarly described as negative for objective findings of lumbosacral radiculopathy or any localized lesion. Dr. Smith made no reference to the medical evidence of record or to the reports of any diagnostic test procedures. She provided no explanation of how her recommendations were based on residuals due to the accepted injury. The Board finds that the Office properly accorded the weight of medical opinion evidence to the reports of Dr. Almaraz and Dr. Thayer.

The Office complied with its procedures in advising appellant that the position offered was suitable and providing him with the opportunity to accept the position or provide reasons for his refusal. At the time of the June 19, 2003 termination decision, appellant failed to provide sufficient evidence to justify his refusal of the modified window clerk position. The Office met its burden of proof to terminate appellant's wage-loss benefits based on his refusal of suitable work. Thereafter, the burden of proof shifted to appellant to establish that his refusal of the modified job offer was justified.¹⁰

⁸ Whether a particular employment injury causes disability for employment and the duration of that disability are medical questions to be determined by the medical evidence of record. See *Laurie S. Swanson*, 53 ECAB 517 (2002).

⁹ See *Edward P. Carroll*, *supra* note 7, at 340-41.

¹⁰ See *Gayle Harris*, 52 ECAB 319, 321 (2001).

Appellant requested an oral hearing and submitted additional medical evidence. Dr. Smith submitted additional treatment notes, including a May 21, 2003 report which noted that she had consulted with Dr. Thayer and sent him a letter noting her recommended physical limitations. She noted that Dr. Thayer generally agreed that appellant required treatment for his complaints of chronic pain. Additional reports were also submitted from Dr. Thayer. Of note is the August 19, 2003 letter to appellant's counsel, in which the physician reiterated that he agreed with the assessment and evaluation performed by Dr. Almaraz, noting that the restrictions imposed on appellant were reasonable. Dr. Thayer again noted that the orthopedic findings were negative, as were the diagnostic studies and he opined that appellant could have a somatoform or other pain disorder.

This evidence is not sufficient to support that appellant was unable to return to the full-time modified-duty window clerk position offered. Certainly, this evidence does not reflect that Dr. Thayer changed his opinion as to the suitability of the offered position. He indicated that the work restrictions set forth by Dr. Almaraz were reasonable and consistent with appellant's findings on examination. While he indicated that appellant had some type of pain disorder, he did not provide any statement that appellant's pain complaints rendered him totally disabled due to such condition. Rather, his report reflects the physician's opinion that appellant was and remains capable of full-time modified duty subject to the restrictions noted above, nor has appellant taken the position that he is rendered totally disabled for work due to his pain symptomatology. At the hearing, he discussed his return to work in early February 2004, for four hours a day. The weight of the medical opinion, as represented by the reports of Dr. Thayer, does not support that appellant was disabled from returning to the full-time modified duty position offered in this case. Dr. Thayer did not retract his prior findings and opinion on appellant's capacity for modified duty and he did not support a finding that appellant was rendered totally disabled due to residual pain from his accepted injury. The weight of the medical evidence reflects that the job offer was within appellant's defined work restrictions, as set by Dr. Almaraz.

CONCLUSION

The Board finds that Office met its burden of proof to establish that the offered position was suitable work and properly terminated appellant's wage-loss benefits based on his refusal of suitable work. Appellant has not met his burden of proof to establish that the offered position was not suitable to his work restrictions.

ORDER

IT IS HEREBY ORDERED THAT the July 12, 2004 decision of the Office of Workers' Compensation Programs' hearing representative be affirmed.

Issued: October 19, 2005
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board