



The procedure was performed by Dr. James Zmolek, a Board-certified orthopedic surgeon, on October 16, 2002. The Office paid appellant appropriate compensation for total disability.

In a work capacity evaluation dated April 21, 2003, Dr. Zmolek outlined work restrictions based on appellant's accepted right rotator cuff condition. He restricted reaching above the shoulder with the right arm, no reaching with the right arm, no pushing/pulling with the right arm, no repetitive use of right wrist/elbow and no lifting over five pounds with the right arm. Dr. Zmolek noted on the form that appellant also had a back condition apparently pertaining to a separate claim.

On June 25, 2003 the Office referred appellant for vocational rehabilitation.

In a report dated July 7, 2003, Dr. Zmolek stated that appellant remained disabled from employment which required heavy lifting with the right upper extremity. He advised that appellant also remained disabled from employment which required overhead activities with the right upper extremity.

On August 8, 2003 the vocational rehabilitation counselor identified a modified position as a sales associate within the work restrictions prescribed by Dr. Zmolek.

On September 14, 2003 Dr. Zmolek approved the sales associate position. He indicated that appellant should be restricted from reaching above shoulder height and engage in limited reaching at shoulder height and with the right arm.

On September 22, 2003 Dr. Zmolek diagnosed appellant with left shoulder impingement and possible rotator cuff tear. He placed limitations on appellant's left upper extremity of no overhead reaching or lifting and on lifting more than 10 to 20 pounds. In a work capacity form dated September 22, 2003, Dr. Zmolek restricted appellant from lifting over 15 pounds. In a report dated November 6, 2003, Dr. Zmolek stated that appellant's employment at the employing establishment required repetitive overhead activities with the left upper extremity as well as episodes of heavy lifting, pushing, pulling and grasping. He advised that appellant had experienced persistent left shoulder pain for over two years' duration. Dr. Zmolek concluded that appellant's left shoulder symptomatology was work related. In a November 6, 2003 form report, he restricted appellant from lifting over five pounds with her arms above shoulder level.

On November 6, 2003 the employing establishment offered appellant modified work as a sales associate.<sup>1</sup> The job description indicated that appellant would be required to perform four basic tasks:

“(a) Retail duties -- Selling stamps ... accept[ing] mail pieces that the customer places on the counter, [for which appellant would be] provided assistance to lift any item beyond physician's prescribed weight restrictions. The countertop was below shoulder level.... A cash drawer was assigned to [appellant] and assistance [would] be provided to put it in place at the workstation. Retail duties involved

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<sup>1</sup> The job description mistakenly stated that the offer was for a position as a “letter carrier,” although the description clearly indicates that appellant would be working behind a window service area selling postal products.

occasional lifting under [five] pounds, occasional pivoting/turning, no bending/squatting, standing, simple grasping and fine manipulation. Duties could be performed using left hand/arm;

“(b) Accepting/renting post office box -- This occasional duty involve[d] accepting post office box rent or rental applications and dispensing a post office box key. [Appellant would] not be required to handle any item weighing more than a sheet of paper, currency or a key. Duties could be performed using left hand/arm;

“(c) Retrieving accountable mail pieces -- This occasional duty involve[d] taking a mail piece in her hand that weighed less than [five] pounds from a holding area behind the window service area for accountable mail pieces ... and bringing it to the customer at the counter. Assistance would be [provided] if mail pieces [were] beyond restrictions. [Appellant would] scan the mail piece by using a scanner weighing 16 ounces before bringing it to the customer, [which] involved holding the scanner in the left hand and scanning the label once and then putting the scanner down. [Appellant would] not [be] required to handle any item that was beyond the physician’s prescribed weight restrictions. Duties could be performed using left hand/arm;

“(d) Other administrative duties [would] be assigned by management within physical restrictions.... [These additional duties included:] [tele]phone duties; ... working a postal data entry system [which] involve[d] sitting at a computer terminal to enter customer information into a database while working at own pace; ... processing claims for damaged or lost mail items/money orders, [which required] intermittent writing on forms with no lifting beyond weight restrictions and working at her own pace; and count[ing] money, [which] involved simple grasping and fine manipulation.”

The employing establishment stated that the job was available immediately.

By letter dated May 13, 2004, the Office advised appellant that the position offered was suitable and that, pursuant to section 8106(c)(2), she had 30 days to either accept the job or provide an explanation for refusing the job offer. The Office advised appellant that her compensation could be terminated based on her refusal to accept a suitable position, which reflected her ability to work as a modified mail clerk for eight hours per day. The Office noted that, as of that date, appellant had not responded to the employing establishment’s offer. The Office stated that, if appellant refused the job or failed to report to work within 30 days without reasonable cause, it would terminate her compensation pursuant to 5 U.S.C. § 8106(c)(2).<sup>2</sup>

On June 17, 2004 appellant rejected the position, contending that she was physically unable to work at any job due to her neck and elbow conditions.

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<sup>2</sup> 5 U.S.C. § 8106(c)(2).

By decision dated June 18, 2004, the Office terminated appellant's compensation benefits on the grounds that she refused an offer of suitable work.

On June 21, 2004 the Office received a statement from appellant's attorney dated June 14, 2004, which asserted that appellant was not physically able to accept the job offer because it entailed duties which exceeded her work restrictions.

By letter dated June 29, 2004, the Office set aside the June 18, 2004 termination decision. The Office advised appellant that she had not provided a valid reason for declining the modified job offer and that it was affording her 15 additional days to accept the job offer.

In a report dated July 14, 2004, Dr. Zmolek stated that appellant complained of persistent and progressive left shoulder pain, weakness and limitation of function. He advised that appellant had moderate to severe pain anteriorly, posteriorly and laterally to the shoulder, with marked exacerbation of pain with any attempts at pushing, pulling, lifting and grasping-type activities. Dr. Zmolek diagnosed a complete rotator cuff tear, as diagnosed by magnetic resonance imaging (MRI) scan and recommended corrective surgery. He stated:

“With regard to the left upper extremity, [appellant] remains disabled from employment which requires lifting of greater than 5 to 10 pounds and overhead activities. I would suggest avoidance of any forceful pushing, pulling, lifting and grasping[-]type activities with the left upper extremity.”

Dr. Zmolek indicated on a form dated July 14, 2004, that due to her left shoulder rotator cuff tear appellant was not able to perform the November 6, 2003 modified job offer and was disabled from work.

In a report dated July 27, 2004, Dr. Jessica A. Cohen-Brown stated findings on examination, noted appellant's history of injuries and stated that she had been treating her for left flexor carpi-radialis tendinitis, with complete degeneration of the triangular fibrocartilage as detected by MRI scan. She stated:

“[Appellant] should be able to, however, perform a job with permanent limitations previously outlined by Dr. Zmolek for limiting weight lifting to 5 [to] 10 pounds. I anticipate that she probably could work the counter, which would limit her need for lifting heavy packages.”

In an August 2, 2004 report, Dr. Zmolek stated:

“[Appellant] returns today reporting gradual progressive increase in left shoulder pain, weakness and limitation of function. The patient reports significant exacerbation of pain with any significant use of the left arm and shoulder region. Pushing, pulling, lifting and driving cause significant increase in shoulder pain.... The patient is unable to reach overhead with the left upper extremity, secondary to pain and weakness. Day[-]to[-]day activities such as combing hair and reaching for a glass of orange juice cause significant pain.”

Dr. Zmolek concluded that appellant remained disabled from employment which required any pushing, pulling, lifting or grasping activities with the left upper extremity.

By decision dated September 22, 2004, the Office terminated appellant's compensation benefits on the grounds that she refused an offer of suitable work.

Appellant's attorney requested a hearing, which was held on June 29, 2005. At the hearing, appellant's attorney argued that Dr. Zmolek had found on July 14, 2004 that appellant was not able to accept the November 6, 2003 modified job offer because of her left upper extremity condition.

Following the hearing, appellant submitted a June 1, 2004 report from Dr. Cohen-Brown, who stated that she was treating appellant for a tendinitis condition and cartilage tear in her left wrist. She also submitted a June 17, 2004 report from Dr. Edison Scott Connor, a Board-certified neurosurgeon, who stated that he had been treating her for lumbar spondylosis. Dr. Connor indicated that he had reviewed the November 6, 2003 job offer and believed that appellant could not perform this position due to her lumbar spondylosis condition.

By decision dated September 15, 2005, an Office hearing representative affirmed the September 22, 2004 termination decision.

### **LEGAL PRECEDENT**

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits. Under section 8106(c)(2) of the Federal Employees' Compensation Act<sup>3</sup> the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.<sup>4</sup> Section 10.517 of the Office's regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured 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 a determination is made with respect to termination of entitlement to compensation.<sup>5</sup> All of appellant's medical conditions whether work related or not, must be considered in assessing the suitability of the position.<sup>6</sup>

To justify termination, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.<sup>7</sup> This burden of proof is applicable if the Office terminates compensation under 5 U.S.C. § 8106(c) for refusal to accept suitable work.

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<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

<sup>4</sup> *Patrick A. Santucci*, 40 ECAB 151 (1988); *Donald M. Parker*, 39 ECAB 289 (1987).

<sup>5</sup> 20 C.F.R. § 10.517; *see also Catherine G. Hammond*, 41 ECAB 375 (1990).

<sup>6</sup> *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(4) (December 1993).

<sup>7</sup> *See John E. Lemker*, 45 ECAB 258 (1993).

## ANALYSIS

The determination 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 the medical evidence.<sup>8</sup> In the instant case, Dr. Zmolek outlined work restrictions based on appellant's accepted right rotator cuff condition of no reaching above the shoulder with the right arm, no reaching with the right arm, no pushing/pulling with the right arm, no repetitive use of right wrist/elbow and no lifting over five pounds with the right arm. On September 14, 2003 Dr. Zmolek approved the sales associate position identified by the employing establishment, adding additional restrictions of no reaching above shoulder height and limited reaching at shoulder height and with the right arm. The employing establishment offered this position to appellant on November 6, 2003 and the Office found that it was within Dr. Zmolek's work restrictions. However, Dr. Zmolek subsequently submitted a July 14, 2004 report indicating that appellant had developed a torn rotator cuff condition in her left shoulder, with persistent and progressive left shoulder pain and weakness and limitation of function. He stated that appellant experienced marked exacerbation of pain with any attempts at pushing, pulling, lifting and grasping-type activities, which he advised her to avoid. Dr. Zmolek restricted appellant from employment requiring lifting more than 5 to 10 pounds and overhead activities. He indicated on July 14, 2004 that, due to her left shoulder rotator cuff tear, appellant was not able to perform the November 6, 2003 modified job offer and was disabled from work. In an August 2, 2004 report, Dr. Zmolek reiterated that appellant was experiencing a gradual, progressive increase in left shoulder pain with weakness and limitation of function and significant exacerbation of pain with any significant use of the left arm and shoulder region. He noted that daily activities such as combing hair and reaching for a glass of orange juice caused her significant pain.

Once appellant submitted this additional medical evidence indicating that she had greater physical restrictions than those upon which the sales associate position was based, the Office was required to determine whether the offered position was still suitable. The Office is required to evaluate each condition, regardless of etiology, which existed prior to the suitability determination.<sup>9</sup> The Office, however, failed to consider the effects of a nonwork-related medical condition in determining whether the position it offered to appellant was suitable. The Office did not meet its burden of proof in this case to terminate appellant's compensation benefits pursuant to 5 U.S.C. § 8106.<sup>10</sup> Accordingly, the Board will reverse the Office's September 22, 2004 decision.

## CONCLUSION

The Board finds that the Office did not meet its burden to terminate appellant's compensation benefits pursuant to 5 U.S.C. § 8106.

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<sup>8</sup> *Robert Dickinson*, 46 ECAB 1002 (1995).

<sup>9</sup> *See* 20 C.F.R. § 10.124(c).

<sup>10</sup> *Barbara R. Bryant*, 47 ECAB 715 (1996).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 22, 2004 decision of the Office of Workers' Compensation Programs be reversed.

Issued: August 21, 2006  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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