

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

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**A.G., Appellant** )

**and** )

**U.S. POSTAL SERVICE, POST OFFICE,** )  
**Lexington, KY Employer** )  
\_\_\_\_\_ )

**Docket No. 06-1225**  
**Issued: December 14, 2006**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On May 1, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' hearing representative's decision dated February 10, 2006 which affirmed the termination of appellant's compensation on the grounds that he refused an offer of suitable work. Pursuant to 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 met its burden of proof to terminate appellant's compensation effective January 14, 2005 on the grounds that he refused an offer of suitable work.

**FACTUAL HISTORY**

On September 27, 2000 appellant, then a 38-year-old building equipment mechanic, filed a traumatic injury claim alleging that on that date he sustained an injury to his shoulder while

moving a ladder in the performance of duty.<sup>1</sup> The Office accepted the claim for right shoulder strain and sprain, neck sprain and cervical herniated nucleus pulposus. While appellant did not immediately stop work,<sup>2</sup> he did stop work on February 22, 2003 and received appropriate compensation for wage loss.

Appellant sought medical care and treatment with Dr. Harold Rutledge, a Board-certified anesthesiologist. In a February 26, 2003 report, Dr. Herbert G. Steger, a clinical psychologist, diagnosed adjustment disorder with mixed anxiety and depressed mood and chronic pain syndrome. In an April 3, 2003 report, Dr. P.D. Patel, a Board-certified psychiatrist and neurologist, noted appellant's history of injury and treatment. He diagnosed chronic pain syndrome with spasms and torticollis of the neck muscles, on the right, a history of degenerative joint disease and recommended Botox treatments.

By letter dated May 19, 2003, the Office requested an opinion from Dr. Rutledge regarding appellant's current status and work capability.

In a July 9, 2003 report, Dr. Rutledge advised that appellant was having some pain at his disc level and was not able to return to work. He hoped that appellant would receive enough symptomatic treatment to return him to some type of vocational status. Dr. Rutledge noted that appellant needed a functional capacity evaluation to help determine what he could do. He described appellant's pain syndrome as very unusual and even "weird." Dr. Rutledge noted that he must "objectify" his complaints as much as possible. He completed a work capacity evaluation finding that appellant was unable to perform his usual job because of pain. Dr. Rutledge did not know how long the restrictions would apply.

On November 17, 2003 the Office referred appellant for a second opinion examination with Dr. Bernard Kliefoth, a Board-certified neurological surgeon, to determine the relationship of appellant's present condition to his work injury and to determine the extent and degree of any disability remaining as a result of any work injury.

On December 9, 2003 Dr. Rutledge advised that he was not recommending any additional treatment and found that appellant had reached maximum medical improvement. He assigned work tolerance restrictions which included weight restrictions of no lifting over 15 pounds.

The record reflects that appellant sought treatment with Dr. Cesar Agtarap, Board-certified in internal medicine, as Dr. Rutledge stopped practicing medicine. In a February 2, 2004 report, Dr. Agtarap noted appellant's history of injury and treatment and diagnosed chronic pain, moderate to severe, right shoulder pain, cervicgia-neck, herniated nucleus pulposus, cervical spine, osteoarthritis of the shoulder, anxiety with physical condition and opioid

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<sup>1</sup> The record reflects that appellant had preexisting hypertension and hiatal hernia.

<sup>2</sup> On November 7, 2000 appellant sustained a recurrence of disability and continued to work. The record reflects that appellant worked in a light-duty capacity.

dependence. He discussed surgical options and their benefits and risks and advised that appellant was not to drive or operate heavy machinery while taking his medications.

On February 19, 2004 the employing establishment offered appellant a modified position as a modified clerk. The job of a modified clerk was comprised of eight hours per day, with no lifting over 15 pounds. The job required working letters and flats in the box section while standing and walking for approximately six hours per day and doing manual letter case work for approximately two hours per day. Appellant declined the position on February 23, 2004.

By letter dated March 15, 2004, the Office advised appellant that the modified clerk position was suitable to his capabilities and was currently available. It advised appellant that the offered position was compatible with the work tolerance limitations given by Dr. Rutledge. Appellant was advised that he should accept the position or provide an explanation for refusing the position within 30 days. If he failed to accept the offered position and failed to demonstrate that the failure was justified, his compensation could be terminated.

In a March 25, 2004 report, Dr. William H. Brooks, a Board-certified neurosurgeon, diagnosed chronic cervical strain and degenerative arthritis. He advised that appellant did not have a condition that required neurosurgical intervention. Dr. Brooks noted that appellant had a "chronic painful condition."

In a December 2, 2003 report, Dr. Klieforth noted appellant's history of injury and treatment. He opined that the September 27, 2000 injury permanently exacerbated appellant's underlying cervical spondylosis. Dr. Klieforth indicated that appellant could not return to work and advised that his condition was permanent. He opined that with proper neurological care appellant might attain a level where he could perform "very mild, desk-type part-time labor."

By letter dated April 19, 2004, the Office provided a copy of the second opinion report from Dr. Klieforth to appellant's treating physician, Dr. Rutledge. The Office requested that he provide an opinion regarding appellant's ability to return to work, including any objective findings.

In an undated report, received by the Office on May 10, 2004, Dr. Rutledge opined that, while Dr. Klieforth indicated that appellant could not work, he believed that appellant could "return to work with a 15-pound weight restriction." He opined that it was his "continued opinion that [appellant] should be able to work in a sedentary or light-duty capacity." Dr. Rutledge noted that appellant had subjective evidence of cervical spondylosis and degenerative disc disease. He also indicated that appellant had objective evidence of muscle spasm and dystonia in his cervical muscles; however, he opined that the subjective complaints outweighed the objective complaints. Dr. Rutledge advised that appellant had a permanent condition directly related to the work-related injury of September 27, 2000.

The Office found a medical conflict between Dr. Rutledge, appellant's treating physician, who opined that appellant could work with restrictions and Dr. Klieforth, the second opinion physician, who opined that appellant was totally disabled. On July 7, 2004 the Office referred

appellant, along with a statement of accepted facts and the medical record to Dr. Patrick K. Leung, a Board-certified neurologist, for an impartial medical evaluation.

In an August 11, 2004 report, Dr. Leung noted appellant's history of injury and treatment and found that appellant had reached maximum medical improvement. He noted no atrophy in the arms or hands and that appellant moved around easily in the examining room. Dr. Leung explained that there was no evidence of cervical radiculopathy or any significant entrapment neuropathy. He was "unable to find any significant permanent neurologic sequelae" pertaining to the injuries of September 27 and November 7, 2000. He determined that there was limitation of the cervical spine movement, consistent with cervical strain and opined that appellant could work at light or limited duties. Dr. Leung recommended continued follow up with appellant's pain specialist for his neck condition and his psychiatrist for his depression.

By letter dated September 22, 2004, the Office requested that Dr. Leung provide a supplemental report that included a description of appellant's work restrictions and an opinion as to whether he could perform the modified clerk position offered by the employing establishment.

In a September 23, 2004 supplemental report, Dr. Leung advised that appellant continued to have pain in his right shoulder, neck and right arm with slight limitation of flexion of his neck as residuals of the September 27, 2000 injury. While appellant had subjective complaints involving the neck and right arm and shoulder, there was "only minimal objective supportive evidence," a slight limitation of neck flexion to support the subjective complaints. Dr. Leung reviewed the job description and opined that appellant was capable of performing the duties of the modified clerk position.

By letter dated October 26, 2004, the Office requested that the employing establishment advise it as to the availability of the modified clerk position. On November 9, 2004 the employing establishment informed the Office that the modified clerk position was still available.

By letter dated November 9, 2004, the Office advised appellant that the modified job was found to be suitable to his capabilities and was currently available. The Office indicated that Dr. Leung, the impartial medical examiner, found that his work restrictions were consistent with the offered position. Appellant was advised that he should accept the position or provide an explanation for refusing the position within 30 days. If he failed to accept the offered position and failed to demonstrate that the failure was justified, his compensation could be terminated.

On December 8, 2004 the Office received a statement in which appellant alleged that Dr. Klieforth opined that he could not perform any type of work. Appellant contended that neither Dr. Klieforth nor Dr. Rutledge mentioned the injection that he received for his shoulder injury on December 20, 2000 which caused him to have severe pain. He alleged that this was a consequential injury. Appellant stated that he continued to experience severe pain, which included headaches, red burning ears, as well as eye and jaw pain. He alleged that the modified job would require him to place his head at an angle outside his movement capabilities and work overhead.

Appellant also submitted medical evidence previously of record. In a November 30, 2004 report, Dr. Alam Noor Khan, a Board-certified neurologist, noted appellant's history of injury and treatment, which included chronic pain. He opined that it was doubtful that appellant would be able to perform any type of work as a result of his chronic pain.

By letter dated December 10, 2004, the Office informed appellant that his reasons for refusing the position were not acceptable. It allowed an additional 15 days for him to accept the position. Appellant was advised that no further reason for refusal would be considered.

In a December 20, 2004 response, appellant contended that he had not received a detailed job description, and that there was no mention of whether he would be required to do overhead work or squatting, which were both requirements of the modified clerk position. He argued that he could not perform modified duty.

By decision dated January 14, 2005, the Office terminated appellant's monetary compensation benefits effective that day, finding that he refused suitable work. The Office determined that the report of Dr. Leung, the impartial medical examiner, represented the weight of the medical evidence.

By letter dated February 8, 2005, appellant requested a hearing, which was held on November 29, 2005.

In a February 23, 2005 report, Dr. Stephen J. Ryan, a Board-certified neurologist, noted appellant's history of injury and treatment, which included neck pain. He diagnosed musculoskeletal chronic strain issues and advised that it was "not clear what the 'knot' in the posterior mid cervical area may represent." Dr. Ryan advised that "the knot may involve chronic spasm of the cervical paraspinal muscle." He did not address appellant's ability to perform the modified clerk position.

The Office also received additional reports from Dr. Agtarap, and Dr. R.W. May, a Board-certified family practitioner; however, they did not provide any opinion regarding whether appellant could perform the modified clerk position.

In a December 25, 2005 letter, appellant provided a copy of Dr. Brooks' April 22, 2004 report in which he diagnosed cervical spondylosis. In a December 1, 2005 treatment note, Dr. Khan noted appellant's complaints which included headaches, blurred or double vision, anxiety, depression, dizziness, tingling and headaches. He opined that appellant was disabled due to pain, but did not address the modified clerk position.

By decision dated February 10, 2006, the Office hearing representative affirmed the January 14, 2005 decision.

## LEGAL PRECEDENT

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits.<sup>3</sup> This includes cases in which the Office terminates compensation under section 8106(c)(2) of the Federal Employees' Compensation Act for refusal to accept suitable work.

Section 8106(c)(2)<sup>4</sup> of the Act provides 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. Section 10.517(a)<sup>5</sup> of the Office's regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured for him or her has the burden to show that this refusal or failure to work was reasonable or justified. After providing the two notices described in section 10.516,<sup>6</sup> the Office will terminate the employee's entitlement to further compensation under 5 U.S.C. §§ 8105, 8106 and 8107, as provided by 5 U.S.C. § 8106(c)(2). However, the employee remains entitled to medical benefits as provided by 5 U.S.C. § 8103 or justified. To justify termination, the Office must show that the work offered was suitable,<sup>7</sup> and must inform appellant of the consequences of refusal to accept such employment.<sup>8</sup> According to Office procedures, certain explanations for refusing an offer of suitable work are considered acceptable.<sup>9</sup> Unacceptable reasons include appellant's preference for the area in which he resides; personal dislike of the position offered or the work hours scheduled; lack of promotion potential or job security.<sup>10</sup> The Office must consider preexisting and subsequently acquired medical conditions in determining the suitability of an offered position.<sup>11</sup>

## ANALYSIS

In this case, Dr. Rutledge, appellant's treating physician, disagreed with Dr. Klieforth, an Office referral physician, as to whether appellant was totally disabled or had the capacity to

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<sup>3</sup> *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

<sup>4</sup> 5 U.S.C. § 8106(c)(2).

<sup>5</sup> 20 C.F.R. § 10.517(a).

<sup>6</sup> 20 C.F.R. § 10.516.

<sup>7</sup> *See Carl W. Putzier*, 37 ECAB 691 (1986); *Herbert R. Oldham*, 35 ECAB 339 (1983).

<sup>8</sup> *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992). *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(d)(1) (July 1997).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(1)-(5) (July 1997). *See Cloteal Thomas*, 41 ECAB 310 (1989); *Carl W. Putzier*, 37 ECAB 691 (1986).

<sup>10</sup> *Arthur C. Reck*, 47 ECAB 339 (1996); Federal (FECA) Procedure Manual at Chapter 2.814.5(c) (July 1996).

<sup>11</sup> *See Gayle Harris*, 52 ECAB 319 (2001).

perform the duties of a modified clerk position. The Office properly found a conflict in medical evidence which required referral to an impartial medical specialist.

The Act, at 5 U.S.C. § 8123(a), in pertinent part, provides: “If there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.”

The Office referred appellant to Dr. Leung for an impartial medical evaluation. Dr. Leung performed a thorough evaluation of appellant on August 11, 2004. He advised that appellant was not totally disabled but had the capacity to perform modified duty. Dr. Leung found no evidence of cervical radiculopathy or any significant entrapment neuropathy of the cervical region. He provided a supplemental report on September 23, 2004 in which he noted that appellant had subjective complaints with minimal objective findings. Dr. Leung provided a reasoned opinion that appellant was capable of working the modified clerk position and provided restrictions, for sedentary duty, of lifting no more than 15 pounds. When a case is referred to an impartial medical specialist for the purpose of resolving a conflict in medical opinion, the opinion of such specialist, if sufficiently well rationalized and based on a proper background, must be given special weight.<sup>12</sup> Dr. Leung’s opinion represented the weight of the medical evidence on the issue of appellant’s ability to work the modified clerk position.

Subsequent to the evaluation by Dr. Leung, the employing establishment confirmed that the modified clerk position was still available. The position accommodated the work restrictions provided by Dr. Rutledge, appellant’s own treating physician. Dr. Leung, also agreed that appellant could perform the duties. The Office reviewed the position and found it to be suitable for appellant.

To properly terminate compensation under section 8106, the Office must provide appellant notice of its finding that an offered position is suitable and give him an opportunity to accept or provide reasons for declining the position.<sup>13</sup> The Office properly followed its procedural requirements in this case. By letter dated November 9, 2004, the Office advised appellant that the position was suitable and provided him 30 days to accept the position or provide reasons for his refusal. The Office further notified him that he could still accept the position without penalty and that a partially disabled employee who refused suitable work was not entitled to compensation.

By letter received by the Office on December 8, 2004, appellant alleged that he had chronic pain that prevented him from working. He contended that the position did not indicate how he would place his head while working at a particular angle. While an acceptable reason for refusing work determined by the Office to be suitable would be that the duties actually exceed those listed in the offer,<sup>14</sup> appellant did not establish that this was the case. The description

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<sup>12</sup> *Kathryn Haggerty*, 45 ECAB 383, 389 (1994); *Jane B. Roanhaus*, 42 ECAB 288 (1990).

<sup>13</sup> *See Maggie L. Moore*, *supra* note 8.

<sup>14</sup> *See Cloteal Thomas*, *supra* note 9 and *Carl W. Putzier*, *supra* note 9.

provided by the employing establishment does not provide any indication that appellant would be required to perform activities other than described in the offer.

Appellant also submitted a November 30, 2004 report from Dr. Khan, who doubted that appellant would be able to perform any type of work as a result of his chronic pain. However, Dr. Khan did not address the modified clerk position or provide a reasoned opinion regarding appellant's capabilities to perform the position.<sup>15</sup> Appellant did not otherwise submit sufficient medical evidence to establish that he had any condition that would prevent him from performing the sedentary position

By letter dated December 10, 2004, the Office properly informed appellant that his reasons for refusing the offered position were unacceptable and provided him 15 days to accept the position. Appellant refused to do so and thus the Office properly terminated his wage-loss compensation for refusal of suitable work. At the time of the termination, the weight of the medical evidence established that he could perform the duties of the offered position.

An employee who refuses or neglects to work after suitable work has been offered to him or her has the burden of showing that such refusal to work was justified.<sup>16</sup> In the present case, appellant has not shown that his refusal to work was justified. The weight of the medical evidence continues to support that appellant's accepted conditions did not prevent him from performing the job he was offered on February 19, 2004. The medical reports received subsequent to the evaluation by Dr. Leung, are insufficient to either overcome Dr. Leung's opinion or create a new conflict in the medical evidence.

The Office received a December 1, 2005 treatment note, in which Dr. Khan opined that appellant was disabled due to pain, but he did not provide any opinion with respect to appellant's ability to perform the suitable work position. Other medical reports submitted by appellant did not provide a specific opinion regarding his ability to perform the offered position.

Following the termination of his benefits, appellant has not established that the offered position was outside of his physical recommendations. The Board finds that appellant did not meet his burden to show that his refusal to accept suitable work was justified.

The Board finds that the Office met its burden of proof in terminating appellant's compensation benefits effective January 14, 2005 and that appellant did not, thereafter, establish that his refusal of suitable work was justified.

### **CONCLUSION**

The Board finds that the Office met its burden of proof to terminate appellant's compensation effective January 14, 2005 on the grounds that he refused an offer of suitable work.

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<sup>15</sup> See *supra* note 11.

<sup>16</sup> 5 U.S.C. § 8106(c)(2).



**ORDER**

**IT IS HEREBY ORDERED THAT** the February 10, 2006 decision of the Office of Workers' Compensation Programs' hearing representative is affirmed.

Issued: December 14, 2006  
Washington, DC

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

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

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board