

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

J.L., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Los Angeles, CA, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 07-500
Issued: August 17, 2007**

Appearances:
Appellant, for the appellant
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 December 26, 2006 appellant filed a timely appeal of a May 22, 2006 merit decision of the Office of Workers' Compensation Programs, terminating his compensation benefits and September 15, 2006 nonmerit decision, denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this termination case.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation benefits on the grounds that he refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2); and (2) whether the Office properly denied appellant's request for a merit review of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On May 16, 2003 appellant, then a 46-year-old mail handler, filed a traumatic injury claim. He alleged that on April 18, 2003 he experienced pain in the lower right side of his back and right hip while hooking up a bulk mail container to a mule. Appellant stopped work on the

date of injury. The Office accepted his claim for lumbosacral strain and paid appropriate compensation.

In a September 3, 2003 medical report, Dr. Marvin White, Jr., an attending internist, opined that appellant continued to be treated for his work-related lumbosacral strain and that he was totally disabled for work.

By letter dated August 8, 2003, the Office referred appellant, together with a statement of accepted facts, the case record and a list of questions, to Dr. Jerrold M. Sherman, a Board-certified orthopedic surgeon, for a second opinion medical examination. In an August 26, 2003 report, Dr. Sherman opined that appellant no longer had any residuals or disability causally related to his April 18, 2003 employment injury. He further opined that appellant could work eight hours per day with no restrictions.

On October 10, 2003 the Office found a conflict in the medical opinion evidence between Dr. White and Dr. Sherman as to whether appellant had any residuals or disability due to his accepted employment injury. By letter dated November 28, 2003, the Office referred appellant together with a statement of accepted facts, the case record and a list of questions, to Dr. Rama E. Chandran, a Board-certified orthopedic surgeon, for an impartial medical examiner.

In a January 12, 2004 report, Dr. Chandran reviewed a history of appellant's April 18, 2003 employment injury, medical treatment and medical records. She noted his complaint of constant pain in his lower back that radiated to his buttocks. Dr. Chandran reported essentially normal findings on physical examination with the exception of tenderness in the lumbar spine. She diagnosed disc protrusion of three to four millimeters at L4-S1 with foraminal stenosis and disc protrusion at L3-4 of four millimeters with a compression of both right and left L4 nerve roots based on x-ray and a magnetic resonance imaging (MRI) scan. Dr. Chandran opined that the former condition was caused by appellant's April 18, 2003 employment injury and that the latter condition would not have occurred if he had not sustained the employment injury. She further opined that there was no aggravation of the disc protrusion as a result of the accepted employment injury. Dr. Chandran indicated that appellant had both subjective and objective factors of disability. She concluded that he was unable to perform his regular work duties but he could perform restricted duties eight hours per day that did not require any repeated bending, stooping, squatting, kneeling, crawling or lifting more than 10 pounds.

On February 18, 2004 the employing establishment offered appellant a modified mail handler position based on the restrictions set forth in Dr. Chandran's January 12, 2004 report. The position involved prepping flat mail, working from hampers/bascarts, sitting and standing as needed, assisting with security sign-in at the registry cage and reliever for electric equipment check in and out. The physical requirements included no lifting more than 10 pounds and no repeated bending, stooping, squatting, kneeling or crawling.

By letter dated April 16, 2004, the Office expanded the acceptance of appellant's claim to include disc protrusion at L5-S1 and L3-4 based on Dr. Chandran's January 12, 2004 report.

In a letter dated August 4, 2004, the Office advised appellant that a suitable position based on Dr. Chandran's January 12, 2004 opinion was available and that he had 30 days to

either accept the position or arrange for the submission of a medical report. It further advised him that he would be paid for any difference in salary between the offered position and his date-of-injury position and that he could accept the job without penalty. The Office informed appellant that his compensation would be terminated based on his refusal to accept a suitable position pursuant to 5 U.S.C. § 8106(c)(2).

On August 5, 2004 the Office held a telephone conference call with appellant and Rosalind Belcher, his vocational rehabilitation counselor. Appellant contended that the offered position was not suitable because it required him to perform duties outside his restrictions. It required him to handle magazines which came in bundles of 15 to 20 in a hamper and he would be required to repetitively bend and stoop over the hamper and lift more than 10 pounds. Appellant stated that the position also required long hours of standing on a concrete floor which he could not do in light of his back condition. He could not keep up with prepping mail due to his back condition because it involved using a prep mail machine that was fast producing. Appellant was advised to put his reasons for refusing the offered position in writing and that his allegations would be confirmed by the employing establishment.

On August 16, 2004 the employing establishment offered appellant an amended modified mail handler position based on Dr. Chandran's January 12, 2004 restrictions. It advised him that the previous offered position was no longer available. The current offered position required sitting at a return to sender table in a straight back chair and fingering first class letters and use of the hands to finger each letter in a mail tray, making sure that all the letters were facing the same direction. After verifying the tray of mail, it should be placed on mail moving equipment for further processing. The weight of the tray could be reduced by taking a handful of mail at a time before lifting the tray. This task may be done either in a standing or sitting position which would allow alternate personal comfort. The physical requirements of the position involved no lifting more than 10 pounds and no repeated bending, stooping, squatting, kneeling or crawling. Appellant was instructed to notify his supervisor immediately if any assistance was needed.

On August 28, 2004 appellant rejected the job offer. He stated that chronic pain in his lower back had not decreased and at that time he was being referred to a pain management specialist. Appellant further stated that once he completed pain management treatment, he would like to return to light-duty work.

By letter dated September 15, 2004, the Office advised appellant that a suitable position based on Dr. Chandran's January 12, 2004 opinion was available and that he had 30 days to either accept the position or arrange for the submission of a medical report. It further advised him that he would be paid for any difference in salary between the offered position and his date-of-injury position and that he could accept the job without penalty. The Office informed appellant that his compensation would be terminated based on his refusal to accept a suitable position pursuant to section 8106(c)(2).

The Office received several medical reports dated August 13, September 10 and October 8, 2004 from Dr. Charles M. Bosley, an orthopedic surgeon, who addressed appellant's continuing back pain and weakness in his lower extremities. Dr. Bosley requested authorization for referral to a pain management center.

On November 17, 2004 the Office advised appellant that it was aware of his continued refusal to accept the offered position. It provided him a final opportunity to submit evidence which addressed the basis for the termination of his compensation. The Office reinstated appellant's compensation effective October 31, 2004. It advised him that his reasons for refusing the offered position were not valid. Appellant was given 15 days to accept the position.

Dr. Bosley's November 13, 2004 report reiterated that appellant had back pain and weakness in his lower extremities. He again requested authorization for pain management treatment.

By decision dated December 6, 2004, the Office terminated appellant's compensation. It found that Dr. Chandran's January 12, 2004 statement that appellant was capable of performing light-duty work was entitled to special weight accorded an impartial medical specialist. The Office further found that the evidence submitted by appellant was insufficient to outweigh the special weight accorded to Dr. Chandran's report.

On December 7, 2004 the Office received Dr. Bosley's November 26, 2004 report which restricted appellant from sitting, stooping, bending and lifting. In a December 2, 2003 report and a December 3, 2004 referral slip, Dr. Bosley stated that appellant sustained a herniated nucleus pulposus. In a December 9, 2004 report he diagnosed discogenic disease. In the December 2 and 9, 2004 reports, Dr. Bosley opined that appellant was totally disabled and reiterated his prior restrictions. He further opined that, due to his pain, appellant was unable to accept the offered position. Dr. Bosley concluded that his prognosis was extremely guarded. His December 4, 2004 report indicated that appellant was receiving pain management treatment and that his prognosis remained extremely guarded.

In a December 13, 2004 report, Dr. Castoria Seymore, Jr., an anesthesiologist, reviewed a history of appellant's work-related injuries including the April 18, 2003 employment injury, medical treatment and family and social background. Dr. Seymore reported pain in his lumbar spine and weakness in the lower extremities on physical examination. He diagnosed lumbar disc protrusion with right radiculopathy and myofascial pain syndrome. Dr. Seymore recommended fluoroscopic guided lumbar transforaminal epidural steroid injections at the right L5 and S1 to alleviate appellant's continuous pain. In reports dated December 14, 2004 and January 13, 2005, Dr. Seymore diagnosed lumbar degenerative disc disease, an umbilical hernia and myofascial pain syndrome.

A January 9, 2004 MRI scan of appellant's lumbar spine was performed by Dr. Alan T. Turner, a Board-certified radiologist, who found a diffuse disc bulge measuring three to four millimeters at L5-S1 with narrowing of the neural foramina and degenerative disc disease at L5-S1.

In a January 5, 2005 report, Dr. Bosley reviewed Dr. Chandran's January 12, 2004 report. He stated that his report did not reflect appellant's current deteriorated condition. Dr. Bosley related that back surgery was required and continued pain management treatment prior to surgery.

On January 5 and 13, 2005 appellant requested a review of the written record by an Office hearing representative regarding the Office's December 6, 2004 decision.

Dr. Bosley's February 8 and April 1, 2005 reports stated that appellant's back and lower extremity conditions had not changed and that he remained totally disabled.

By decision dated April 22, 2005, an Office hearing representative affirmed the Office's December 6, 2004 decision. The hearing representative found that Dr. Chandran's impartial medical opinion was entitled to special weight in finding that appellant was capable of performing the duties of the offered position.

Dr. Seymore's February 8, 2006 report reviewed a history of an injury appellant sustained on April 13, 2004 and medical treatment.¹ He reported his complaints of pain in the lower back into the right lower extremity and secondary to a hernia. Dr. Seymore also reported pain on physical examination. He diagnosed lumbar degenerative disc disease with right sciatica. Dr. Seymore recommended lumbar epidural steroid injections and a MRI scan to reevaluate the overall pathology of appellant's lumbar spine.

On April 4, 2006 appellant requested reconsideration of the hearing representative's April 22, 2005 decision.

By decision dated May 22, 2006, the Office denied modification of the April 22, 2005 decision. It found that the evidence submitted by appellant was insufficient to outweigh the special weight accorded to Dr. Chandran's impartial medical opinion.

In a June 2, 2006 letter, appellant requested reconsideration. In an undated complaint that was submitted to the Office's inspector general's office, appellant contended that the Office improperly handled his claim. He contended that an Office claims examiner failed to assist him with his claim. Appellant further contended that the claims examiner pushed for vocational rehabilitation services although his conditions were not permanent and stationary and he had not received medical treatment. His claims examiner was crude and used abusive language during a telephone conference with Dr. White. Appellant's attending physician was replaced with an Office contract physician. He went without orthopedic services in excess of 90 days. Appellant was threatened by a claims examiner during the telephone conference with termination of his compensation and medical benefits after he notified the Office about an insufficient job offer. A senior claims examiner denied appellant's request for union representation during the telephone conference and a certified supervisor to conduct the conference. Appellant contended that the August 17, 2004 limited-duty job offer was not evaluated by a claims examiner prior to the termination of his compensation.² He also contended that the Office denied authorization for pain management treatment. Appellant did not receive notice of subsequent authorization for such treatment until November 24, 2004.

¹ The Board notes that it appears that Dr. Seymore inadvertently stated that the date of appellant's employment-related injury was April 13, 2004 rather than April 18, 2003 as his description of the accepted injury was consistent with the history of the April 18, 2003 employment injury.

² It appears that appellant inadvertently stated that the employing establishment's limited-duty job offer was made on August 17, 2004 rather than on August 16, 2004 as previously noted by the Board.

By decision dated September 15, 2006, the Office denied appellant's request for reconsideration. It found that the evidence submitted was irrelevant, cumulative and immaterial in nature and, thus, insufficient to warrant a merit review of the claim.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.³ Under section 8106(c)(2) of the Federal Employees' Compensation Act, the Office may terminate the compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.⁴ 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.⁵ 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.⁶

Section 10.517 of the Act'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.⁷ Pursuant to section 10.516, the employee shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.⁸

When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁹

ANALYSIS -- ISSUE 1

The initial question presented is whether the August 16, 2004 job offer for a modified mail handler position was medically suitable. The Board finds that a conflict in the medical opinion evidence arose between Dr. White, an attending physician, and Dr. Sherman, an Office referral physician, as to whether appellant was totally disabled for work due to his April 18, 2003 employment-related lumbosacral strain. Dr. White opined that appellant continued to experience residuals and disability due to his accepted employment-related injury. Dr. Sherman opined that

³ *Linda D. Guerrero*, 54 ECAB 556 (2003).

⁴ 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

⁵ *Ronald M. Jones*, 52 ECAB 190 (2000).

⁶ *Joan F. Burke*, 54 ECAB 406 (2003).

⁷ 20 C.F.R. § 10.517(a); *see Ronald M. Jones*, *supra* note 5.

⁸ 20 C.F.R. § 10.516.

⁹ *Gloria J. Godfrey*, 52 ECAB 486 (2001).

he no longer had any residuals or disability causally related to his accepted employment injury and he could work eight hours a day with no restrictions. The Act provides that, 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 the examination.¹⁰ The Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹¹

The Office referred appellant to Dr. Chandran, selected as the impartial medical specialist. In a January 12, 2004 report, Dr. Chandran diagnosed disc protrusion of three to four millimeters at L4-S1 with foraminal stenosis and disc protrusion at L3-4 of four millimeters with a compression of both right and left L4 nerve roots based on x-ray and an MRI scan. She opined that the former condition was caused by appellant's April 18, 2003 employment injury and the latter condition would not have occurred if he had not sustained the employment injury. Dr. Chandran further opined that there was no aggravation of the disc protrusion as a result of the accepted employment injury. She concluded that although appellant could not perform his regular work duties, he could perform limited-duty work eight hours per day that did not require any repeated bending, stooping, squatting, kneeling, crawling or lifting more than 10 pounds.

The Board finds that Dr. Chandran's January 12, 2004 opinion is based on a proper factual and medical background and is entitled to special weight. She found that appellant was no longer totally disabled due to his April 18, 2003 employment injury and that he could perform limited-duty work with restrictions. For this reason, her report constitutes the special weight of the medical opinion evidence afforded an impartial medical specialist.

The offered modified mail handler position allowed appellant to either sit or stand while performing his work duties. It did not require lifting more than 10 pounds and repeated bending, stooping, squatting, kneeling or crawling. The offered position conforms to the restrictions set forth by Dr. Chandran. The Board finds that, based on the weight of the medical evidence, the offered position of modified mail handler was medically suitable.

The Office notified appellant of its finding that the modified mail handler job offer was suitable and of the consequences for not accepting a suitable offer and allotted him the requisite 30 days to respond. He contended that the position was not suitable because he suffered from chronic back pain and was being referred to a pain management specialist for treatment.

In accordance with established procedures, the Office found that appellant's reasons for refusing the position were not valid and provided him an additional 15 days to accept the position prior to termination of compensation. Appellant submitted Dr. Bosley's August 13, September 10, October 8 and November 13, 2004 reports which addressed his back pain and weakness in his lower extremities. However, Dr. Bosley's report does not discuss the offered position or provide a reasoned opinion on the issue presented. The Board finds that the job offered was medically and vocationally suitable and the Office followed its procedures prior to

¹⁰ 5 U.S.C. § 8123(a). *See S.G.*, 58 ECAB ____ (Docket No. 07-30, issued February 26, 2007).

¹¹ 20 C.F.R. § 10.321. *See R.C.*, 58 ECAB ____ (Docket No. 06-1676, issued December 26, 2006).

termination of compensation. Accordingly, the Board finds that the Office met its burden of proof to terminate compensation.

Following the December 6, 2004 decision, appellant submitted additional medical evidence from Dr. Bosley which addressed his continuing treatment for his back condition, restrictions and disability. In his November 26 and December 2 and 9, 2004 reports, Dr. Bosley restricted appellant from sitting, stooping, bending and lifting and found that he was totally disabled due to pain. As the offered position allowed appellant to stand while performing his work duties and had the same restrictions as set forth by Dr. Bosley, the Board finds that his November 26 and December 2 and 9, 2004 reports do not establish that appellant could not perform the duties of the offered position.

Dr. Bosley's December 3, 2004 referral slip and December 4, 2004 report indicated that appellant sustained a herniated nucleus pulposus. He stated that his prognosis was extremely guarded. Dr. Bosley's February 8 and April 1, 2005 reports found that appellant's back and lower extremity conditions had not changed and that he remained totally disabled. However, he does not discuss the relevant issue in this case of whether appellant was capable of performing the modified mail handler position at the time it was offered or provide a reasoned opinion on the issue presented.

Similarly, Dr. Seymore's reports which stated that appellant sustained lumbar disc protrusion with right radiculopathy, myofascial pain syndrome, an umbilical hernia and lumbar degenerative disc disease with right sciatica do not establish that appellant was physically incapable of performing the duties of the offered position. This evidence fails to discuss the offered position or provide a rationalized opinion on whether the position was medically suitable for appellant.

The Board finds that appellant has submitted insufficient medical evidence to support his refusal of suitable work. Therefore, he has not established a reasonable basis for refusing the offered position. As the weight of the medical evidence at the time of the December 6, 2004 decision established that he could perform the duties of the offered position, appellant did not offer sufficient justification for refusing the position. Therefore, the Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective December 6, 2004, as he refused an offer of suitable work.¹²

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128 of the Act,¹³ the Office's regulation provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not

¹² *Karen L. Yaeger*, 54 ECAB 323 (2003).

¹³ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, [t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

previously considered by the Office.¹⁴ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.¹⁵ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review of the merits.

ANALYSIS -- ISSUE 2

In a May 22, 2006 decision, the Office denied modification of the termination of appellant's compensation on the grounds that he refused an offer of suitable work. In a letter dated June 2, 2006, he disagreed with this decision and requested reconsideration. As noted, the relevant underlying issue is whether appellant can perform the duties of the modified mail handler position offered by the employing establishment.

Appellant contended that the Office did not properly handle his traumatic injury claim as he did not receive assistance from a claims examiner or medical treatment for more than 90 days; a claims examiner was verbally abusive to Dr. White who was replaced by an Office referral physician and threatened to terminate his compensation after his refusal to accept the offered position; his requests for union representation during a telephone conference, a certified supervisor to conduct the conference and authorization for pain management treatment were denied; the Office failed to evaluate the employing establishment's August 16, 2004 job offer; and delayed notification of authorization for pain management treatment. However, the question of whether the Office properly determined that the modified mail handler position was suitable is medical in nature and appellant's arguments that the Office improperly handled his claim are not relevant to this issue. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁶

Appellant did not submit any relevant and pertinent new evidence not previously considered by the Office in support of his request for reconsideration. Further, he did not show that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office. As appellant did not meet any of the necessary regulatory requirements, the Board finds that the Office properly denied merit review.¹⁷

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation benefits on the grounds that he refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2). The Board further finds that the Office properly denied appellant's request for a merit review of his claim pursuant to 5 U.S.C. § 8128(a).

¹⁴ 20 C.F.R. § 10.606(b)(1)-(2).

¹⁵ *Id.* at § 10.607(a).

¹⁶ *See Arlesa Gibbs*, 53 ECAB 204 (2001); *Kevin M. Fatzner*, 51 ECAB 407 (2000).

¹⁷ *See James E. Norris*, 52 ECAB 93 (2000).

ORDER

IT IS HEREBY ORDERED THAT the September 15 and May 22, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 17, 2007
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