



On May 2, 1997 appellant, then a 33-year-old part-time rural carrier associate, filed a traumatic injury claim for neck and back injuries sustained on February 14, 1997 when her vehicle slid on ice, spun around and turned over on its side in a ditch. She returned to work on March 15, 1997 but stopped work again on November 8, 1997. On February 19, 1998 appellant underwent surgery consisting of anterior cervical discectomy and fusion at C5-6 and C6-7, anterior plating from C5 through C7 and bone grafting over the right iliac crest. She returned to work on May 5, 1998. Appellant did not work between August 28, 1998 and May 21, 2000 for nonwork-related reasons. She returned to work on May 22, 2000. The Office accepted appellant's claim for cervical subluxation, cervical radiculopathy, a herniated disc in the cervical spine and related surgery. Appellant sustained a recurrence of disability on July 6, 2002 causally related to her February 14, 1997 employment injury. She did not return to work.

On March 27, 2003 the Office asked Dr. Michael J. Kramer, appellant's attending Board-certified neurosurgeon, to review the findings in a February 3, 2003 functional capacity evaluation and provide his recommendations for work restrictions. On April 1, 2003 Dr. Kramer referred the Office to the functional capacity evaluation for recommendations regarding the number of hours that appellant was capable of working and her work restrictions. Rick Wickstrom, the physical therapist who performed the functional capacity evaluation, stated that appellant's job involved delivering mail to 575 boxes on a 75-mile rural route. Appellant sat in the front passenger seat, steered with her left hand and operated the brake and accelerator pedals with her left foot. She reached back with her left arm to get mail from the back seat and reached through the passenger window with her right arm to place mail in mailboxes. Appellant's functional range of motion for right and left cervical extension and flexion was abnormal; right elbow strength was 27 percent of normal and left elbow strength was 46 percent of normal; right shoulder strength was 31 percent of normal and left shoulder strength was 41 percent of normal. The evaluation noted that her job required substantial reaching with both arms and neck twisting. It indicated that appellant was capable of performing sedentary to light clerical work.

On April 9, 2003 the Office referred appellant to Dr. Kevin J. Paley, a Board-certified orthopedic surgeon, for an examination and evaluation to determine her work restrictions.

On May 7, 2003 Dr. Paley provided a history of appellant's condition, a review of the medical evidence and physical findings on examination. He stated that she was not capable of performing the complete duties of a rural carrier associate as described in the statement of accepted facts. Dr. Paley stated:

“[Appellant's] [n]eck was soft and nontender to palpation. She had a well-healed anterior incision. [Appellant] did have a limited cervical neck range of motion, lacking approximately 30 degrees from normal for rotation. She had good [flexion] and extension present, lacking just a few degrees of terminal extension and flexion.”

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“Extremity examination showed no focal deficits with regard to sensation o[r] motor function of both upper and lower extremity. [Appellant] had symmetrical

upper extremity deep tendon reflexes present. There was no intrinsic wasting or atrophy in the upper extremities.”

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“[Appellant’s] current allowances are C5 through C7 subluxation and cervical radiculopathy in the right upper extremity by history alone. There is no objective data to support any upper extremity weakness in the right side.”

\* \* \*

“It is my opinion that [appellant’s] current condition is a direct result of the cervical disc rupture which occurred at this level and has been subsequently treated by Dr. Kramer.... It is my opinion that the residuals of her cervical disc rupture are her main complaints at this time and are the correct diagnosis with regard to what is keeping her condition active at this time.”

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“[Appellant] recently had a functional capacity examination performed [in February 2003], which cleared her to perform at a light[-]duty capability. This, by definition, allows her to carry on an occasional basis up to 20 pounds and on a frequent basis 10 pounds. I, therefore, have completed the work capacity evaluation form with these restrictions. These restrictions would be permanent based on the severity of her initial injury and subsequent residual complaints.”

In a work capacity evaluation form, Dr. Paley indicated that appellant could work for eight hours a day with no reaching above the shoulder. Pushing, pulling and lifting was limited to one to two hours a day up to 20 pounds and up to 10 pounds on a frequent basis.

On October 22, 2003 the employing establishment offered appellant a modified position. The duties included casing mail on a modified platform for approximately two hours a day and delivering mail for approximately six hours a day using a mail cart weighing no more than 20 pounds.<sup>2</sup> The work restrictions included no reaching above the shoulder, a limit of 2 hours for pushing, pulling or lifting and lifting of no more than 20 pounds for up to 1.95 hours.<sup>3</sup> Appellant rejected the job offer. She stated that her physician restricted her driving to no more than two hours at a time.<sup>4</sup>

On November 7, 2003 Dr. Kramer stated that appellant was experiencing paresthesias and discomfort in her right arm but indicated that objective tests were normal. He stated that appellant had attempted to return to her job but it “did n[o]t work.” On November 21, 2003

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<sup>2</sup> The job description is inaccurate in that appellant did not deliver mail using a mail cart.

<sup>3</sup> A portion of the description of modified duties is illegible.

<sup>4</sup> There is no medical report of record indicating that appellant could drive only two hours at a time.

Dr. Kramer stated that an EMG (electromyogram) performed on November 13, 2003 failed to show any evidence of cervical radiculopathy.

On November 18, 2003 the Office advised appellant that the modified rural carrier associate position was suitable as it conformed to the physical limitations provided by Dr. Paley. The employing establishment confirmed on November 4, 2003 that the position offered to appellant remained available. The Office allowed her 30 days in which to accept the position or provide her reasons for refusal. The Office advised appellant that an employee who refuses an offer of suitable work without reasonable cause is not entitled to compensation. On December 10, 2003 appellant responded that the job offered was not consistent with the February 10, 2003 functional capacity evaluation recommendation that she perform a sedentary or light-duty position.

By letter dated December 30, 2003, the Office advised appellant that her reasons for refusing the position were not acceptable and she had 15 days to accept. On January 13, 2004 appellant responded that she was unable to perform the position offered because she had neck pain radiating into her right arm and right arm numbness.

The Office asked Dr. Paley to review the November 13, 2003 EMG and indicate whether his opinion regarding appellant's work restrictions was changed based on the test results. On January 7, 2004 he stated that appellant had a normal EMG on November 13, 2003 without evidence of electrophysiological, cervical radiculopathy or neurogenic compromise. Dr. Paley did not change her work restrictions.

By decision dated February 10, 2004, the Office terminated appellant's compensation on the grounds that she refused an offer of suitable work.

Appellant requested an oral hearing that was held on November 26, 2004. She stated that the modified job offered to her was substantially the same as her regular job. Appellant was required to sit in her vehicle for five to six hours, reach into the back seat and lift bundles of mail to the front seat. The bundles weighed up to 15 pounds. Appellant sat in the front passenger seat, drove with her left hand on the steering wheel, leaned out of her vehicle, opened each post mailbox and inserted the mail. Some of the mailboxes were taller than others or otherwise difficult to reach, requiring appellant to reach above her right shoulder to insert the mail while maintaining control of her vehicle with her left arm and left foot. Appellant's 72-mile route included the delivery of flat mail and parcels to 575 mailboxes. She indicated that employing establishment rules did not permit her to exit her vehicle unless she was delivering a parcel. Consequently, appellant reached into the back seat to bring mail bundles to the front after each previous bundle was delivered. She indicated that some parcels exceeded her 20-pound weight limitation. Appellant was required to return to the employing establishment by 5:30 p.m. each day in order to transfer outgoing mail from her rural patrons to the outgoing mail truck.

By decision dated March 4, 2005, an Office hearing representative affirmed the February 10, 2004 decision. On October 7, 2005 the Board remanded the case for reconstruction and proper assemblage.

By decision dated November 13, 2006, Office hearing representative affirmed the February 10, 2004 termination decision.

### **LEGAL PRECEDENT**

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>5</sup> Section 8106(c)(2) of the Federal Employees' Compensation Act<sup>6</sup> 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."<sup>7</sup> To justify termination of compensation, the Office must establish that the work offered was suitable and must inform the employee of the consequences of refusal to accept such employment.<sup>8</sup>

Section 10.517(a) of the Act's implementing regulation provides that an employee who refuses to work after suitable work has been offered to or secured for the employee, has the burden of showing that such refusal or failure to work was reasonable or justified.<sup>9</sup> 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.<sup>10</sup>

### **ANALYSIS**

The Office accepted that appellant sustained cervical sUBLUXATION, cervical radiculopathy and a herniated disc in the cervical spine as a result of the accident on February 14, 1997 and the Office authorized related surgery. The Office terminated appellant's compensation by decision dated February 10, 2004 on the grounds that she refused an offer of suitable work. The initial question is whether the Office properly determined that the position was suitable.

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>11</sup>

In this case, the Office relied on the reports of Dr. Paley in finding that the modified rural carrier associate position offered by the employing establishment was within appellant's work limitations.

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<sup>5</sup> *Richard P. Cortes*, 56 ECAB \_\_ (Docket No. 04-1561, issued December 21, 2004); *Melvin James*, 55 ECAB 406 (2004).

<sup>6</sup> 5 U.S.C. §§ 8101-8193.

<sup>7</sup> 5 U.S.C. § 8106(c)(2); *see also Linda D. Guerrero*, 54 ECAB 556 (2003).

<sup>8</sup> *Ronald M. Jones*, 52 ECAB 190 (2000); *Arthur C. Reck*, 47 ECAB 339 (1995).

<sup>9</sup> 20 C.F.R. § 10.517(a); *see Ronald M. Jones*, *supra* note 8.

<sup>10</sup> 20 C.F.R. § 10.516; *see Kathy E. Murray*, 55 ECAB 288 (2004).

<sup>11</sup> *Kathy E. Murray*, *supra* note 10.

Dr. Paley provided work restrictions for appellant based on his findings on physical examination and the results of an EMG. It appears that he did not review a copy of the modified job description or otherwise have knowledge of the specific physical requirements of the position. Although Dr. Paley provided a list of work restrictions, he did not provide an opinion as to whether the modified job offered was suitable for appellant's physical limitations. Additionally, the modified job offered to appellant by the employing establishment is not consistent with the work restrictions provided by Dr. Paley who indicated that appellant was limited to lifting up to 20 pounds on an occasional basis and 10 pounds on a frequent basis. The modified job description does not include the 10-pound restriction, only a restriction of lifting mail weighing more than 20 pounds. Appellant stated at the hearing that the bundles of mail she lifted from the back seat of her vehicle to the front, while delivering to the 575 mailboxes on her route, sometimes weighed up to 15 pounds, exceeding the 10-pound limitation of mail lifted on a frequent basis. She also indicated that some parcels exceeded her 20-pound weight limitation for occasional lifting. Dr. Paley specified that appellant should have no reaching above the shoulder. The modified job description indicated that there would be no reaching above the shoulder. However, at the hearing appellant indicated that the modified job offered to her was substantially the same as her regular job and included reaching above her shoulder on occasion. For five to six hours on her 72 mile route, she reached into the back seat and lifted bundles of mail to the front seat. Appellant sat in the front passenger seat, drove with her left hand on the steering wheel, leaned out of her vehicle, opened each post mailbox and inserted the mail. Some of the mailboxes were taller than others or otherwise difficult to reach, requiring her to reach above her right shoulder to insert the mail while maintaining control of her vehicle with her left arm and left foot.

Based on the evidence of record, the Board finds that the Office improperly determined that the modified position offered to appellant constituted suitable work within her physical limitations. Consequently, the Office did not meet its burden of proof to terminate appellant's compensation based on her refusal to accept an offer of suitable work.

### **CONCLUSION**

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits for refusing an offer of suitable work.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated November 13, 2006 is reversed.

Issued: June 4, 2007  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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