

FACTUAL HISTORY

On August 14, 1996 appellant, then a 50-year-old rural carrier, filed a traumatic injury claim alleging that on that date she hurt her neck as a result of a motor vehicle accident. By letter dated September 25, 1996, the Office accepted the claim for cervical, back and left shoulder strains. Appellant underwent a lumbar laminectomy/discectomy on April 30, 1997. She returned to part-time limited-duty work on July 14, 1997. Appellant stopped work on July 30, 1997. The Office accepted the claim for aggravation of lumbar degenerative joint disease and headaches.

By letter dated August 13, 2003, the Office referred appellant, together with a statement of accepted facts, the case record and a list of questions, to Dr. Thomas P. Rooney, a Board-certified orthopedic surgeon, for a second opinion medical examination. In a September 3, 2003 medical report, Dr. Rooney listed essentially normal findings on physical, neurological and x-ray examination. He stated that appellant suffered from degenerative disc disease of the cervical and lumbar spines and right shoulder and tendinitis of the left shoulder. Dr. Rooney found that, despite her complaints, the effects of the accepted August 14, 1996 employment injuries should have resolved after six weeks. He was unable to explain her current disability but advised that it was not related to her accepted employment injuries since all of the objective findings most likely preexisted her injuries. Dr. Rooney opined that appellant was not totally disabled and that she could return to her normal occupation with restrictions.

By letter dated October 20, 2003, the Office requested that Dr. Shailesh C. Vora, an attending Board-certified neurologist, review and comment on Dr. Rooney's report. In an October 23, 2003 report, Dr. Vora stated that appellant could perform sedentary work. She could not perform her regular work duties, which involved repetitive movement and lifting heavy objects based on the findings of magnetic resonance imaging (MRI) scans of her cervical, lumbar and thoracic spines and nerve conduction velocity/electromyogram studies.

By letter dated January 5, 2004, the Office requested that Dr. Vora clarify his opinion regarding appellant's ability to perform sedentary work. In a January 9, 2004 work capacity evaluation (Form OWCP-5c), he stated that appellant could not perform her regular work duties eight hours per day. Dr. Vora provided physical restrictions.

The Office found a conflict in the medical opinion evidence between Dr. Rooney and Dr. Vora as to the extent of appellant's employment-related disability. By letter dated July 6, 2004, it referred her, together with a statement of accepted facts, the case record and a list of questions, to Dr. Lorne Ryan, a Board-certified neurologist, for an impartial medical examination.

In a July 26, 2004 report, Dr. Ryan reviewed the history of appellant's August 14, 1996 employment injuries and medical treatment. He reported normal findings on physical and neurological examination. Dr. Ryan determined that appellant had reached maximum medical improvement and had sustained a 10 percent impairment of the whole person based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (5th ed. 2001) (113, Table 74). He stated that her headaches were not related to the accepted employment injuries. Dr. Ryan stated that appellant's lumbar degenerative disease may have

been aggravated by the accepted employment injury but presumably a disc herniation was present before the injury. Appellant's cervical, shoulder and thoracic strains were benign conditions and should have resolved within weeks, as noted by Dr. Rooney. Dr. Ryan opined that appellant was partially disabled due to her degenerative disc disease at L5-S1, which prevented her from bending, stooping and lifting more than 45 pounds. He explained that the employment incident was minor. Dr. Rooney stated that, although MRI scan evidence showed a herniated disc at L5/S1, it also showed degenerative disease at multiple levels and changes in the bone compatible with chronic degenerative disease of the spine. He concluded that appellant suffered from a chronic degenerative process which would have progressed without the accident.

Dr. Ryan opined that the etiology of appellant's current disability was chronic pain. He stated that there was no reason to attribute eight years of pain to a minor 1996 injury with preexisting degenerative disc disease. Dr. Ryan opined that appellant could not resume her regular duties as a rural carrier but was not totally disabled. She could return to full-time work with physical restrictions. In an August 5, 2004 OWCP-5c form, Dr. Ryan stated that appellant could bend, stoop, kneel and climb up to two hours per day and lift no more than 45 pounds up to eight hours per day.

On August 12, 2004 the Office requested that the employing establishment advise whether appellant could be placed in a job based on the restrictions set forth by Dr. Ryan. By letter dated August 12, 2004, the Office issued a notice of proposed termination of medical benefits for her employment-related headaches and strains based on Dr. Ryan's impartial medical opinion.

On August 20, 2004 the employing establishment offered appellant a full-time modified rural carrier position. The position required sorting mail, preparing a trip report, maintaining change of address information and loading mail into a vehicle and delivering it to customers. The physical requirements included intermittent reaching above the shoulders, standing, simple grasping and sitting/driving. The employing establishment noted Dr. Ryan's restrictions and stated that the position was being offered to appellant to work within the noted limitations.

In a letter dated August 26, 2004, the Office advised appellant that a modified position was available and that she had 30 days to either accept the position or provide an explanation for refusing it. It found that the position was based on Dr. Ryan's July 26 and August 5, 2004 reports. The Office advised appellant that she would be paid for any difference in salary between the offered position and her date-of-injury position and that she could accept the job without penalty. It informed her that her compensation could be terminated based on her refusal to accept a suitable position pursuant to 5 U.S.C. § 8106(c)(2).

On August 31, 2004 appellant rejected the modified-duty job offer. She contended that she was not physically or mentally able to perform the duties of the offered position. Appellant related that she could not lift 40 pounds as required. She submitted the June 25, 2003 MRI scan of Dr. Robert W. Laakman, a Board-certified radiologist, who found moderate and mild hypertrophic change of the acromioclavicular joints of the right and left shoulder with evidence of supraspinatus tendinosis, respectively. There was joint effusion with evidence of suspected loose bodies within the joints and possible intrasubstance tears involving the supraspinatus tendon of the right shoulder. There was no full thickness or rotator cuff tear in the shoulders.

In an August 27, 2004 letter, appellant alleged that she remained totally disabled for work. She submitted Dr. Vora's August 26, 2004 prescription for a functional capacity evaluation.

By decision dated September 14, 2004, the Office terminated appellant's wage-loss compensation benefits effective that date for headaches and strains. It accorded special weight to Dr. Ryan's July 26, 2004 opinion as an impartial medical specialist in finding that appellant no longer had any residuals or disability causally related to her accepted August 14, 1996 employment-related headaches and strains. The Office stated that she was still entitled to medical benefits for her employment-related aggravated lumbar degenerative disc disease.

On September 27, 2004 the Office advised appellant that her reasons for refusing the offered position were not valid. She was given 15 days to accept the position. Appellant did not respond within the allotted time period.

In an October 5, 2004 report, Dr. Dan A. Martin, a Board-certified internist, stated that appellant experienced symptoms related to degenerative disc disease of the lumbar and cervical spines and chronic low back pain radiating to her left leg. Dr. Martin noted that her condition was complicated by fibromyalgia. Appellant also developed arthritis in the left shoulder with tendinitis and bone spurs and loose bodies within the joint. Dr. Martin opined that she was disabled from her usual work duties as a rural carrier because she was precluded from lifting more than 40 pounds. She was also restricted from twisting, bending and stooping in a repetitive manner. Dr. Martin concluded that it was unlikely that appellant would improve over time.

In an October 12, 2004 decision, the Office terminated appellant's wage-loss compensation effective that date on the grounds that she refused an offer of suitable work. The evidence she submitted was insufficient to establish that she was unable to perform the offered position.

By letter dated October 8, 2004, appellant, through her representative, requested an oral hearing before an Office hearing representative regarding the September 14, 2004 decision terminating benefits for headaches and strains. On October 29, 2004 he requested a review of the written record by a hearing representative regarding the October 12, 2004 suitable work termination decision.

In a May 27, 2005 report, Dr. Martin stated that appellant had a L5 discectomy in 1997 and, since that time, experienced continued lumbar pain which rendered her totally disabled from her previous mail carrier position.

By decision dated August 12, 2005, an Office hearing representative affirmed the September 14 and October 12, 2004 decisions. She accorded special weight to Dr. Ryan's July 26, 2004 report as an impartial medical specialist in finding that appellant no longer had any residuals or disability due to her August 14, 1996 employment-related cervical, lumbar and left shoulder strains and headaches. The hearing representative found the evidence of record sufficient to establish that appellant could perform the duties of the offered modified rural carrier position based on the opinions of Dr. Rooney and Dr. Ryan.

In a February 18, 1998 report, Dr. Jeff K. Ketcham, a Board-certified anesthesiologist, stated that appellant experienced pain of unknown origin in her lower back, neck and upper shoulder. He stated that she had very limited ability to sit or stand for any prolonged period. Driving would be difficult since appellant had limited range of motion of the head region and she was unable to lift more than 10 pounds comfortably. Dr. Ketcham recommended very sedentary work that required no lifting and limited motion of the hands above the head. Appellant should be allowed to change positions frequently during the day. Dr. Ketcham was not sure whether she would be able to work full time, noting that she probably could work only four hours per day.

In a letter dated February 9, 2006, appellant, through counsel, requested reconsideration of the August 12, 2005 decision.¹ In an undated report, Barbara J. Morris² stated that appellant suffered from myofascial pain and noted her restrictions.

By letter dated March 20, 2006, appellant's attorney submitted the treatment notes dated February 11, 1997 through November 15, 2005 from Dr. Jay M. Lipke, a Board-certified orthopedic surgeon, who addressed appellant's left shoulder, knee and cervical conditions. In an April 12, 2005 treatment note, Dr. Lipke determined that appellant sustained an 18 percent impairment of the left upper extremity and an 11 percent impairment of the whole person.

In a May 16, 2006 decision, the Office denied modification of the August 12, 2005 decision. The evidence of record was insufficient to establish that appellant continued to be disabled due to the August 14, 1996 employment injuries or that she was unable to perform the duties of the modified rural carrier position. The Office found that the termination of appellant's compensation for refusing an offer of suitable work pursuant to section 8106(c) of the Federal Employees' Compensation Act barred her receipt of any subsequent wage loss or schedule award compensation.³

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. Under section 8106(c)(2) of the 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

¹ By decision dated April 28, 2006, the Office found that appellant's letter requesting reconsideration was dated February 9, 2006, more than one year after its October 12, 2004 decision and was untimely. It found that she did not submit evidence to establish clear evidence of error in the prior decisions terminating her compensation benefits. In a May 12, 2006 letter, appellant's counsel stated that his February 9, 2006 letter requested reconsideration of the hearing representative's August 12, 2005 decision and not the October 12, 2004 decision and, thus, it was timely filed.

² The Board notes that Ms. Morris' professional qualifications are not contained in the case record.

³ The Board notes that, following the issuance of the Office's May 16, 2006 decision, the Office received additional evidence. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). Appellant can submit this evidence to the Office and request reconsideration. 5 U.S.C. § 8128; 20 C.F.R. § 10.606.

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

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

Office regulations provide that, in determining what constitutes suitable work for a particular disabled employee, the Office should consider the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work and other relevant factors.⁷ It is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.⁸ 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 the medical evidence.⁹

In assessing medical evidence, the number of physicians supporting one position or another is not controlling, the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for and the thoroughness of physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.¹⁰ Office procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer, medical evidence of inability to do the work or travel to the job or the claimant found other work which fairly and reasonably represents his or her earning capacity (in which case compensation would be adjusted or terminated based on actual earnings). Furthermore, if medical reports document a condition which has arisen since the compensable injury and the condition disables the employee, the job will be considered unsuitable.¹¹

Section 10.516 of the Code of Federal Regulations states that the Office will advise the employee that the work offered is suitable and provide 30 days for the employee to accept the job or present any reasons to counter the Office's finding of suitability.¹² Thus, before terminating compensation, the Office must review the employee's proffered reasons for refusing

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

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

⁷ 20 C.F.R. § 10.500(b).

⁸ *Richard P. Cortes*, 56 ECAB 200 (2004).

⁹ *Id.*; *Bryant F. Blackmon*, 56 ECAB 752 (2005).

¹⁰ *See Connie Johns*, 44 ECAB 560 (1993).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(4) (July 1997).

¹² 20 C.F.R. § 10.516.

or neglecting to work.¹³ If the employee presents such reasons and the Office finds them unreasonable, the Office will offer the employee an additional 15 days to accept the job without penalty.¹⁴

ANALYSIS -- ISSUE 1

The Board finds that a conflict in medical opinion arose between Dr. Rooney, an Office referral physician, and Dr. Vora, an attending physician, as to whether appellant had any continuing disability causally related to her accepted August 14, 1996 cervical, back and left shoulder strains and aggravation of lumbar degenerative joint disease. Dr. Rooney opined that appellant had no disability causally related to her accepted employment injuries and that she could return to her regular work duties as a rural carrier. Dr. Vora opined that appellant was totally disabled from her regular work duties but she could perform sedentary work with restrictions.

The Office referred appellant to Dr. Ryan, selected as the impartial medical specialist. In a July 26, 2004 report, Dr. Ryan listed no objective findings of disability relative to the accepted August 14, 1996 employment injuries. After reviewing appellant's medical records and reporting his essentially normal findings on physical and neurological examination, Dr. Ryan opined that appellant could not resume her regular duties as a rural carrier; however, she was not totally disabled. He advised that she return to full-time work with physical restrictions. Dr. Ryan explained that her headaches were not causally related to the accepted employment injuries. He further explained that residuals of the employment-related cervical, shoulder and thoracic strains were benign conditions and resolved within weeks after the employment injury. Dr. Ryan stated that appellant was partially disabled due to an aggravation of her preexisting lumbar degenerative disc disease. In an August 5, 2004 OWCP-5c form, Dr. Ryan found that appellant could bend, stoop, kneel and climb up to two hours per day and lift no more than 45 pounds up to eight hours per day.

The Board finds that Dr. Ryan's impartial opinion is based on a proper factual and medical background and is entitled to special weight. He found that appellant no longer had any total disability due to the accepted August 14, 1996 employment-related cervical, back and left shoulder strains and aggravation of degenerative joint disease. For this reason, his report constitutes the special weight of the medical opinion evidence afforded an impartial medical specialist.

Based on the work restrictions provided by Dr. Ryan, the employing establishment offered appellant the modified rural carrier position. The position involved sorting mail, preparing a trip report, maintaining change of address information and loading mail into a vehicle and delivering it to customers. The physical requirements included intermittent reaching above the shoulders, standing, simple grasping and sitting/driving. The offer stated that appellant could also work within the restrictions set forth by Dr. Ryan.

¹³ See *Sandra K. Cummings*, 54 ECAB 493 (2003); see also *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992) and 20 C.F.R. § 10.516 which codifies the procedures set forth in *Moore*.

¹⁴ *Id.*

Dr. Ryan's opinion was supported by Dr. Martin, appellant's attending physician, who agreed in an October 5, 2004 report that she could not perform her regular work duties. Similarly, he restricted her from lifting more than 40 pounds and engaging in repetitive twisting, bending and stooping. The Board finds that the Office met its burden of proof to establish that the position offered appellant on August 20, 2004 was suitable work within her physical restrictions.¹⁵

The Board further finds that the Office complied with its procedural requirements in advising appellant that the position was suitable, providing her with the opportunity to accept the position or provide reasons for refusing the job offer, and in notifying her of the penalty provision of section 8106(c).¹⁶ In an August 26, 2004 letter, the Office notified appellant that the modified rural carrier position was suitable to her physical limitations and of the consequences for not accepting a suitable job offer pursuant to section 8106(c). It confirmed that the position remained available. After appellant refused the offered position on August 31, 2004, the Office advised her in a September 27, 2004 letter that her reasons for refusing the job offer was not valid. It provided her with 15 days to accept the offered position without penalty. Appellant did not respond within the allotted time period. The Office terminated her compensation benefits by decision issued on October 12, 2004.

The burden of proof then shifted to appellant to establish that the offered position was not suitable work.¹⁷ Dr. Ketcham's report stated that she experienced ongoing pain in her lower back, neck and upper shoulder of unknown origin. He stated that she had very limited ability to sit or stand for any prolonged period. Driving would be difficult since appellant had limited range of motion of the head region and she was unable to lift more than 10 pounds comfortably. Dr. Ketcham recommended sedentary work that required no lifting and limited motion of the hands above the head. Appellant should be allowed to change positions frequently during the day. Dr. Ketcham was not sure whether she would be able to work full time, probably only four hours per day. He did not indicate that he had reviewed a description of the offered position. Moreover, Dr. Ketcham did not attribute appellant's pain to the August 14, 1996 employment injuries. Rather, he stated that the etiology of her pain was unknown. The Board finds that Dr. Ketcham's report is insufficient to establish that appellant could not perform the duties of the modified position.

Dr. Martin's May 27, 2005 report stated that appellant continued to experience lumbar pain and that she was totally disabled from her prior rural carrier position. Dr. Laakman's treatment notes and reports stated that appellant had ongoing left shoulder and knee and cervical problems. However, neither Dr. Martin nor Dr. Laakman address whether appellant was unable to perform the duties of the offered modified position. The Board finds that the reports of Dr. Martin and Dr. Laakman are insufficient to establish that appellant was disabled from performing the duties of the offered rural carrier position. Accordingly, she has not met her burden of proof.

¹⁵ *Bryant F. Blackmon, supra* note 9.

¹⁶ *See Bruce Sanborn, 49 ECAB 176 (1997).*

¹⁷ *Bryant F. Blackmon, supra* note 9.

LEGAL PRECEDENT -- ISSUE 2

Office regulations provide that in a termination under section 8106(c) of the Act a claimant has no further entitlement to compensation under sections 8105, 8106 and 8107 of the Act which includes payment of continuing compensation for permanent impairment of a scheduled member.¹⁸ The Board has found that a refusal to accept suitable work constitutes a bar to receipt of a schedule award for any impairment which may be related to the accepted employment injury.¹⁹

ANALYSIS -- ISSUE 2

As stated, the Office terminated appellant's wage-loss compensation on the grounds that she refused an offer of suitable work. On March 20, 2006 appellant requested a claim for a schedule award.

In its May 16, 2006 decision, the Office properly found that appellant was not entitled to a schedule award under 5 U.S.C. § 8107 as she refused an offer of suitable work. With regard to schedule awards, the Board has held that monetary compensation payable to an employee under section 8107 are payments made from the Employees' Compensation Fund and are, therefore, subject to the penalty provision of section 8106(c).²⁰ The Board, therefore, finds that appellant's refusal to accept suitable work constitutes a bar to her receipt of a schedule award for any impairment which may be related to the accepted employment injuries following the October 12, 2004 termination decision.

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation benefits effective October 12, 2004 on the grounds that she 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 entitlement to schedule award compensation.

¹⁸ 5 U.S.C. § 8106(c). *See also* 20 C.F.R. § 10.517(a).

¹⁹ *Stephen R. Lubin*, 43 ECAB 564 (1992).

²⁰ *Id.* *See Sandra A. Sutphen*, 49 ECAB 174 (1997).

ORDER

IT IS HEREBY ORDERED THAT the May 16, 2006 and August 12, 2005 decisions of the Office of Workers' Compensation Programs are affirmed.

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