

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

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T.C., Appellant )

and )

**DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL  
CENTER, Chillicothe, OH, Employer** )

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**Docket No. 07-2109  
Issued: March 24, 2008**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
COLLEEN DUFFY KIKO, Judge

**JURISDICTION**

On August 14, 2007 appellant, through her attorney, filed an appeal from a May 10, 2007 decision of the Office of Workers' Compensation Programs terminating her compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

**ISSUE**

The issue is whether the Office properly terminated appellant's compensation under 5 U.S.C. § 8106(c)(2) on the grounds that she refused an offer of suitable work.

**FACTUAL HISTORY**

The Office accepted that on November 20, 2001 appellant, then a 35-year-old licensed practical nurse, sustained cervical, thoracic and lumbar strains and aggravation of preexisting

cervical stenosis<sup>1</sup> when she struck a wall while driving a cart. She returned to work on November 20, 2001 on modified duty. Appellant resigned from federal employment effective March 1, 2002 and received compensation on the daily and periodic rolls. She continued under medical care for upper extremity paresthesias and weakness and limited cervical motion. The Office authorized a C5 discectomy with fusion and fixation, performed on June 17, 2003. Appellant did not return to work.

Dr. Jeffrey C. Hill, an attending Board-certified orthopedic surgeon, submitted periodic reports through 2004 finding appellant totally disabled for work. Following additional development, the Office obtained an impartial medical opinion from Dr. John W. Wolfe, a Board-certified orthopedist, who submitted August 25 and September 14, 2004 reports finding appellant totally and permanently disabled for work.

On February 18, 2005 appellant sustained head trauma in a car accident, resulting in postconcussion syndrome and chronic headaches. She submitted reports through November 2005 from Dr. Francis J. O'Donnell, an attending osteopathic physician Board-certified in orthopedic surgery, opining that appellant's neck pain was due to the February 2005 accident and psychiatric comorbidity.

A March 31, 2005 functional capacity evaluation demonstrated that appellant could perform sedentary work, with lifting up to 12.5 pounds. Dr. Hill reviewed the evaluation on September 6, 2005 and found that appellant had reached maximum medical improvement. He noted that, according to the March 2005 functional capacity evaluation, appellant could pull or push up to 10 pounds and lift up to 12.5 pounds. Dr. Hill limited sitting to four hours a day and squatting, kneeling and climbing to less than one hour a day. He restricted reaching, twisting, bending, stooping and repetitive upper extremity motions to two-and-a-half hours a day. Dr. Hill released appellant to full-time work within these restrictions as of September 9, 2005.<sup>2</sup>

In a November 9, 2005 report, Dr. Hill stated that appellant's electrodiagnostic tests did not demonstrate a cause for appellant's symptoms or dysfunction. He diagnosed depression.

On November 18, 2005 the employing establishment offered appellant a light-duty position as a licensed practical nurse, within the restrictions provided by Dr. Hill on September 6, 2005. The job duties consisted of providing personal care, administering medications, clerical tasks, collecting samples and assembling therapy equipment.

Appellant refused the offer on November 28, 2005. She asserted that she had neck pain, numbness and weakness in both arms and required narcotic medications. Appellant alleged that, following the November 20, 2001 injury, she was forced to work outside of her restrictions and would not allow that to happen again. She awaited additional test results.

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<sup>1</sup> Appellant underwent neck surgeries in 1970 and on February 21 and April 8, 1997. She also sustained a neck injury in a nonoccupational October 2001 motor vehicle accident.

<sup>2</sup> Dr. Hill renewed his previous work restrictions in reports through January 11, 2006.

In a January 13, 2006 letter, the Office advised appellant that the offered limited-duty job remained available and was suitable work within her medical and vocational capabilities. The Office found that appellant's reasons for refusing the offer were invalid and afforded her 30 days to accept the position or provide a written explanation for her refusal. The Office noted that, if appellant failed to report for work or present adequate justification for her refusal, her compensation would be terminated.

Appellant submitted a February 10, 2006 report from Dr. Hill releasing her to work within the restrictions previously provided.

In a February 17, 2006 letter, the Office afforded appellant an additional 15 days to accept the offered position or her compensation would be terminated. The Office reiterated that it had considered her reasons for refusing the offered position and found them invalid. The Office advised appellant that it would not consider any further reasons for refusal.

Appellant accepted the offered position on March 5, 2006.<sup>3</sup> In a March 9, 2006 letter, the employing establishment instructed her to report for work on March 19, 2006. Dr. Hill renewed previous work restrictions in reports through April 2006. Appellant did not report for work. The limited-duty licensed practical nurse position remained open and available.

By decision dated May 9, 2006, the Office terminated appellant's compensation effective May 8, 2006 on the grounds that she refused an offer of suitable work. The Office found that appellant did not report for work in the offered licensed practical nurse position that was within the restrictions provided by Dr. Hill.

In an April 24, 2007 letter appellant, through her attorney, requested reconsideration. She asserted that the offered position was not properly explained to her and was not within restrictions imposed by her physical and mental impairments. Appellant submitted additional medical evidence.

In chart notes from April 14, 2006 to January 15, 2007, Dr. Hill opined that appellant functioned well but focused inappropriately on feeling disabled. He stated that appellant could work within the restrictions indicated by the March 2005 functional capacity evaluation. Dr. Hill noted in a September 13, 2006 report that appellant felt she could not perform the offered position. However, she was accepted to a college nursing program and felt able to perform the requirements of being a registered nurse.

Appellant underwent a coronary artery bypass graft on December 6, 2006. Dr. Hill found appellant disabled for work from February 12 to March 11, 2007 and released her to work under previous restrictions as of March 12, 2007. He advised appellant in an April 24, 2007 letter that he would no longer prescribe her narcotics as a urinalysis showed the presence of Vicodin and not prescribed OxyContin.

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<sup>3</sup> In a March 6, 2006 telephone memorandum, the employing establishment advised the Office that appellant accepted the offered position but had broken her arm and was awaiting treatment. There is no other indication in the record that appellant fractured or otherwise injured an arm.

By decision dated May 10, 2007, the Office denied modification on the grounds that the evidence submitted was insufficient to warrant modification. The Office found that appellant was provided a detailed position description and that Dr. Hill's reports indicated that she could perform the job. The Office noted that she did not establish any disability related to a nonoccupational psychiatric condition.

### **LEGAL PRECEDENT**

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>4</sup> In this case, the Office terminated appellant's compensation under section 8106(c)(2) of the Act, which 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>5</sup> To justify termination of compensation, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.<sup>6</sup> For conditions not accepted by the Office as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation.<sup>7</sup> Once the Office establishes that the work offered was suitable, the burden of proof shifts to the employee who refuses to work to show that such refusal was reasonable or justified.<sup>8</sup> 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.<sup>9</sup>

Section 10.517(a) of the Act's implementing regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured by the employee, has the burden of showing that such refusal or failure to work was reasonable or justified.<sup>10</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>11</sup> 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>12</sup>

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<sup>4</sup> *Linda D. Guerrero*, 54 ECAB 556 (2003); *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

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

<sup>6</sup> *Ronald M. Jones*, 52 ECAB 190 (2000); *Arthur C. Reck*, 47 ECAB 339 (1995).

<sup>7</sup> *Alice J. Tysinger*, 51 ECAB 638 (2000).

<sup>8</sup> *Bryant F. Blackmon*, 56 ECAB 752 (2005).

<sup>9</sup> *Joan F. Burke*, 54 ECAB 406 (2003); *see Robert Dickerson*, 46 ECAB 1002 (1995).

<sup>10</sup> 20 C.F.R. § 10.517(a); *see Ronald M. Jones*, *supra* note 6.

<sup>11</sup> 20 C.F.R. § 10.516.

<sup>12</sup> *Kathy E. Murray*, 55 ECAB 288 (2004); *Anna M. Delaney*, 53 ECAB 384 (2002).

## ANALYSIS

The Office accepted that, on November 20, 2001, appellant sustained cervical, thoracic and lumbar strains and an aggravation of cervical stenosis requiring a C5 discectomy and fusion. She received total disability compensation beginning in March 2002. Dr. Hill, an attending Board-certified orthopedic surgeon, released appellant to full-time sedentary duty as of September 6, 2005.

In a September 6, 2005 report, Dr. Hill opined that appellant could perform sedentary work within restrictions delineated by a March 2005 functional capacity evaluation. On the basis of Dr. Hill's report, the employing establishment identified a full-time light-duty practical nurse position within those restrictions. The Board finds that Dr. Hill's reports establish that the offered practical nurse position was within appellant's physical limitations.<sup>13</sup> Also, the offer was in writing, described the assigned duties and their physical requirements and instructed appellant when to report for work.<sup>14</sup> The Board finds that the Office met its burden to establish that the position was suitable work.<sup>15</sup>

After appellant first refused the offered position, the Office advised her in a January 13, 2006 letter of the Act's penalty provisions for refusing suitable work. The Board finds that the Office complied with its procedural requirements in advising her that the position was suitable work and allowing her to accept the job or justify her refusal. Appellant accepted the offer on March 5, 2006 but did not report for duty or submit acceptable reasons for refusing the offered position. Therefore, the Office terminated appellant's compensation benefits by decision issued May 9, 2006.

The burden of proof then shifted to appellant to establish that the offered position was not suitable work.<sup>16</sup> On reconsideration, appellant submitted reports from Dr. Hill finding her able to work within previously stated restrictions from April 14, 2006 through February 11, 2007 and from March 12, 2007 onward. Although she asserted that she could not work as a licensed practical nurse, appellant told Dr. Hill on September 13, 2006 that she felt able to work as a registered nurse. This tends to disprove appellant's contention that she was unable to perform the offered position.

Appellant also stated that she was disabled due to an unspecified psychiatric condition. While the Office did not accept a mental illness in this case, it is well established that the Office must consider preexisting and subsequently acquired conditions in evaluating whether an offered position is suitable.<sup>17</sup> However, appellant submitted no medical evidence finding her disabled for work or imposing work limitations due to a psychiatric illness. The Office denied

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<sup>13</sup> *Richard P. Cortes*, 56 ECAB 2000 (2004).

<sup>14</sup> *See* 20 C.F.R. § 10.507.

<sup>15</sup> *Marilou Carmichael*, 56 ECAB 451 (2005).

<sup>16</sup> *Bryant F. Blackmon*, *supra* note 8.

<sup>17</sup> *Richard P. Cortes*, *supra* note 13.

modification by May 10, 2007 decision as Dr. Hill's reports established that appellant could perform the offered position. Accordingly, the Office met its burden of proof to terminate appellant's compensation based on her refusal of suitable work.

**CONCLUSION**

The Board finds that the Office properly terminated appellant's compensation benefits on the grounds that she refused an offer of suitable work.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 10, 2007 is affirmed.

Issued: March 24, 2008  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board