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

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| **S.H., Appellant** | ) | |
| **and** | ) | **Docket No. 08-1114** |
| | ) | **Issued: April 16, 2009** |
| **U.S. POSTAL SERVICE, POST OFFICE, St. Louis, MO, Employer** | ) | |

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

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On March 5, 2008 appellant filed a timely appeal from the merit decision of the Office of Workers' Compensation Programs' hearing representative dated June 11, 2007 affirming a July 6, 2006 Office decision terminating appellant's compensation benefits for failure to accept suitable employment, as well as the January 8, 2008 decision denying modification of this decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction to review the merits of this case.

### ***ISSUES***

The issues are: (1) whether the Office properly terminated appellant's compensation benefits effective July 6, 2006 on the grounds that she refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c); and (2) whether appellant established that she had any employment-related disability after July 6, 2006. On appeal, appellant contends that the medical evidence establishes that she is totally disabled.

## ***FACTUAL HISTORY***

On March 1, 2003 appellant, then a 50-year-old mark-up clerk, filed an occupational disease claim. In a statement accompanying her claim, she alleged that she sustained injuries to her right leg, ankles, lower back, right arm and right shoulder as a result of two separate falls (June 14, 1998; September 1998). Appellant also noted that her injuries were aggravated by her work duties, including lifting, bending, prolonged standing and sitting on slanted stools. By letter dated June 19, 2003, the Office accepted appellant's claim for aggravation of lumbar degenerative disc disease. On October 27, 2002 appellant underwent a decompressive microlaminectomy, L4-L5, L5-S1, foraminotomy, bilateral microdiscectomy L5-21 and posterior lumbar interbody fusion. By letter dated July 27, 2004, the Office expanded appellant's claim to include bilateral lumbar radiculitis at L5-S1.

By letter dated November 23, 2005, the employing establishment made an offer, modified assignment (limited duty) for a position as a modified automated markup clerk. The physical requirements of this position were: sitting three hours intermittently, walking one hour intermittently, standing two hours intermittently, lifting, pushing and pulling up to 20 pounds intermittently, fine manipulation and simple grasping for six hours intermittently and twisting, bending and stooping one hour intermittently. On December 1, 2005 appellant declined the job offer.

In a medical report dated February 8, 2006, Dr. Thomas K. Lee, appellant's Board-certified orthopedic surgeon, noted that appellant was noncompliant in attending physical therapy. He noted that appellant wanted additional surgery, but that he told her that whereas surgery might lead to improvement, it was his opinion that appellant "has a poor prognosis in terms of symptomatic improvement and would be at risk for potential complications from noncompliance." Dr. Lee listed his impressions as: (1) L3-4 facet arthrosis and disc bulge; and (2) status post L4-5, L5-S1 fusion. He opined that appellant was at maximum medical improvement. Dr. Lee opined that she was unable to return to her regular duty as an automated markup clerk. However, he opined that appellant was capable from a medical standpoint of performing the position of modified automated marking clerk as outlined in the November 23, 2005 letter. Dr. Lee completed a duty status report on the same date and indicated that appellant could lift 20 pounds, sit for one hour at a time for four hours a day, stand and walk one hour at a time for up to two hours a day, bend and stoop for one hour per day, push, pull for four hours a day.

In a March 30, 2006 note, Dr. Lee reiterated that appellant was capable of performing the offered position.

By letter dated April 7, 2006, the employing establishment made another offer of employment as a modified automated markup clerk. The physical restrictions were listed as follows: four hours sitting intermittently (one hour at a time), walking and standing for two hours intermittently one hour at a time, lifting up to 20 pounds intermittently, pushing/pulling four hours intermittently, fine manipulation and simple grasping eight hours intermittently, twisting one hour intermittently and bending one hour intermittently (no bending for work below knee level). By letter dated April 10, 2006, appellant declined the job offer, contending that returning to this work before surgery would increase damage to her back. She contended that

she should not be working at any job at this time and noted that she was taking 10 or more painkillers daily.

In support of her decision to decline the job offer, appellant submitted a note from Dr. John O'Keefe, a Board-certified neurologist, dated April 3, 2006 wherein he indicated that he treated appellant for acquired lumbar canal stenosis and cervical disc disease and that he referred her to a surgeon because there was nothing more he could do and that she may benefit from surgery.[1]

On May 17, 2006 the employing establishment confirmed that the position offered appellant remained available.

By letter to appellant dated May 17, 2006, the Office indicated that the position offered by the employing establishment was suitable and indicated that appellant had 30 days to accept the position or provide a written explanation of why she did not accept the position. It informed appellant that if she failed to report to the position or demonstrate that the failure was justified, her right to compensation would be terminated.

By letter dated May 19, 2006, that dealt largely with other issues, appellant discussed her injuries. She noted, *inter alia*, that she had swollen ankles and stated that when she raised her right arm her pulse stopped. Appellant contended that when she tried to return to work she was exposed to a hostile work environment. She noted that her pain has increased significantly since surgery. Appellant also submitted a copy of her typical daily schedule.

On June 19, 2006 the Office found that the evidence submitted by appellant was not sufficient to support her refusal to accept the job offer. It gave appellant 15 more days to accept the position and noted that if she did not accept the position within that time period, her entitlement to wage-loss and schedule award benefits would be terminated.

By decision dated July 6, 2006, the Office terminated appellant's compensation benefits effective that date.

By letter dated July 12, 2006, appellant, through her attorney, requested an oral hearing.

In a report dated July 24, 2006, Dr. Lee stated that appellant had surgical fusion at L4-5 and L5-S1 and that the injury has not resolved and been surgically corrected. He further stated that the question as to whether the condition had returned to preinjury baseline is not applicable as the surgical treatment required a fusion. By note dated August 2, 2006, Dr. Lee indicated that appellant had been released from his care and that in his opinion she required no further treatment for the April 1, 2002 work injury.

In a report dated October 16, 2006, Dr. James J. Coyle, a Board-certified orthopedic surgeon, listed his impression as status post L4 through S1 instrumented fusion. He did not see any indication for exploration of the fusion, removal of the hardware or proximal decompression.

[1] The Board notes that in a July 25, 2005 letter to appellant, Dr. O'Keefe indicated that he was "withdrawing from further professional attendance upon you." He suggested that appellant obtain another physician without delay.

Dr. Coyle did indicate that appellant was lacking in some lower extremity flexibility. He indicated that although appellant may benefit from range of motion exercises and a conditioning program, he did not see any indication for further surgery. Dr. Coyle advised her that he saw no potential benefit to removing her instrumentation. He finally indicated that he did not see appellant working in any heavy capacity or repetitive bending capacity but noted that a functional capacity evaluation (FCE) would be helpful in assessing appellant's safe abilities.

In a March 12, 2007 report, Dr. Philip C. Trotta, a Board-certified radiologist, summarized a computerized tomography (CT) scan of the lumbar spine taken on March 12, 2007 as showing postoperative fusion involving L4-5 and the sacrum with excellent fusion at the bone block graft at the L5-S1 level. Dr. Trotta also noted mild central spinal stenosis at the L3-4 disc space level but no focal disc herniation.

At the hearing held on March 27, 2007, appellant discussed her employment history, her injuries and the claim history.

In a medical report dated April 3, 2007, Dr. James Lu, a Board-certified internist, indicated that appellant presented herself with failed back syndrome, status post L4 through S1 decompression and instrumented spinal fusion. He noted that the imaging of appellant's lumbar spine was generally benign, with the only notable feature being mild central canal and lateral recess stenosis at the L3-4 level. Dr. Lu indicated that there was no clear anatomic source of the ongoing severe back pain and that he would not recommend any surgery to her back at that time but would recommend continued conservative management with medications, regular exercise and a consultation with a pain management physician. He indicated that although he would be happy to remove her bone stimulator, he strongly emphasized that removing the stimulator would likely have very little impact on any of her symptoms. Dr. Lu noted that appellant still wished to have it removed.

By decision dated June 11, 2007, the hearing representative affirmed the July 2, 2006 decision.

On June 26, 2007 the Office authorized appellant's change of physician to Dr. Howard Weiss, a Board-certified neurologist.

Appellant submitted a surgical report wherein Dr. Lu indicated that he performed a removal of implantable bone growth stimulate from the superficial lumbar tissues. She also submitted progress reports by Dr. Lu dated from April 26 through May 22, 2007. In an April 26, 2007 note, Dr. Lu indicated that appellant underwent surgical removal of her implantable bone grown stimulator on that date, was neurologically stable and was discharged the same date. In a May 15, 2007 note, he reported some improvement of the right paraspinous back pain since her surgery, but otherwise her prior complaints of constant lower back and lower extremity pain remained unchanged from her preoperative symptoms.

In a medical report dated July 26, 2007, Dr. Weiss diagnosed appellant with spinal stenosis, lumbar disc degeneration and chronic low back strain. He opined that the 1998 injury to her back at the employing establishment did trigger her symptoms and was a major contributing factor to her low back pain. Dr. Weiss concluded that appellant was disabled and

unable to perform any type of work which would require moderate to heavy lifting or prolonged standing or sitting. He noted that there was no treatment he could offer appellant and suggested that she be referred to a pain specialist at a pain clinic and the treatment be continued there. Dr. Weiss believed that appellant's injury was permanent and that the back pain would continue.

By decision dated January 8, 2008, the Office denied modification.

## ***LEGAL PRECEDENT -- ISSUE 1***

The Federal Employees' Compensation Act provides at section 8106(c)(2) that a partially disabled employee who refuses or neglects to work after suitable work is offered is not entitled to compensation.[2] Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits under section 8106 for refusing to accept or neglecting to perform suitable work.[3] The Board has recognized that section 8106(c) serves as a penalty provision as it may bar an employee's entitlement to future compensation and, for this reason, will be narrowly construed.[4] To establish that a claimant has abandoned suitable work, the Office must substantiate that the position offered was consistent with the employee's physical limitations and that the reasons offered for stopping work were unjustified.[5] 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 of record.[6]

Section 10.516 of the Code of Federal Regulations states that the Office will advise the employee that the work offered is suitable and provides 30 days for the employee to accept the job or present any reasons to counter its finding of suitability.[7] Thus, before terminating compensation, it must review the employee's proffered reasons for refusing or neglecting to work.[8] If the employee presents such reasons and the Office finds them unreasonable it will offer the employee an additional 15 days to accept the job without penalty. The Board has clarified that, in cases where compensation is terminated pursuant to section 8106(c), the essential requirements of due process, notice and an opportunity to respond apply not only where an employee refuses suitable work, but also apply in the same force to cases where an employee abandons suitable work.[9]

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[2] 5 U.S.C. § 8106(c)(2).

[3] *See Bryant F. Blackmon*, 56 ECAB 752 (2005); *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

[4] *See Richard P. Cortes*, 56 ECAB 201 (2004); *H. Adrian Osborne*, 48 ECAB 556 (1997).

[5] *See Wayne E. Boyd*, 49 ECAB 202 (1997).

[6] *See John E. Lemker*, 45 ECAB 258 (1993); *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

[7] 20 C.F.R. § 10.516.

[8] *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[9] *Mary A. Howard*, 45 ECAB 646 (1994).

## ***ANALYSIS -- ISSUE 1***

The Office accepted that appellant had an aggravation of lumbar degenerative disc disease and bilateral lumbar radiculitis at L5-S1 causally related to her federal employment. It terminated her monetary compensation effective June 6, 2006 based on her failure to accept suitable work.

Appellant received treatment from Dr. Lee, who in a February 8, 2006 report, diagnosed appellant with L3-4 facet arthrosis and disc bulge and status post L4-5, L5-S1 fusion. Dr. Lee opined that, although appellant was not capable of performing her regular position of automated markup clerk, she was able to perform the position of modified automated markup clerk as set forth in a November 23, 2005 letter. He indicated in a duty status report that appellant could lift 20 pounds, sit for one hour at a time for four hours a day and stand and walk for one hour at a time for two hours a day.

By letter dated April 7, 2006, appellant was offered a position with the employing establishment as a modified markup clerk with restrictions which included four hours of sitting intermittently (one hour at a time), walking and standing for two hours intermittently (one hour at a time), lifting up to 20 pounds intermittently, pushing/pulling four hours intermittently and twisting and bending one hour intermittently with no bending below knee level. This job was clearly designed to be within the work restrictions as set forth by Dr. Lee. Appellant indicated that she would not accept this position and submitted a brief statement dated April 3, 2006 by Dr. O'Keefe wherein he indicated that he treated appellant for acquired lumbar canal stenosis and cervical disc disease and had referred her to a surgeon. Contrary to appellant's allegation on appeal that Dr. O'Keefe found appellant totally disabled, at no point did he make any comment with regard to appellant's work ability. Thus, the Board finds that the weight of the medical evidence at the time the job offer was made establishes that appellant could perform the offered position.

The Office properly notified appellant of its finding that the offered position was suitable and the consequences of not accepting a suitable offer. It additionally confirmed that the position remained available and offered her 30 days in which to accept the position. By letter dated June 19, 2007, the Office found that appellant had not submitted evidence sufficient to support her refusal to accept the job offer and gave appellant 15 more days to accept the position and warned her that if she did not, her wage-loss and schedule award benefits would be terminated. Appellant refused to do so and thus, the Office properly terminated her compensation for failure to accept suitable work.

## ***LEGAL PRECEDENT -- ISSUE 2***

As the Office met its burden of proof to terminate appellant's compensation benefits, the burden shifted to her to establish that she had any disability causally related to her accepted injury after termination of compensation benefits.[10] To establish a causal relationship between the condition, as well as any attendant disability claimed and the employment injury, an

[10] *See Manuel Gill*, 52 ECAB 282 (2001).

employee must submit rationalized medical evidence, based on a complete factual and medical background, supporting such a causal relationship.[11]

## ***ANALYSIS -- ISSUE 2***

In support of her claim that she was unable to perform the offered position, appellant submitted further medical evidence. However, no evidence submitted after the termination of compensation benefits on July 6, 2006 proves that appellant was totally disabled after this date. Dr. Lee indicated that appellant had been released from his care and required no further treatment for her injury. Dr. Coyle indicated that he did not see appellant working in any heavy capacity but noted that a functional capacity evaluation would be helpful in assessing appellant's abilities. Dr. Trotta interpreted a computerized tomography taken on March 12, 2007, but stated no opinion as to appellant's work capacity. Dr. Lu indicated that he removed appellant's implantable bone grown stimulator on April 26, 2007 and noted that appellant's complaints of back pain remained unchanged after the surgery. He made no comment on her work capacity.

Finally appellant submitted a medical report dated July 26, 2007 by Dr. Weiss. She contends on appeal that Dr. Weiss found her permanently and totally disabled; however, a review of Dr. Weiss' July 26, 2007 report indicates that he does not make this statement, rather he indicates that appellant was unable to perform any type of work requiring moderate to heavy lifting or prolonged standing or sitting. The Board notes that the position offered by the employing establishment was within these guidelines as appellant would not be required to lift greater than 20 pounds, would be limited to sitting four hours a day for one hour at a time and was limited to walking and standing for two hours a day for one hour at a time. Accordingly, Dr. Weiss does not indicate that appellant was unable to perform the employment nor does he indicate that appellant is totally disabled.

Appellant has not submitted evidence sufficient to establish that she was totally disabled after the termination of her compensation benefits on July 6, 2006.

## ***CONCLUSION***

The Board finds that the Office properly terminated appellant's compensation benefits effective July 6, 2006 on the grounds that she refused a suitable offer of work. The Board further finds that appellant failed to establish that she had any employment-related disability after July 6, 2006, that would warrant him incapable of performing the duties of the offered position.

[11] *Id.*

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated January 8, 2008 and June 11, 2007 are affirmed.

Issued: April 16, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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