



The medical records note that appellant had osteitis pubis, mild to moderate arthrosis of the bilateral hips, trochanteric bursitis on the left and left lower extremity radiculopathy and ankylosing spondylosis. A December 22, 2005 magnetic resonance imaging (MRI) scan of the pelvis revealed a cyst, degenerative disc disease and spondylosis at L5-S1 and minimal bilateral trochanteric bursitis. A July 5, 2006 MRI scan of the lumbar spine revealed moderate bilateral foraminal stenosis at L5-S1 secondary to degenerative disc disease with very minimal broad left postlateral disc protrusions at the L4-5 level.

Appellant came under the treatment of Dr. Steve Arthurs, a Board-certified family practitioner, from January 10 to June 13, 2006. Dr. Arthurs diagnosed sacroiliitis, piriformis syndrome, ankylosing spondylitis, degenerative disc disease and thoracic and lumbar pain. He opined that appellant's condition was related to the lifting, bending, twisting, stooping and walking she did as a carrier. Dr. Arthurs opined that appellant was totally disabled due to these conditions. Dr. Craig W. Carson, a Board-certified rheumatologist, treated appellant from April 11 and June 1, 2006. He diagnosed ankylosing spondylitis and Sjogren's syndrome, which limited her function and she could not engage in work-related activities. Dr. Carson stated that he could not comment on the causal relationship between ankylosing spondylitis and her job.

On August 7, 2006 appellant was seen by Dr. Michael H. Wright, a Board-certified orthopedic surgeon, who diagnosed nonwork-related ankylosing spondylitis and degenerative disc disease possibly related to repetitive bending and lifting as a letter carrier. Dr. Wright opined that she could return to work full-time light duty with no lifting, pushing or pulling more than 20 pounds, with occasional bending and stooping. On August 7, 2006 the employing establishment offered appellant a full-time limited-duty carrier position effective August 9, 2006.

In reports dated August 21 and October 18, 2006, Dr. Arthurs disagreed with Dr. Wright's assessment of appellant's work capacity. He reiterated that appellant was totally disabled. Appellant experienced left-sided pain and could not pick up her foot to walk without stumbling and could not walk her regular route or carry a mailbag.

In November 2006 the Office referred appellant to Dr. Christopher Jordan, a Board-certified orthopedic surgeon, to determine whether she had residuals of her work injury. On November 21, 2006 Dr. Jordan reviewed appellant's history and diagnosed ankylosing spondylitis and degenerative disc disease at L5-S1. He advised that appellant's work-related conditions continued and stated that physical examination noted objective evidence of lumbar radiculopathy and degenerative disc disease. Dr. Jordan opined that appellant could not return to work as a city letter carrier; however, she could return to full-time light-duty work within the restrictions set forth by Dr. Wright.

On December 27, 2006 the Office found a conflict of medical opinion arose between Dr. Arthurs, appellant's treating physician, who advised that she was totally disabled and Dr. Jordan, an Office referral physician, who found that appellant had residuals of her work condition but could work full-time light duty.

The Office referred appellant to Dr. C.L. Soo, a Board-certified orthopedic surgeon, selected as the impartial medical specialist. In a report dated January 12, 2007, Dr. Soo reviewed appellant's history of injury and medical treatment. He diagnosed lumbar degenerative disc

disease at L5-S1, upper thoracic spine degenerative change and rheumatologic problems. Physical examination revealed tenderness on the upper thoracic spine, normal flexion and extension, limited thoracic rotation, normal strength and no sensory deficit. Dr. Soo recommended a functional capacity evaluation which was performed on March 1, 2007. On March 15, 2007 he advised that appellant work at a sedentary physical demand level for eight hours per day, leg lift up to seven pounds and torso lift up to five pounds.<sup>1</sup> In a work capacity evaluation dated May 24, 2007, Dr. Soo noted that appellant could work eight hours per day in a sedentary physical demand level, sitting was limited to six to eight hours per day, walking and standing limited to three hours per day, reaching limited to three to six hours per day, twisting limited to three hours per day, repetitive movements of the wrists and elbows limited to six to eight hours per day, pushing and pulling limited to three hours per day and 8 to 10 pounds, lifting limited to three hours per day and seven to eight pounds and no squatting, kneeling or climbing with breaks as needed.

On June 26, 2007 the employing establishment offered appellant a full-time limited-duty job as a modified carrier effective July 16, 2007 from 4:00 a.m. to 1:00 p.m. The duties included casing flats and letters, preparing a route to be split, split casing while standing with a rest bar within medical restrictions, with assistance provided in relocating the rest bar, casing and preparing routes as assigned, casing afternoon curtailed or presorted mail within restrictions, verifying unendorsed bulk business mail (UBBM) and assisting with return of nondeliverable mail and second notices. The requirements of the position included sitting intermittently up to eight hours as needed for comfort, walking intermittently up to one hour, occasional reaching above the shoulder to place letters and flat mail in a case with minimal weight; lifting intermittently not to exceed seven pounds with assistance provided for greater weight; intermittent bending; no climbing or twisting and standing intermittently as needed for comfort up to three to four hours. The job was subject to Dr. Soo's limitations.

In a June 26, 2007 letter, the Office advised appellant that the job offer constituted suitable work. Appellant was notified that she had 30 days to accept the job or provide reasons for refusing it; otherwise, she risked termination of her compensation benefits.

In a letter dated July 17, 2007, appellant refused the job offer. She contended that the rest bar had no support so she could not sit for long periods of time, the weight limit exceeded her restrictions, repetitive casing and pulling mail aggravated her condition and she could not push,

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<sup>1</sup> Dr. Soo noted that appellant could lift from the floor in a squatting position 12 inches from the floor, limited to seven pounds for three hours per day, four pounds if she does three to six hours per day. He noted that she could lift at the shoulder level seven pounds for three hours per day, four pounds for three to six hours per day and one pound if she does more than six hours per day. Dr. Soo noted that appellant could carry with both hands seven pounds for less than three hours a day, four pounds for three to six hours per day and one pound for more than six hours per day. He noted that appellant could lift five pounds if she uses one hand to carry objects for less than three hours per day, three pounds for three to six hours per day and one pound more than six hours per day. Appellant could push/pull in a walking position about 10 pounds if she did less than three hours per day, five pounds for three to six hours per day and two pounds for more than six hours per day. Dr. Soo noted that she could push/pull in a standing position about eight pounds less than three hours a day, four pounds for three to six hours a day and two pounds if she does more than six hours per day. He noted that with regard to nonmaterial handling appellant could bend less than three hours and she was prohibited from squatting, kneeling or climbing. Dr. Soo noted that appellant could do sit, stand and walk up to three hours per day, she could reach forward and overhead for less than six hours per day.

pull or reach above her shoulders. Appellant further noted that her disabling conditions of ankylosing spondylitis and rheumatoid arthritis prevented her from accepting the job offer. She referenced reports from Dr. Carson dated April 11 and June 1, 2006 previously of record, which advised that she was total disability. Appellant submitted a July 16, 2007 duty status report from Dr. Soo whom she saw independent of an Office referral. Dr. Soo prepared a work status report, noting appellant reached maximum medical improvement and could return to full-time light duty on July 8, 2007. He referenced the functional capacity evaluation of March 2007 and noted restrictions of no pushing/pulling over seven pounds per day not to exceed three hours per day and no lifting or carrying over seven pounds per day not to exceed three hours per day.

On July 26, 2007 the Office advised appellant that the position of modified carrier was suitable work. It advised that her reasons for refusing the position were unacceptable. The Office afforded appellant 15 additional days to accept the job offer.

Appellant submitted a July 16, 2007 report from Dr. Soo who reviewed the physical requirements of the job offer and opined that appellant could perform the job with restrictions of sitting intermittently up to eight hours per day, walking intermittently up to one hour per day, occasional above the shoulder lifting intermittently not to exceed seven pounds, intermittent bending, no climbing or twisting and standing as needed for comfort up to three to four hours a day. Dr. Soo opined that appellant could perform the job if the following criteria were met: lifting up to seven pounds for less than three hours a day, lifting intermittently, not to exceed seven pounds, for no more than three hours in an eight-hour day and sitting for eight hours per day with good ergonomic back support. Appellant reported treatment for rheumatoid arthritis and ankylosing spondylitis and Dr. Soo noted reviewing reports from appellant's physician regarding this condition. Dr. Soo further noted that appellant would be able to do the job one day and then have to take off a few days later due to inflammatory response after the physical activity because of the rheumatological problem.

Appellant contacted the Office on August 6, 2007 to obtain clarification about the job offer and her compensation. In an August 7, 2007 memorandum of conference, she expressed concerns with regard to the job offer, specifically over the frequency of occasional above the shoulder reaching that intermittent lifting was not to exceed seven pounds and that she was not provided with a chair with back support. The claims examiner noted the employer was aware of her restrictions and that appellant would be provided with a chair with back support. Appellant indicated that she could not perform the job duties and referenced her July 17, 2007 letter explaining her rheumatological condition. The claims examiner noted that there was no current medical evidence supporting her inability to perform the offered position or to refute the opinion of the referee physician.

In a decision dated August 13, 2007, the Office terminated appellant's monetary compensation, effective September 2, 2007, on the grounds that she refused an offer of suitable work.

Appellant, through her attorney, requested reconsideration. She asserted that the job offer was not suitable and noted that Dr. Soo expressly found that she could not perform the job. Appellant contended that the Office failed to consider other medical conditions in determining

whether the job was suitable. She submitted a September 12, 2007 report from Dr. Arthurs who concurred with Dr. Carson's opinion that appellant was unable to perform the offered job. In reports dated February 7 and March 20, 2008, Dr. Carson diagnosed rheumatoid arthritis, spondylitis and lateral epicondylitis. Appellant submitted reports from Dr. Ana A. Kumar, a Board-certified rheumatologist, dated May 1 to June 12, 2008, who diagnosed rheumatoid arthritis, spondylitis and Sjogren's syndrome.

In a decision dated September 9, 2008, the Office denied modification of the August 13, 2007 decision.

### **LEGAL PRECEDENT**

Section 8106(c)(2) of the Federal Employees' Compensation Act states that a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or secured for him is not entitled to compensation.<sup>2</sup> The Office has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects suitable work when it is offered. Before compensation can be terminated, however, the Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.<sup>3</sup> In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused or neglected by appellant was suitable.<sup>4</sup>

The implementing regulations provide that an employee, who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of showing that such refusal or failure to work was reasonable or justified and shall be provided with the opportunity to make such a showing before entitlement to compensation is terminated.<sup>5</sup> To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.<sup>6</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>7</sup> 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

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<sup>2</sup> 5 U.S.C. § 8106(c)(2).

<sup>3</sup> *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

<sup>4</sup> *Glen L. Sinclair*, 36 ECAB 664 (1985).

<sup>5</sup> 20 C.F.R. § 10.517(a) (1999); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(5) (July 1997).

<sup>6</sup> *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

<sup>7</sup> *See Marilyn D. Polk*, 44 ECAB 673 (1993).

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.<sup>8</sup> 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, all impairments whether work related or not, must be considered in assessing the suitability of an offered position.<sup>9</sup>

### ANALYSIS

The Office accepted appellant's condition for lumbar radiculopathy and lumbar degenerative disc disease. It terminated appellant's compensation effective September 2, 2007, based on appellant's refusal of suitable work. In this case, the Office properly found that a conflict in the medical evidence existed between appellant's attending physician, Dr. Arthurs, who indicated that appellant had residuals of her work-related conditions and was totally disabled, and the Office referral physician, Dr. Jordan, who opined that appellant had residuals of her work condition but could return to light-duty work with restrictions. It referred appellant to Dr. Soo to resolve the conflict.

Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.<sup>10</sup>

The Office referred appellant to Dr. Soo to resolve a conflict in the medical opinion evidence between Dr. Arthurs, her treating physician, and Dr. Jordan, as to her capacity to perform the position of modified carrier. The Board finds that Dr. Soo's opinion as set forth in his July 16, 2007 report, does not support that the June 26, 2007 job offer was suitable. In that report, Dr. Soo added work restrictions which prevented appellant from meeting the physical requirements of the offered modified carrier position. The new restrictions were imposed limitations greater than those set forth earlier in his March 15 and May 24, 2007 reports. The physical requirements of the June 26, 2007 job offer were based on Dr. Soo's original restrictions of sitting limited to six to eight hours per day, walking and standing limited to three hours per day, reaching and reaching above the shoulder limited to three to six hours per day, twisting limited to three hours per day, repetitive movements of the wrists and elbows limited to six to eight hours per day, pushing, pulling limited to three hours per day and 8 to 10 pounds, lifting limited to three hours per day and 7 to 8 pounds, no squatting, kneeling or climbing and breaks as needed. However, in the July 16, 2007 report, Dr. Soo noted appellant's preexisting rheumatological condition and provided restrictions of lifting up to seven pounds for less than

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<sup>8</sup> See *Connie Johns*, 44 ECAB 560 (1993).

<sup>9</sup> *Mary E. Woodard*, 57 ECAB 211, 217 (2005). See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b) (July 1997).

<sup>10</sup> *Aubrey Belnavis*, 37 ECAB 206 (1985). See 5 U.S.C. § 8123(a).

three hours a day, lifting intermittently not to exceed seven pounds for no more than three hours in an eight-hour day, sitting for eight hours per day with good ergonomic back support. He further noted that appellant would be able to work one day and then have to take off a few days due to inflammatory response after the physical activity because of her diagnosed rheumatological arthritic problem.

In determining the suitability of a position, the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.<sup>11</sup> The issue is whether the position of modified carrier is suitable considering her employment injury as well as any health conditions which predated the employment injury or arose subsequent to the employment injury.<sup>12</sup> In considering whether appellant is capable of performing the position of a full-time modified carrier, Dr. Soo's earlier reports of January 12 to May 24, 2007 set forth restrictions consistent with the offered position. However, on July 16, 2007 he opined that appellant's nonwork-related rheumatological condition would cause her to have to take days off after working. The Office relied upon the opinion of Dr. Soo in terminating her compensation for refusal of suitable work; however, it did not consider the July 16, 2007 report which he indicated that appellant could not work on consecutive days. Dr. Soo's opinion tends to establish that appellant cannot perform the duties of the modified carrier position.

As the weight of the medical evidence is insufficient to establish that appellant is capable of performing the offered position, in view of both her work-related and nonwork-related conditions, the Office did not meet its burden of proof in establishing that appellant refused suitable work.

### **CONCLUSION**

The Board finds that the Office did not meet the burden of proof in terminating appellant's disability compensation for refusal of suitable employment. Therefore, the Board finds that the Office improperly invoked the penalty provision of 5 U.S.C. § 8106(c).

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<sup>11</sup> See *supra* note 9.

<sup>12</sup> See *id.*; *Gayle Harris*, 52 ECAB 319 (2001).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated September 9, 2008 is reversed.

Issued: November 3, 2009  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

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