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

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| **M.C., Appellant** | ) | |
| **and** | ) | **Docket No. 09-296** |
| | ) | **Issued: September 29, 2009** |
| **U.S. POSTAL SERVICE, POST OFFICE, Los Angeles, CA, Employer** | ) | |

*Appearances:*
*Stephen D. Scavuzzo, Esq.*, for the appellant,
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

### *JURISDICTION*

On November 16, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' hearing representative's decision dated August 28, 2008, which affirmed the Office's March 20, 2008 decision, terminating her compensation on the grounds that she refused an offer of suitable work. Pursuant to 20 C.F.R. §§ 501.2 and 501.3(c), the Board has jurisdiction over the merits of this case.

### *ISSUE*

The issue is whether the Office properly terminated appellant's compensation effective March 6, 2008 on the grounds that she refused an offer of suitable work.

### *FACTUAL HISTORY*

This case has twice been on appeal before the Board. On May 1, 2003 the Board determined that the case was not in posture for decision regarding whether appellant sustained an injury causally related to factors of her federal employment. The Board directed the Office to

further develop the medical evidence.[1] In an April 5, 2006 decision, the Board again found that the case was not in posture for decision regarding whether appellant's conditions of repetitive stress disorder and preexisting spondylolisthesis were caused or aggravated by compensable factors of employment.[2] The Board found that a second opinion physician's report was inadequate and directed the Office to further develop factual evidence and to refer appellant to a medical specialist for a reasoned medical opinion regarding whether her claimed conditions were causally related to her work. The facts and history contained in the prior appeals are incorporated by reference.

The Office developed the evidence regarding appellant's work area. The employing establishment indicated that her duty station only had two or three clerks working at a time, which required that they sort mail in the back office as well as work the window. It confirmed that appellant had been working in a light-duty capacity for six hours per day for about a year and was assisted with any packages or activities that were outside of her restrictions. On April 28, 2006 appellant noted that her duties included dispatching and distributing mail, which came in sacks and trays of varying sizes at least twice daily.

On May 9, 2006 the Office referred appellant for a second opinion, along with a statement of accepted facts, a set of questions and the medical record to Dr. Stanley Ross, a Board-certified orthopedic surgeon. In a June 13, 2006 report, Dr. Ross noted appellant's history and treatment. He diagnosed lumbar spine sprain/strain and advised that it was resolved. Dr. Ross opined that appellant could not perform the full duties of her employment but it was "due to her preexisting spondylolisthesis." He indicated that appellant could continue working six hours daily with restrictions of no kneeling or squatting. In a July 19, 2006 addendum, Dr. Ross opined that climbing over the counter temporarily aggravated her preexisting spondylolisthesis, which had ceased. He indicated that he did not believe that climbing over the counter caused appellant's initial back injury, as she was able to continue working from the date of injury, until November 13, 1999. Dr. Ross indicated that she could work light duty for six to eight hours a day and lift no more than 70 pounds. In an August 1, 2006 addendum, he noted that the aggravation was a temporary Grade 1 disability. Dr. Ross indicated that appellant's activities as a clerk did not aggravate her preexisting spondylolisthesis, as she had worked prior to the accident without any problems.

On August 3, 2006 the Office accepted that climbing over the counter in 1997 aggravated appellant's condition. It accepted her claim for aggravation of spondylolisthesis, which ceased on June 13, 2006. The Office advised appellant that she was eligible for compensation for wage loss for periods supported by medical evidence for the period from 1997 through June 13, 2006. It also denied disability after June 13, 2006, because the aggravation of her preexisting condition ceased.

On August 28, 2006 appellant requested a hearing. She alleged that she was appealing two hours of leave without pay from June 13, 2006 until she was able to resume full duty.

[1] Docket No. 03-570 (issued May 1, 2003).

[2] Docket No. 06-183 (issued April 5, 2006).

In a February 2, 2007 opinion decision, an Office hearing representative set aside the August 3, 2006 decision and found a conflict in medical between Dr. Ross, and appellant's treating physician, Dr. Nicolas Panaro, a Board-certified physiatrist, as to whether the July 21, 1997 work incident caused a temporary or permanent aggravation of preexisting spondylolisthesis.[3] The hearing representative also found that the employing establishment had not addressed the duties described by appellant and instructed the Office to obtain from the employing establishment a description of her duties performed as a window clerk from the period June 1985 to November 1999. The Office was instructed to revise its statement of accepted facts and to refer appellant to an appropriate Board-certified orthopedic surgeon to resolve the medical conflict.

On remand, the Office obtained a statement from appellant's postmaster, James McPartland, who indicated that her duties included five hours standing/walking, lifting up to 10 pounds (mail trays) 25 times per day, sorting markup mail while sitting for one hour per day and sorting mail in the box section for one hour while standing or sitting.[4]

On May 7, 2007 the Office referred appellant along with a statement of accepted facts and the medical record to Dr. George Burak, a Board-certified orthopedic surgeon, for an impartial medical evaluation to resolve the conflict between Drs. Panaro and Ross regarding whether a causal relationship exists between her condition of preexisting lumbar spondylolisthesis whether there was continuing disability due to the work injury.

In a May 21, 2007 report, Dr. Burak noted appellant's history of injury and treatment. He examined her and determined that, despite using a cane, she "could ambulate quite well" without the cane. Dr. Burak noted that "at times appellant had an extremely exaggerated gait that did not follow any type of neurological deficits." He examined the lumbosacral spine and indicated that it was in midline with evidence of mild paravertebral muscle spasm at the extremes of motion, that appellant had 30 degrees of extension and 110 degrees of flexion with complaints of low back discomfort. Dr. Burak noted that appellant related that she could not perform toe walking gait patterns because this resulted in back discomfort; however, she was able to perform a heel walking pattern without any difficulty. He indicated that straight-leg raising was possible and unrestricted bilaterally both in the supine and sitting positions at 70 degrees bilaterally, with deep tendon reflexes present and equal bilaterally throughout both lower extremities. Dr. Burak determined that appellant did not have any sensory deficits or atrophy in the lower extremities. He also noted that she could hyperextend her lumbar spine while lying on her abdomen and extending her elbows keeping her pelvis on the examining table without any difficulties. Mr. Burak opined that the July 2, 1997 incident caused a permanent aggravation of appellant's underlying spondylolisthesis, which predated the event in question. He also noted that she had preexisting degenerative changes involving the L5-S1 neural foramina, which predated the work incident. Dr. Burak indicated that appellant could work for eight hours per day with restrictions

[3] Dr. Panaro opined that appellant's had a work-related chronic repetitive stress injury to her lower back. His report and findings are contained in the Board's May 1, 2003 decision.

[4] Appellant received wage-loss compensation through June 13, 2006. On remand, she was paid compensation for intermittent wage loss of two hours per day effective June 14, 2006.

of lifting/pushing/pulling of no more than 20 pounds; with kneeling and twisting limited to six hours, no climbing and breaks "usual as per job."

On July 26, 2007 the Office amended the accepted condition to include a permanent aggravation of preexisting spondylolisthesis.

On August 29, 2007 the employing establishment offered appellant a full-time job as a modified distribution clerk, using the restrictions provided by Dr. Burak. The job duties included window services for five hours, boxing mail for two hours and clerical duties for one hour. The physical requirements included no pushing or pulling greater than 20 pounds for eight hours, limited kneeling and twisting for no more than six hours and avoiding climbing.

On September 4, 2007 appellant rejected the job offer. She submitted an August 30, 2007 report from Dr. Lorelei Davidson, a Board-certified physiatrist and treating physician, who opined that she could not work more than six hours daily. Dr. Davidson opined that working beyond six hours a day was likely to cause an exacerbation of appellant's low back pain.

By letter dated October 11, 2007, the Office advised appellant that the modified position had been found to be suitable to her capabilities and was currently available. It indicated that the impartial medical examiner, Dr. Burak, had examined her on May 21, 2007 and provided work restrictions that were consistent with the offered position. Appellant was advised that she should accept the position or provide an explanation for refusing the position within 30 days. The Office informed her that, if she did not accept the offered job and failed to demonstrate that the failure was justified, her compensation would be terminated.

Appellant submitted additional reports from Dr. Davidson. They included reports dated October 16 and 30 and December 6, 2007. Dr. Davidson continued to treat appellant and advised that she was only capable of working a six-hour day. In her December 6, 2007 report, she indicated that appellant had limited range of motion, lumbosacral tenderness and dropped reflex.

By letter dated January 15, 2008, the Office informed appellant that her reasons for refusing the position were not acceptable and allowed an additional 15 days for her to accept the position. Appellant was advised that the weight of the medical evidence rested with Dr. Burak. She was advised that no further reason for refusal would be considered.

The Office received a March 4, 2008 report from Dr. Davidson, who repeated her previous findings and advised that appellant could not work more than four to six hours per day.

On March 6, 2008 the employing establishment notified the Office that the offered position remained available.

By decision dated March 20, 2008, the Office terminated the appellant's entitlement to monetary compensation benefits, effective March 6, 2008, on the basis that she had refused suitable work. It determined that the report of Dr. Burak, the impartial medical examiner, represented the weight of the medical evidence.

Appellant requested a hearing, which was held on July 15, 2008. During the hearing she alleged that she could not perform the modified position for eight hours daily. Appellant's attorney alleged that the job offer exceeded appellant's restrictions and a conflict existed between Drs. Burak and Davidson as to appropriate work restrictions.

In a July 10, 2008 report, Dr. Davidson conducted a physical examination and noted findings of lumbar tenderness on palpation, reduced range of motion, paraspinal muscle tightness, "4/5" right ankle dorsiflexion and "5/5" right hip extensors. She noted that straight-leg raising produced pain on the right low back to the post thigh. Dr. Davidson diagnosed lumbar derangement, radiculopathy, myofascitis, myofascial pain syndrome, sacroiliitis and coccydynia. She opined that appellant could work six hours per day or eight hours with a two-hour break, with no lifting more than 10 pounds and no crawling, kneeling or repetitive bending.

In a June 30, 2008 report, Dr. Chris Perrone, a chiropractor, diagnosed lumbar spondylolisthesis and lumbar radiculopathy. He noted that appellant's symptoms included pain in the lower back radiating into the legs, severe pain in the buttocks, muscle spasms, numbness and weakness in the legs and an abnormal gait. Dr. Perrone noted that standing, sitting and walking caused pain. He opined that appellant was permanently disabled. Appellant also submitted additional chiropractic treatment notes and physical therapy reports.

By decision dated August 28, 2008, the Office hearing representative affirmed the Office's March 20, 2008 decision.

## ***LEGAL PRECEDENT***

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits.[5] This includes cases in which the Office terminates compensation under section 8106(c)(2) of the Federal Employees' Compensation Act for refusal to accept suitable work.

Section 8106(c)(2)[6] of the Act 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. Section 10.517(a)[7] of the Office's regulations provide that an employee who refuses or neglects to work after suitable work has been offered or secured for him or her has the burden to show that this refusal or failure to work was reasonable or justified. After providing the two notices described in section 10.516,[8] the Office will terminate the employee's entitlement to further compensation under 5 U.S.C. §§ 8105, 8106 and 8107, as provided by 5 U.S.C. § 8106(c)(2). However, the employee remains entitled to medical benefits as provided by 5 U.S.C. § 8103 or justified. To justify termination, the Office must show that

[5] *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

[6] 5 U.S.C. § 8106(c)(2).

[7] 20 C.F.R. § 10.517(a).

[8] *Id*. at § 10.516.

the work offered was suitable[9] and must inform appellant of the consequences of refusal to accept such employment.[10] According to Office procedures, certain explanations for refusing an offer of suitable work are considered acceptable.[11] Unacceptable reasons include appellant's preference for the area in which he resides; personal dislike of the position offered or the work hours scheduled; lack of promotion potential or job security.[12]

## ***ANALYSIS***

The Office properly found that Dr. Panaro disagreed with an Office referral physician, Dr. Ross, regarding whether a causal relationship existed between appellant's preexisting lumbar spondylolisthesis and the accepted work injury and as to whether she continued to be disabled due to the accepted condition. It properly found a conflict in medical evidence which required a referral to an impartial medical specialist for resolution. The Act, at 5 U.S.C. § 8123(a), in pertinent part, provides: "If there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

The Office referred appellant to Dr. Burak for an impartial medical evaluation to resolve the medical conflict. Dr. Burak performed a thorough evaluation on appellant. He provided a reasoned opinion that she was capable of working eight hours a day, in a limited capacity. In a May 21, 2007 report, Dr. Burak examined appellant and noted findings. For example, he indicated that, despite using a cane, she "could ambulate quite well" without a cane. Dr. Burak also noted that appellant had an "extremely exaggerated gait that did not follow any type of neurological deficits." He set forth examination findings and noted that, while she had complaints of low back discomfort related to her ability to perform toe walking, she was able to perform a heel walking without difficulty. Dr. Burak found no sensory deficits or atrophy in the lower extremities or any difficulty hyperextending appellant's lumbar spine. He opined that the July 2, 1997 incident caused a permanent aggravation of appellant's underlying spondylolisthesis. However, Dr. Burak advised that she could work for eight hours per day with restrictions of lifting/pushing/pulling of no more than 20 pounds; with kneeling and twisting limited to six hours, no climbing and breaks "usual as per job." When a case is referred to an impartial medical specialist for the purpose of resolving a conflict in medical opinion, the opinion of such specialist, if sufficiently well rationalized and based on a proper background, must be given special weight.[13] The Board finds that Dr. Burak is based on a proper background

[9] *See Carl W. Putzier*, 37 ECAB 691 (1986); *Herbert R. Oldham*, 35 ECAB 339 (1983).

[10] *See Maggie L. Moore*, 42 ECAB 484, 488 (1991), *reaff' d on recon.*, 43 ECAB 818, 824 (1992). *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(d)(1) (July 1997).

[11] Federal (FECA) Procedure Manual, *supra* note 10 at Chapter 2.814.5(a)(1)-(5) (July 1997).

[12] *Arthur C. Reck*, 47 ECAB 339 (1996); Federal (FECA) Procedure Manual, *supra* note 10 at Chapter 2.814.5(c) (July 1997).

[13] *Kathryn Haggerty*, 45 ECAB 383, 389 (1994); *Jane B. Roanhaus*, 42 ECAB 288 (1990).

and is sufficiently well rationalized such that it is entitled to special weight and establishes that appellant is capable of working eight hours per day in a limited-duty position.

Subsequent to the evaluation by Dr. Burak, the employing establishment offered appellant a limited-duty position. The position accommodated the work restrictions given by Dr. Burak. The Office reviewed the position and found it to be suitable for appellant. On September 4, 2007 appellant rejected the offer and submitted an August 30, 2007 report from Dr. Davidson, who opined that appellant was unable to work for more than six hours a day as it was likely to cause an exacerbation of her low back pain.

To properly terminate compensation under section 8106(c), the Office must provide appellant notice of its finding that an offered position is suitable and give her an opportunity to accept or provide reasons for declining the position.[14] It properly followed its procedural requirements in this case. By letter dated October 11, 2007, the Office advised appellant that the position was suitable and provided her 30 days to accept the position or provide reasons for her refusal. It further notified her that the position remained open, that she could still accept without penalty and that a partially disabled employee who refused suitable work was not entitled to compensation.

Appellant submitted reports dated August 30, October 16 and 30 and December 6, 2007 from Dr. Davidson, who continued to advise that appellant was only capable of working a six-hour day. In her August 30, 2007 report, Dr. Davidson indicated that working beyond six hours per day was likely to cause an exacerbation of her low back pain. However, to the extent that appellant is asserting that a return to work might cause further injury, the Board has held that fear of future injury is not compensable.[15] In her December 6, 2007 report, Dr. Davidson indicated that appellant had limited range of motion, lumbosacral tenderness and dropped reflex. The Office must consider preexisting and subsequently acquired conditions in determining the suitability of an offered position.[16] In this case, however, the evidence does not show that appellant's conditions would prevent her from performing the offered sedentary position. For example, Dr. Davidson did not explain, why appellant could not perform the modified position, which was based upon the restrictions provided by the impartial medical examiner. She did not indicate that she was even aware of the offered position or explain why the offered position would not be suitable.

On January 15, 2008 the Office properly informed appellant that her reasons for refusing the offered position were unacceptable and provided her 15 days to accept the position. It received a March 4, 2008 report from Dr. Davidson, who repeated her opinion that appellant could not work for more than four to six hours per day. Dr. Davidson repeated her findings which included that appellant had decreased range of motion, lumbosacral tenderness and dropped reflex. However, this report does support that the work offered was not suitable since

[14] *See Moore*, *supra* note 10.

[15] *I.J.*, 59 ECAB ___ (Docket No. 07-2362, issued March 11, 2008).

[16] *See Gayle Harris*, 52 ECAB 319 (2001).

she essentially repeated her prior opinions and did not offer any reasoning to explain why appellant could not perform particular duties of the offered position.

Appellant refused to accept the offered position and the Office properly terminated her wage-loss compensation for refusal of suitable work. At the time of the termination, the weight of the medical evidence established that appellant could perform the duties of the offered position.

An employee who refuses or neglects to work after suitable work has been offered to her has the burden of showing that such refusal to work was justified.[17] Appellant has not shown that her refusal to work was justified. The weight of the medical evidence continues to support that her conditions did not prevent her from performing the job that she was offered on August 29, 2007. The medical reports received subsequent to the evaluation by Dr. Burak are insufficient to either overcome Dr. Burak's opinion or create a new medical conflict.

In a July 10, 2008 report, Dr. Davidson repeated her previously expressed opinion that appellant was unable to work for more than six hours per day. Although she indicated that appellant could work an eight-hour day, she stated that appellant would need a two-hour break. Dr. Davidson did not specifically address whether and how appellant's conditions prevented her from performing the limited-duty position she was offered. She did not provide any findings and rationale to support that appellant would have been unable to perform the limited-duty position during the time period it was offered and available to her.

The Board notes that appellant also submitted a June 30, 2008 report for Dr. Perrone, a chiropractor. In assessing the probative value of chiropractic evidence, the initial question is whether the chiropractor is considered a physician under section 8101(2) of the Act.[18] A chiropractor cannot be considered a physician under the Act unless it is established that there is a subluxation as demonstrated by x-ray to exist.[19] Thus, where x-rays do not demonstrate a subluxation, a chiropractor is not considered a "physician" and his or her reports cannot be considered as competent medical evidence under the Act.[20] In this case, the record does not indicate that a subluxation of the spine was diagnosed. Therefore, Dr. Perrone's reports cannot be considered those of a physician and are of no probative value.

Appellant also submitted physical therapy reports. However, a physical therapist is not a "physician" within the meaning of section 8101(2) and cannot render a medical opinion.[21] Thus, these reports are of no probative value.

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[17] *See supra* note 6.

[18] 5 U.S.C. § 8101(2).

[19] *Thomas R. Horsfall*, 48 ECAB 180 (1996). *See also* 20 C.F.R. § 10.5(bb) of the Office's regulations provide that the term "subluxation" means an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae anatomically, which must be demonstrable on any x-ray film to individuals trained in the reading of x-rays.

[20] *See Thomas W. Stevens*, 50 ECAB 288 (1999); *see also Susan M. Herman*, 35 ECAB 669 (1984).

[21] *Vickey C. Randall*, 51 ECAB 357 (2000).

The Board finds that the Office met its burden of proof in terminating appellant's compensation benefits effective March 6, 2008 on the grounds that she refused an offer of suitable work. On appeal, appellant's attorney asserts that her work restrictions do not allow her to work for more than six hours daily. However, as noted, the report of Dr. Burak establishes that appellant could perform the offered position for eight hours daily.

## ***CONCLUSION***

The Board finds that the Office properly terminated appellant's compensation effective March 6, 2008 on the grounds that she refused an offer of suitable work.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the August 28 and March 20, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 29, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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