

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

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**P.M., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Lompoc, CA, Employer**

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**Docket No. 09-816  
Issued: January 14, 2010**

*Appearances:*  
*Raquell Krueger-Denio, for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On February 4, 2009 appellant, through her representative, filed a timely appeal from a December 5, 2008 merit decision of the Office of Workers' Compensation Programs which affirmed the termination of her wage-loss benefits for refusing suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the appeal.

**ISSUE**

The issue is whether the Office properly terminated appellant's compensation effective July 24, 2007 on the grounds that she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c).

On appeal, appellant's representative contends that the job offer was not suitable.

**FACTUAL HISTORY**

On February 27, 1997 appellant, then a 40-year-old letter carrier, filed an occupational disease claim for carpal tunnel syndrome and problems involving her neck, shoulders and back as employment related. The Office accepted her claim for left arm strain and bilateral shoulder

calcific tendinitis, for which she underwent a right shoulder arthroscopy. By letter dated April 12, 2004, it placed appellant on the periodic rolls in receipt of wage loss for total disability.

In a July 19, 2006 report, Dr. Margaret E. Elfering, a second opinion Board-certified orthopedic surgeon, confirmed the diagnoses of right shoulder calcific tendinitis and left shoulder tendinitis. Based upon her review of the medical evidence, statement of accepted facts and findings on physical examination, Dr. Elfering found that appellant was capable of working provided there was no casing mail, no over the shoulder height work, no full reaching with the arms and no lifting more than 10 pounds. In an attached July 24, 2006 work capacity evaluation (Form OWCP-5c), Dr. Elfering set forth appellant's work restrictions, noting that she was capable of an eight-hour day. The restrictions included no full reaching, no reaching at shoulder level, no pushing overhead and no pulling overhead.

On September 1, 2006 Dr. C. Clay Wellborn, an attending Board-certified orthopedic surgeon, diagnosed right arm strain. On physical examination, he noted a normal range of motion. Appellant related to the physician that her symptoms were made worse with overhead use. Dr. Wellston advised that appellant might "require intermittent additional symptomatic care" but that no additional treatment was currently planned.

On October 10, 2006 Dr. Elfering stated that appellant continued to have residuals of her accepted conditions. She noted that appellant had restrictions on the use of her shoulders which included no reaching out or above shoulder height and no reaching below shoulder level.

On November 16, 2006 the employing establishment offered appellant a job as a modified carrier technician based on Dr. Elfering's reports. The job was sedentary, required no full reaching above or below shoulder level, no lifting more than 10 pounds and no overhead pulling or pushing. The employing establishment notified her that the position was presently available and would remain so until the Office made a suitability determination. The job description listing the duties of the offered position identified the position as stamps by mail (SBM). The duties of the position included: counting the incoming number of stamps by mail order forms; opening the stamp by mail envelopes with an electronic cutter; pulling checks and order forms from the envelopes and sorting them; taking and putting a self-adhesive address label on a Tyvek envelope; responding to customers and answering telephones with a hand free telephone; minimal and light typing of information into a computer order form; using a calculator to total the checks placed in the computer; and sealing the Tyvek envelope by pulling the adhesive strip from the envelope's flap and folding it over. Attached to the proposed job offer was a form appellant was to provide to Dr. Wellborn for his opinion on whether she could perform the duties of the offered position.

On April 30, 2007 the Office advised appellant of its determination that the position offered by the employing establishment was suitable. It noted that the November 16, 2006 job offer conformed to her physical restrictions. The Office notified appellant that her compensation could be terminated if she did not accept the position or provide good cause for not doing so within 30 days of the date of the letter.

In a letter dated May 24, 2007, appellant's representative informed the Office that neither appellant nor she had received a copy of the modified position. Additional time to respond to the

job offer was requested as appellant had a June 6, 2007 appointment with Dr. Wellborn. Appellant's representative contended that the offered position did not take into consideration her nonemployment depression and an accepted right knee condition.

On May 29, 2007 appellant rejected the offered position. She contended that it exceeded her medical restrictions, did not consider all her medical conditions, her commute and driving restrictions or the side effects of her medications.

Appellant submitted the June 4, 2007 report of Robert Bannister, MA, MFT, who advised that appellant had a history of major depression for which she received treatment. Mr. Bannister advised that appellant was totally disabled.

On June 6, 2007 Dr. Wellborn completed the form forwarded by the employing establishment. He noted that he disapproved of the job offer for the reason that it did not meet appellant's current work limitations. On June 11, 2007 Dr. Wellborn submitted an OWCP-5 work capacity evaluation, advising that appellant was limited to a maximum of lifting and reaching five pounds below the shoulder, no reaching or lifting above the shoulder, one hour in operating a motor vehicle, and four- hour work restrictions of pushing and pulling no more than five pounds.

In a June 22, 2007 letter, the Office advised appellant that it had considered her reasons for not accepting the position and found them to be unacceptable. It noted that Mr. Bannister was not a physician and his opinion did not constitute medical evidence. The Office noted that the most recent medical report from Dr. Wellborn was dated September 1, 2006 and did not provide objective findings. Appellant was advised that her compensation would be terminated if she did not accept the job offer within 15 days of the letter.

In a July 5, 2007 report, Dr. Wellborn reported that he disapproved of the job offer as currently extended to appellant. He advised that there should be no reaching above shoulder level and that she was limited to a maximum of four hours a day of intermittent pushing and pulling less than five pounds. Dr. Wellborn noted that driving from her residence to work would exceed a one-hour driving limitation.

In a July 24, 2007 decision, the Office terminated appellant's compensation effective that day on the grounds that she had refused an offer of suitable work. It found that the job limitations were based on the opinion of Dr. Elfering and that the July 5, 2007 report of Dr. Wellborn was not rationalized as the physician did not set forth any findings from physical examination. The weight of medical opinion established that the job offer was suitable.

In a July 31, 2007 letter, appellant's representative requested a review of the written record before an Office hearing representative.

On November 6, 2007 appellant's representative presented arguments as to why the job was not suitable, contending that the position was not within appellant's physical restrictions and that the Office failed to comply with its procedures regarding the suitability determination.

In an October 15, 2007 report, Dr. Wellborn reviewed his treatment of appellant since 2001 and that he had reviewed the November 16, 2006 job offer. He noted that appellant had

physical limitations due to restrictions based on her thoracic outlet syndrome, knee conditions<sup>1</sup> and upper extremity conditions. Dr. Wellborn reported that appellant had permanent restrictions of no repetitive reaching overhead or away from the body, no machinery use, no driving more than one hour one way and no lifting more than five pounds overhead or away from the body. He stated that pulling envelopes away from the machine was contrary to his limitation of no reaching away from the body, no pulling and no working with machinery. Dr. Wellborn reviewed the job duties listed under the position description and stated why they exceed her restrictions by requiring overhead reaching or pulling or were over her weight restriction. As to the restriction on driving, he stated it was imposed to limit the amount of time appellant was required to hold her upper extremities up from her body. Dr. Wellborn also noted that the medication appellant was taking caused drowsiness as a side effect.

By decision dated December 5, 2007, an Office hearing representative affirmed the July 24, 2007 decision terminating appellant's wage-loss benefits finding that she refused an offer of suitable work.

On September 9, 2008 appellant requested reconsideration of the December 5, 2007 decision. She submitted a March 18, 2008 report from Dr. Paul Willis, a neurologist, who noted that he had previously examined appellant in 1998 and noted her complaint of predominately left shoulder and arm pain without clear cervical, radicular or thoracic outlet patterns. Dr. Willis presented findings on physical examination and noted that prior diagnostic studies had shown degenerative disc disease at C5-6 and C6-7 with prominent anterior and posterior spurring. He diagnosed chronic shoulder dysfunction, degenerative disease and noted appellant's other diagnoses of depression, lupus and hypertension. While Dr. Willis could not find evidence of neurologic deficit, there was limitation with effortful positional movement of the shoulder. He noted that appellant was attempting to pursue an employment job that complied with her orthopedic restrictions.

Appellant also submitted reports from Dr. Katherine Hamilton, Ph.D., a clinical psychologist, who noted treatment for depression since 1990 to 1991. Dr. Hamilton disapproved of the job offer as appellant was found totally disabled due to depression.

By decision dated December 5, 2008, the Office denied modification of the December 5, 2007 decision.

### **LEGAL PRECEDENT**

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.<sup>2</sup> Under section 8106(c)(2) of the Act, the Office may terminate wage-loss 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.<sup>3</sup> To support termination,

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<sup>1</sup> Dr. Wellborn noted that appellant had a separate claim for this, but does not note the claim number.

<sup>2</sup> A.W., 59 ECAB \_\_\_ (Docket No. 08-306, issued July 1, 2008).

<sup>3</sup> 5 U.S.C. § 8106(c)(2); *see also Mary E. Woodard*, 57 ECAB 211 (2005); *Geraldine Foster*, 54 ECAB 435 (2003).

the Office must show that the work offered was suitable and must inform the employee of the consequences of refusal to accept such employment.<sup>4</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>5</sup>

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.<sup>6</sup> It is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.<sup>7</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 the medical evidence.<sup>8</sup> 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.<sup>9</sup>

If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Office shall appoint a third physician who shall make an examination.<sup>10</sup>

### ANALYSIS

The Office accepted that appellant's claim for left arm strain, right shoulder calcific tendinitis and left shoulder tendinitis and authorized surgery. It terminated appellant's compensation by decision dated July 24, 2007 on the grounds that she refused an offer of suitable work. The Board finds that the Office did not meet its burden of proof to terminate compensation benefits as there was a conflict in medical opinion as to appellant's work restrictions.

The Office found that the weight of medical opinion regarding appellant's work restrictions was represented by Dr. Elfering, a second opinion physician. The record reflects that Dr. Elfering found that appellant was capable of full-time work in a limited capacity and provided limitations. She limited lifting to 10 pounds maximum with no casing, no over the shoulder height work and no full reaching.

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<sup>4</sup> *T.S.*, 59 ECAB \_\_\_ (Docket No. 07-1686, issued April 24, 2008); *Ronald M. Jones*, 52 ECAB 190 (2000).

<sup>5</sup> *Richard P. Cortes*, 56 ECAB 200 (2004); *Joan F. Burke*, 54 ECAB 406 (2003).

<sup>6</sup> 20 C.F.R. § 10.500(b).

<sup>7</sup> *Richard P. Cortes*, *supra* note 5.

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

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(4) (July 1997).

<sup>10</sup> *See Richard L. Rhodes*, 50 ECAB 259 (1999).

The employing establishment based the modified-duty job offer on the work restrictions listed by Dr. Elfering. In extending the job offer to appellant on November 16, 2006, it provided her with a form to be completed by her attending physician addressing whether he approved of the job description. Dr. Wellborn completed the form in June 2007, advising that the work limitations described in the job offer were not consistent with appellant's limitations. He advised that appellant had a maximum lifting capacity of five pounds and imposed greater limitations on the number of hours she could push or pull to four hours a day. Dr. Wellborn advised no overhead lifting or reaching above or below shoulder level. He also limited driving to one hour a day.

At the time the Office terminated appellant's compensation on July 24, 2007, there was a conflict in medical opinion between appellant's attending physician and the second opinion physician as to her capacity for employment, work limitations and the suitability of the modified-duty position offered. Based on the evidence of record, the Board finds that the Office improperly determined that the modified position offered to appellant constituted suitable work within her physical limitations. Consequently, the Office did not meet its burden of proof to terminate appellant's wage-loss compensation.

### **CONCLUSION**

The Board finds that the Office did not meet its burden of proof to terminate appellant's monetary compensation benefits on the grounds that she refused an offer of suitable work under 5 U.S.C. § 8106(c).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated December 5, 2008 be reversed.

Issued: January 14, 2010  
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