

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

A.G., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
New York, NY, Employer)

**Docket No. 09-1599
Issued: May 11, 2010**

Appearances:

*Paul Kalker, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 8, 2009, appellant filed a timely appeal from an April 30, 2009 decision of the Office of Workers' Compensation Programs that affirmed the termination of his compensation for refusing suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation effective April 13, 2008 on the grounds that he refused an offer of suitable work.

FACTUAL HISTORY

On July 26, 2004 appellant, then a 55-year-old letter carrier, filed a traumatic recurrence of disability claim for which he stopped work on July 23, 2004. He alleged a recurrence of a January 23, 2003 injury and that he was unable to perform his normal duties due to pain in his right arm and shoulder. The Office adjudicated the claim as a new injury and accepted an

aggravation of cervical radiculopathy, closed cervical dislocation and neck sprain.¹ Appellant was placed on the periodic rolls and received appropriate compensation.²

Appellant received treatment from Dr. Lyzette Velazquez, a Board-certified psychiatrist and neurologist, Dr. Dudley K. Angell, a Board-certified physiatrist, and Dr. Sireen Gopal, a Board-certified physiatrist. He also received chiropractic treatment from Dr. James R. McGee, a chiropractor. On November 24, 2004 Dr. Velazquez advised that appellant's condition was employment related and that he was totally disabled. In a report dated March 10, 2006, Drs. Gopal and Angell, diagnosed cervical disc herniation with radiculopathy and recommended cervical injections, which he later received.

On February 12, 2007 the Office referred appellant to Dr. Robert M. Israel, a Board-certified orthopedic surgeon, for a second opinion regarding the extent of his residuals and ability to work. In a March 6, 2007 report, Dr. Israel reviewed appellant's history of injury and treatment. He examined appellant and determined that the C5-6 disc herniation was resolved. Dr. Israel explained that there were no objective findings and no aggravation. He explained that appellant's injury-related condition resolved and that he was capable of performing the full duties of his job as a letter carrier without restrictions. Dr. Israel found that appellant had reached maximum medical improvement.

On March 30, 2007 the Office determined that a conflict in medical opinion arose between Dr. Velasquez the treating physician, and Dr. Israel the second opinion physician, regarding appellant's residuals and capacity for work.

On June 12, 2007 the Office referred him, together with a statement of accepted facts and the medical record, to Dr. Martin Barschi, a Board-certified orthopedic surgeon, for an impartial medical evaluation. In a July 3, 2007 report, Dr. Barschi reviewed appellant's history of injury and medical treatment. On examination of the cervical spine, appellant had normal flexion, extension and lateral rotation. Dr. Barschi noted that there was no paraspinal muscle spasm but tenderness to palpation in the left trapezius area. He noted that appellant had tenderness to palpation in the right scapulothoracic border. Dr. Barschi found that the shoulders did not abduct past 100 degrees with complaint of pain. He noted that appellant had normal rotation and no tenderness in the subacromial space area in either shoulder. There was no thenar or hypothenar atrophy in the hands. Dr. Barschi's examination of the back and lower extremities revealed no positive relevant orthopedic findings. He advised that appellant had symptoms consistent with cervical spine radiculopathy and chronic degenerative changes in his cervical spine. Dr. Barschi reviewed a July 11, 2007 magnetic resonance imaging (MRI) scan from Dr. Andre Khoury, a Board-certified diagnostic radiologist, which revealed no evidence of any acute disc herniation. He opined that appellant had not recovered from the aggravation of his cervical radiculopathy which occurred on July 23, 2004. Dr. Barschi explained that there was no necessity for any further physical therapy or chiropractic treatment as appellant could begin a program of home exercise. Regarding any neurologic or psychiatric care, he recommended evaluation by an appropriate specialist. Dr. Barschi advised that appellant could return to work with permanent

¹ Both claims were combined into a master claim file. The 2003 claim was accepted for cervical radiculopathy.

² The record reflects that appellant was being treated for a preexisting spinal condition prior to his injury.

restrictions, which were a result of his accepted condition and included no overhead activities or any heavy lifting or carrying. He specified that appellant should do no more than one to two hours of reaching, no reaching above the shoulder, one to two hours of twisting and operating a motor vehicle, no more than two to four hours of repetitive movements of the wrists and elbows, pushing of no more than 15 pounds, pulling and lifting of no more than 10 pounds and no climbing.

A July 11, 2007 MRI scan, read by Dr. Khoury, revealed degenerative disc disease with a central and bilateral disc herniation at C5-6 and C6-7 and a bulging disc at C4-5. He advised that the herniation reached the spinal cord at C5-6 and C6-7.

In an August 3, 2007 report, Dr. Velazquez opined that appellant was disabled from January 23, 2003 to October 8, 2007. She diagnosed cervical and lumbar radiculopathy. Dr. Velazquez continued to treat appellant and find that he was totally disabled. In an August 21, 2007 work capacity report, she advised that he was unable to perform his usual job. Dr. Velazquez stated that appellant could only work 1 to 2 hours per day and prescribed restrictions, which included less than 1 hour of sitting, walking, standing, twisting, bending or stooping, less than 10 minutes of reaching, no reaching above the shoulder, operating a motor vehicle at work or to and from work for less than five miles, no more than 30 minutes of repetitive movements of the wrists, elbows, pushing, pulling, lifting, squatting, kneeling, climbing and 20 to 30 minute breaks every 1 to 2 hours. She also noted that appellant could only push, pull or lift one to two pounds every one to two hours. Dr. Velazquez indicated that appellant's restrictions were permanent.

In a November 20, 2007 report, Dr. Nathaniel L. Tindel, a Board-certified orthopedic surgeon to whom appellant was referred by Dr. Velazquez, diagnosed chronic neck pain with bilateral cervical radiculopathy. He recommended additional physical therapy.

On January 11, 2008 the employing establishment offered appellant a modified limited-duty letter carrier assignment based on Dr. Barschi's restrictions. The duties consisted of delivering express and drop mail for two hours, maintaining books and mail for one hour, separating mail for two hours and carrier pickups and delivery for one and a half hours. The physical requirements included pushing of no more than 15 pounds, pulling and lifting up to 10 pounds, repetitive movements of the wrist and elbow for up to four hours per day on an intermittent basis, reaching, twisting and driving to work for no more than two hours per day, intermittently and no reaching above the shoulder or climbing.

By letter dated January 23, 2008, the Office advised appellant that the modified letter carrier position was suitable to his capabilities and available. It found that his work restrictions, as provided by Dr. Barschi, were consistent with the offered position. Appellant was advised that he should accept the position or provide an explanation for refusing the position within 30 days. The Office informed him that if he did not accept the offered position and his refusal was not justified, his compensation would be terminated.

On February 8, 2008 appellant refused the modified job offer. He contended that he was unable to work and would be having surgery on his spine. Appellant also provided a January 16,

2008 report from Dr. Velazquez, who reiterated her previous opinion and noted that he was in need of surgery.

In reports dated January 16 and 29, 2008, Dr. Tindel noted that appellant had ongoing symptoms in his neck and both arms. Appellant's range of cervical motion was diminished by 30 percent with flexion and extension. Dr. Tindel noted intact sensory findings with deep tendon reflexes normal and symmetrical. He diagnosed chronic neck pain with bilateral cervical radiculopathy, cervical stenosis with multi-level degenerative disc disease C4-5, C5-6 and C6-7. Dr. Tindel noted that appellant was considering surgery, was unable to return to work and remained totally disabled. He further noted that appellant could not push up to 15 pounds or perform any type of repetitive movement. Dr. Tindel advised that appellant could not do any reaching, twisting or driving or any reaching over the shoulder due to his cervical stenosis.

By letter dated February 11, 2008, the Office informed appellant that his reasons for refusing the position were not supported and allowed an additional 15 days for him to accept the position. Regarding pending surgery, it advised appellant that surgery had not been authorized. He was advised that no further reason for refusal would be considered.

On February 15 and 21, 2008 appellant contacted the Office and was advised to submit any reasons for refusal in writing.

In a letter dated February 22, 2008, appellant stated he was surprised that Dr. Barschi found that he was able to work. He noted that Dr. Barschi ordered an MRI scan on July 11, 2007, but he was never given the opportunity to refute his findings. Appellant informed the Office that Dr. Tindel had submitted a request for surgery on his cervical spine, but that he had not received any response. On February 25, 2008 he advised the Office that his physician would submit a report shortly.

In a February 25, 2008 report, Dr. Velazquez stated that appellant underwent conservative treatment that included chiropractic manipulation, physical therapy and cervical epidurals with minimal response. On February 15, 2008 appellant remained symptomatic with neck pain radiating to both shoulders. Dr. Velazquez advised that he was considering surgery. She stated that appellant's neurological examination showed "2+" cervical spine tenderness and spasms with limited range of motion, flexion of 40/45 degrees, extension of 10/30 degrees, right lateral flexion of 45/65 degrees and left lateral flexion of 35/65 degrees. Dr. Velazquez found weakness of the left triceps and the left handgrip and decreased sensation to pinprick and temperature over the left arm. She diagnosed post-traumatic cervical radiculopathy due to a herniated disc with cord impingement, chronic cervical neck stenosis with multiple level degenerative disc disease at C4-5, C5-6 and C5-7 that was due to the July 23, 2004 injury. Dr. Velazquez agreed with Dr. Tindel that appellant needed an anterior cervical discectomy and fusion of C4 through C7 and possible posterior spinal fusion with instrumentation. She stated that he was totally disabled since 2004. Dr. Velazquez noted that appellant was unable to lift, push or pull more than 5 to 10 pounds. She also advised that he was unable to do repetitive movement of the wrist and elbow for more than 10 to 15 minutes or reach, twist and drive for more than 30 to 45 minutes. Dr. Velazquez also advised that he could not work an eight-hour day or do any above the shoulder repetitive activities due to his cervical spinal stenosis with nerve entrapment, especially in the left arm. She explained that appellant had weakness of the

left arm that would endanger his condition if he lifted more than 5 to 10 pounds in a repetitive motion. In a separate report of the same date, Dr. Velazquez opined that he was totally and permanently disabled and could not work eight hours a day and could not push up to 15 pounds.

In an April 7, 2008 telephone call memorandum, the Office confirmed that the proposed job offer remained available.

By decision dated April 9, 2008, the Office terminated appellant's monetary compensation benefits effective April 13, 2008. It found that he refused suitable work and that the report of Dr. Barschi, the impartial medical examiner, represented the weight of the evidence.³

Appellant's representative requested reconsideration on February 3, 2009. He contended that the Office did not sufficiently develop the medical evidence and that the conditions resulting from the accepted injury were improperly identified, which resulted in the second opinion and impartial examiners not having appropriate information. Appellant's representative contended that the Office improperly referred appellant for a second opinion physician, which constituted physician shopping. He asserted that the second opinion report was not rationalized or sufficient to create a conflict. Appellant's representative also argued that the report of the impartial medical examiner was deficient and not entitled to special weight.

In a November 1, 2008 report, Dr. Tindel listed appellant's history and findings on examination. He advised that the July 11, 2007 MRI scan showed multilevel changes at C4-5, C5-6 and C6-7 with loss of disc space height, degeneration and herniated discs with spinal stenosis, but no significant spinal cord compression. Dr. Tindel diagnosed chronic neck pain with bilateral cervical radiculopathy and cervical stenosis with multilevel degenerative disc disease at C4-5, C5-6 and C6-7 with disc herniation. He explained that, prior to the injury, appellant had no neck pain or cervical spine symptoms. Immediately, after the injury, appellant developed neck pain and neurological symptoms consistent with injury, which included spinal cord compression due to the herniated discs. Dr. Tindel noted that appellant's examination was notable for symmetric but hyperreflexic reflexes and marked limitation of the cervical spine, which was in contrast to the findings of Dr. Israel, who reported "no objective findings at this time." He agreed with Dr. Israel, who noted symmetrical deep tendon reflexes; however, Dr. Israel did not document the grade of reflex (0, 1, 2 or 3), only that they were the same on both sides (symmetric). Dr. Tindel explained that appellant was "in fact, symmetrically hyperreflexic," which was consistent with spinal cord compression. He also noted that Dr. Barschi had recommended a neurological evaluation. Dr. Tindel reviewed the offer of limited duty and opined that appellant could not perform the job duties. He advised that appellant was permanently disabled from employment as a result of conditions causally related to the injury of July 23, 2004.

By decision dated April 30, 2009, the Office denied modification of the April 9, 2008 decision.

³ On December 8, 2008 the Office denied authorization for anterior cervical discectomy and fusion. In the April 9, 2009 decision, it vacated this decision and directed appellant to submit a new request for the surgery from his physician.

LEGAL PRECEDENT

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits.⁴ 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.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 medical evidence.⁶

Section 8106(c)(2)⁷ 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)⁸ 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 10.516,⁹ the Office will terminate the employee's entitlement to further compensation under 5 U.S.C. § 8105, 8106-07, 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 the work offered was suitable¹⁰ and must inform appellant of the consequences of refusal to accept such employment.¹¹

ANALYSIS

The Office accepted that appellant sustained an aggravation of cervical radiculopathy, closed dislocation cervical and neck sprain. It terminated his compensation effective April 13, 2008 based on his refusal of suitable work.

The Office properly found that a conflict was created between the treating physician, Dr. Velazquez, a Board-certified neurologist, who opined that appellant was totally disabled and Dr. Israel, a Board-certified orthopedic surgeon and second opinion physician, who opined that appellant could return to full duty without restrictions on March 6, 2007. Section 8123(a) of the Act provides, in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint

⁴ *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

⁵ *See Y.A.*, 59 ECAB ____ (Docket No. 08-254, issued September 9, 2008).

⁶ *T.T.*, 58 ECAB 296 (2007).

⁷ 5 U.S.C. § 8106(c)(2).

⁸ 20 C.F.R. § 10.517(a).

⁹ *Id.* at § 10.516.

¹⁰ *See Carl W. Putzier*, 37 ECAB 691 (1986); *Herbert R. Oldham*, 35 ECAB 339 (1983).

¹¹ *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992). *See Federal (FECA) Procedure Manual*, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(d)(1).

a third physician who shall make an examination.”¹² Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.¹³ Thus, the Office properly referred appellant to Dr. Barschi to resolve the medical conflict.

The Board finds that the medical evidence does not establish that appellant was capable of performing the job requirements of the offered position. Dr. Barschi’s July 3, 2007 report, noted appellant’s history and findings but did not explain apparent inconsistencies within his report or provide sufficient medical rationale for certain findings.¹⁴ In reviewing the July 11, 2007 MRI scan from Dr. Khoury’s record, Dr. Barschi noted that the scan showed central and bilateral disc herniation at C5-6 and C6-7 and a bulging disc at C4-5 but he also found no evidence of acute disc herniation. This is in contrast to the findings in Dr. Khoury’s report, which noted that the herniation at C5-6 and C6-7 reached the spinal cord. Dr. Barschi did not address this apparent inconsistency. Concluding that appellant had no relevant objective orthopedic findings of the back, the physician concluded that appellant had symptoms consistent with a cervical spine radiculopathy and chronic degenerative changes in his cervical spine and advised that appellant had not recovered from the aggravation of his cervical radiculopathy which occurred on July 23, 2004. He recommended a return to work with permanent restrictions and explained that they were due to the accepted condition, he did not explain his reasoning in how he arrived at this conclusion, since also indicated there were limited relevant orthopedic findings. Dr. Barschi also did not explain why appellant required no further treatment, other than a home exercise program, for these continuing symptomatic conditions. Additionally, the Board also notes that Dr. Barschi recommended that appellant be referred to an appropriate specialist for his neurological or psychiatric symptoms.

The Office did not seek further clarification of these matters. It also did not refer appellant for a neurological or psychiatric evaluation as suggested by Dr. Barschi. This is important since the medical record indicates that there may be neurological components to appellant’s condition and since, to terminate benefits under 5 U.S.C. § 8106(c), the Office must consider both preexisting and subsequently acquired conditions in determining the suitability of an offered position.¹⁵ The Board has held that, when the Office obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist’s opinion requires clarification or elaboration, the Office must secure a supplemental report from the specialist to correct the defect in his original report.¹⁶

¹² 5 U.S.C. § 8123(a); *see also* *Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207, 210 (1993).

¹³ *See Roger Dingess*, 47 ECAB 123, 126 (1995); *Juanita H. Christoph*, 40 ECAB 354, 360 (1988); *Nathaniel Milton*, 37 ECAB 712, 723-24 (1986).

¹⁴ *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

¹⁵ *E.H.*, 60 ECAB ____ (Docket No. 08-1862, issued July 8, 2009).

¹⁶ *L.R. (E.R.)*, 58 ECAB 369 (2007).

The Board finds that the medical conflict remains unresolved. Consequently, the Office has not met its burden of proof to terminate appellant's monetary compensation on the grounds that he refused an offer of suitable work.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation effective April 13, 2008 on the grounds that he refused an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the April 30, 2009 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 11, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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