United States Department of Labor
Employees' Compensation Appeals Board

O.L., Appellant	)	
and	)	**Docket No. 10-924**
	)	**Issued: February 14, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Nashville, TN, Employer	)	

Appearances:
Katherine A. Austin, 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 February 8, 2010 appellant filed an appeal from an August 17, 2009 decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation benefits effective October 8, 2000 pursuant to 5 U.S.C. § 8106; and (2) whether the Office properly denied appellant's request for authorization of cervical spine surgery.

On appeal, appellant's attorney asserts that the Office erroneously granted special weight to the referee physician on both issues because his report contained errors and thus, the weight of the medical evidence supports that appellant could not perform the offered position and supports the need for cervical surgery.

FACTUAL HISTORY

On November 15, 1992 appellant, then a 35-year-old custodian, injured his back while trying to move a desk. He stopped work that day. The Office accepted that he sustained employment-related cervical and lumbar strains. Appellant received appropriate compensation and was placed on the periodic compensation rolls.[1]

The Office continued to develop the claim and referred appellant to Dr. E. Dewey Thomas, an orthopedic surgeon, for a second opinion. In a June 11, 1998 report, Dr. Thomas noted findings and advised that appellant's work-related diagnoses were chronic cervical and lumbar musculoligamentous sprains, which had basically reached maximum medical improvement and were by-and-large resolved. He questioned appellant's motivation to return to work and advised that appellant had no residual impairment from the accepted conditions and could return to work with minimal restrictions. By decision dated August 20, 1998, the Office terminated appellant's compensation benefits, effective August 21, 1998. In an August 6, 1999 decision, an Office hearing representative affirmed the August 20, 1998 decision regarding the termination of benefits and found that a conflict in medical evidence had been created between Dr. Thomas who advised that appellant had no continuing disability and Dr. Melvin D. Law, Jr., an attending Board-certified orthopedic surgeon, who advised in a May 13, 1999 affidavit that appellant continued to be disabled from the 1992 employment injury.

Appellant was thereafter referred to Dr. David W. Gaw, Board-certified in orthopedic surgery, for an impartial evaluation[2] and in an October 6, 1999 report, he noted reviewing the medical record and appellant's description of the November 15, 1992 work injury and his complaint that since the injury he had radiating neck and back pain with shocking sensations and numbness and problems moving his arms, standing, walking, bending and lifting. Dr. Gaw provided examination findings, noting that appellant was in no obvious pain, did not walk with a limp and had no trouble getting up and down. He found moderate tenderness in the neck and upper thoracic regions but no true muscle spasm. Motor examination was normal and sensory examination showed decreased sensation to touch and pinprick in the median nerve distribution on the right. Tinel's test was negative and Phalen's slightly positive bilaterally. Lumbar examination demonstrated soreness and some spasm and no atrophy or weakness involving the lower extremities. Dr. Gaw advised that the November 1992 injury was the most likely cause of appellant's condition in that it aggravated preexisting degenerative changes in the neck and back. He commented that he reviewed evaluations by Dr. Lloyd Walwyn and Dr. Gavigan. In reports dated October 25, 1999, Dr. Gaw advised that the most disabling residual of the November 15, 1992 injury was chronic pain which was a disease within itself. He stated that appellant was certainly not 100 percent impaired or disabled and could return to restricted duty, beginning at

[1] Appellant also has a claim accepted for right carpal tunnel syndrome that was adjudicated separately by the Office. The record also indicates that he receives Department of Veterans Affairs (VA) benefits of 10 percent for degenerative joint disease of the cervical spine, 10 percent for left lower extremity peripheral neuropathy, 10 percent for right lower extremity peripheral neuropathy, 20 percent for fibromyalgia and additional compensation for unemployability.

[2] The Office asked that the physician provide a current diagnosis, if appellant had disabling residuals and whether he could perform his usual job duties and, if not, his restrictions.

two to three hours daily and gradually increasing to eight hours a day, with pain his limiting factor. Dr. Gaw advised that appellant could walk and stand for one-half to one hour, sit for two hours, occasionally lift 30 pounds and frequently lift 10 to 15 pounds.

Appellant received retroactive compensation and was returned to the periodic rolls. On February 8, 2000 Dr. Law recommended posterior cervical laminectomy and fusion from C2 through T1 with an anterior cervical discectomy and fusion at C5-6, noting that appellant was still having neck and low back pain. In a February 16, 2000 report, an Office medical adviser advised that the recommended surgery was not appropriate to treat appellant's accepted conditions. In a March 16, 2000 supplemental report, Dr. Gaw advised that people, like appellant, with chronic pain syndrome did not get very good results from spinal surgery, but that since the surgery was to help pain, it could be a reasonable approach, but that he would be very leery operating on appellant. He recommended a neurosurgical consultation before surgery was authorized.

Following Dr. Gaw's recommendation, the Office referred appellant to Dr. Warren R. McPherson, a Board-certified neurosurgeon and in a May 15, 2000 report, he provided examination findings and advised that moving the desk in November 1992, combined with other factors, could be a factor in appellant's pain. Dr. McPherson opined that the odds of the proposed surgery being successful were low and he did not think it was a good choice. On May 28, 2000 he advised that no specific treatment other than an exercise program and symptomatic medication was needed.

On June 19, 2000 the employing establishment offered appellant a modified mail handler job, beginning at two hours a day, working up to seven hours daily by the sixth week, with restrictions of sitting two hours a day, walking and standing one-half to one hour daily and no reaching, twisting, pushing, pulling, squatting, kneeling or climbing. Occasional lifting was restricted to 30 pounds and frequent lifting to 15 pounds. On June 28, 2000 appellant stated that he could not accept or reject the job offer as his physician had not approved the job and had recommended surgery. On July 24, 2000 Dr. Gaw noted reviewing the offered job and found that appellant could perform the duties of the position.

Appellant did not return to work and in a July 27, 2000 letter, the Office advised him that the position offered was suitable. He was notified that if he did not report to work or did not demonstrate that the failure was justified, under section 8106 of the Federal Employees' Compensation Act,[3] his right to compensation for wage loss or a schedule award would be terminated. Appellant was given 30 days to respond. On August 18, 2000 his attorney stated that he could not accept the position, based on his physician's advice and in August 23, 2000 reports, Dr. Law noted appellant's complaints of neck and back pain and diagnosed cervical pain, spondylosis and herniated disc. Dr. Law noted reviewing the reports of Dr. Gaw and Dr. McPherson and opined that appellant would have continued chronic pain and would need chronic pain management after surgery, but this should not be a contraindication for surgery to relieve appellant's neurogenic compression. In a letter dated August 28, 2000, the Office

[3] 5 U.S.C. §§ 8101-8193.

advised appellant that his reasons for refusing to accept the offered position were insufficient and that he had an additional 15 days to accept the job offer.

By decision dated September 22, 2000, the Office found that, the weight of the medical evidence rested with the opinions of the Office medical adviser, Dr. Gaw and Dr. McPherson who found that the recommended surgery was not warranted and denied authorization for the proposed cervical surgery. In a September 25, 2000 decision, it terminated appellant's compensation benefits, effective October 8, 2000, on the grounds that he refused an offer of suitable work. The Office found that the weight of the medical evidence rested with Dr. Gaw, who provided an impartial evaluation for the Office. Appellant requested a hearing, that was held on March 28, 2001. At the hearing he described the November 1992 employment injury and continuing symptoms and disability.

In a March 28, 2001 affidavit, Dr. Law advised that he agreed with Dr. Gaw's assessment except that he would add that appellant has cervical myelopathy and spinal cord dysfunction with spinal cord compression, as found in an August 12, 1998 myelogram and supported by a February 3, 2000 magnetic resonance imaging (MRI) scan study.[4] He noted that appellant's cervical myelopathy was progressive, with neurologic involvement characterized by pain, electric-like shocks, arm numbness and neck stiffness. Dr. Law reiterated his recommendation for cervical decompression and fusion surgery, stating that it would prevent the progression of the myelopathy. He also noted that appellant had bulging lumbar discs and that lumbar surgery could be considered. Dr. Law concluded that appellant continued to be disabled and required medical treatment and pain management as a result of the 1992 work injury. In an April 6, 2001 report, Dr. W. Stephen Long, Board-certified in anesthesiology and pain medicine, noted appellant's complaints and diagnosed cervical and lumbar degenerative disc disease and began pain management.

By decision dated July 5, 2001 and finalized on July 6, 2001, an Office hearing representative affirmed the September 22 and 25, 2000 decisions.[5] On July 3, 2002 appellant, through his attorney, requested reconsideration, arguing that the termination should be reversed and the requested surgery authorized. In reports dated April 17, 2001 to January 28, 2002, Dr. Long described appellant's physical findings and treatment, reiterated his diagnoses and advised that appellant should have a functional capacity evaluation (FCE) and cervical epidural steroid injections. In a July 3, 2002 report, Dr. Law advised that appellant would not be successful "at returning to work at his previous job."

[4] An August 12, 1998 postmyelogram computerized tomography scan demonstrated mild left positional cord impingement at C3-4, C4-5 and C6-7 levels, moderate left and right and three-level foraminal stenosis. The February 3, 2000 MRI scan demonstrated multilevel spondylosis at C3-4 and C5-6 on the left and C6-7 on the right with positional cord impingement and spondylosis at C5-6 without cord impingement.

[5] The Office subsequently received a July 6, 2001 investigative memorandum, advising that appellant was observed doing gardening work on May 17, 2001, spraying bushes, lifting and carrying landscaping material and a gasoline can, kneeling and sitting on the ground, digging dirt with a shovel, shoveling gravel, climbing into a truck, reaching above the shoulders to close a truck and walking with no difficulty. The record contains photographs of appellant performing the described activities.

By decision dated September 5, 2002, the Office denied modification of the prior decision. Appellant, through his attorney, again requested reconsideration on September 2, 2003 and submitted evidence previously of record and a January 8, 2003 FCE, prepared by John Boucher, C.P.T., that described appellant's effort as near full, advising that he could do more physically at times than was demonstrated during testing. His work tolerances were noted and he was deemed incapable of competitive employment due to decreased physical work tolerances, his chronic pain syndrome and recent cardiac condition. In an August 26, 2003 affidavit, Dr. Long noted treating appellant for pain management since April 6, 2001 and opined that appellant was not able to perform the June 5, 2000 offered position due to his chronic pain syndrome caused by the November 15, 1992 employment injury. He referred to appellant's cervical MRI scan and FCE findings and noted appellant's limitations. Dr. Long stated that spinal stabilization by surgery would decrease his pain and risk of further injury.

In a merit decision dated October 16, 2003, the Office denied modification of the prior decisions. On January 13, 2004 appellant filed an appeal with the Board and by order dated June 17, 2004, the Board dismissed the appeal, finding that the record did not contain copies of the Office's final decisions of October 16, 2002 and October 16, 2003.[6] By order dated August 4, 2005, the Board granted appellant's petition for reconsideration, vacated the June 17, 2004 order, reinstated the appeal and remanded the case to the Office for reconstruction and proper assemblage of the case record, to be followed by an appropriate decision. By decision dated August 17, 2009, the Office denied modification of the prior decision.

LEGAL PRECEDENT -- ISSUE 1

Section 8106(c) of the Act provides in pertinent part, "A partially disabled employee who (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation."[7] It is the Office's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.[8] 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.[9] 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.[10] In determining what constitutes "suitable work" for a particular disabled employee, the Office considers the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, the employee's

[6] Docket No. 04-703 (issued June 17, 2004).

[7] 5 U.S.C. § 8106(c).

[8] *Joyce M. Doll*, 53 ECAB 790 (2002).

[9] 20 C.F.R. § 10.517(a).

[10] *Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

qualifications to perform such work and other relevant factors.[11] Office procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.[12] 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.[13]

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.[14] It is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.[15]

Section 8123(a) of the Act provides that if there is 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.[16] When the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[17]

ANALYSIS -- ISSUE 1

The Board finds that the Office met its burden of proof to terminate appellant's monetary compensation effective October 8, 2000 on the grounds that he refused a June 19, 2000 offer of suitable work. In terminating his wage-loss compensation, the Office found that the weight of the medical evidence established that the position was within his physical capabilities, based on the referee opinion of Dr. Gaw. It had determined that a conflict in medical evidence had been created between the opinions of orthopedists Dr. Law, an attending physician, and Dr. Thomas, a second opinion physician, who disagreed regarding appellant's ability to work.

In reports dated October 6 and 25, 1999, Dr. Gaw reviewed appellant's complete medical history, provided examination findings and advised that the November 12, 1992 employment injury aggravated preexisting degenerative changes in the neck and back and diagnosed chronic pain, stating that this was a disease within itself. He opined that appellant was not totally disabled and could return to restricted duty, beginning at two to three hours daily and gradually increasing to eight hours a day, with pain his limiting factor with restrictions to his physical

[11] 20 C.F.R. § 10.500(b); *see Ozine J. Hagan*, 55 ECAB 681 (2004).

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5.a(1) (July 1997); *see Lorraine C. Hall*, 51 ECAB 477 (2000).

[13] *Gloria G. Godfrey*, 52 ECAB 486 (2001).

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

[15] *Richard P. Cortes*, 56 ECAB 200 (2004).

[16] 5 U.S.C. § 8123(a); *see Geraldine Foster*, 54 ECAB 435 (2003).

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

activity. As Dr. Gaw provided a well-rationalized opinion, the opinion of his is therefore entitled to the special weight accorded an impartial examiner and therefore constitutes the weight of the medical evidence.[18]

The employing establishment offered appellant a modified mail handler position on June 19, 2000 that comported with the restrictions provided by Dr. Gaw. In a July 24, 2000 report, Dr. Gaw advised that he had reviewed the June 19, 2000 job offer and that appellant was capable of performing the position.

While appellant submitted additional reports from Dr. Law, the Board finds that these are not sufficient to overcome the special weight afforded Dr. Gaw. On August 23, 2000 Dr. Law merely noted appellant's complaint of continued pain and discussed the need for surgery. In a March 28, 2001 affidavit, he advised that he generally agreed with Dr. Gaw's assessment but concluded that appellant was totally disabled and required further medical treatment due to the 1992 employment injury. A subsequently submitted report of a physician on one side of a resolved conflict of medical opinion is generally insufficient to overcome the weight of the impartial medical specialist or to create a new conflict of medical opinion.[19] The Board finds that Dr. Law's subsequent reports reiterate his previous opinion regarding appellant's ability to work and are insufficient to overcome the weight accorded Dr. Gaw as an impartial medical specialist.

In an April 6, 2001 report, Dr. Long noted appellant's history and complaints and offered diagnoses. He, however, did not provide any opinion as to appellant's work capabilities or his ability to perform the offered position.

There is also no evidence of a procedural defect in this case as the Office provided appellant with proper notice. Appellant was offered a suitable position by the employing establishment and such offer was refused. Thus, under section 8106 of the Act, his monetary compensation was properly terminated effective October 8, 2000 on the grounds that he refused an offer of suitable work.[20]

After the Office established that, the offered work was suitable, the burden shifted to appellant to show that his refusal of suitable work was reasonable or justified.[21] Appellant submitted additional reports in which Dr. Law reiterated his prior findings and conclusions, stating on July 3, 2002 that appellant would not be successful returning to his previous job. These reports, too, are insufficient to overcome the special weight accorded Dr. Gaw, as Dr. Law had been on one side of the conflict in medical evidence resolved by Dr. Gaw.[22]

[18] *See Sharyn D. Bannick*, 54 ECAB 537 (2003).

[19] *Richard O'Brien*, 53 ECAB 234 (2001).

[20] *Joyce M. Doll, supra* note 8.

[21] *M.S.*, 58 ECAB 328 (2007).

[22] *Richard O'Brien, supra* note 19.

In reports dated from April 17, 2001 to January 28, 2002, Dr. Long described appellant's status and in an August 26, 2003 affidavit, advised that he had been treating appellant for pain management since April 6, 2001 and opined that appellant could not perform the June 5, 2000 offered position due to chronic pain caused by the November 15, 1992 employment injury. The earlier reports are, however, of diminished probative value as he did not address appellant's ability to perform the offered job and the August 26, 2003 report is also of diminished probative value as the physician did not specifically address appellant's ability to perform the position when offered in June 2000. Appellant submitted no medical evidence subsequent to the August 26, 2003 affidavit from Dr. Long.

On appeal, appellant's attorney asserts that Dr. Gaw was not a referee physician in regard to whether the offered position was suitable. However, the questions posed to Dr. Gaw at the time of appellant's initial referral included whether appellant could perform his usual job and, if not, Dr. Gaw was asked to provide physical restrictions. He was therefore properly designated an impartial examiner in regard to appellant's work capabilities and as to whether the offered position was suitable.

Regarding appellant's argument on appeal that it was insufficient for Dr. Gaw to merely check a question, "yes," indicating that the offered position was suitable, a review of the July 3, 2000 letter to Dr. Gaw eliciting his opinion, noted that a copy of the modified mail handler position was attached and clearly asked if appellant could perform the offered position and he also previously set forth restrictions consistent with the position.

As to appellant's additional argument that, a March 17, 1997 functional capacity evaluation provided additional restrictions, his condition in 1997 is not relevant to whether he could perform the offered position in 2000. Moreover, the functional capacity evaluation was rendered by a physical therapist and section 8101(2) of the Act provides that "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law[23] and lay individuals such as physician's assistants, nurses and physical therapists are not competent to render a medical opinion under the Act.[24] Appellant's reliance on the Board case, *Marcia L. Doble*,[25] is also without merit. In *Doble*, the Board reversed an Office decision terminating appellant's compensation benefits on the grounds that she refused an offer of suitable work. The basis for the reversal, however, was because the offered position did not comply with the restrictions provided by the impartial examiner and in this case Dr. Gaw clearly found the offered position suitable.[26]

[23] 5 U.S.C. § 8101(2); *see Roy L. Humphrey*, 57 ECAB 238 (2005).

[24] *David P. Sawchuk*, 57 ECAB 316 (2005).

[25] Docket No. 97-1204 (issued December 17, 1999).

[26] Regarding appellant's argument that he was not treated by Dr. Gavigan, the record indicates that Dr. Gavigan was referenced in a prior Board decision contained in the record. As there is no indication that Dr. Gaw relied on Dr. Gavigan's opinion, his mere referral to Dr. Gavigan does not rise to the level of reversible error.

An employee who refuses or neglects to work after suitable work has been offered has the burden of showing that such refusal to work was justified.[27] The Board finds that the Office properly terminated appellant's monetary compensation due to his refusal of suitable work and that he did not, thereafter, establish that his refusal of suitable work was justified.

LEGAL PRECEDENT -- ISSUE 2

Section 8103 of the Act provides that the United States shall furnish an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which the Office considers likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of the monthly compensation.[28] While the Office is obligated to pay for treatment of employment-related conditions, the employee has the burden of establishing that the expenditure is incurred for treatment of the effects of an employment-related injury or condition.[29]

In interpreting this section of the Act, the Board has recognized that the Office has broad discretion in approving services provided under section 8103, with the only limitation on the Office's authority being that of reasonableness.[30] Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.[31] To be entitled to reimbursement of medical expenses, a claimant has the burden of establishing that the expenditures were incurred for treatment of the effects of an employment-related injury or condition. Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.[32]

For a surgical procedure to be authorized, a claimant must submit evidence to show that the surgery is for a condition causally related to an employment injury and that it is medically warranted. Both of these criteria must be met in order for the Office to authorize payment.[33]

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[27] 5 U.S.C. § 8106(c)(2).

[28] *Id*. at § 8103; *see L.D.*, 59 ECAB 648 (2008).

[29] *Kennett O. Collins, Jr*., 55 ECAB 648 (2004).

[30] *See D.K.*, 59 ECAB 141 (2007).

[31] *Minnie B. Lewis*, 53 ECAB 606 (2002).

[32] *M.B.*, 58 ECAB 588 (2007).

[33] *R.C.*, 58 ECAB 238 (2006).

ANALYSIS -- ISSUE 2

The Board finds that the weight of the medical evidence regarding the need for cervical surgery rests with the opinions of Dr. Gaw,[34] Dr. McPherson and the Office medical adviser who opined that the cervical surgery was not to treat an employment-related condition and was not medically warranted. Appellant's physician Dr. Law recommended posterior cervical laminectomy and fusion from C2 through T1 with an anterior cervical discectomy and fusion at C5-6 on February 8, 2000 and on August 23, 2000 advised that the surgery was to relieve neurogenic compression. On March 28, 2001 he stated that the surgery would prevent progression of cervical myelopathy, which caused pain and numbness and on August 26, 2003, Dr. Long, an attending pain management specialist, advised that surgery would likely decrease appellant's pain and risk.

The Office's obligation to pay for medical treatment under section 8103 extends only to treatment of employment-related conditions[35] and the accepted conditions in this case are cervical and lumbar strains and chronic pain syndrome.[36] As noted by the Office medical adviser on February 16, 2000, the recommended surgery was not appropriate to treat appellant's accepted conditions of cervical and lumbar strains. Cervical compression and/or myelopathy have not been accepted as employment related. Moreover, while the 1992 work injury may have aggravated appellant's preexisting degenerative disc disease of the cervical spine, neither Dr. Law nor Dr. Long explained why appellant's continued cervical spine problems and the need for surgery were not due to the natural progression of the underlying condition or provided a sufficient explanation addressing the accepted cervical strain and how it contributed to the need for cervical surgery. The medical evidence therefore does not establish that the recommended surgery was to treat an accepted condition.

In order for a surgical procedure to be authorized, a claimant must also submit evidence to show that the surgery is medically warranted.[37] In a March 16, 2000 report, Dr. Gaw, advised that appellants chronic pain syndrome did not get good results from spinal surgery. He stated that he was very leery that it was appropriate for appellant and recommended neurosurgical evaluation before proceeding. Dr. McPherson, a Board-certified neurosurgeon and Office referral physician, advised on May 15, 2000 that the odds that the proposed surgery would be successful were very low and he did not think it a good choice. In this case, the Office obtained the opinions of two second-opinion examiners, Drs. Gaw and McPherson, to ascertain whether the proposed surgery was medically necessary. Neither physician was supportive of the value of the proposed procedure and no medical evidence was received subsequent to Dr. Long's August 26, 2003 report.

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[34] The Board notes that while Dr. Gaw was the referee physician with regard to appellant's work capacity, as the Office had not determined that a conflict had been created regarding the need for surgery, Dr. Gaw was an Office referral physician on the question of the recommended cervical surgery. *See Joseph Roman*, 55 ECAB 233 (2004).

[35] *R.L.*, 60 ECAB ___ (Docket No. 08-833, issued October 6, 2008).

[36] The Board notes that degenerative disc disease of the cervical spine has been accepted by the VA as service connected. *Supra* note 1.

[37] *Id.*

The Board concludes that the medical evidence was insufficient to meet appellant's burden of showing that the proposed surgery was to treat an accepted condition or medically warranted or to establish a conflict in medical opinion and the Office's refusal to authorize the requested cervical surgery was reasonable and did not constitute an abuse of discretion.[38]

CONCLUSION

The Board finds that the Office properly terminated appellant's wage-loss compensation pursuant to 5 U.S.C. § 8106(c) on the grounds that he refused an offer of suitable employment and denied his request for cervical surgery.

ORDER

IT IS HEREBY ORDERED THAT the August 17, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 14, 2011
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

[38] *D.K.*, *supra* note 30; *R.L.*, *supra* note 35.