

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

R.P., Appellant

and

**U.S. POSTAL SERVICE, PROCESSING &
DISTRIBUTION CENTER, Seattle, WA,
Employer**

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**Docket No. 10-875
Issued: March 24, 2011**

Appearances:

*John E. Goodwin, Esq., for the appellant
Office of Solicitor, for the Director*

Oral Argument February 15, 2011

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 17, 2010 appellant filed a timely appeal from the January 14, 2010 merit decision of the Office of Workers' Compensation Programs terminating his compensation. 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 met its burden of proof to terminate appellant's compensation effective July 31, 2009 on the grounds that he refused an offer of suitable work.

FACTUAL HISTORY

In June 2008, the Office accepted that appellant, then a 47-year-old bulk mail technician, sustained chronic sinusitis, nasal cavity polyps and extrinsic asthma due to exposure to dust and fumes in his work environment. It paid compensation for periods of disability.

In a May 12, 2008 report of test results obtained on May 7, 2008, a certified industrial hygienist advised that the dust levels in the employing establishment were measured using two different methods to determine if it should be considered as nuisance dust and/or a health hazard for the employees performing certain tasks. The eight-hour Time-Weighted Average dust levels were measured at five locations inside the building. All locations had a very low level of airborne dust and all of the measured dust levels were below the permissible exposure limit for workers.

In a May 14, 2008 report, Dr. Ernest Weymuller, Jr., an attending Board-certified otolaryngologist, stated that he removed crusting with purulent material from appellant's sinuses. He indicated that appellant reported that, despite attempts to be moved to another location, he was working in an environment that had a significant amount of dust which aggravated his sino-nasal conditions. Dr. Weymuller stated:

“In my opinion, it is certainly appropriate for [appellant] to be making this request and I think all effort should be made to move him out of a dusty environment or, at the very least, to provide him constant protection with face masks and hopefully he can avoid this exposure which certainly is not making it any easier for him to heal up from his surgery.”

In reports dated in mid 2008, Dr. Christine M. Puig, an attending Board-certified otolaryngologist, stated that, due to his chronic sinus disease and allergy condition, appellant should be working in a dust-free environment without chemical fumes or mold. She advised that his sinus and allergic conditions were permanent with periodic flare-ups and recommended that he wear a face mask at work.¹

The Office referred appellant to Dr. Gerald Randolph, a Board-certified otolaryngologist, for further evaluation. It asked Dr. Randolph to address whether the diagnosed conditions were medically connected to the work injury by direct cause, aggravation or precipitation and, if aggravation was indicated, whether it is temporary or permanent. Dr. Randolph was also asked whether wearing a face mask provided by the employer to lessen exposure to inhaled dust would, on a more likely than not basis, allow appellant to work his regular job as a bulk mail technician.

On October 27, 2008 Dr. Randolph reviewed a description of appellant's medical history and reported findings on examination.² He indicated that both Dr. Puig and Dr. Weymuller had recommended that appellant use a face mask in environments that cause his allergies to flare. Dr. Randolph stated, “However, [appellant] states that the face mask is uncomfortable and he develops a claustrophobic sensation with the use of the face mask. Therefore, he refuses to use the face mask.” On physical examination appellant's nose revealed mild posterior naso-septal deflection to the right and obvious surgical changes in the right side of the nose related to prior

¹ Dr. Puig indicated that appellant underwent several sinus surgeries, including a Lothrop frontal sinus surgery procedure in February 2008. This procedure removed the frontal recess of the sinus and a portion of the superior nasal septum to allow for adequate frontal sinus drainage. In October 2001, appellant underwent bilateral revision sphenoidectomy, partial middle turbinate resection and nasal polypectomy.

² Dr. Randolph indicated that appellant first underwent nasal surgery in 1989.

ethmoid surgery. The nasal mucosa was entirely normal, no polyps were visualized and there was no evidence of active infection or current membrane changes related to allergy. Dr. Randolph diagnosed multiple environmental and food allergies by history, allergic rhinitis and recurrent nasal polyposis secondary to allergies and chronic pansinusitis by history secondary to allergic rhinitis and recurrent nasal polyposis.

Dr. Randolph concluded that the accepted diagnoses were medically connected to the work environment by aggravation of appellant's nonwork-related multiple allergy condition. He reported that appellant experienced temporary aggravations of his condition due to dust and vapors in his workplace. Dr. Randolph expected that these aggravations would occur when appellant was "exposed to workplace environmental allergens that would be related to acute exacerbation of his allergic rhinitis." Such aggravations might hasten development of nasal polyps, sinus blockage, sinus infection and the potential need for surgical intervention. Dr. Randolph indicated that after the current normal examination of appellant's nose he could not describe any "injury-related factors of disability at this time." He noted that appellant subjectively complained of headaches but indicated that he did not evaluate headache conditions. With respect to appellant's work restrictions, Dr. Randolph stated:

"[Appellant] should not work in an environment, which would aggravate his inhalant allergy conditions. Normally, the use of a proper face mask would be adequate protection from inhalant allergies. However, [appellant] apparently refuses to utilize the face mask due to his sensation of difficulty breathing and claustrophobia related to the use of a mask."

* * *

"The use of a proper face mask would protect [appellant] from inhaled environmentally present allergens. If he were able to tolerate the face mask, this would allow him to continue his work as a bulk mail technician."³

The Office provided Dr. Randolph with the report of the airborne dust levels measured at the employing establishment in May 2008 and asked for a supplemental opinion. In a March 12, 2009 report, Dr. Randolph noted that the report showed dust levels below levels that would be considered hazardous by the Occupational Safety and Health Administration. He stated:

"[Appellant's] problem would not be so much related to the measured levels of dust and particulate matter in the air as to the degree of [his] allergic response to breathing those things to which he is personally allergic.

"I do not specialize in allergy testing or allergy treatment. My otolaryngology background included the treatment of ear, nose and throat problems that occur as a consequence of [appellant's] allergies. Therefore, review of this material does not change the opinions expressed in my report dated October 27, 2008. Questions regarding [appellant's] allergic response to potential allergens that may

³ In a work restrictions form, Dr. Randolph checked a "no" indicating that appellant could not currently perform his regular work, but stated, "OK, if able to use face mask."

be present in the [employing establishment] should be referred to the appropriate allergy specialist.”

After review of Dr. Randolph’s reports, the employer offered appellant the full-time position of modified bulk mail technician on April 6, 2009. The job involved resolving customer complaints and inquiries and providing mailing options and information to promote customer satisfaction. The offer stated, “This job offer is within the following medical limitations: Using face mask.”

In an April 20, 2009 letter, the Office advised appellant of its determination that the modified bulk mail technician position offered by the employer was suitable. It informed him that his compensation would be terminated if he did not accept the position or provide good cause for not doing so within 30 days of the date of the letter.

In an April 28, 2009 letter, appellant noted that while the job offer indicated he would be allowed to wear a mask, it was the same job that he held when he filed his claim. He stated that he previously attempted to wear a mask at work but experienced difficulty in breathing due to his asthma condition.

In an April 28, 2009 report, Dr. Puig reiterated that appellant had problems with chronic sinusitis, asthma and recurring nasal and sinus polyps exacerbated by his work environment. Appellant’s most recent sinus surgery was April 10, 2008 and he experienced one full year of near disease-free sinus status due to improved breathing conditions facilitated by avoiding a work environment with dust and chemical fumes. Dr. Puig stated that the modified bulk mail technician position was not suitable because it was the same job in the same dusty and chemical fume-filled environment that caused the initial aggravation of his chronic sinusitis, asthma and recurring nasal and sinus polyps. She recommended a position in another field with less exposure to chemical fumes and dust. In a May 8, 2009 report, Dr. Puig stated that appellant was “unable to work wearing a mask for reasons related to upper respiratory reactive airway disease (asthma) and sensation of claustrophobia.”

In a June 25, 2009 letter, the Office advised appellant that his reasons for not accepting the modified bulk mail technician position offered by the employer were unjustified. It informed him that his compensation would be terminated if he did not accept the position within 15 days of the date of the letter. The Office found that there was no medical evidence that appellant had ever been diagnosed with claustrophobia and that this condition prevented him from wearing a face mask. Appellant did not accept the position.

In a July 31, 2009 decision, the Office terminated appellant’s compensation effective July 31, 2009 on the grounds that he refused an offer of suitable work. It indicated that the opinion of Dr. Randolph showed that appellant could perform the position.

Appellant requested a hearing before an Office hearing representative. At the November 4, 2009 hearing, he testified that he thought he would be sent to a dust-free environment and noted that his physician recommended another type of job. Counsel argued that Dr. Randolph failed to accept the facts outlined in the statement of accepted facts in that he did not acknowledge that appellant had several chronic work-related conditions. He maintained that

appellant's refusal of the offered position was based on medical advice. Counsel also questioned whether the Office referral physician should have been a pulmonologist rather than an otolaryngologist.

In a November 5, 2009 report, Dr. Puig reported that overall appellant was doing well, but that he needed to continue avoiding environments that would trigger his allergies.

In a January 14, 2010 decision, the Office hearing representative affirmed the Office's July 31, 2009 decision indicating that the weight of the medical evidence regarding appellant's ability to perform the position offered by the employer continued to rest with the opinion of Dr. Randolph.

LEGAL PRECEDENT

Section 8106(c)(2) of the Federal Employees' Compensation 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."⁴ However, to justify such termination, the Office must show that the work offered was suitable.⁵ An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.⁶

The Board has held that the equivocal or speculative nature of a given medical opinion lessens the probative value of that opinion.⁷ A medical opinion that is not based on a complete and accurate factual and medical history is of limited probative value.⁸

ANALYSIS

In June 2008, the Office accepted that appellant sustained chronic sinusitis, nasal cavity polyps and extrinsic asthma due to exposure to dust and fumes in his work environment. It paid him compensation for periods of disability. On April 6, 2009 the employer offered appellant the full-time position of modified bulk mail technician.⁹ The job offer stated, "This job offer is within the following medical limitations: Using face mask." The Office determined that the job was suitable based on the October 27, 2008 and March 12, 2009 reports of Dr. Randolph, a Board-certified otolaryngologist who served as an Office referral physician. Appellant refused the position and the Office terminated his compensation effective July 31, 2009 for refusing suitable work.

⁴ 5 U.S.C. § 8106(c)(2).

⁵ *David P. Camacho*, 40 ECAB 267, 275 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341, 345 (1981).

⁶ 20 C.F.R. § 10.124; *see Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

⁷ *See Leonard J. O'Keefe*, 14 ECAB 42, 48 (1962); *James P. Reed*, 9 ECAB 193, 195 (1956).

⁸ *Donna Faye Cardwell*, 41 ECAB 730, 741-42 (1990).

⁹ The job involved resolving customer complaints and inquiries and providing mailing options and information to promote customer satisfaction.

On appeal, counsel asserted that the Office had not shown that the modified bulk mail technician offered by the employer was suitable. Therefore, the Office had not supported its termination of appellant's compensation effective July 31, 2009 for refusing suitable work. Appellant argued that Dr. Randolph's opinion was of limited probative value because he did not acknowledge that appellant's work-related sinus, allergic and asthma conditions were chronic in nature. Counsel also asserted that the evidence established that appellant was not able to wear a face mask for medical reasons, could not perform the modified bulk mail technician position and had been asked to return to the same environment which caused his original problem.

The Board finds that medical evidence does not establish that appellant is capable of performing the modified bulk mail technician position offered by the employer in April 2009 and determined by the Office to be suitable.¹⁰ In finding that appellant was capable of performing the modified bulk mail technician position, the Office relied in the opinion of Dr. Randolph.

In an October 27, 2008 report, Dr. Randolph diagnosed multiple environmental and food allergies by history, allergic rhinitis and recurrent nasal polyposis secondary to allergies and chronic pansinusitis by history secondary to allergic rhinitis and recurrent nasal polyposis.¹¹ He noted that Dr. Puig and Dr. Weymuller, two attending Board-certified otolaryngologist, had recommended that appellant use a face mask in environments that cause his allergies to flare. Dr. Randolph provided an opinion that appellant could perform his regular bulk mail technician position if he could tolerate wearing a mask.

The Board finds that Dr. Randolph's opinion on appellant's ability to perform the modified bulk mail technician position is equivocal and speculative in nature. Therefore, his opinion on this matter is of limited probative value.¹² Dr. Randolph's opinion is rendered equivocal by the fact that he did not provide a clear opinion regarding whether appellant's medical condition would allow him to wear a mask on a regular basis. He advised that appellant reported having trouble breathing while wearing a mask. Given that appellant had extrinsic asthma, chronic sinusitis and other conditions that might affect his breathing, Dr. Randolph did not adequately explain the effect these conditions had on appellant's ability to tolerate wearing a face mask.¹³

Dr. Randolph's opinion on appellant's ability to perform the modified bulk mail technician position is also rendered speculative by his March 12, 2009 report. He noted that appellant's problem would not be so much related to the measured levels of dust and particulate matter in the air as to the degree of his allergic response to breathing those matters to which he

¹⁰ The Board notes that there is no indication that the modified bulk mail technician position was temporary or seasonal in nature *see* Federal (FECA) Procedure Manual, Part 2 -- Claim, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4b (July 1997).

¹¹ Dr. Randolph concluded that the accepted diagnoses were medically connected to the work environment by aggravation of his nonwork-related multiple allergy condition.

¹² *See supra* note 7.

¹³ The record contains evidence in which a medical reason is advanced for appellant's inability to wear a mask. In a May 8, 2009 report, Dr. Puig stated that appellant was "unable to work wearing a mask for reasons related to upper respiratory reactive airway disease (asthma) and sensation of claustrophobia."

was allergic.¹⁴ Dr. Randolph suggested that appellant would not be able to tolerate even the relatively low levels of allergens found in his workplace without wearing a mask. He further advised that he was not able to provide fully informed opinion on such matters by stating, “I do not specialize in allergy testing or allergy treatment. My otolaryngology background included the treatment of ear, nose and throat problems that occur as a consequence of [appellant’s] allergies.... Questions regarding [appellant’s] allergic response to potential allergens that may be present in the employing establishment should be referred to the appropriate allergy specialist.”¹⁵ Dr. Randolph’s reports do not resolve the question of whether appellant’s allergic conditions allow him to perform the modified bulk mail technician position.¹⁶

For these reasons, the medical evidence is not sufficient to establish that the modified bulk mail technician position offered by the employer was suitable. The Office improperly terminated appellant’s compensation effective July 31, 2009 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 July 31, 2009 on the grounds that he refused an offer of suitable work.

¹⁴ The Office had provided Dr. Randolph with findings of dust measurements in appellant’s workplace.

¹⁵ Dr. Randolph indicated that he was not changing the opinion contained in his October 27, 2008 report, but it appears that he was only referring to matters within his competence to render an opinion.

¹⁶ Moreover, Dr. Randolph’s opinion does not appear to be based on a complete and accurate factual and medical history. *See supra* note 8. The Office accepted that work factors caused chronic sinusitis, nasal cavity polyps and extrinsic asthma, but Dr. Randolph did not adequately acknowledge the chronic nature of appellant’s medical condition, particularly his asthma and sinusitis.

ORDER

IT IS HEREBY ORDERED THAT the January 14, 2010 decision of the Office of Workers' Compensation Programs is reversed.

Issued: March 24, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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