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

| | | |
|---|---|---|
| **T.H., Appellant** | ) | |
| **and** | ) | **Docket No. 10-1785** |
| | ) | **Issued: May 3, 2011** |
| **U.S. POSTAL SERVICE, POST OFFICE, Tulsa, OK, Employer** | ) | |

*Appearances:*
*Appellant, pro se*
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

### ***JURISDICTION***

On June 24, 2010 appellant filed a timely appeal from the Office of Workers' Compensation Programs' May 25, 2010 merit decision terminating her wage-loss benefits on the grounds that she refused an offer of suitable work. Pursuant to the Federal Employees' Compensation Act[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

### ***ISSUE***

The issue is whether the Office properly terminated appellant's compensation effective June 6, 2010 on the grounds that she refused an offer of suitable work.

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that appellant submitted additional evidence on appeal. The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. Therefore, this additional evidence cannot be considered by the Board. 20 C.F.R. § 501.2(c); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).

On appeal, appellant contends that the report of the impartial medical examiner was insufficient to meet the Office's burden of proof.

## ***FACTUAL HISTORY***

On March 8, 2007 appellant, then a 57-year-old clerk, filed an occupational disease claim alleging that she sustained injuries to her cervical and lumbar spine due to her employment activities. The Office accepted her claim for sprains of the cervical and lumbar spines and aggravation of degenerative cervical and lumbosacral intervertebral disc disease.

Appellant was treated by Dr. Gerald Snider, a Board-certified family practitioner. On June 5, 2007 Dr. Snider provided a history of injury and examination findings. He noted that appellant's functional capacity was significantly compromised. Cervical range of motion was restricted to 108 degrees of flexion to 0 degrees of extension. Testing revealed below-normal extension strength levels. Appellant demonstrated significant cervical pain and somatic dysfunction, as well as secondary cephalgia and degenerative disc disease at multiple levels of the cervical and lumbar areas, which Dr. Snider attributed to the work-related injury.

On July 7, 2007 Dr. Snider opined that appellant could work an eight-hour day. Appellant was restricted, however, from lifting, pulling or pushing more than 15 pounds, prolonged or repetitive lifting, forward bending, pushing or pulling, standing more than 120 minutes or walking more than 30 minutes.

On July 9, 2007 appellant attempted to return to work at the employing establishment in a position as a modified mail processor, which encompassed restrictions provided by Dr. Snider. After performing her duties for two hours, she stopped working due to significant pain. On July 19, 2007 Dr. Snider opined that appellant was temporarily totally disabled.

In an October 22, 2007 report, Dr. William D. Smith, a Board-certified orthopedic surgeon and Office referral physician, diagnosed degenerative cervical and lumbar disc disease, which he judged to be secondary in part to the accepted work injury. On physical examination, he found palpable cervical and lumbar tenderness. Cervical rotation and dorsolumbar motion were limited by 50 percent. Appellant was able to perform toe and heel walking well. February 20, 2007 radiographs of the cervical and lumbar spine revealed subtle changes of degenerative disc disease at both levels. Magnetic resonance imaging (MRI) scans of the lumbar spine and cervical spine confirmed degenerative cervical and lumbar disc disease. Dr. Smith opined that the diagnosed conditions were aggravated by the accepted work injury and were permanent in nature. He stated that appellant was not capable of working as a modified mail processor, but that she was able to work in a part-time position, 4 hours per day with maximum restrictions of sitting for 1 hour; walking and standing for 30 minutes; and pushing, pulling and lifting 4 hours. Appellant was precluded from twisting, bending, stooping, driving, squatting, kneeling, climbing or reaching above shoulder level.

On March 17, 2008 Dr. Snider stated that appellant was unable to perform any meaningful work because she had to lie down every 10 to 30 minutes to relieve pain.

The Office found a conflict in medical opinion between Dr. Smith and Dr. Snider as to whether appellant was disabled from working due to her accepted injury and, if so, the nature of work restrictions under which she could perform employment. It referred appellant, together with a statement of accepted facts, a list of questions and the medical record, to Dr. Sami R. Framjee, a Board-certified orthopedic surgeon, for an impartial medical evaluation.

In a September 24, 2008 report, Dr. Framjee reviewed the history of employment and appellant's medical treatment and provided examination findings. X-rays revealed minor degenerative changes at C4-7, with no evidence of disc herniation in the cervical or lumbar spine. A report of a magnetic resonance imaging (MRI) scan showed a bulging disc at C3-4. Sensory examination of the right and left upper extremities revealed no neural deficits. On range of motor testing of the cervical spine, appellant demonstrated forward flexion to 50 degrees, right and left flexion to 40 degrees, right and left rotation to 80 degrees. Examination of the thoracolumbar spine revealed lumbar lordosis and no point tenderness on palpation. Forward flexion was to 80 degrees, extension was to 20 degrees and right and left flexion was to 30 degrees. Dr. Framjee stated that the degenerative changes to appellant's cervical and lumbar spine were incidental to, and not secondary to, the accepted injury. He opined that appellant had no residuals from the accepted injury and that she could return to her date-of-injury job with lifting restrictions of 20 pounds.

On October 22, 2008 the Office determined that Dr. Framjee's report should be considered a second opinion on the issue of whether she had residuals of her accepted condition. It further found that Dr. Framjee's opinion created another conflict with Dr. Snider's report as to whether appellant could return to her original position.

On October 27, 2008 the Office informed appellant that it was referring her to Dr. Christopher Jordan, a Board-certified orthopedic surgeon, for a second opinion evaluation and to Don Stover for a physical therapy evaluation. In a November 11, 2008 report, Dr. Jordan provided examination findings and reviewed radiology reports. On examination of the cervical and lumbar spine, there were no spasms or pain with palpation or extension. A May 1, 2007 MRI scan revealed a bulge at C3-4. A lumbar MRI scan was normal, but for decreased signal intensity, which was indicative of disc dehydration and slight narrowing at L5-S1. Dr. Jordan opined that the changes reflected on the MRI scans were more degenerative than traumatic. He assumed that appellant's limitations were due to her accepted work activities, because she had no history of any other injury or problems that would explain her symptoms. Dr. Jordan opined that appellant was able to work in a part-time, sedentary position. The record also contains a December 22, 2008 report of a functional capacity evaluation performed by Mr. Stover, who opined that appellant should be able to safely function at a light-medium job with restrictions.

On February 26, 2009 appellant returned to work in a position as a modified mail processor. She stopped working after one hour due to pain. On March 2, 2009 Dr. Snider opined that appellant was unable to work in any position requiring physical activity and was temporarily totally disabled. He reported that she experienced increased back pain and spasms due to constant twisting activities when she returned to work casing mail.

On March 13, 2009 the Office referred appellant, together with a statement of accepted facts, to Dr. C.L. Soo, a Board-certified orthopedic surgeon, for an impartial medical evaluation

and an opinion to resolve the conflict in medical opinion as to her work capabilities.[3] In an April 16, 2009 report, Dr. Soo noted appellant's accepted conditions as "lumbar." He provided a history of injury and treatment and examination findings. Dr. Soo found good range of motion in the cervical spine, tenderness in the right upper trapezius area to the right intrascapular region, and no sensory deficit. Strength was 5/5 from C5 to T1. There was general tenderness in the lumbosacral junction and increased pain with extension and flexion. Strength was 5/5 from L2 to S1, with no sensory deficit. Gait was normal, and there was no clonus or Babinski sign. X-rays of the cervical spine showed a spur over C5-6 and C6-7. The MRI scans showed cervical degeneration over C5-6 and multiple lumbar degenerative changes, both without significant nerve impingement. Dr. Soo stated that appellant's condition "probably is most likely to be a cervical degenerative disc disease and lumbar degenerative disc disease." He indicated uncertainty as to whether she could ever return to work because he did not believe that a patient who had been off work for two years could ever go back to work.

In an April 16, 2009 addendum to his original report, Dr. Soo stated that the bone spur at C5-7 and the evidence of multiple lumbar degenerative discs all suggested continuation of cervical and lumbar intervertebral disc disease. He opined that appellant had continuing residuals from her accepted injury. Dr. Soo required, however, a new functional capacity examination to determine whether appellant could work full or part time at a regular sedentary, light- or limited-duty job.

On November 20, 2009 Dr. Snider reported positive straight leg raising. Appellant had marked lower pericervical and perilumbar tenderness with mild muscle spasms and limited range of motion in the back, secondary to pain. She was unable to sit or stand for any period of time without pain. Dr. Snider opined that appellant was unable to return to work due to her job injury.

On December 11, 2009 Dr. Soo reported the results of a functional capacity evaluation (FCE), performed on that date by Holly Goodson. Pursuant to the report, appellant could perform a job involving a light level of work eight hours per day, based upon the results of the September 1994 Journal of Occupational Medicine. In accordance with the FCE, Dr. Soo recommended restrictions restricting lifting from floor to waist to less than three hours per day, lifting waist to eye level less than 17 pounds, three hours per day, carrying with both hands less than 25 pounds, three hours per day, sitting, walking, standing or repetitive truck rotation less than six hours per day, raising her arm above the head, standing, bending over, stooping and climbing stairs less than three hours per day. Appellant was not permitted to kneel or squat. The FCE reflected that she exhibited significant self-limited behavior during the evaluation.

On February 13, 2010 appellant disagreed with Dr. Soo's reports. She contended that no conflict existed between the opinions of Dr. Smith and Dr. Snider, as both physicians opined that she was unable to perform the duties of her date-of-injury job.

In a March 1, 2010 work capacity evaluation, Dr. Soo indicated that appellant could perform the duties of a job involving a light level of work, eight hours a day with the following permanent restrictions: sitting, walking, standing, twisting -- six hours; reaching and reaching

[3] The Board notes that the Office determined that Dr. Jordan had been identified as a second opinion. Therefore, his report could not serve as a referee report and was insufficient to resolve the conflict in medical opinion.

above shoulder level -- three hours; pushing and pulling no more than 25 pounds -- three hours; lifting no more than 17 pounds -- three hours; climbing -- three hours; and no bending, stooping, kneeling or squatting.

On March 2, 2010 the Office informed appellant that, due to the time delay in receiving Dr. Soo's report, appellant was being referred to Dr. Bernie McCaskill, a Board-certified orthopedic surgeon, for another impartial medical examination. On March 8, 2010 appellant objected to being examined by Dr. McCaskill, stating that his office was too far from her residence. In a letter dated March 9, 2010, the Office informed appellant that she would not be required to attend the appointment with Dr. McCaskill. It stated: "After further review, the medical report received from Dr. Soo was objective and a final ruling will be made based on this report."

On March 10, 2010 the Office informed appellant that Dr. Soo's report represented the weight of the medical evidence and established that she was capable of working light duty with restrictions. By letter of the same date, it asked the employing establishment to prepare a job offer in keeping with Dr. Soo's restrictions.

On March 15, 2010 the employing establishment offered appellant a position as a modified clerk, six hours per day. The position required six hours of casing manual letters, six hours of casing flats, and two hours of stand-by time, as needed. The job also required the ability to stand, walk and sit intermittently for six hours; reach above the shoulder for three hours per day, push and pull a maximum of 25 pounds and lift a maximum of 17 pounds, less than three hours per day.

In statements received by the Office on March 17 and April 2, 2010, appellant contended that Dr. Soo's report was not well rationalized, was internally inconsistent and did not address all of her accepted conditions. In a March 23, 2010 report, Dr. Snider reiterated his opinion that appellant was unable to work in her date-of-injury job due to the effects of her accepted employment injury. On March 29, 2010 appellant responded to the employing establishment's offer, stating that she was unable to accept or decline the position at that time, as she was "waiting on [her] appeal."

On April 6, 2010 the Office informed appellant that the modified clerk position offered by the employing establishment on March 15, 2010 was suitable in accordance with the medical restrictions set by Dr. Soo. It confirmed that the position was still available for acceptance. The Office stated that, within 30 days, appellant must either accept the position or provide a written explanation of her reasons for declining it, explaining that her compensation would be terminated if she declined the position without justification.

On April 10, 2010 appellant informed the Office that she was physically unable to perform the duties of the modified clerk position because the required repetitive motion, bending and lifting caused back strain and muscle spasms. On April 18, 2010 she reiterated her criticism of Dr. Soo's report on the grounds that he contradicted himself regarding her ability to work, that he did not review the entire file and did not obtain a clear x-ray. Appellant also contended that her claim should be accepted for the additional condition of subluxation.

On April 23, 2010 appellant informed the Office that she received a compact disc which contained the documents reportedly sent to Dr. Soo for his review. She noted that Dr. Soo did not receive any report from Dr. Snider, who was on one side of the conflict he was asked to resolve.

By letter dated May 6, 2010, the Office informed appellant that her reasons for declining the modified position were not valid. It provided her 15 days to accept the position without penalty and informed her that no further reason for refusal would be accepted.

By decision dated May 25, 2010, the Office terminated appellant's compensation benefits effective June 6, 2010 for failure to accept suitable employment, finding that she had provided no valid reason for her failure to do so. It also found that Dr. Soo's report "resolved the conflict and bears the weight of medical that [she could] return to work in a limited-duty position for eight hours per day."

## ***LEGAL PRECEDENT***

The Office has authority under section 8106(c)(2) of the Act to terminate compensation for any partially disabled employee who refuses or neglects suitable work when it is offered.[4] The Board has recognized that section 8106(c) serves as a penalty provision as it may bar an employee's entitlement to future compensation and, for this reason, will be narrowly construed.[5] Before compensation can be terminated the Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work, and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position. In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), the Office has the burden of showing that the work offered to and refused by appellant was suitable.[6]

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.[7] It is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.[8] 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.[9]

[4] 5 U.S.C. §§ 8101-8193, 8106.

[5] *Stephen A. Pasquale*, 57 ECAB 396 (2006).

[6] *M.L.*, 57 ECAB 746 (2006).

[7] 20 C.F.R. § 10.500(b).

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

[9] *Id*.; *Bryant F. Blackmon*, 56 ECAB 752 (2005).

## ***ANALYSIS***

The Board finds that the Office improperly terminated appellant's compensation benefits on the grounds that she refused an offer of suitable work. The Office referred her to Dr. Soo to resolve a conflict in medical opinion as to whether she was able to return to work and, if so, in what capacity.[10] Dr. Soo's reports, however, were insufficient to resolve the conflict. Therefore, the Office improperly relied on his opinion when determining that the position offered by the employing establishment constituted suitable employment.

Dr. Soo's April 16, 2009 report is deficient on several counts. While he provided minimal examination findings, he did not provide range of motion measurements, as requested by the Office. Dr. Soo provided an inaccurate factual background, noting the accepted condition as "lumbar." Most significantly, he failed to offer a definitive opinion as to whether appellant was capable of returning to work. Rather, Dr. Soo expressed doubt as to whether she could ever return to work because he did not believe that a patient who had been off work for two years could ever go back to work. His opinion is speculative at best and does not support the Office's decision to terminate appellant's benefits.[11] In his April 16, 2009 addendum, Dr. Soo opined that appellant had continuing residuals from her accepted injury, but stated that he was unable to make a determination as to whether she could return to work based upon the information available to him. Neither of these reports is sufficient to establish that appellant has the physical ability to perform the modified position offered by the employing establishment.

On January 11, 2009 Dr. Soo reported the results of a December 11, 2009 FCE, which reflected that appellant could perform a job involving a light level of work eight hours per day based upon the results of the September 1994 Journal of Occupational Medicine. He recommended restrictions as delineated in the FCE. Dr. Soo did not, however, explain why he relied on the results of the FCE, or his interpretation of the impact of the proposed restrictions on appellant's level of disability. Such a discussion is particularly relevant in light of his previous expression of concern that appellant would never be able to return to work. Dr. Soo essentially repeated the contents of the FCE, without rationale. Medical conclusions unsupported by rationale are of little probative value.[12]

The Board also notes that Dr. Soo's March 1, 2010 work capacity evaluation contained restrictions which varied somewhat from those contained in his December 11, 2009 report. For example, on December 11, 2009 he opined that appellant could bend and stoop three hours per day. Yet, without explanation on March 1, 2010, Dr. Soo concluded that she could perform no tasks involving bending or stooping. Such inconsistencies diminish the probative value of his reports. The Board notes that Dr. Soo did not have an opportunity to review the position

[10] The Board notes appellant's contention that there was no conflict between Dr. Smith and Dr. Snider as they both opined that she was unable to perform her date-of-injury job. The conflict, however, arose from the physicians' disagreement as to the degree of appellant's disability and restrictions under which she would be able to work.

[11] The Board has held that medical opinion evidence such as this, which is couched in speculative language, is of diminished probative value. *Kathy A. Kelley*, 55 ECAB 206, 211 (2004).

[12] *Willa M. Frazier*, 55 ECAB 379 (2004).

description for the job offered by the employing establishment in order to render an opinion as to whether appellant could perform the required duties.

As Dr. Soo's reports were insufficiently rationalized to form a valid basis for the Office's work suitability determination, there remains an unresolved conflict in medical opinion. Therefore, the Office failed to meet its burden of showing that the work offered to and refused by appellant was suitable.[13]

## ***CONCLUSION***

The Board finds that the Office improperly terminated appellant's compensation benefits on the grounds that she refused an offer of suitable work.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the May 25, 2010 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 3, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

[13] *M.L., supra* note 6.