

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

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A.R., Appellant	)	
	)	
and	)	<b>Docket No. 10-1835</b>
	)	<b>Issued: May 23, 2011</b>
U.S. POSTAL SERVICE, POST OFFICE,	)	
City of Industry, CA, Employer	)	
	)	

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*Appearances:*  
Stephen Millard, for the appellant  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On July 7, 2010 appellant, through her representative, filed a timely appeal of a May 25, 2010 Office of Workers' Compensation Programs' termination decision. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

**ISSUES**

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation benefits effective July 16, 2008 on the grounds that she refused suitable work; and (2) whether appellant has established any continuing employment-related disability on or after July 16, 2008.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On June 6, 2001 appellant filed a traumatic injury claim alleging that she injured her lower back when the rest bar she was using collapsed causing her to fall. The Office accepted this claim for lumbar strain on June 13, 2001.

On November 15, 2004 appellant, then a 44-year-old manual clerk, filed a traumatic injury claim alleging that she injured her hand, elbow, back, right foot and toes when a coworker pulled a soda bottle from between her fingers. The Office accepted her claim for lumbar sprain on April 7, 2005. It expanded appellant's claim to include bilateral brachial neuritis or radiculitis, displacement of lumbar disc without myelopathy, and degeneration of lumbar disc.

By decision dated February 14, 2007, the Office denied appellant's claim for a schedule award under her 2001 back injury claim. This decision was reversed by the Branch of Hearings and Review on May 15, 2007.

Appellant's attending physician, Dr. Brian D. Rothi, a Board-certified orthopedic surgeon, completed a report on March 14, 2007 and related appellant's history of injury on June 5, 2001 as well as November 12, 2004. He opined that appellant's employment injuries resulted in a disc herniation at L5-S1. Dr. Rothi stated that appellant required a ride to work and was unable to drive herself. He opined that appellant was totally disabled due to disc prolapse and her inability to perform prolonged driving. On May 25, 2007 Dr. Rothi listed appellant's restrictions as no repetitive bending, twisting or stooping and no lifting over 10 pounds.

Dr. Philip Wirganowicz, a Board-certified orthopedic surgeon and Office second opinion physician, completed a report on June 11, 2007. He examined appellant and found that she was over reactive with examination indicating pain on light palpation in a nondermatomal pattern and decreased sensation in all extremities in a nondermatomal pattern as well as volitional giving way and muscular testing. Dr. Wirganowicz opined that appellant could return to her date-of-injury position.

Dr. Rothi completed a report on July 12, 2007 disagreeing with Dr. Wirganowicz's findings. He opined that appellant had additional upper extremity findings as well as more significant findings in the low back. Dr. Rothi alleged that Dr. Wirganowicz was biased and stated that appellant had not yet reached maximum medical improvement in regard to her back condition. On July 17, 2005 he determined that appellant had reached maximum medical improvement and offered an impairment rating of 23 percent of the whole person.

The Office referred appellant, along with a statement of accepted facts and list of specific questions to Dr. John Santaniello, a Board-certified orthopedic surgeon, for an impairment medical examination. It noted that appellant had other claims accepted for bilateral lateral epicondylitis, bilateral carpal tunnel syndrome and contusions of the left ankle and lower leg. In his October 30, 2007 report, Dr. Santaniello reviewed the medical records and the statement of accepted facts. He opined that the June 5, 2001 fall resulted in a permanent impairment of the L5-S1 disc and that the November 12, 2004 injury resulted in a temporary aggravation of the lumbar spine condition. Dr. Santaniello opined that appellant's lumbar disc condition worsened due to appellant's job requirement of frequent bending and lifting of up to 25 pounds. He stated that appellant could not return to full-duty work and that she would require further medical care due to her herniated disc. Dr. Santaniello completed a work capacity evaluation and indicated

that appellant could work four hours a day with four hours of sitting, walking, standing, reaching, reaching above the shoulder, twisting, but one hour of bending and stooping. He found that appellant could operate a motor vehicle. Dr. Santaniello indicated that appellant could perform no repetitive movements of the wrists and elbows and that she could push, pull and lift up to 10 pounds for one hour each. He found that appellant could squat for four hours, could not kneel and could climb for one hour with five-minute breaks every hour.

The employing establishment offered appellant a light-duty assignment on December 11, 2007 which required four hours of working postage due mails with one hour of pushing and pulling, one hour of lifting less than 10 pounds and four hours of sitting, standing and walking.

On December 27, 2008 Dr. Rothi disagreed with Dr. Santaniello's finding that if appellant could ride in a car she could drive. He stated that, while a passenger could assume any position of comfort, a driver was required to use the legs in a flexed position putting traction on the nerve roots. Dr. Rothi stated that appellant was unable to perform the offered job because of the demands for prolonged sitting and standing as well as repetitive manipulative activities of both upper extremities.

Appellant declined the offered position on December 27, 2007. Dr. Rothi disapproved of the position on February 21, 2008 and stated that the job required wrist and elbow use.

By decision dated January 4, 2008, the Office denied appellant's claim for a schedule award due to her accepted back injuries.

The employing establishment responded on February 29, 2008 and stated that the postage due mails job offer was extremely light work and not considered repetitive. The employing establishment stated that appellant was allowed to work at her own pace, grasping a handful of mail, examining each piece, weighing the mail and determining postage due. Appellant would then grasp a stamper, stamp the envelope, write down the postage due on the envelope and place the envelope in a tray. She would handle parcels in the same manner, but the boxes would weigh no more than 10 pounds. Appellant had the option to sit or stand while performing this task. On March 25, 2008 the employing establishment provided additional information regarding the offered position, noting that there were no time requirements for processing each envelope and that she could work at her own pace. On March 25, 2008 the claims examiner discussed the position with the employing establishment and noted that the position was still available.

The Office requested that the district medical adviser comment on the suitability of the position. In a note dated April 7, 2008, the district medical adviser stated, "I have no idea what is meant by 'repetitive' use. It would seem that the claimant would be able to do the work if allowed to self-pace without productions expectations."

In a letter dated April 22, 2008, the Office informed appellant that the offered position was suitable and allowed her 30 days for a response. Appellant submitted a report dated May 2, 2008 from Dr. Rothi noting that appellant did not believe that she could perform the position. Dr. Rothi stated that appellant had a limited sitting tolerance of less than one hour. He noted repetitive movements of the hand, wrist and elbow were required. Dr. Rothi noted that he disagreed with Dr. Santaniello's findings that appellant could sit for four hours a day and could reach above the shoulder for four hours a day. He completed a work capacity evaluation and limited appellant's sitting to less than one hour, walking to 10 minutes and standing to 10

minutes with no reaching above the shoulder. Counsel responded on May 21, 2008 and stated that appellant could not perform the position with repetitive movements of the wrists and elbows.

On June 3, 2008 the Office noted that appellant had refused the offered position and stated that appellant's reasons were not acceptable. It provided appellant 15 days to accept the position.

In a telephone memorandum dated July 9, 2008, the employing establishment stated that appellant had not returned to work.

By decision dated July 16, 2008, the Office terminated appellant's wage-loss and schedule award compensation benefits on the grounds that she refused an offer of suitable work. It reviewed the accepted conditions and additional claims and found that Dr. Santaniello's report was entitled to the weight of the medical evidence and established that appellant could work four hours a day with restrictions. The Office found that the employing establishment had offered a suitable work position and that appellant did not accept the position as advised by letters dated April 22 and June 3, 2008.

Appellant requested an oral hearing on July 30, 2008. She submitted a report dated September 19, 2008 from Dr. Rothi opining that appellant's condition had significantly worsened since the July 17, 2007 evaluation and that she was not employable. Appellant testified on November 18, 2008 that she had previously performed the suitable work position. She stated that she lifted up to 15 pounds of mail in a tray and then sorted the individual letters, weighed them, stamped each letter and wrote the correct postage amount on the envelope. Appellant stated that there was no time frame, but that she had to press the stamp in the ink pad and then firmly press on the envelope. She stated that she did 20 letters in five minutes.

The Branch of Hearings and Review issued a decision on February 17, 2009 and affirmed the Office's July 16, 2008 decision finding that appellant would not be required to perform repetitive activities as she could work at her own pace.

In a report dated March 30, 2009, Dr. Santaniello noted that appellant had described her offered position and that appellant had alleged that stamping each letter was repetitive and would cause her harm. He opined that the stamping motion did not require repetitive flexion-extensions of the wrist and could be done with the wrist in a neutral position. Dr. Santaniello stated that the modified job offer would not result in injury to the wrist or elbow.

Appellant, through her attorney, requested reconsideration on May 12, 2009 and alleged that the offered position did not comport with appellant's work restrictions. By decision dated June 19, 2009, the Office reviewed the merits and denied modification of the February 17, 2009 decision.

Counsel requested reconsideration on August 26, 2009 and alleging the position offered was ambiguous suggesting that appellant might be required to work more than four hours a day. The Office denied modification of its prior decision on November 19, 2009.

On March 2, 2010 appellant again requested reconsideration and submitted arguments from counsel. By decision dated May 25, 2010, the Office declined to modify the July 16, 2008

decision terminating her compensation benefits for refusing an offer of suitable work. It reviewed counsel's arguments and found that they lacked merit.

### **LEGAL PRECEDENT -- ISSUE 1**

It is well settled that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>2</sup> As in this case it terminated appellant's compensation under 5 U.S.C. § 8106(c), the Office must establish that appellant refused an offer of suitable work. Section 8106(c) of the Act<sup>3</sup> 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 of the applicable regulations<sup>4</sup> provides 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 showing before a determination is made with respect to termination of entitlement to compensation. To justify termination of compensation, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.<sup>5</sup>

### **ANALYSIS -- ISSUE 1**

The Office had accepted that appellant sustained several employment-related injuries including lumbar strain and bilateral brachial neuritis or radiculitis, displacement of lumbar disc without myelopathy and degeneration of lumbar disc. In separate claims, it accepted bilateral lateral epicondylitis, bilateral carpal tunnel syndrome and contusions of the left ankle and lower leg.

Appellant's attending physician, Dr. Rothi, submitted a series of medical reports opining that appellant was disabled for work. The Office referred appellant to Dr. Wirganowicz for a second opinion evaluation. Dr. Wirganowicz determined that appellant could return to her date-of-injury position. When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of the Act which 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 and resolve the conflict of medical evidence.<sup>6</sup> This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.<sup>7</sup> Due to this disagreement between physicians regarding the extent of appellant's disability for work, the Board finds that the Office properly determined that there was a conflict of medical opinion evidence which required

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<sup>2</sup> *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

<sup>3</sup> 5 U.S.C. § 8106(c)(2).

<sup>4</sup> 20 C.F.R. § 10.517(a).

<sup>5</sup> *Arthur C. Reck*, 47 ECAB 339, 341-342 (1995).

<sup>6</sup> 5 U.S.C. §§ 8101-8193, 8123; *B.C.*, 58 ECAB 111 (2006); *M.S.*, 58 ECAB 328 (2007).

<sup>7</sup> *R.C.*, 58 ECAB 238 (2006).

referral to an impartial medical examiner. The Office referred appellant to Dr. Santaniello, a Board-certified orthopedic surgeon, to determine appellant's work abilities. Dr. Santaniello concluded that she could work four hours a day sitting, walking, standing, reaching, reaching above the shoulder, twisting for four hours each. He limited appellant to one hour of bending and stooping. Dr. Santaniello found that she could not perform repetitive movements of the wrists and elbows but that she could push, pull and lift up to 10 pounds for 1 hour each. He restricted appellant to squatting for four hours, climbing for one hour and no kneeling. Dr. Santaniello determined that she required a five-minute break every hour.

In situations where there are opposing medical reports of virtually equal weight and rationale, and 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.<sup>8</sup> The Board finds that Dr. Santaniello's report was based on a proper factual background and offered clear reasoning in support of his work restrictions. This report is entitled to the special weight of the medical evidence.

The employing establishment offered appellant a light-duty position based on the restrictions provided by Dr. Santaniello. This position required four hours of working postage due mails with one hour of pushing and pulling, one hour of lifting less than 10 pounds and four hours of sitting, standing and walking. The employing establishment further explained the work duties noting that appellant would be allowed to work at her own pace, grasping a handful of mail, examining each piece, weighing the mail and determining postage due. Appellant would then grasp a stamper, stamp the envelope, write down the postage due on the envelope and place the envelope in a tray.

Dr. Rothi stated that appellant was unable to perform the offered job because of the demands for prolonged sitting and standing as well as repetitive manipulative activities of both upper extremities. The district medical adviser stated that she did not know what was meant by repetitive use and suggested that if appellant was allowed to self-pace without production requirements the position would be suitable.

The Board finds, however, that the Office failed to meet its burden of proof in establishing that the offered position was consistent with the work restriction as established by the impartial medical specialist. Appellant and her physician raised a concern regarding the repetitive nature of the offered work position which entailed complicated activities of her hands and arms with no other duties offered. The position description as provided by the employing establishment establishes that appellant would, during the four hours that she worked, be required to separate individual envelopes, weigh them, stamp the envelopes with the appropriate stamp and note the postage due by handwriting an amount on the envelope. The medical evidence as submitted by Dr. Rothi did not support the suitability of the position and the remainder of the medical evidence was ambiguous or failed to address the specific issue of what constituted repetitive activity of appellant's wrists and elbows as prohibited by Dr. Santaniello.

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<sup>8</sup> *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

The Board finds that as the medical evidence did not clearly establish that the position was within appellant's work restrictions as established by Dr. Santaniello, the Office failed to meet its burden of proof to terminate appellant's compensation benefits.<sup>9</sup>

**CONCLUSION**

The Board finds that the Office failed to meet its burden of proof to terminate appellant's compensation benefits on the grounds that she refused an offer of suitable work as the medical evidence did not clearly establish that the offered position was within appellant's work restrictions on July 16, 2008 when the Office terminated appellant's compensation benefits.

**ORDER**

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

Issued: May 23, 2011  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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<sup>9</sup> Due to the disposition of this issue, it is not necessary for the Board to address whether appellant has established any continuing disability.