



for head contusion, concussion, neck sprain and lumbar sprain. Appellant received compensation for temporary total disability.

A conflict in medical opinion arose on the extent of any disability for work. Dr. Leon M. Bernstein, the attending Board-certified orthopedic surgeon, found that appellant was totally disabled for work since the date of injury. Dr. P. Leo Varriale, a Board-certified orthopedic surgeon and second-opinion physician, disagreed. He reviewed appellant's medical records, examined her, and found no current disability due to the July 23, 2010 employment injury. Dr. Varriale found that she had fully recovered and could return to her date-of-injury job as a letter carrier.

To resolve this conflict, OWCP referred appellant, together with the medical record and a statement of accepted facts, to Dr. Eial Faierman, a Board-certified orthopedic surgeon, who related appellant's history and reviewed the medical record, including imaging studies and reports of diagnostic testing.

Dr. Faierman described his findings on physical examination. Appellant walked into the office with a normal gait and no assistive devices or brace. Using a goniometer, Dr. Faierman found normal cervical spine motion with 50 degrees extension, flexion full to the chest and 80 degrees left and right lateral rotation with pain on the extremes. Appellant had 5/5 motor strength in all muscle groups. There was normal sensation to light touch in all upper extremity distributions bilaterally. Appellant had normal deep tendon reflexes in the biceps, triceps and brachioradialis tendons. Examination of the shoulders was entirely normal.

Lumbar spine motion was also normal with 90 degrees flexion, 15 degrees extension and 40 degrees left and right lateral rotation with pain. Appellant had 5/5 motor strength in all lower extremity muscle groups. She had normal sensation to light touch in all lower extremity distributions bilaterally. Normal deep tendon reflexes were noted in the patella and Achilles tendons bilaterally. There was no vertebral or costovertebral angle tenderness. The Babinski test was negative. There was full range of motion of both hips and good dorsal pedis pulses bilaterally. Appellant had no clonus. Straight leg raise was negative.

Dr. Faierman thought appellant may have exacerbated her preexisting cervical and lumbar spine degenerative changes, but that was now clinically resolved. He found that she currently had a mild disability regarding her cervical and lumbar spine. Dr. Faierman determined that appellant's strength level was somewhere between light and medium strength, being able to frequently lift up to 10 pounds and occasionally up to 50 pounds. He found that she could work eight hours a day with restrictions. Dr. Faierman added that appellant did not require further physical therapy or treatment. He completed a work capacity evaluation.

OWCP provided the employing establishment with Dr. Faierman's prescribed limitations and asked if it was possible to offer appellant a permanent job within those limitations. The employing establishment offered appellant a modified assignment as a carrier technician based on those limitations.

OWCP reviewed the job offer and notified appellant that it was suitable based on the medical limitations provided by Dr. Faierman. As the employing establishment advised that the

position remained available for her, OWCP gave appellant 30 days to accept the position or provide a written explanation for refusing. OWCP notified appellant of the penalty for refusing suitable work under 5 U.S.C. § 8106(c)(2).

Appellant advised OWCP that she could not accept the assignment “as it far exceeds the limitations placed on me by my attending physician.” She added that the duties of the modified assignment were the same as a regular-duty assignment for a mail carrier with no limitations.

Dr. Bernstein reviewed Dr. Faierman’s report and advised that appellant could work four hours a day in a strictly clerical and sedentary position with no pushing, pulling, lifting or excess motions of the spine, and with 5- to 10-minute breaks every half hour. He added that physical therapy did give appellant short-term relief in terms of hours or perhaps a day or two. Dr. Bernstein argued that, if appellant were to work under the restrictions of the offered assignment for four hours a day, she would be totally incapable of working the other four hours, even in the lightest form of duty, because this would greatly exacerbate her symptoms.

OWCP reviewed appellant’s reasons for refusing the offered position. It also reviewed Dr. Bernstein’s supplemental report. It notified her that neither reason justified a change in the previous finding of suitability. As the offered position remained suitable and available to her if she was willing to accept it, OWCP gave appellant a final 15 days to accept the offer and report to work or have her compensation benefits, apart from medical care, terminated.

In a decision dated January 31, 2012, OWCP terminated appellant’s compensation benefits under 5 U.S.C. § 8106(c)(2) on the grounds that she refused an offer of suitable work. It found that the weight of the medical opinion evidence rested with Dr. Faierman, the impartial medical specialist, and noted that the employing establishment had confirmed that appellant did not report for work.

Appellant, through her representative, requested reconsideration. She alleged that the medical evidence supported the acceptance of more severe conditions, and not having accepted the same required that Dr. Varriale’s and Dr. Faierman’s conclusions be discounted. Appellant alleged that in seeking a second opinion, OWCP created the appearance of doctor shopping and engaged in an effort to terminate her compensation. She alleged that there was no genuine conflict in medical opinion, that Dr. Faierman’s opinion should be discounted and not accorded the weight of the medical evidence. Appellant alleged that he performed no objective testing and failed to explain with medical rationale the resolution of the condition from which she suffers, which is demonstrated by objective medical evidence. She argued that Dr. Bernstein continued to support her claim for continuing compensation, in part by finding Dr. Faierman’s report “absolutely inconsistent with the objective findings on the MRI [magnetic resonance imaging scan].” Finally, appellant argued that she developed a consequential emotional condition that rendered her mentally incapable of carrying out her work-related duties.

On July 20, 2012 OWCP reviewed the merits of appellant’s case and denied modification of its prior decision. It explained that the record revealed normal examinations, with Dr. Faierman’s evaluation being essentially similar to Dr. Varriale’s. Further, OWCP found that Dr. Bernstein offered no examination findings or objective evidence of disability, nor did he provide rationale to support appellant’s prolonged disability. It explained that, although

Dr. Faierman erroneously misread the restrictions imposed by Dr. Bernstein, he based his opinion primarily on his thorough examination. As Dr. Faierman opinion was convincing and based on a complete and accurate knowledge of the facts and medical history, it was afforded greater weight in resolving the conflict between Dr. Bernstein and Dr. Varriale.

Counsel argues on appeal that the evidence firmly supports continuing work-related disability and appellant's inability to accept the offered assignment. He adds that it is apparent that OWCP has subjected the evidence submitted by appellant's physician to a greater level of scrutiny than the evidence submitted by the physicians it retained.

### **LEGAL PRECEDENT**

Section 8106(c)(2) of FECA states that a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or secured for him or her is not entitled to compensation.<sup>2</sup> OWCP has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects suitable work when it is offered. Before compensation can be terminated, however, OWCP 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.<sup>3</sup> In other words, to justify termination of compensation under section 8106(c)(2), which is a penalty provision, OWCP has the burden of showing that the work offered to and refused or neglected by appellant was suitable.<sup>4</sup>

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.<sup>5</sup> When there exist 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 upon a proper factual background, must be given special weight.<sup>6</sup>

### **ANALYSIS**

When a conflict arose between appellant's physician, Dr. Bernstein, and OWCP's second-opinion physician, Dr. Varriale, on the extent of any disability for work, OWCP properly referred appellant to Dr. Faierman for an impartial medical evaluation pursuant to 5 U.S.C. § 8123(a). OWCP provided Dr. Faierman with a statement of accepted facts and appellant's medical record so he could base his opinion on a proper factual and medical background.

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<sup>2</sup> *Id.* at § 8106(c)(2).

<sup>3</sup> *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

<sup>4</sup> *Glen L. Sinclair*, 36 ECAB 664 (1985).

<sup>5</sup> 5 U.S.C. § 8123(a).

<sup>6</sup> *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

Dr. Faierman reviewed appellant's history and medical record, including imaging studies and reports of diagnostic testing. He physically examined appellant and described his findings, which were essentially normal and similar to those of Dr. Varriale, who found that appellant had fully recovered from her injury. Dr. Faierman determined that any exacerbation of appellant's preexisting cervical and lumbar spine degenerative changes had now clinically resolved. As appellant still had mild disability regarding her cervical and lumbar spine, he imposed certain work restrictions.

The Board finds that Dr. Faierman's opinion is based on a proper factual and medical background and is sufficiently well reasoned that it must be accorded special weight in resolving the extent of appellant's disability for work. From the Board's reading of his opinion, appellant has no orthopedic residuals of her July 23, 2010 employment injury and no need for further treatment of the same. Dr. Faierman felt that the fall may have exacerbated her preexisting degenerative changes, but her essentially normal physical examination showed that any such exacerbation was now resolved. Thus, the work limitations he outlined relate solely to appellant's preexisting condition cervical and lumbar spine condition and not to her accepted employment injury.<sup>7</sup>

The Board has reviewed the modified assignment offered to appellant and finds that it is consistent with the physical limitations outlined by the impartial medical specialist, whose opinion represents the special weight of the medical evidence. OWCP properly notified her of the position's suitability and of the penalty for refusing the offer under 5 U.S.C. § 8106(c)(2).

Appellant's reasons for refusing the offer were not valid. That the assignment far exceeded, in her opinion, the limitations placed on her by Dr. Bernstein was immaterial. Dr. Bernstein and Dr. Varriale disagreed about the extent of her disability, and OWCP properly referred her to an impartial medical specialist to resolve the matter. The assignment was consistent with the limitations placed on appellant by Dr. Faierman.

Dr. Bernstein reviewed Dr. Faierman's opinion and expressed his disagreement. As he was on one side of the conflict that Dr. Faierman resolved, and as he offered nothing sufficiently probative to create a second conflict, the Board finds that Dr. Faierman's opinion continues to represent the special weight of the medical evidence on the extent of appellant's disability for work.<sup>8</sup>

Further, although Dr. Bernstein imposed more stringent limitations, he offered no rationale or objective findings to support them. His opinion that appellant would be able to work only four hours under the limitations of the offered position appeared speculative.

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<sup>7</sup> It is well established that OWCP must consider preexisting and subsequently acquired conditions when evaluating the suitability of an offered position. *Mary E. Johnson*, Docket No. 06-324 (issued July 24, 2006).

<sup>8</sup> Compare *Gloria J. Godfrey*, 52 ECAB 486 (2001) (finding that reports from the attending physician, who was on one side of the conflict, plus the findings of a more recent magnetic resonance imaging scan, created a new conflict with the opinion of the impartial medical specialist regarding the claimant's ability to work); *Margaret Ann Connor*, 40 ECAB 214 (1988) (where the Board found that reports from new physicians constituted new evidence and created a new conflict in medical opinion with the report of the impartial medical specialist).

OWCP notified appellant that her reasons for refusing the offered assignment were unacceptable and properly extended her another opportunity to accept the offer, with the warning that her failure to do so would trigger the termination of her wage-loss compensation. As appellant did not accept, the Board finds that OWCP properly terminated her compensation under 5 U.S.C. § 8106(c)(2).<sup>9</sup> The Board will therefore affirm OWCP's July 20, 2012 decision.

Although counsel believes that the evidence firmly supports continuing work-related disability and appellant's inability to accept the offered assignment, the weight of the medical opinion evidence supports that her work-related disability has ceased and that the offered assignment was suitable. The Board finds no evidence that OWCP improperly obtained a second opinion on the extent of appellant's disability or improperly accorded special weight to the opinion of the impartial medical specialist.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **CONCLUSION**

The Board finds that OWCP properly terminated appellant's compensation under 5 U.S.C. § 8106(c)(2) on the grounds that she refused suitable work.

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<sup>9</sup> *V.C.*, Docket No. 11-275 (issued September 21, 2011) (affirming termination under section 8106(c)(2) where the impartial medical specialist found no medical or orthopedic reason the claimant could not work at her usual job, as she should have recovered from her cervical sprain within a few months and should not have any residual complaints eight years later); *T.L.*, Docket No. 10-1649 (issued March 9, 2011) (affirming a section 8106(c)(2) termination where the impartial medical specialist found that the accepted medical conditions had resolved but the claimant continued to have symptoms from her underlying degenerative cervical disc disease); *K.H.*, Docket No. 08-2086 (issued September 29, 2009) (where the impartial medical specialist found that the claimant had fully recovered from her work injuries but nonetheless imposed restrictions to help prevent a recurrence of her condition, the Board affirmed termination under section 8106(c)(2) when the claimant refused to accept the offered position).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 20, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 5, 2013  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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