

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARK A. SCALZO and U.S. POSTAL SERVICE,
INTERNATIONAL & BULK MAIL CENTER, Jersey City, NJ

*Docket No. 02-507; Submitted on the Record;
Issued September 3, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation under 5 U.S.C. § 8106(c) based on his refusal to accept suitable employment as offered by the employing establishment.

On May 16, 1998 appellant, then a 47-year-old custodian, sustained employment-related shoulder and cervical sprains. He stopped work that day and has not returned. In July 1998 appellant was referred to the nurse intervention program, in October 1998 for vocational rehabilitation and has undergone physical therapy.

The Office continued to develop the claim and found that a conflict in medical opinion existed between the opinions of Dr. Seth Kane, a Board-certified orthopedic surgeon, who had provided a second-opinion evaluation for the Office and appellant's treating physician, Dr. George B. Jacobs, a Board-certified neurosurgeon. By letter dated September 21, 1999, the Office referred appellant to Dr. John Owens, a Board-certified orthopedic surgeon, for an impartial medical evaluation.

On December 23, 1999, January 10, 2000 and January 5, 2001, the employing establishment offered appellant a position as a laborer, custodial, modified.¹ By letters dated March 24, 2000 and January 17 and February 21, 2001, the Office advised appellant that the position offered was suitable. He was notified of the penalty provisions of section 8106 and given 30 days to respond. In response, appellant refused all but one of the duties of the offered position and submitted an additional report from Dr. Jacobs. In letters dated March 16 and September 18, 2001, the Office advised appellant that his reasons for refusing the offered position were not acceptable and he was given an additional 15 days to respond. By decision dated November 6, 2001, the Office terminated appellant's wage-loss compensation, effective that day, on the grounds that he declined an offer of suitable work. The instant appeal follows.

¹ The record further indicates that the offered position remained available on November 6, 2001.

The Board finds that the Office met its burden to terminate appellant's compensation benefits.

Section 8106(c)(2) of the Federal Employees' Compensation Act² provides in pertinent part, "A partially disabled employee who ... refuses or neglects to work after suitable work is offered ... is not entitled to compensation."³ To prevail under this provision, the Office must show that the work offered was suitable and must inform the employee of the consequences of refusal to accept such employment. 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.⁴ 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.⁵

The implementing regulation 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 a showing before entitlement to compensation is terminated.⁶ 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.⁷

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.⁸ In assessing medical evidence, the number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for and the thoroughness of physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.⁹

In the present case, the record reflects that the physical restrictions of the modified position offered to appellant on January 5, 2001 were in agreement with those provided by Dr. Owens, a Board-certified orthopedic surgeon, who provided an impartial medical evaluation. In an October 25, 1999 report, Dr. Owens, who was furnished with the medical record, a set of

² 5 U.S.C. §§ 8101-8193.

³ 5 U.S.C. § 8106(c)(2).

⁴ See *Michael I. Schaffer*, 46 ECAB 845 (1995).

⁵ See *Robert Dickerson*, 46 ECAB 1002 (1995).

⁶ 20 C.F.R. § 10.517(a) (1999).

⁷ *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

⁸ See *Marilyn D. Polk*, 44 ECAB 673 (1993).

⁹ See *Connie Johns*, 44 ECAB 560 (1993).

questions and a statement of accepted facts, set forth appellant's history, complaints and findings of physical examination. He noted magnetic resonance imaging scan findings of degenerative disc disease and normal electromyographic/nerve conduction studies. Dr. Owens advised that appellant had limited mobility of the cervical spine without objective weakness involving the upper extremities and concluded that appellant had reached maximum medical improvement. He also submitted a work capacity evaluation, in which Dr. Owens advised that appellant was able to work 8 hours per day with a 20-pound restriction of pushing, pulling and lifting. In a supplementary report dated October 9, 2000, he further advised that appellant's shoulder sprain had completely resolved and his present complaints were caused by his cervical condition. Finally, Dr. Owens reviewed the offered position and advised that appellant could perform the duties.

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.¹⁰ Dr. Owens provided such an opinion. The medical evidence of record thus establishes that, at the time the job offer was made, appellant was capable of performing the modified position.¹¹

In order to properly terminate appellant's compensation under section 8106, the Office must provide appellant notice of its finding that an offered position is suitable and give him an opportunity to accept or provide reasons for declining the position.¹² The record in this case indicates that the Office properly followed the procedural requirements. By letters dated March 24, 2000, January 17 and February 21, 2001, the Office advised appellant that a partially disabled employee who refused suitable work was not entitled to compensation, that the offered position had been found suitable and allotted him 30 days to either accept or provide reasons for refusing the position.

In letters dated March 16 and September 18, 2001, the Office advised appellant that the reasons given for not accepting the job offer were unacceptable. He was given an additional 15 days in which to respond. Appellant did not respond to the September 18, 2001 letter. There is, thus, no evidence of a procedural defect in this case as the Office provided appellant with proper notice. He was offered a suitable position by the employing establishment and such offer was refused. Thus, under section 8106 of the Act, his compensation was properly terminated effective November 6, 2001.

¹⁰ See *Kathryn Haggerty*, 45 ECAB 383 (1994); *Edward E. Wright*, 43 ECAB 702 (1992).

¹¹ See *John E. Lemker*, 45 ECAB 258 (1993).

¹² See *Maggie L. Moore*, *supra* note 7.

The November 6, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
September 3, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member