

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of AUDREY M. TREMBLY and U.S. POSTAL SERVICE,
LEHIGH VALLEY REMOTE ENCODING CENTER, Allentown, PA

*Docket No. 03-163; Submitted on the Record;
Issued May 27, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation pursuant to 5 U.S.C. § 8106(c)(2) for refusing or neglecting suitable work.

On June 1, 1998 appellant, then a 44-year-old data conversion operator, filed an occupational disease claim alleging that keying activities in her federal employment exacerbated the carpal tunnel syndrome in her right wrist and the flexor tendinitis in her right forearm. The Office accepted her claim for mild bilateral carpal tunnel syndrome and paid compensation.

Appellant accepted limited duty in Allentown, PA, on May 15, 1998. On December 4, 1998 appellant accepted a limited-duty miscellaneous clerk assignment in East Stroudsburg, PA, which required no keying.

The employing establishment thereafter offered appellant a permanent modified part-time flexible clerk position in Lehigh Valley, PA. The position required manual casing of mail,¹ hand

¹ The position description states: "Casing mail involves sorting mail by standing in front of a distribution case, grasping mail out of a tray and holding it in the left hand at waist level. The right hand is used to take mail, piece by piece, from the left hand and place it in proper slots in the distribution case. The weight in the left hand is zero to two pounds depending on how much the clerk can comfortably hold at one time. When the clerk has sorted all the mail, it is removed from the slots in the case and placed in trays. The trays are then loaded onto a container for further processing. The trays maximum weight is approximately 17 pounds."

stamping,² verifying mail³ and repairing damaged mail.⁴ These assignments were to be done on a rotating as-needed basis, and not every duty would be performed every day. Physical requirements of the position included no keying or typing and no lifting over 20 pounds. Appellant's treating orthopedist, Dr. Steven Svabek, signed the job description certifying that appellant was able to perform the duties of this modified position. The position took effect on March 13, 1999. The position was modified on July 9, 1999 to reflect medical clearance to key for four hours a day.

On March 17, 1999 Dr. Svabek reported that appellant could work eight hours a day with restrictions, but the restrictions appeared to be suggested by appellant herself. He reported:

"She states that she can only drive a vehicle more than 15 minutes at a time in any direction. Repetitive wrist motions, she feels that she can do anything from zero to three hours and for pushing, pulling and lifting she feels no more than five pounds maximum."

To clarify whether these restrictions were reasonable, the Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. Daniel E. Muser, an orthopedic surgeon.

On May 3, 1999 Dr. Muser related appellant's history, current complaints and findings on physical examination. He reported that appellant had mild right carpal tunnel syndrome and borderline left carpal tunnel syndrome secondary to bilateral flexor tenosynovitis due to accumulative occupational trauma. Dr. Muser reported the following restrictions:

"At the present time and within a reasonable degree of medical certainty, that the patient's current restrictions are reasonable due to work injury except for the following specific amendments. I believe this patient can work 8 hours per day, full-time position in a light[-]duty category lifting 20 pounds and carrying 10 pounds frequently. There [i]s no limitation per sitting, walking, standing, reaching, reaching above shoulders, twisting. She can do that eight hours a day. I believe the patient can operate a motor vehicle for at least an hour at a period using occupational splints preventing the wrists from going into a flexed posture.⁵ I believe the patient can use the elbow eight hours a day for repetitive movements with respect to repetitive movements in the wrists and hands.

² "Mail which is unable to be canceled by machine is removed from the mail stream and is canceled piece by piece manually by using a hand stamp to place an ink mark over the stamp. The stamp weighs only a few ounces and [appellant] would be expected to do this in intervals of 15 to 20 minutes."

³ "Trays of mail would be fingered through to make sure all mail is faced in the right direction prior to being placed on the automated equipment. If a letter is faced in the wrong direction, it would be removed, turned and placed back in the tray."

⁴ "Mail that is undeliverable due to being damaged is to be taped back together and placed in a plastic bag. A label with our apology is attached and the mail is then placed in a tray for further processing."

⁵ Appellant told Dr. Muser that she could drive for 20 minutes, at most, before getting burning pain in both hands.

“I believe the patient could at most perform repetitive movements for an hour at a time followed by an hour of rest up to four times a day or up to four hours maximum per eight[-]hour shift with the use of occupational splints to prevent the flexed posture. I believe the patient has no limitations at pushing, pulling or lifting for 8 hours a day, but up to a maximum of lifting 20 pounds and carrying 10 pounds. I believe the patient can squat, kneel and climb and can perform this occasionally during an eight[-]hour period.”

Noting a functional capacity evaluation performed in April 1999, Dr. Muser reported that he needed to consider the results of that evaluation to determine whether testing responses were appropriate and to determine at what level of functional capacity appellant could perform. “Pending the results of that evaluation,” he stated, “the above physical limitations may have to be amended....”

The Office provided Dr. Muser with a copy of the April 13, 1999 functional capacity evaluation. On June 23, 1999 Dr. Muser reported:

“I am in receipt of the functional evaluation results on [appellant]. Based upon my review of those results, I would be unable to recommend any changes to [her] work restrictions, therefore, the previous restrictions would need to remain in effect.”

On June 30, 1999 Dr. Svabek reported that he agreed with Dr. Muser’s opinion:

“This is a dictation on response to the functional capacity evaluation ... and review of a second opinion by Dr. Muser, M.D. After reviewing his second opinion, I agree with all his assessments. He does denote and it is underlined that he feels the patient could operate a motor vehicle for at least an hour at a period using occupational splints preventing the wrists from going into a flexed position. He also states the patient could work four hours a day or four times a week with repetitive motions for [an] hour as long as the patient got [an hour’s] worth of rest in between each hour of repetitive motion. I agree with Dr. Muser’s evaluation and her restrictions. Her restrictions could be applied to Dr. Muser’s evaluations for her employment at the [employing establishment].”

On July 8, 1999 the employing establishment notified appellant that the Office field nurse had reviewed the position that appellant accepted on March 5, 1999 and had determined that the position was within her medical capabilities. The employing establishment stated, however, that appellant would be employed as a full-time career employee, not a part-time flexible and instructed her to report for work on July 10, 1999 to begin her new assignment.

On July 19, 1999 the Office notified appellant that the offered position was suitable to her work capabilities and was currently available. The Office advised that she had 30 days to accept the position or to provide an explanation for refusing it. The Office notified appellant of the provisions of 5 U.S.C. § 8106(c)(2) and advised that her right to further compensation would be jeopardized if she failed to accept the offer and failed to demonstrate that the failure was justified.

Appellant made daily attempts to drive to the work location to report to duty, but after about 14 miles the discomfort and pain became “so excessive as to not permit me to operate my motor vehicle in a safe manner.” She reported that splints did not help. To cover her absence from work she took sick leave until the balance was exhausted, then leave without pay. On July 22, 1999 the employing establishment notified the Office that appellant was currently on prescheduled annual leave and was expected to report to work on August 3, 1999.

Appellant submitted a July 19, 1999 prescription note from Dr. Joseph E. Cronkey, an orthopedic hand surgeon, who reported that appellant could return to work with the following limitations: driving 15 minutes maximum; no heavy lifting (5-pound limit) and no repetitive movement.

On July 26, 1999 appellant advised the Office that, in light of Dr. Cronkey’s restrictions, the offered position was not suitable for her. She advised that a more detailed narrative report from Dr. Cronkey would be forwarded in the next couple of weeks.

On July 30, 1999 the Office informed appellant that it had received her letter refusing the offered position. The Office found that the reasons given by appellant were unacceptable and advised that she had 15 additional days to accept the offer. If she did not provide a written response within that time, or if she continued to refuse, the Office stated that it would proceed with a final decision in the matter and, moreover, would not consider further reasons for refusal.

On August 13, 1999 the Office received appellant’s response. Appellant explained that she did not refuse the job. Rather, that she attempted to drive to the work location each day, but her injury prevented her from reaching her destination.

Appellant submitted a July 26, 1999 narrative report from Dr. Cronkey, who related appellant’s history and symptoms. He noted that her new job included sorting mail, putting them in slots and picking up items from a tabletop or countertop. Appellant also noted that there was a driving distance of over 15 minutes and that appellant’s hands became very painful and numb after 15 minutes of driving. Dr. Cronkey described his findings on physical examination, including positive Tinel’s sign bilaterally at the carpal tunnel and cubital tunnel areas and some discomfort but no true radicular paresthesias with tapping of the dorsal radial nerves of both forearms. He diagnosed multiple nerve entrapments of bilateral upper extremity. Dr. Cronkey reported:

“It is my opinion within a reasonable degree of medical certainty, that these entrapments are caused by repetitive motion at work. These entrapments include the median nerve at the wrists, ulnar nerve at the elbow, and dorsal radial cutaneous nerve at the right forearm.

“My recommendations are, (1) job restrictions and driving restrictions, (2) QST [Quantitative Sensory Test] evaluation. The patient will return to see me after that QST evaluation.

“She was advised initially if the QST testing would indeed show significant sensory and two point threshold abnormalities that surgical decompression could be entertained.

“The work restrictions include the avoidance of any activities of lifting of more than five pounds and any activity that includes repetitive flexion or extension of wrists or maintenance of the wrist in a non neutral position.

“Additionally any activities that require pronation and supination, and elbow flexion and extension should be avoided.

“Addendum: As per prescription dated July 19, 1999, the patient may return to work with limitations of driving no more than 15 minutes; no heavy lifting (5-pound limit); and no repetitive movement of bilateral upper extremities.”⁶

In a decision dated August 16, 1999, the Office terminated appellant’s compensation pursuant to 5 U.S.C. § 8106(c)(2) for refusing an offer of suitable work. The Office found that the weight of the medical evidence rested with Dr. Muser’s report and Dr. Svabek’s concurrence, which confirmed that appellant was capable of working limited duty. The Office did not recognize Dr. Cronkey as a treating physician and found that his report lacked medical rationale along with objective findings to support his opinion. The Office found, therefore, that appellant failed to accept suitable employment without good reason.

On August 19, 1999 appellant submitted a July 27, 1999 report from Dr. James B. Kim, a physiatrist, who related appellant’s history, complaints and findings on examination. He diagnosed bilateral hand and elbow pain with findings suggestive of bilateral carpal tunnel syndrome, as well as lateral epicondylitis and possible underlying radial neuropathy. He recommended treatment and reported: “I agree with Dr. Cronkey of no more than 15 minutes driving, 5-pound maximum lifting which should be occasional at best and no repetitive, constant or frequent use of both upper extremities. This includes repetitive casing of mail or lifting of mailboxes, trays and definitely no keyboarding and she understood.”

In an August 19, 1999 report, Dr. Kim reiterated appellant’s restrictions and added:

“I have looked over her job descriptions for ‘PTF (modified) clerk for the Lehigh Valley.’ According to this she would be performing repetitive frequent upper extremity work, reaching and she would have lifting of up to 20 pounds but no greater. At this point, I do not believe, within a reasonable degree of medical certainty that [appellant] can perform this modified clerk position as well.”

On August 31, 1999 appellant advised the Office that Dr. Cronkey was her treating physician effective July 19, 1999. She noted that she saw Dr. Svabek on only two occasions and it was the Office field nurse who arranged the second appointment.

Appellant requested a review of the written record by an Office hearing representative.

⁶ On August 24, 1999 Dr. Cronkey noted the results of the QST evaluation: “Performed on the upper extremities, there was significant reduction in strength, digit bell grip curve. There was also reduced strength in the key pinch tested area. The routine four sites of the upper extremities were tested. Right side was tested more abnormal than the left and all the sites were abnormal indicating a peripheral neuropathy involving the ulnar nerve at the elbow, dorsal radial nerve and median nerve in the wrist.” On September 1, 1999 Dr. Cronkey recommended surgery.

In a decision dated February 29, 2000, the hearing representative affirmed the termination of appellant's compensation. She found that the medical evidence confirmed that the position was suitable and that appellant failed to provide a suitable explanation for her failure to return to work. The hearing representative noted that appellant was able to perform her limited-duty position in Allentown, PA, until February 1999, when a permanent position was identified. Although the offered position in Lehigh Valley was closer to her home, appellant contended that she was unable to drive the distance to the work site. The hearing representative found that medical reports supporting her claim that she was unable to perform her job did not offer sufficient justification because they contradicted previous medical opinions, lacked objective clinical rationale and appeared to be based on appellant's own desires: Limitations reported by both Drs. Cronkey and Kim were identical to those provided by Dr. Svabek on March 17, 1999. Although Dr. Kim reviewed the position description, his opinion that appellant could not perform the duties listed was not consistent with appellant's having performed the duties in a similar position from November 1998 through February 1999. Further, the hearing representative noted that appellant's sole reason for not working was her inability to drive to the postal facility. It was not based on whether she could actually do the job.

Appellant disagreed with the hearing representative's decision and requested reconsideration. Among the argument she presented, appellant explained that she worked at the East Stroudsburg Post Office from November 14, 1998 through July 9, 1999, at which time the employing establishment removed her from her job. She offered evidence to support that the offered position in Lehigh Valley was 26.2 miles from her home, while her temporary position in East Stroudsburg was 14.7 miles from her home.⁷

In a decision dated July 26, 2002, the Office reviewed the merits of appellant's case and denied modification of its prior decision. The Office found that appellant had failed to present adequate and sufficient argument for her refusal of suitable work. She had not provided sufficient reasoning for refusing the suitable job offer, supported by an affirmative well-rationalized medical opinion explaining why she was not capable of driving up to at least an hour at a period or performing the duties of the job.

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation pursuant to 5 U.S.C. § 8106(c)(2) for refusing or neglecting suitable work.

Section 8106(c)(2) of the Federal Employees' Compensation Act 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 is not entitled to compensation.⁸ The Office 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, 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

⁷ Appellant's previous temporary position in Allentown, PA, was 28.52 miles from her home.

⁸ 5 U.S.C. § 8106(c)(2).

forth the specific job requirements of the position.⁹ In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused or neglected by appellant was suitable.¹⁰

On the issue of suitability, the Office found that the weight of the medical evidence rested with the report of the Office referral physician, Dr. Muser, together with the concurrence of appellant's then treating physician, Dr. Svabek. On May 3, 1999 Dr. Muser reported that appellant was capable of lifting 20 pounds, operating a motor vehicle for at least an hour at a time using wrist splints and performing repetitive movements for an hour at a time followed by an hour of rest up to 4 times a day.

The offered position involved no lifting over 20 pounds, was located 26.2 miles from appellant's home and required casing mail, or sorting the mail by hand piece by piece, hand stamping mail in intervals of 15 to 20 minutes and verifying and repairing mail. Dr. Muser's report supported that this position was suitable for appellant.

Dr. Cronkey, the orthopedic hand surgeon who took over appellant's care, disagreed. On July 19, 1999 he reported that appellant was capable of lifting no more than 5 pounds, driving 15 minutes maximum and should do no repetitive movement. In his narrative report of July 26, 1999, Dr. Cronkey related appellant's history and symptoms and described how the new position would require appellant to sort mail, put the mail into slots and pick up items from a tabletop or countertop. He made positive findings on physical examination and diagnosed multiple nerve entrapments. Dr. Cronkey reported that it was his opinion, within a reasonable degree of medical certainty, that these entrapments were caused by repetitive motion at work and he recommended avoidance of any activity requiring lifting more than five pounds or repetitive flexion or extension of the wrists. He repeated that appellant was to drive no more than 15 minutes, was to lift no more than 5 pounds and was allowed no repetitive movement of her arms. Dr. Cronkey's report supported that the offered position was not suitable for appellant.

The Board finds that a conflict in medical opinion exists between appellant's physician, Dr. Cronkey, and the Office referral physician, Dr. Muser, on the issue of suitability of the offered position. Both physicians based their opinions on an accurate history, on appellant's complaints and symptoms and on current clinical findings.¹¹ Because this conflict arose prior to the Office's August 16, 1999 decision, the issue of suitability was unresolved by the medical evidence when the Office terminated compensation. For this reason, the Board finds that the Office did not meet its burden of proof to justify its termination of compensation pursuant to 5 U.S.C. § 8106(c)(2).¹²

⁹ *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

¹⁰ *Glen L. Sinclair*, 36 ECAB 664 (1985).

¹¹ The Board is not convinced that Dr. Cronkey withheld his professional opinion and allowed appellant to self-certify her medical restrictions.

¹² The July 27, 1999 report of Dr. Kim, the physiatrist, received by the Office after its August 16, 1999 decision to terminate compensation, reinforces the conflict that exists in this case between the Office referral physician and appellant's treating physician. Dr. Kim examined appellant, reviewed the offered position, noted that the position

The July 26, 2002 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, DC
May 27, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

required repetitive frequent upper extremity work and lifting up to 20 pounds, and reported with a reasonable degree of medical certainty that appellant could not perform the duties of that position.