

In a report dated January 10, 2007, Dr. Francis Tindall, a Board-certified orthopedic surgeon, opined that appellant could return to work eight hours a day with restrictions. He advised that appellant should not operate a motor vehicle and could not push, pull or lift with her right arm. On February 6, 2007 Dr. Tindall stated that appellant could return to a sedentary position using her left hand. He stated that appellant should be able to operate a motor vehicle as "one armed people drive cars." Dr. Tindall noted that appellant could straighten her right arm completely and flex it completely and should therefore be able to drive her car.

The employing establishment offered appellant a light-duty position as a modified mail processing clerk on February 8, 2007. The duties of this position included use of the left arm only lifting one pound, sitting eight hours a day, standing up to one hour, walking up to one hour, simple grasping for eight hours with the left arm only and up to four hours of fine manipulation with the left upper extremity only. Dr. Tindall reviewed the position description on February 8, 2007 and indicated that the duties were in compliance with appellant's restrictions and that she could begin working the limited-duty position on February 8, 2007. The employing establishment submitted an offer on February 1, 2007 with similar physical restrictions. Appellant responded on February 9 and 20, 2007 respectively and stated that she was neither accepting or denying the assignment and would respond within 30 days.

In a letter dated February 22, 2007, the Office informed appellant that she had been offered a suitable work position as a modified mail processing clerk and that the position was still available to her. It allowed her 30 days to accept the position or offer her reasons for refusal.

On March 19, 2007 appellant advised that she was unable to accept the offered position because she could not operate a motor vehicle. She stated that if the employing establishment provided transportation she would accept the position. Appellant stated that the Office appeared to recognize that she could not drive as it had provided transportation to and from her doctors' appointments. In a report dated February 16, 2007, Dr. Gary M. Weiner, a Board-certified orthopedic surgeon, recommended that she limit the use of her right upper extremity and stated that appellant should not drive "as she would be unable to use the right upper extremity in a useful manner during an emergency or need to utilize both hands on the steering wheel." Appellant also submitted a report from her physical therapist. She requested a second opinion evaluation on February 20, 2007 and stated that she would not have proper transportation until March 15, 2007.

By letter dated March 26, 2007, the Office informed appellant that her reasons for refusing the offered position were not valid as Dr. Weiner's restriction on driving was prophylactic in nature and failed to address her ability to operate a motor vehicle under ordinary circumstances. It stated that fear of future injury was not a valid reason for refusing a suitable work position. The Office allowed appellant 15 days to accept the offered position and informed her of the penalties under section 8106(c) if she refused the position.

Dr. Tindall completed a report on March 21, 2007. He noted that appellant stated that she could not work because she could not shift gears with her right hand and drive her car. Dr. Tindall stated that appellant should be able to drive her car, that her motor power was intact and that flexion and extension power of her elbow was satisfactory. He concluded, "I see no

reason why she cannot drive her car.... I think we need a functional study carried out on her to see why she cannot drive her car and we probably need to request an independent medical assessment of her.”

In a note dated April 6, 2007, Dr. Weiner reported his physical findings and recommended a functional capacity evaluation.

Appellant submitted an electrodiagnostic study on April 17, 2007 and alleged that she had tendinitis and carpal tunnel syndrome. Dr. Tindall agreed with this assessment, but opined that these conditions were not due to her employment injuries.

By decision dated April 25, 2007, the Office terminated appellant’s compensation benefits finding that she refused an offer of suitable work. It found that there was insufficient medical evidence to justify an automobile modification.

Appellant underwent a functional capacity evaluation at the request of the employing establishment on May 4, 2007. This test established that she was capable of performing the physical requirements of the offered position. Dr. Brian L. Shafer, a Board-certified orthopedic surgeon, completed a report on August 17, 2007 and diagnosed degenerative joint disease in the right elbow with mild valgus instability.

Appellant requested reconsideration by letter dated April 23, 2008, contending that her compensation benefits should not have been terminated until after the recommended functional capacity evaluation. She submitted statements from coworkers that the offered position could not be performed with only one arm. By decision dated May 15, 2008, the Office denied modification of its termination decision.

LEGAL PRECEDENT

It is well settled that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.¹ As the Office in this case terminated appellant’s compensation under 5 U.S.C. § 8106(c), it must establish that appellant refused an offer of suitable work. Section 8106(c) of the Act² 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 regulations³ 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.⁴ Once it establishes

¹ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

² 5 U.S.C. § 8106(c)(2).

³ 20 C.F.R. § 10.517(a).

⁴ *Arthur C. Reck*, 47 ECAB 339, 341-42 (1995).

that the work offered is suitable, the burden of proof shifts to the employee who refuses to work to show that such refusal was reasonable or justified.⁵

An acceptable reason, if supported by medical evidence, for refusing an offer of suitable work is inability to travel to work.⁶ The Office's procedures provide that the inability to travel to work is an acceptable reason if the inability is because of residuals of the employment injury.⁷ The Board has also held that nonwork-related conditions that prevent an employee from traveling to work are also an acceptable reason for rejecting an offer of suitable work if supported by the medical evidence. This holding is consistent with the Board's holding that all impairments, whether work related or not, must be considered in assessing the suitability of an offered position.⁸

ANALYSIS

Appellant sustained employment-related fractures of her pelvis and right arm and stopped work due to these conditions. The employing establishment offered appellant a modified position of mail processing clerk which was approved by her attending physician, Dr. Tindall, a Board-certified orthopedic surgeon. In a February 6, 2007 report, Dr. Tindall opined that appellant should be able to operate a motor vehicle despite her reservations noting that she could straighten and flex her right arm. The Office determined that the offered position was suitable and advised appellant by letter dated February 22, 2007. Appellant disagreed with this finding on the grounds that she was not capable of driving to and from work.

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits on the grounds that she refused an offer of suitable work. There is no dispute in the medical evidence that appellant was capable of performing the physical requirements of the offered position. Appellant's attending physician found that the offered position conformed to her physical limitations and that she could drive to and from work. Dr. Tindall opined that appellant could drive to work and explained that she could straighten and flex her right arm as required by driving. He further noted that persons with only the use of one arm could drive and that appellant was capable.

In support of her position that the offered position was not suitable, appellant contended that she was unable to operate a motor vehicle and could not commute to work. She disagreed with Dr. Tindall's opinion that she was capable of driving to and from work and submitted a report from Dr. Weiner dated February 16, 2007. Dr. Weiner opined that appellant was not capable of driving as she could not safely depend on her right arm in the case of an emergency. He opined that she was not capable of driving as she would not be capable of using her right arm "in a useful manner" in the case of an emergency or other situation requiring both hands on the

⁵ *Bryant F. Blackmon*, 56 ECAB 752, 762 (2005).

⁶ *Mary E. Woodard*, 57 ECAB 211 (2005).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5a(5) (July 1996).

⁸ *Mary E. Woodard*, *supra* note 6.

steering wheel. Dr. Weiner did not offer any physical findings supporting his opinion that appellant could not drive and did not provide medical reasoning explaining his conclusion. As the Office met its burden of establishing that the offered position was suitable, the burden of proof shifted to appellant to show her refusal to accept the offered position was reasonable or justified as the offered position was not suitable. The Board finds that Dr. Weiner's report is not sufficiently detailed or well reasoned to establish that appellant could not safely drive to and from work. Dr. Weiner did not offer a medical basis for appellant's inability to drive. Without physical findings and an explanation of the biomechanical issues which would prevent appellant from using her right arm to steer or otherwise drive a car, this report is not sufficient to establish that offered position was not suitable work due to appellant's inability to commute.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits on the grounds that she refused an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the May 15, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 9, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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