

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

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**B.S., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Madisonville, TN, Employer**

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**Docket No. 08-1488  
Issued: April 22, 2009**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On April 28, 2008 appellant filed a timely appeal of merit decisions of the Office of Workers' Compensation Programs dated May 30, 2007 and April 22, 2008 based on his refusal of suitable employment and granting schedule awards for 31 percent impairment of his right upper extremity and 25 percent impairment of his left upper extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether the Office properly terminated appellant's compensation effective June 10, 2007 because he refused an offer of suitable work under 5 U.S.C. § 8106; and (2) whether appellant has established entitlement to schedule award compensation.

**FACTUAL HISTORY**

On June 21, 2004 appellant, then a 30-year-old part-time flexible clerk, filed an occupational disease claim alleging that he developed pain in his hands and wrists due to casing mail. By letter dated August 6, 2004, the Office accepted appellant's claim for bilateral carpal

tunnel syndrome. On April 13, 2005 Dr. William K. Bell, a Board-certified orthopedic surgeon, performed a right carpal tunnel release on appellant who returned to work limited duty on July 19, 2005 but stopped work again on April 21, 2006.

In a March 2, 2006 note, Dr. Joshua Gettinger, a Board-certified family practitioner, noted that he was appellant's primary care physician. He noted that appellant had bilateral carpal tunnel syndrome with an incomplete response to therapy. Dr. Gettinger noted that appellant was at the end of an extensive course of rehabilitation supervised by Dr. Jeffrey Hecht, a Board-certified physiatrist. He opined that appellant remained significantly incapacitated by his carpal tunnel syndrome. In an April 20, 2006 note, Dr. Gettinger indicated that appellant was released from work through May 8, 2006.

In an April 24, 2006 report, Dr. Hecht indicated that appellant had ongoing pain in his hands and arms, worsening with activity. He noted that Dr. Gettinger would now be taking over his treatment as appellant had failed to respond to conservative treatment.

In a May 11, 2006 report, Dr. Gettinger noted that appellant has been a patient of his practice since 1991. He noted that appellant's carpal tunnel syndrome began in early 2004. Dr. Gettinger noted that appellant's surgery failed to produce any improvement in his chronic arm pain and limitation. He indicated that appellant has reached maximal improvement with rehabilitation and remained significantly impaired. Dr. Gettinger stated that an April 26, 2006 nerve conduction (NCS)/electromyography (EMG) showed evidence of nerve entrapment in both arms, bilateral median nerve entrapment at the wrist (carpal tunnel syndrome) and bilateral ulnar nerve entrapment at the elbow. He also noted that at the time of appellant's surgery there was extensive fibrosis of the median nerve of the wrist. Dr. Gettinger concluded that these findings suggested that appellant had "a marked propensity for inflammatory reactions at the sites of occupational stress." He further stated that, in his 26 years of primary care practice, this is the worst case of multiple nerve entrapment he has encountered.

In a June 2, 2006 note, Dr. Gettinger ordered appellant to remain off work for the next 12 weeks.

By letter dated June 14, 2006, the Office referred appellant to Dr. Clifford L. Posman, a Board-certified orthopedic surgeon, for a second opinion. In a report dated July 7, 2006, Dr. Posman listed his impression as "multiple entrapment neuropathy secondary to repetitive overuse." He indicated that appellant had reached maximum medical improvement and noted that further surgery was unlikely to improve his condition. Dr. Posman listed appellant's diagnoses as bilateral carpal tunnel syndrome and cubital tunnel syndrome. He opined that his bilateral carpal tunnel syndrome was definitely medically connected to the repetitive overuse of his hands as a postal clerk and that the cubital tunnel syndrome was more than likely related to these activities as well. Dr. Posman noted that appellant's complaints were not modified by the carpal tunnel release surgery or extensive physical therapy. He did not believe that appellant was capable of performing the normal job duties eight hours a day, but did believe that he could perform limited duties eight hours a day. Dr. Posman noted that appellant was limited to repetitive movements with his wrists and elbows of one to two hours a day and pushing, pulling and lifting of 10 pounds one to two hours a day.

By letter dated August 8, 2006, the Office accepted appellant's claim for bilateral cubital tunnel syndrome.

The record contains a modified job offer (limited-duty employee) dated August 30, 2006 made by the employing establishment for employment as a distribution/window clerk. The duties listed included one hour delivering express mail, picking up and delivering missent mail and performing MCDC scans; one hour of monitoring and clearing afternoon accountable mail, monitoring lobby and picking up trash from parking lot; one hour of performing collection on Saturdays and Wednesday (limited dispatch); and three hours of answering telephone, going to bank, running errands and ordering supplies and equipment. The employing establishment noted that the physical demands of this job included driving a vehicle for 1 hour, walking 1 hour, sitting/standing/bending for 6 hours, lifting and manipulation (within restrictions) for 2 hours and pushing/pulling/writing for 0.5 hours. An attachment indicated that appellant could also case mail for one hour, accept passport applications for one hour and provide window relief for one hour.

By letter dated August 30, 2006, appellant indicated that he could not return to work at this time pursuant to the physician's advice. He attached a note dated August 29, 2006 wherein Dr. Gettinger indicated that he had reviewed the modified job offer from the employing establishment of August 30, 2006 and that appellant was unable to perform these duties at that level due to severe intractable pain, worsened at lower levels of activity than proposed.

In a September 6, 2006 report, Dr. Gettinger again indicated that, in his medical judgment, appellant was currently unable to perform the activities listed in the recent modified job offer. He noted that it would be difficult for appellant to work more than two hours per day total at virtually any workplace activity due to severe and unremitting pain. Dr. Gettinger opined that even that level of activity would carry a risk of exacerbating his neuropathy and might lead to further and permanent damage. He noted that he agreed with most of Dr. Posman's report, but disagreed with regard to appellant's ability to perform the requirements of the job offer. Dr. Gettinger noted that, any time appellant returned to work of comparable intensity, this resulted in severe pain and contributed to the progression of his disease. He noted that, since appellant was removed from work, he has been unable to tolerate activity at home of much lower intensity than described for more than short periods of time. Dr. Gettinger concluded that the finding of unusually severe fibrosis at the time of carpal tunnel surgery indicates a significant risk of progression should he push his limits.

By letter dated October 4, 2006, the Office determined that a conflict existed between Dr. Gettinger, appellant's treating physician, who opined that he was unable to work in any capacity and Dr. Posman, the second opinion examiner, who opined that he is able to work eight hours a day with restrictions. Accordingly, it referred appellant to Dr. Richard Albert Bagby, a Board-certified orthopedic surgeon, to resolve the conflict. In an opinion dated November 8, 2006, Dr. Bagby indicated that he reviewed the August 30, 2006 job offer and believed that appellant was capable of performing this job. He noted that appellant withholds and give less than good motor effort on most manual testing. Dr. Bagby also noted that appellant had positive EMG/NCV reports of multiple compressions of carpal and cubital tunnels but with the absence of atrophy or anatomically consistent motor weaknesses he would not be said to have severe compressive neuropathy. He opined that appellant can work an eight-hour day with restrictions.

Dr. Bagby noted that appellant indicated that it was his goal to retire and pursue additional medical treatment. Finally, he indicated that he reviewed the modified job offer of August 30, 2006 and that appellant was “capable of this.”

On December 22, 2006 Dr. Gettinger indicated that appellant was released from work for the next four weeks.

On January 23, 2007 appellant filed claims for schedule awards. In support thereof, he submitted an August 4, 2006 report, wherein Dr. Hecht concluded that appellant’s total upper extremity impairment using the Combined Values Charts of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5<sup>th</sup> ed. 2001) for both of his arms was 48 percent, which converted to a whole person impairment of 29 percent. Appellant also noted that he would allow an additional 3 percent for pain to produce a total whole person impairment of 31 percent.<sup>1</sup>

On February 6, 2007 the Office asked the Office medical adviser to determine appellant’s impairment rating. The Office medical adviser determined that appellant had a 31 percent impairment to his right upper extremity and a 25 percent impairment of the left upper extremity pursuant to the A.M.A., *Guides*.<sup>2</sup> He also set the date of maximum medical improvement as August 4, 2006.

By letter to appellant dated March 28, 2007, the Office indicated that the position of window distribution clerk, offered by the employing establishment on August 30, 2006, was found to be suitable and that he had 30 days to either accept the position or provide an explanation of reasons for rejecting the position

By letter to appellant dated April 11, 2007, the Office of Personnel Management indicated that his application for disability retirement had been approved.

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<sup>1</sup> Dr. Hecht found 25 percent upper extremity impairment due to right median neuropathy at the wrist (carpal tunnel syndrome), referencing Table 16-15, page 492 and 495 of the A.M.A., *Guides*. Utilizing the same reference, he found that appellant had a 20 percent upper extremity due to left median neuropathy at the wrist (carpal tunnel syndrome). Dr. Hecht concluded that the total upper extremity impairment from carpal tunnel syndrome using the Combined Values Chart was 40 percent. He indicated that this would equal a 24 percent whole person impairment to which he would add 3 percent for pain, to equal a whole person impairment of 26 percent. Dr. Hecht then found impairment due to ulnar neuropathy at the elbow was 8 percent on the right and 6 percent on the left, which would convert to total upper extremity impairment of 48 percent, which would equal a 29 percent impairment of the whole person and that when 3 percent was added for pain, would produce a whole person impairment of 31 percent.

<sup>2</sup> The Office medical adviser noted that appellant had bilateral carpal tunnel syndrome and cubital tunnel syndrome with surgical release right carpal tunnel syndrome on April 13, 2005. He noted residual Grade 2 sensory deficit right median nerve and Grade 4 motor and sensory deficit right median nerve. The Office medical adviser noted that based on the A.M.A., *Guides*, appellant was entitled to a 25 percent right upper extremity impairment for median nerve and an 8 percent impairment for right upper extremity for ulnar nerve which equaled a 31 percent impairment of the right upper extremity. A.M.A., *Guides* 492, Table 16-15; 482, Table 16-10a; 484, Table 16-11a. He further noted that appellant had a Grade 3 sensory deficit (left) median nerve and Grade 4 motor and sensory deficit of the left ulnar nerve, which equaled a 20 percent impairment of the left upper extremity for the median nerve and a 6 percent impairment for ulnar nerve for a 25 percent impairment of the left upper extremity pursuant to the A.M.A., *Guides*.

By note dated April 24, 2007, appellant indicated that his physician stated that he was unable to return to work. He attached an April 24, 2007 report, wherein Dr. Gettinger indicated that he had reviewed the position offered on August 30, 2006 and determined that appellant was unable to return to work at that level at this time. Dr. Gettinger noted that appellant required assistance in daily activities and that persisting in tasks beyond his limits will likely give him a greater disability. He also noted that, due to his medication, appellant has severe fatigue and requires a two to four hour nap everyday. Dr. Gettinger noted that he was concerned that returning appellant to work will accelerate and worsen the degree of disability and result in increased pain. He also disagreed with Dr. Bagby and indicated that appellant was a large framed person and has considerable decrease in muscle tone in hands and arms. Dr. Gettinger noted that no other person questioned appellant's efforts at the test. Finally, he concluded that his findings were consistent with appellant's EMG. Dr. Gettinger found that appellant could not return to work due to heavy medication, fatigue, disabling severe pain and numbness and the likelihood of any activity worsening his condition.

By letter dated May 4, 2007, the Office informed appellant that it considered his reasons for refusing the accepted position and did not find them valid. It indicated that they reviewed appellant's additional medical evidence. Furthermore, the Office indicated that the employing establishment noted that the position remained available. It informed appellant that he had 15 days to accept the position.

By decision dated May 30, 2007, the Office found that appellant's entitlement to further compensation for wage loss as well as compensation for permanent impairment to a scheduled member was to be terminated effective June 10, 2007 due to failure to accept suitable work. It noted that the decision did not affect appellant's entitlement to medical benefits.

By letter dated June 24, 2007, appellant indicated that he was only seeking a schedule award (not other workers' compensation benefits), that he was never intentionally noncompliant with the Office regulations and that he did not refuse to work. He indicated that, on the date that he received the letter instructing him to return to work within 15 days, he called the supervising postmaster and was informed that he no longer had a job to return to as his separation date was April 16, 2007.

On June 28, 2007 appellant requested an oral hearing.

By letter dated June 24, 2007, appellant noted that the only benefit he was seeking was the schedule award that he was not intentionally noncompliant with the regulations and that he did not refuse work. He further indicated that, on the same date he received the Office's May 4, 2007 letter indicating that he needed to return to work within 15 days, he called the employing establishment and was informed as he retired and his separation date was April 16, 2007, he no longer had a job to return to. Appellant also discussed his continuing medical disability, his inability to do things in his personal life, his medical treatment and his aspirations at the employing establishment.

In a June 24, 2007 update of appellant's condition, Dr. Gettinger indicated that appellant remained severely limited due to pain and weakness from his carpal tunnel syndrome. He noted that there had been no changes in his clinical status, limitations or medication treatment since the April 24, 2007 letter.

In a June 28, 2007 letter, a representative of the employing establishment indicated that appellant applied for retirement status and that this was granted April 16, 2007, which was prior to the final termination of his compensation benefits. He indicated that appellant told him that he did not understand that he could be required to return to work after retirement was processed.

In a June 28, 2007 letter to the Office, a representative from the employing establishment indicated that she spoke with appellant and that she explained that the offer of limited duty continued to be an alternative to total disability even if appellant retired.

On July 6, 2007 the Office received a copy of an April 11, 2007 letter from the Office of Personnel Management approving appellant's application for disability retirement.

At the hearing held on December 5, 2007 appellant and his wife testified that when he received his 15-day notice that he had to return to work, he called the postmaster but the postmaster told him that he could not come back to work because he had retired. He also testified that he believed that there was a misunderstanding with Dr. Posman and that he wished he could have gone back to clear it up. Appellant also testified that he did not believe that he could perform the position offered.

In an undated letter received by the Office on January 11, 2008, Postmaster Billy J. Morgan indicated that he no longer had access to appellant's employment records and was relying on his memory. He indicated that appellant rejected the August 30, 2006 job offer as not within his restrictions. Postmaster Morgan noted that appellant contacted him near the first of May 2007 and stated that the Office was requiring him to return to work. He indicated that, previously, he had an e-mail saying that appellant had accepted disability retirement. Postmaster Morgan indicated that he spoke with the Office and they told him that even if appellant accepted retirement, he would still have to return to work if he wished to receive compensation.

By decision dated January 30, 2008, the hearing representative affirmed the termination of appellant's compensation benefits.

In an April 18, 2008 note, the Office medical adviser reviewed the latest notes by appellant's family practitioners, but concluded that his assessment of appellant's impairment rating remained unchanged.

By decision dated April 22, 2008, the Office issued a decision finding that appellant had a 31 percent permanent loss of use of his right arm and a 25 percent permanent impairment of the left arm. The date of maximum medical improvement was August 4, 2006. However, the Office noted that appellant was paid wage-loss compensation from August 4, 2006 through June 10, 2007 (when his benefits were terminated), which covered the same period as the period of the schedule award. Accordingly, it did not issue a schedule award because appellant could not be paid benefits for a schedule award and wage-loss compensation concurrently.

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

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>3</sup> Section 8106(c)(2) of the Federal Employees' Compensation Act<sup>4</sup> provide 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.<sup>5</sup> The Office may not terminate compensation without establishing that the disability ceased or that it is no longer related to the employment.<sup>6</sup> The Board has stated that monetary compensation payable to an employee under section 8107 are payments made from the Employees Compensation Fund and are, therefore, subject to penalty provision of section 8106(c).<sup>7</sup>

Section 10.517(a) of the Act's implementing regulations provide that an employee who refused to work after suitable work has been offered to or secured for the employee, has the burden of showing that such refusal or failure to work was reasonable or justified.<sup>8</sup> Pursuant to section 10.516, the employee shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.<sup>9</sup>

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>10</sup>

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

The Board finds that a conflict in medical opinion arose between Dr. Gettinger, appellant's treating physician, who opined that he was not able to work in any capacity, and Dr. Posman, the second opinion examiner, who opined that he was able to work with restrictions. Accordingly, the Office referred appellant to Dr. Bagby, an impartial medical examiner, to resolve the conflict. In a November 8, 2006 opinion, Dr. Bagby indicated that appellant was capable of working eight hours a day with restrictions and noted that he was capable of performing the offered position of window distribution clerk. The Board notes that Dr. Bagby indicated that appellant gave less than good effort on most manual testing. Dr. Bagby also noted

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<sup>3</sup> *Barry Neutach*, 54 ECAB 313 (2003); *Lawrence D. Price*, 47 ECAB 120 (1995).

<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> *Id.* at § 8106(c)(2); *see also Linda D. Guerrero*, 54 ECAB 556 (2003).

<sup>6</sup> *Ronald M. Jones*, 52 ECAB 190 (2000); *Arthur R. Reck*, 47 ECAB 339 (1995).

<sup>7</sup> *Sandra A. Sutphen*, 49 ECAB 174 (1997); *Stephen R. Lubin*, 43 ECAB 564 (1992).

<sup>8</sup> 20 C.F.R. § 10.517(a); *see Ronald M. Jones*, *supra* note 6.

<sup>9</sup> *Supra* note 8 at § 10.516; *see Kathy E. Murray*, 55 ECAB 288 (2004).

<sup>10</sup> *Manuel Gill*, 52 ECAB 282 (2001).

that although appellant had positive EMG/NCV reports of multiple compressions of carpal and cubital tunnels, in the absence of atrophy or anatomically consistent motor weaknesses he would not be said to have severe compressive neuropathy. As this impartial opinion is based on a proper factual and medical background and is, therefore, entitled to special weight.<sup>11</sup> Accordingly, the Office properly relied upon the opinion of Dr. Bagby, the impartial medical specialist, in determining that appellant had failed to accept suitable employment and in terminating his compensation benefits.

The Board further notes that the Office complied with its procedural requirements in advising appellant that the position was found suitable, providing him with the opportunity to accept the position or provide his reasons for refusing the job offer and notifying him of the penalty provision of section 8106(c).<sup>12</sup> Appellant retired on April 16, 2007. Retirement, however, is not considered an acceptable reason for refusing an offer of suitable work.<sup>13</sup> Appellant chose to retire on medical disability rather than attempt the offered position.

Appellant contended that the position was no longer available to him after he retired. However, other than the letters and testimony of appellant and his wife, there is no supporting evidence that indicates that the job offer was not available. The employing establishment noted in a June 28, 2007 letter, that explained that the offer of limited duty continued to be an alternative to total disability even if appellant retired. Postmaster Morgan indicated that, pursuant to appellant's call in May 2007, he contacted the Office and was informed that even if appellant accepted retirement, if he wished to continue to receive compensation benefits, he must return to work. He indicated that he relayed this information to appellant. There is no indication from Postmaster Morgan that the offered position was no longer available. Finally, the Office noted in its May 4, 2007 letter that it had contacted the employing establishment and the position was still available. Accordingly, appellant has not established that the position was no longer available.

Accordingly, the Office properly terminated appellant's compensation for refusal to accept suitable employment.

### **LEGAL PRECEDENT -- ISSUE 2**

Office regulations provide that in a termination under section 8106(c) of the Act a claimant has no further entitlement to compensation under sections 8105, 8106 and 8107 of the Act which includes payment of continuing compensation for permanent impairment of a scheduled member.<sup>14</sup> The Board has found that a refusal to accept suitable work constitutes a

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<sup>11</sup> *Darlene R. Kennedy*, 57 ECAB 414 (2006).

<sup>12</sup> *See Bruce Sanborn*, 49 ECAB 176 (1997).

<sup>13</sup> *See Robert P. Mitchell*, 52 ECAB 116 (2000) (where the claimant chose to receive disability retirement benefits rather than accept a position offered by the employing establishment).

<sup>14</sup> 5 U.S.C. § 8106(c). *See also* 20 C.F.R. § 10.517(a).



bar to receipt of a schedule award for any impairment which may be related to the accepted employment injury.<sup>15</sup>

### **ANALYSIS -- ISSUE 2**

Appellant contends that he is not seeking wage-loss compensation but rather is seeking payment of his schedule award. He does not challenge the Office's determination that he sustained a 31 percent impairment of his right upper extremity and a 25 percent impairment of his left upper extremity. Rather, appellant challenges the Office's determination that he was not entitled to receive a schedule award despite this finding of impairment.

The Board notes that the Office found that appellant's date of maximum medical improvement was August 4, 2006. As appellant's schedule award commences on the date of maximum medical improvement, any such award would have commenced on August 4, 2006. However, at that time he was still receiving wage-loss compensation. An employee cannot concurrently receive compensation under a schedule award and compensation for disability for work.<sup>16</sup> With regard to the period of time after the termination of benefits on June 10, 2007 due to appellant's refusal to accept suitable work, refusal to accept suitable work is a bar to schedule award benefits.<sup>17</sup> The Board, therefore, finds that appellant's refusal to accept suitable work constitutes a bar to his receipt of a schedule award for any impairment which may be related to the accepted injury following the termination of his benefits.

### **CONCLUSION**

The Board finds that the Office properly terminated appellant's compensation effective June 10, 2007 because he refused an offer of suitable work under 5 U.S.C. § 8106. The Board further finds that appellant has not established entitlement to schedule award compensation.

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<sup>15</sup> See *Stephen R. Lubin supra* note 7.

<sup>16</sup> *L.H.*, 58 ECAB \_\_\_\_ (Docket No. 06-1691, issued June 18, 2007); *Michael J. Biggs*, 54 ECAB 595 (2003).

<sup>17</sup> *Stephen R. Lubin, supra* note 7.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated April 22, 2008 and December 5 and May 30, 2007 are affirmed.

Issued: April 22, 2009  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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