

On June 20, 2007 appellant, a 61-year-old letter carrier, filed a Form CA-2 claim for benefits based on occupational disease, alleging that she developed a bilateral carpal tunnel condition causally related to employment factors. The Office accepted the claim for bilateral carpal tunnel syndrome. Dr. David Antonio, Board-certified in orthopedic surgery, performed left carpal tunnel release surgery on September 18, 2007. The Office paid appropriate compensation for temporary total disability.

On January 24, 2008 Dr. Stephen J. Leibovic, Board-certified in orthopedic surgery, released appellant to work light duty, for eight hours per day, with restrictions on the use of her left hand, grasping and weight lifting. Appellant accepted a modified job offer from the employing establishment as a rural mail carrier, tailored to Dr. Leibovic's restrictions, on January 29, 2008.¹

In reports dated April 21 and June 9, 2008, Dr. Antonio noted that appellant had continued complaints of pain from bilateral carpal tunnel syndrome. He stated that her left hand was approximately the same, but advised that she had severe right hand pain which was progressively worsening. In his June 9, 2008 report, Dr. Antonio recommended that appellant reduce her work hours from eight hours a day to six hours per day, though he stated that he had reviewed her present job description and considered it appropriate. In a work capacity evaluation dated June 12, 2008, Dr. Antonio reduced appellant's work hours from eight hours a day to six hours per day on June 11, 2008.

Appellant submitted a June 20, 2008 Form CA-7 requesting compensation for wage loss from June 7 to 20, 2008. A June 24, 2008 Time Analysis Form indicated that she worked six hours on June 12 and 13, 2008 and from June 16 to 20, 2008.

On June 20, 2008 the employing establishment offered appellant a modified job as a rural mail carrier. The job entailed the identical work restrictions as the job she had accepted and worked at since January 29, 2008, except for the fact that she would only be required to work for six hours per day.

On July 8, 2008 appellant filed a Form CA-2a claim for benefits, alleging that she sustained a recurrence of disability on June 12, 2008 which was causally related to her accepted carpal tunnel condition.

In order to determine whether appellant's current claimed disability was causally related to her accepted bilateral carpal tunnel condition, whether she was capable of working for eight hours per day, the Office referred her to Dr. Glenn Spiegler, Board-certified in orthopedic surgery, for a second opinion examination. In a July 22, 2008 report, Dr. Spiegler stated that the persistent discomfort and synovitis caused by her median nerve made it difficult for her to complete her job description. He stated, however, that she was capable of performing everything in her job description for eight hours per day.² Dr. Spiegler advised that appellant could work six hours per day if she were to attend regular physical therapy sessions, but otherwise he would request an eight-hour workday.

¹ The position of modified rural carrier, which appellant accepted, actually entailed sorting and casing mail. It included the following job duties: casing letter mail with the right hand for 2 hours; answering the telephone for ½ hour; sorting mail with the right hand for 3 hours; miscellaneous paperwork for ½ hour; and casing box mail for 2 hours. The job description included Dr. Leibovic's restrictions of limited use of the left hand, no lifting exceeding two pounds and no grasping.

² Dr. Spiegler stated that he disagreed with appellant's 70-pound lifting restriction, listed in her job description, which he opined should be reduced to 25 pounds. The job description provided by the employing establishment, however, in both the January 29 and June 20, 2008 job offers list only a two-pound limitation.

Dr. Spiegler indicated that appellant's symptoms were likely to improve and even resolve completely if she was aggressive about her physical therapy; without such an aggressive approach, however, he advised that she would have limitations on lifting for a prolonged, perhaps permanent, period. He stated that appellant's carpal tunnel syndrome had resolved on the left side, but not the right side. Dr. Spiegler recommended that she undertake aggressive physical therapy for her left hand and that she should consider carpal tunnel release surgery for her right hand; he did not believe that her right carpal tunnel syndrome would resolve without surgery. He estimated that appellant could return to full, regular duty if she underwent approximately three months of aggressive physical therapy.

By decision dated September 3, 2008, the Office denied appellant's claim for a recurrence of disability and her request for wage-loss compensation from June 7 to 20, 2008. It found that she failed to show that there was a change in the nature and extent of her accepted carpal tunnel condition or a change in the nature and extent of her light-duty requirements. The Office stated that Dr. Spiegler's referral opinion represented the weight of the medical evidence.

In a report dated September 15, 2008, Dr. Antonio stated that he had examined appellant on that date and advised that her condition remained essentially unchanged. He noted that she had been examined by Dr. Spiegler and, on the basis of that evaluation, she was returning to light duty for eight hours per day.

On September 18, 2008 appellant elected to receive retirement benefits from the Office of Personnel Management (OPM) as of September 28, 2008.

By letter dated October 22, 2008, the Office advised appellant that, a suitable position, the modified rural carrier job which she began working in January 2008, was available and that, pursuant to section 8106(c)(2), she had 30 days to either accept the job or provide a reasonable, acceptable explanation for refusing the offer. It noted that she had elected to receive disability retirement from OPM and advised her that it would be terminating her compensation based on her refusal to accept a suitable position which reflected her ability to work as a modified rural carrier for eight hours per day. The Office stated that if appellant refused the job or failed to report to work within 30 days without reasonable cause, it would terminate her compensation pursuant to 5 U.S.C. § 8106(c)(2).³

In a letter dated November 10, 2008, appellant stated that she elected to receive disability retirement benefits because her bilateral carpal tunnel syndrome precluded her from performing the modified job. She advised that the job involved mostly sorting and casing mail, which aggravated her left-sided carpal tunnel condition. In addition, appellant experienced considerable pain and discomfort in her right hand and wrist but was apprehensive about undergoing another carpal tunnel release on her right side because of the continued problems she was experiencing after having such surgery on her left hand and wrist.

By letter dated November 26, 2008, the Office advised appellant that she had 15 days in which to accept the position or it would terminate her compensation. Appellant did not respond within 15 days.

³ 5 U.S.C. § 8106(c)(2).

By decision dated January 6, 2009, the Office terminated appellant's entitlement to compensation benefits on the grounds that she refused an offer of suitable work. It stated that Dr. Spiegler's opinion that she could return to light-duty work for eight hours per day constituted the weight of the medical evidence. The Office stated that appellant could not receive both workers' compensation benefits and OPM annuity benefits at the same time. It advised her that this was not a reasonable justification for refusing to accept the modified rural carrier position.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened to order to justify termination or modification of compensation benefits.⁴ After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁵

Section 10.517(a) of the Federal Employees' Compensation Act's implementing regulations provide that an employee who refuses 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.⁶ Pursuant to 20 C.F.R. § 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.⁷

Once the section 8116(a) of the Act states that, while an employee is receiving workers' compensation, he or she may not receive salary, pay or remuneration of any type from the United States, except in return for services actually performed or for certain payments related to service in the Armed Forces, including benefits administered by the Department of Veterans Affairs unless such benefits are payable for the same injury or the same death being compensated for under the Act.⁸ The implementing regulations provide that a beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.⁹ The beneficiary must elect the benefit that he or she wishes to receive.¹⁰

ANALYSIS

The determination 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

⁴ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

⁵ *Id.*

⁶ 20 C.F.R. § 10.517(a).

⁷ *Id.* at § 10.516.

⁸ 5 U.S.C. § 8116(a).

⁹ 20 C.F.R. § 10.421(a).

¹⁰ *Id.*

resolved by the medical evidence.¹¹ The weight of the medical evidence in this case indicates that appellant was capable of performing her light-duty job sorting and casing mail and doing paperwork for eight hours per day. The employing establishment tailored the requirements of the job in accordance with Dr. Leibovic's work restrictions; she accepted the job on January 29, 2008 and continued to perform it for eight hours per day until June 12, 2008, when Dr. Antonio reduced her work hours from eight to six. The Office referred appellant to Dr. Spiegler, who found that she could return to an eight-hour day at her former position. Appellant was subsequently examined on September 15, 2008 by Dr. Antonio, who did not express disagreement with Dr. Spiegler's opinion and stated that, based on Dr. Spiegler's examination, she was returning to modified work for eight hours per day. In the October 22, 2008 letter, the Office notified appellant of its finding that the light-duty casing and sorting position was suitable and of the consequences for not accepting a suitable offer. It confirmed that the position remained available. Appellant rejected the offered position on November 10, 2008 and asserted that she had retired under OPM on the grounds that she could not work due to her continuing problems with bilateral carpal tunnel syndrome. The Office, however, properly found in its January 9, 2008 decision that the weight of the medical evidence rested with Dr. Spiegler's July 22, 2008 opinion, which indicated that she was capable of performing the modified job and returning to work for eight hours per day within the indicated restrictions.

In addition, the Office noted that appellant had elected to receive OPM disability retirement benefits and retire from the employing establishment on September 18, 2008. Retirement, however, is not considered an acceptable reason for refusing an offer of suitable work.¹² Therefore, appellant has not established a reasonable or justifiable basis for refusing the offered position. As the weight of the medical evidence established that she could perform the duties of the offered position, she did not offer sufficient justification for refusing the position. The Board finds that the Office met its burden of proof to terminate appellant's wage-loss compensation pursuant to 5 U.S.C. § 8106,¹³ effective January 6, 2009, as she refused an offer of suitable work.¹⁴ Accordingly, the Board affirms the January 9, 2009 Office decision.

CONCLUSION

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

¹¹ *Robert Dickinson*, 46 ECAB 1002 (1995).

¹² *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).

¹³ 20 C.F.R. § 10.421(a); see *Franklin L. Bryan*, 56 ECAB 310 (2005).

¹⁴ *Karen L. Yaeger*, 54 ECAB 323 (2003).

ORDER

IT IS HEREBY ORDERED THAT the January 6, 2009 decision of the Office of Workers Compensation Programs is affirmed.

Issued: November 10, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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