United States Department of Labor
Employees' Compensation Appeals Board

M.B., Appellant	)	
and	)	**Docket No. 12-728**
	)	**Issued: September 26, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Melville, NY, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 14, 2012 appellant, through her attorney, filed a timely appeal from a January 11, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP), which terminated her compensation benefits on the grounds that she had refused an offer of suitable employment. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether OWCP properly terminated appellant's compensation benefits effective March 13, 2011 pursuant to 5 U.S.C. § 8106(c).

FACTUAL HISTORY

On January 29, 2007 appellant, then a 48-year-old clerk keyer, filed an occupational disease claim alleging that her upper extremity symptoms were related to her employment duties.

[1] 5 U.S.C. § 8101 *et seq.*

OWCP accepted the claim for bilateral wrist and hand tendinitis and later expanded to include bilateral carpal tunnel syndrome. It paid wage-loss benefits, including a recurrence of September 24, 2007; a right carpal tunnel release of February 27, 2008 and a left carpal tunnel release of June 23, 2009. Appellant was approved for disability retirement on July 27, 2009 but elected to receive wage-loss compensation from OWCP.

In a December 4, 2009 report, Dr. Michael J. Katz, a Board-certified orthopedic surgeon and OWCP referral physician, noted the history of injury, reviewed the statement of accepted facts and medical record and set forth findings on examination. He diagnosed status post bilateral carpal tunnel syndrome and left cubital tunnel syndrome and opined that appellant was partially disabled. Dr. Katz opined that she could perform limited work eight hours a day with lifting limited to five pounds in both hands and outlined her restrictions in a December 4, 2009 work capacity evaluation. He stated that appellant had not reached maximum medical improvement and it was uncertain if her disability was permanent. On January 28, 2010 Dr. Katz reviewed a January 21, 2010 magnetic resonance imaging (MRI) scan of the left, wrist which demonstrated status post carpal tunnel release surgery with findings suggestive of recurrent carpal tunnel syndrome as well as slight degenerative osteoarthritis affecting the first metacarpal joint. Based on the left wrist MRI scan, he stated that appellant had recurrent carpal tunnel syndrome with degenerative osteoarthritis. Dr. Katz stated that while she may need another carpal tunnel release as well as a basal joint replacement in the future, her condition appeared permanent and the work restrictions previously given were appropriate.

Dr. Edwardo M. Yambo, a family practitioner, continued to advise that appellant was totally disabled and that she had reached maximum medical improvement.

On June 17, 2010 the employing establishment offered appellant a position as a modified mail processing clerk. The physical requirements of the position required her to pick up letters and reach above shoulder level up to four hours a day and had a five-pound lifting restriction for both hands.

In a July 19, 2010 letter, appellant noted that she was officially retired and considered unable to work again. She also stated that her physicians made it clear that she was unable to return to repetitive duty of any kind.

To resolve the conflict in medical opinion between Dr. Yambo and Dr. Katz as to appellant's capacity to return to a full-time limited-duty position, OWCP referred her to Dr. Bradley L. White, an orthopedic surgeon, for an impartial medical evaluation. In an October 12, 2010 report, Dr. White reviewed the history of injury and medical record and set forth examination findings. He opined that injuries causally related to appellant's work duties consisted of aggravation of preexisting bilateral carpal tunnel only. Dr. White stated that her complaints were mainly on the right side and were related to osteoarthritis of the thumb basal joint combined with ulnar nerve entrapment symptoms, which were not causally related to the work injury. There was no evidence of any further need for treatment and that appellant had a mild permanent partial disability as a result of her accepted injuries, for which she reached maximum medical improvement. Dr. White noted that her continuing symptomatology of thumb basal joint arthropathy and ulnar nerve entrapment might require further treatment. He found that since the modified mail processing clerk position the employing establishment offered

appellant did not require lifting anything greater than five pounds, she would be able to work the position on an eight hour a day basis. In an October 12, 2010 work capacity evaluation form, Dr. White advised that appellant could work eight hours a day in the official modified position with permanent restrictions of no pushing, pulling or lifting more than five pounds.

On November 2, 2010 OWCP advised appellant that the position of modified mail processing clerk was suitable to her work capabilities. It found that Dr. White, the impartial medical specialist, determined that she was able to return to the modified position eight hours a day and that the physical requirements complied with her medical restrictions. OWCP also verified with the employing establishment that the position was currently available. It informed appellant of the penalty provisions of 5 U.S.C. § 8106(c)(2) with respect to refusal of suitable work and afforded her 30 days to either accept the position or provide an explanation of reasons for rejecting the position. On November 29, 2010 appellant declined the position stating that she was unable to accept the position because of her inability to perform the job requirements.

In a report dated November 24, 2010, Dr. Yambo opined that appellant could not perform her regular job but could work light duty. He continued to opine that she was partially disabled.

In a December 1, 2010 report, Dr. Ather Mirza, a Board-certified orthopedic surgeon, opined that appellant was totally disabled and unable to perform any duties of a mail processing clerk. She continued to opine that appellant was disabled as a clerk.

On January 7, 2011 OWCP advised appellant that it proposed to terminate her compensation. It noted the weight of the medical evidence rested with the impartial medical specialist. Appellant was given 15 days to accept the position or face sanctions.

In a February 10, 2011 letter, appellant's attorney stated that appellant had called the employing establishment about her return to work and was told that there was no job for her.

In a February 17, 2011 electronic mailing, Tina DeRosa, district assessment team leader at the employing establishment, verified that appellant had been approved for disability retirement on September 28, 2009. In light of her approved retirement, appellant was advised that if she wanted to return to work and accept the offered position, then she had to put her intent to return to work in writing.

In a March 4, 2011 letter to appellant, David H. Padilla, manager, Health and Resource Management at the employing establishment, noted that if she wished to return to work at the proposed job offer she previously refused, then she needed to state so in writing. Failure to communicate her acceptance in writing would leave her in a refused status.

On March 9, 2011 OWCP verified with the employing establishment that the limited-duty job offer remained available.

By decision dated March 9, 2011, OWCP terminated appellant's monetary compensation benefits effective March 13, 2011 on the grounds that she neglected an offer of suitable work under 5 U.S.C. § 8106(c)(2). It found that the weight of the medical evidence rested with Dr. White, the impartial specialist and that the information she provided in response to the 15-day letter was not sufficient to support her failure to accept the offered position.

On March 16, 2011 appellant requested a telephonic hearing before an OWCP hearing representative, which was held on November 16, 2011. She testified that she had called the employing establishment to indicate that she accepted the offered position, but was advised that she was "not eligible to go back to work" because she had taken disability retirement. Appellant's attorney referenced the March 4, 2011 letter from the employing establishment advising appellant to put her intent to return to work in writing.

Following the hearing, the employing establishment confirmed that, given appellant's prior refusal of the position on the grounds that she was retired, it had requested a written statement of her intent to return to work which, it noted, had not been provided to date.

By decision dated January 11, 2012, an OWCP hearing representative affirmed the March 9, 2011 decision. The hearing representative found that appellant had refused, the modified-duty job offered by the employing establishment and refused suitable work.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[2] Section 8106(c)(2) of FECA 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.[3] OWCP may not terminate compensation without establishing that the disability ceased or that it is no longer related to the employment.[4] 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).[5]

Section 10.517(a) of FECA'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.[6] 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.[7]

In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving

[2] *Barry Neutuch*, 54 ECAB 313 (2003); *Lawrence D. Price*, 47 ECAB 120 (1995).

[3] 5 U.S.C. § 8106(c)(2); *see also Linda D. Guerrero*, 54 ECAB 556 (2003).

[4] *Ronald M. Jones*, 52 ECAB 190 (2000); *Arthur R. Reck*, 47 ECAB 339 (1995).

[5] *Sandra A. Sutphen*, 49 ECAB 174 (1997); *Stephen R. Lubin*, 43 ECAB 564 (1992).

[6] 20 C.F.R. § 10.517(a); *see Ronald M. Jones, supra* note 4.

[7] *Id*. at § 10.516; *see Kathy E. Murray*, 55 ECAB 288 (2004).

the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[8]

ANALYSIS

OWCP accepted that appellant sustained bilateral wrist and hand tendinitis and bilateral carpal tunnel syndrome as a result of her work duties and authorized both right and left carpal tunnel releases, which she underwent. On January 11, 2012 an OWCP hearing representative affirmed a March 9, 2011 decision terminating her compensation benefits based on her refusal of work in a modified mail processing clerk position. Determinative weight was accorded to Dr. White, an orthopedic surgeon serving as an impartial medical specialist, who opined that the modified mail processing clerk position was suitable.

OWCP properly determined that there was a conflict in medical opinion between Dr. Yambo, appellant's treating physician, and Dr. Katz, OWCP's referral physician, on the issue of her work capacity. Dr. Yambo opined that appellant was totally disabled while Dr. Katz opined that she was partially disabled and could work limited duty eight hours a day. To resolve the conflict, it properly referred her, pursuant to section 8123(a) of FECA, to Dr. White for an impartial medical examination and an opinion on the matter. In an October 12, 2010 report, Dr. White opined that appellant had a mild permanent partial disability as a result of her causally-related conditions. He reviewed her findings and determined that she was able to work eight hours a day in the official modified mail processing clerk position with permanent restrictions of no pushing, pulling or lifting more than five pounds.

The Board finds that Dr. White's October 12, 2010 report is sufficiently rationalized to establish that appellant is capable of performing the modified mail processing clerk position. Dr. White examined her and reviewed the medical record along with a copy of the June 17, 2010 modified position and a statement of accepted facts. He opined that appellant was able to work eight hours a day in the official modified position with permanent restrictions of no pushing, pulling or lifting more than five pounds. Dr. White's report contained an in-depth evaluation of her medical condition based on an accurate factual and medical background which properly served as the basis upon which he could render an opinion as to whether the modified mail processing clerk position was suitable. His opinion that appellant could work the modified mail processing clerk position is accorded special weight due to his status as an impartial medical examiner.[9] Thus, OWCP properly relied on Dr. White's opinion in finding the modified mail processing clerk position suitable.

In accordance with the procedural requirements under 5 U.S.C. § 8106(c), OWCP advised appellant on November 2, 2010 that it found the job offer of modified mail processing clerk to be suitable and gave her an opportunity to provide reasons for refusing the position within 30 days. It advised her in a January 7, 2011 letter that her reason that she could not perform the job requirements of the modified position was insufficient and that she had 15 additional days to accept the offered position. While Dr. Mirza opined that appellant was totally

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[8] *Manuel Gill,* 52 ECAB 282 (2001).

[9] *See L.W.*, 59 ECAB 471 (2008).

disabled from the duties of a mail processing clerk, the offered position was that of a modified mail processing clerk and Dr. Mirza offered no rationale or explanation as to how or why appellant was totally disabled. Furthermore, Dr. Yambo opined that appellant was capable of performing light duty as she was only partially disabled. The fact that appellant was already retired prior to the job offer is an insufficient reason to refuse suitable work.[10] The Board finds that OWCP followed established procedures prior to the termination of compensation pursuant to section 8106(c) of FECA.

Appellant argued before OWCP that she intended to return to work and accept the job offered by the employing establishment, but was prevented from doing so when the employing establishment stated that she had taken disability retirement. The record indicates that, as she previously retired, the employing establishment requested that she put her intent to work and accept the offered position in writing due to the fact she was retired. Appellant, however, never put her intent to return to work in writing. A similar situation was presented in *R.F.*, where the claimant had applied and was approved for disability retirement and then returned to the work site with an intent to work.[11] The Board noted that retirement is not an acceptable reason for refusing an offer of suitable work and there was no evidence that the disability retirement had been rescinded or set aside. The Board indicated that, when the claimant accepted retirement, she effectively removed herself from the employing establishment rolls. Therefore, the Board found the suitable job offer had not been withdrawn and OWCP properly terminated compensation.

In the present case, the evidence indicates that appellant had an approved disability retirement with no evidence it had been rescinded or set aside. The employing establishment indicated that the offered position of modified mail processing clerk remained available but advised that appellant would provide no written indication that she would return to the modified position. It clearly indicated that the job offer remained available and there was no contrary evidence. As noted, disability retirement is an insufficient reason to refuse suitable work.[12]

The Board finds that the position offered was medically and vocationally suitable and OWCP complied with the procedural requirements of section 8106(c) of FECA. OWCP met its burden of proof to terminate appellant's compensation benefits based on her refusal to accept suitable work.

On appeal, appellant's counsel argues that OWCP's decision is contrary to fact and law. However, as noted, the position offered was medically and vocationally suitable and OWCP complied with the procedural requirements of section 8106(c) of FECA.

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[10] The Board has long held that electing to receive retirement is not a justifiable reason to refuse an offer of suitable work. *Roy E. Bankston*, 38 ECAB 380 (1987). *See* Procedure Manual, Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity, Refusal of Job Offer,* Chapter 2.814.5(c) (July 1997).

[11] Docket No. 10-1020 (issued January 13, 2011). *See M.C.*, Docket No. 11-2025 (issued April 23, 2012).

[12] *Roy E. Bankston*, *supra* note 10.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP met its burden to terminate appellant's compensation benefits pursuant to 5 U.S.C. § 8106.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated January 11, 2012 is affirmed.

Issued: September 26, 2012
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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