United States Department of Labor
Employees' Compensation Appeals Board

JUANITA H. HARRIS, Appellant	)	
and	)	**Docket No. 04-982**
	)	**Issued: August 18, 2004**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Asheville, NC, Employer	)	

Appearances:
Juanita H. Harris, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On March 4, 2004 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated November 25, 2003, which terminated her compensation benefits due to her refusal of suitable work. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office met its burden of proof to terminate appellant's compensation benefits on the grounds that she refused an offer of suitable work. On appeal appellant contends that she is unable to drive to the offered position and that she cannot write or hold a telephone.

FACTUAL HISTORY

On February 15, 1995 appellant, then a 58-year-old transcriptionist/computer assistant, filed an occupational disease claim alleging that she sustained pain in her wrists

and thumbs which she attributed to factors of her federal employment. The Office accepted her claim for bilateral de Quervain's tenosynovitis. The Office paid appellant compensation for temporary total disability from February 27 to March 3, 1995.

The record indicates that appellant voluntarily retired from the employing establishment on January 29, 1996. In a decision dated September 13, 1996, the Office granted her schedule awards for a six percent impairment of her left upper extremity and an eight percent impairment of her right upper extremity. Following expiration of the schedule awards, appellant elected to receive workers' compensation benefits. The Office placed her on the periodic rolls beginning July 1, 1997.

Appellant informed the Office on February 20, 2001 that she had relocated from Asheville to Rutherfordton, North Carolina.

In a report dated February 19, 2002, Dr. Robert D. Francis, a Board-certified orthopedic surgeon and appellant's attending physician, diagnosed bilateral de Quervain's tenosynovitis, bilateral osteoarthritis of the triscaphoid joint, radial tunnel syndrome of the right forearm and lateral epicondylitis of the right elbow. He stated:

> "It is my considered medical opinion that [appellant] continues to have physical findings consistent with de Quervain's tenosynovitis. She has a positive Finkelstein test and is tender over the first dorsal compartment in both wrists. It would be very difficult for [appellant] to work at a job as a typist or any other activity that required repetitive activities with the hands and wrists. She also has lateral epicondylitis of the right humerus, osteoarthritis in her wrists and radial tunnel syndrome on the right, all of which would make it very difficult for her to work at any sort of repetitive activities with her hands."

In an accompanying work restriction evaluation, Dr. Francis opined that appellant could not work. He found that she could sit, walk, twist, squat, kneel, climb and stand for eight hours per day, but could not reach, perform repetitive movements, push, pull or lift. Dr. Francis further found that appellant could not operate a motor vehicle.

Dr. Francis submitted a progress note dated November 25, 2002, in which he noted that appellant would need surgery in the future and referred her to Dr. John B. Stark, a Board-certified orthopedic surgeon.[1]

In a report dated February 24, 2003, Dr. Stark listed findings of a positive Phalen's test, Tinel's sign, Finkelstein test and Durkin's test. He diagnosed "bilateral osteoarthritis of the carpometacarpal [CMC] joint, multiple triggering fingers, bilateral

[1] The record also contains progress notes from Dr. Francis dated March 28, September 9 and October 10, 2002 describing his treatment of appellant.

de Quervain's and bilateral carpal tunnel syndrome." Dr. Stark noted that appellant did not want surgery. He stated:

> "[Appellant] has not worked since January 1996 and at this point she is not interested in any kind of surgical intervention. It is my estimate that she will never, with conservative management, be capable of returning to work as she utilizes carpal tunnel splints [and] thumb CMC splints both at night and daytime for doing her activities of daily living. However, I do [not] believe that she will ever be capable of working in an office environment as a secretary."

By letter dated June 18, 2003, the employing establishment informed the Office that it was enclosing a copy of a position description for information receptionist for a suitability determination. The employing establishment noted that it had also sent the position description to appellant's attending physician for review.

In a letter dated June 11, 2003, Dr. Stark indicated that he had reviewed the position of information receptionist and stated that he did "not believe that any of [appellant's] medical problems would preclude her from carrying out this position in a safe and thorough manner."

On July 8, 2003 the Office notified the employing establishment that it had not yet received the position description, but that it could offer appellant the job as it had been approved by Dr. Stark.

By letter dated July 14, 2003, the employing establishment offered appellant the position of information receptionist with a start date of July 28, 2003. The employing establishment enclosed the position description and requested a response by July 25, 2003.

On July 17, 2003 appellant declined the job offer because of her increased hand disability, her location 70 miles away and her inability to drive or write.[2]

The Office received a copy of the position description of information receptionist on August 27, 2003. The position was sedentary with sitting, standing or lying down as necessary. The position also provided for the use of telephone headsets and indicated that there were "[n]o special physical demands" required for the work.

In a letter dated September 25, 2003, the Office advised appellant that it had found the position of information receptionist suitable and notified her that if she refused the offered position without reasonable cause, her compensation benefits would be terminated pursuant to 5 U.S.C. § 8106(c). The Office provided her 30 days to accept the position or offer her reasons for refusal. The Office noted that the position remained open, that appellant could accept with no penalty and that it would pay her compensation for any difference in pay between the offered position and her date-of-injury job.

[2] Appellant indicated that she had not driven 50 miles in 3 years.

Appellant submitted a response to the Office on October 22, 2003. She provided as a reason for refusing the offered position the fact that it was over 70 miles from the place where she currently resided.[3] Appellant stated that she was unable to drive to and from the position and further related that her "hands and wrists make it impossible" for her to drive. She also described her problems writing, her trouble sleeping and her inability to hold papers or perform housework. Appellant stated that she had continual pain and numbness in her hands and wrists. She submitted Dr. Francis' February 19, 2002 report in support of her contentions.

By letter dated November 6, 2003, the Office notified appellant that her reasons for refusing the position were unacceptable and allowed her an additional 15 days to accept the position.

On November 17, 2003 appellant informed the Office that she had refused the position because three doctors stated that she could not work in an office. She stated: "I also would not be able to drive even if I could and am, therefore, not able to accept this position."

In a decision dated November 25, 2003, the Office terminated appellant's compensation benefits, effective November 30, 2003, on the grounds that she refused an offer of suitable work.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation, including cases in which the Office terminates compensation under section 8106(c) for refusal to accept suitable work.[4]

Under section 8106(c)(2) of the Federal Employees' Compensation Act,[5] the Office may terminate compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.[6] However, to justify such termination, the Office must show that the work offered was suitable[7] and must inform the employee of the consequences of a refusal to accept employment deemed suitable.[8] An employee who refuses to work or neglects to work after suitable work has been offered has the burden of showing that such refusal to work was justified.[9]

[3] Appellant indicated that she had relocated four years earlier to care for her ill son who was now deceased.

[4] 5 U.S.C. § 8106(c); *Henry W. Sheperd, III*, 48 ECAB 382 (1997).

[5] 5 U.S.C. § 8106(c)(2).

[6] *Martha A. McConnell*, 50 ECAB 129, 131 (1998).

[7] *Marie Fryer*, 50 ECAB 190, 191 (1998).

[8] *Ronald M. Jones*, 48 ECAB 600, 602 (1997).

[9] 20 C.F.R. § 10.517; *Ronald M. Jones*, 52 ECAB 190 (2000).

Section 8106(c) will be narrowly construed as it serves as a penalty provision which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.[10]

Section 10.516 of the Code of Federal Regulation states that the Office will advise the employee that the work offered is suitable and provide 30 days for the employee to accept the job or present any reasons to counter the Office's finding of suitability.[11] Thus, before terminating compensation, the Office must review the employee's proffered reasons for refusing or neglecting to work.[12] If the employee presents such reasons and the Office finds them unreasonable, the Office will offer the employee an additional 15 days to accept the job without penalty.[13]

ANALYSIS

In this case, the Office improperly terminated appellant's compensation for refusing an offer of suitable work. Dr. Stark, in a letter dated June 11, 2003, stated that he had reviewed the position description of information receptionist and found that appellant could perform the job duties. On July 14, 2003 the employing establishment offered her the position of information receptionist. Appellant declined the position on July 17, 2003 noting that she was unable to drive or write. In a letter dated September 25, 2003, the Office notified her that it had found the information receptionist position suitable and advised her of the penalty of refusing suitable work. In a response received October 22, 2003, appellant related that she refused the position because it was more than 70 miles from her current residence and as she was unable to drive, write or hold papers. She resubmitted the February 19, 2002 report from Dr. Francis in support of her contentions.

Under the Office's procedure and Board precedent, an inability to travel to work because of residuals of the employment injury is an acceptable reason for rejecting an offer of suitable work, if supported by the medical evidence.[14] In this case, on February 19, 2002 Dr. Francis completed a work restriction evaluation form and found that appellant was unable to operate a motor vehicle. His report generally supports her contention that she is unable to perform the offered position due to the restriction on driving a motor vehicle. The Office did not undertake further development of the medical evidence by requesting that either Dr. Francis or Dr. Stark specifically address appellant's inability to drive. The Office merely noted that she still lived within commuting range of the offered position and had moved 45 miles from her previous

[10] *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[11] 20 C.F.R. § 10.516.

[12] *See Maggie L. Moore*, 42 ECAB 484 (1991); *reaff'd on recon.*, 43 ECAB 818 (1992).

[13] 20 C.F.R. § 10.516.

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(5) (July 1996); *Glen L. Sinclair*, 36 ECAB 664 (1985).

residence. In this case, the medical evidence supports that appellant is unable to drive for any amount of time. There is no evidence of record showing that any alternative transportation to the work site was available. The Office inappropriately terminated appellant's compensation benefits for refusing suitable work.

CONCLUSION

The Board finds that the Office did not meet 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 decision of the Office of Workers' Compensation Programs dated November 25, 2003 is reversed.

Issued: August 18, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member