

May 21, 1997 claim accepted for bilateral carpal tunnel syndrome.¹ Appellant stopped working in December 2000 and received treatment for both conditions. The Office authorized neck surgery and, on November 7, 2002, she underwent an anterior C5-6 discectomy.

Dr. Craig Callewart, a treating orthopedic surgeon, stated in a March 12, 2003 report that appellant required an ergonomic workstation and was limited to 15 minutes of keyboarding per hour. In response to Dr. Callewart's restrictions, on June 3, 2003 the employing establishment offered appellant a modified claims examiner position. The offer letter stated, "voice recognition equipment is available that will minimize the keyboard work to less than 15 minutes per hour." A statement of the physical requirements of the position reported that it "requires virtually no keyboard activity when utilizing the voice activated equipment."

By report dated June 25, 2003, Dr. Callewart indicated that he had discussed work restrictions with appellant and noted: "Will limit actual use of voice activation/computer to 25 minutes per hour, given her neck difficulties." He also recommended that appellant begin at 4 hours per day until reevaluation, which he indicated would be in 10 weeks.

On July 15, 2003 the employing establishment again offered the modified claims examiner position, with the hours per week now limited to four hours from July 15 to August 15, 2003, six hours from August 18 to September 5, 2003, when appellant would begin working eight hours per day. The Office again indicated that voice recognition equipment was available and would limit keyboarding to less than 15 minutes per hour.

In a letter dated August 25, 2003, the Office advised appellant that it found the offered job to be suitable. The Office stated, "Dr. Callewart has indicated that you would be able to perform 15 minutes of keyboarding out of each hour, alternating voice recognition activation software 25 minutes per hour." Appellant was advised of the provision of 5 U.S.C. § 8106(c)(2) and that she should accept the position or provide reasons for refusing within 30 days.

In a letter dated September 2, 2003, appellant indicated that she needed clarification regarding the job duties; she stated that she had a keyboarding restriction of 25 minutes per hour and inquired as to what duties she would perform in the remaining 35 minutes. The Office responded in a September 4, 2003 letter, that appellant would be expected to use the voice activated system to perform her duties while restricted to 25 minutes of keyboard activities.

In a report dated August 29, 2003, Dr. Callewart stated in pertinent part that appellant "brings job duty list today. We feel that she can work limited hours with voice activated computer 25 minutes out of 60." In a letter dated September 24, 2003, the Office stated that the reasons provided by appellant for refusing the position were not valid and she had an additional 15 days to accept the position.

On October 7, 2003 the Office received a report dated October 3, 2003 from Dr. Callewart, stating that appellant "is only able to work limited hours with voice activation or

¹ The record contains reference to another claim for a left hand ganglion cyst, OWCP File No. 110172959, but evidence from that file is not included in the case record sent to the Board.

computer keyboarding 25 minutes total out of 60 minutes.” On October 8, 2003 the Office received a report dated June 26, 2003 from Dr. Javier Valadez, who indicated that appellant’s conditions included cervical disc disease, carpal tunnel syndrome, hypertension and depression. He opined that appellant was unable to be gainfully employed.

By decision dated October 21, 2003, the Office terminated appellant’s compensation effective November 1, 2003, on the grounds that she refused an offer of suitable work. The Office did not discuss the evidence received on October 7 and 8, 2003.

LEGAL PRECEDENT

5 U.S.C. § 8106(c) provides in pertinent part, “A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation.” It is the Office’s burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.² To justify such a termination, the Office must show that the work offered was suitable.³ The determination of whether an employee is physically capable of performing the job is a medical question that must be resolved by medical evidence.⁴

ANALYSIS

The Office determined that the offered position of modified claims examiner was suitable because it was within Dr. Callewart’s restrictions. Dr. Callewart stated in his June 25, 2003 report that “use of voice activation/computer” was limited to 25 minutes per hour. In his August 29, 2003 report, he stated that appellant could “work limited hours with voice activated computer” for 25 minutes per hour. The October 3, 2003 report stated that appellant was limited to 25 minutes per hour of “with voice activation or computer keyboarding.” All of these reports indicate that the limitation of 25 minutes applied to either keyboarding or use of voice activation equipment. While these may be different activities, Dr. Callewart’s reports consider them together and limit the activities to 25 minutes per hour. In the August 25, 2003 letter, the Office interpreted the restrictions from Dr. Callewart as allowing 15 minutes of keyboarding and 25 minutes of using voice activation equipment per hour, but that is not what the physician stated. The Office did not request clarification from Dr. Callewart or send him the offered position and request an opinion as to whether it was suitable. There is no indication in the job offer that any restrictions were placed on use of voice activation. The offer indicated that keyboarding would be restricted to less than 15 minutes per hour because appellant could use voice activation instead of actual keyboarding. There is no reference to a time restriction regarding use of voice activation. It is not clear from the record whether the offered position could be performed within the stated work restrictions.⁵

² *Henry P. Gilmore*, 46 ECAB 709 (1995).

³ *John E. Lemker*, 45 ECAB 258 (1993).

⁴ *Id.*

⁵ *See Annette Quimby*, 49 ECAB 304 (1998).

It is also noted that Dr. Callewart stated in his June 25, 2003 report, appellant should begin work at 4 hours per day until further evaluation, which he indicated was in 10 weeks. The job offer required appellant to work four hours for one month and then increase to six hours. There is nothing in Dr. Callewart's reports to confirm that four hours for one month would be appropriate. The Office did not seek clarification from Dr. Callewart on the issue.

Appellant submitted a June 26, 2003 report from Dr. Valadez, stating that she could not be gainfully employed. When the Office receives relevant evidence prior to its decision, it must consider the evidence.⁶ The Office did not discuss the evidence received after the September 24, 2003 letter or address whether it was sufficient to render the offered position unsuitable.

The Board therefore finds that the evidence does not establish that the offered position was medically suitable. It is not clear whether the use of voice activation complied with the stated restrictions or whether the offering of four hours per day for one month was appropriate. The Office also failed to properly consider all evidence received prior to the termination decision.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation on the grounds that she refused an offer of suitable work. The medical evidence was not properly developed to adequately determine whether the offered position was medically suitable and the Office did not address all of the relevant evidence of record.

⁶ See *Kenneth R. Love*, 50 ECAB 193, 198 (1998).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 21, 2003 is reversed.

Issued: November 12, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member