



## **FACTUAL HISTORY**

On April 23, 1997 appellant, a 40-year-old clerk, filed an occupational disease claim alleging that her bilateral carpal tunnel syndrome was due to employment factors. Appellant stopped work in August 1997 and has not returned.<sup>1</sup> The Office accepted the claim for bilateral carpal tunnel syndrome on January 20, 2000.<sup>2</sup>

On April 11, 2000 appellant elected benefits under the Act. By letter dated May 16, 2000, the Office placed appellant on the periodic rolls for temporary total disability.

In a September 20, 2000 report, Dr. Harold H. Alexander, a second opinion Board-certified orthopedic surgeon, opined that appellant might have mild carpal tunnel syndrome more on the right side than the left side. Physical findings revealed “good wrist flexion, extension, pronation, supination.” Dr. Alexander performed a Phalen’s test and Tinel’s sign. Appellant related that it “hurts a lot at the wrist” when he performed the Tinel’s sign test, but there was no evidence of tingling or numbness in her fingers. The physician noted that he “tried a Phalen[’s] [t]est with her wrists flexed bilaterally and this can only be tolerated for about five seconds and then she says it hurts a lot.” He reported that appellant “has inconsistent decreased sensation of her fingers in both hands.” Dr. Alexander recommended that a repeat electromyography (EMG) nerve conduction test be performed. He opined that appellant “grossly exaggerated” her symptoms and “there is no evidence of atrophy.” In concluding, he opined that appellant was capable of working modified duty with restrictions on lifting, pulling and pushing.

In a decision dated November 8, 2000, the Office granted appellant a schedule award for a 10 percent impairment of her right arm and a 5 percent impairment of her left arm.

Appellant’s counsel disagreed with the percentage of impairment found under the schedule award and requested a hearing in a December 6, 2000 letter.

In a January 18, 2001 letter, appellant’s counsel requested reconsideration of the January 20, 2000 decision accepting appellant’s claim. Specifically, appellant requested the decision be amended to show 1992 as the onset date.

By letter dated May 29, 2001 appellant, through her attorney, requested a written review of the record in lieu of the oral hearing.

By decision dated August 21, 2001, the Office hearing representative affirmed the November 8, 2000 schedule award.

On April 3, 2002 the employing establishment offered appellant a limited-duty position as a modified distribution clerk based upon the September 20, 2000 report by Dr. Alexander. Physical requirements included no lifting over five pounds, fine manipulation of the wrists, simple grasping and no repetitive motions of the wrist or arms. The duties of the position

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<sup>1</sup> Appellant retired on disability in September 1997.

<sup>2</sup> On February 28, 2000 appellant filed a claim for a schedule award.

included sorting, rewrapping and repairing parcels and other damaged mail. The hours of the position were from 14:25 to 22:75 with a start date of April 20, 2002. The employing establishment forwarded a copy of the offered position description to Dr. Joseph I. Hoffman, Jr., an attending Board-certified orthopedic surgeon, for his review.

In an April 8, 2002 report, Dr. Hoffman reported appellant's signs and symptoms had somewhat worsened over the prior three years. A physical examination found positive bilateral Phalen's test and Tinel's sign. Regarding appellant's ability to work, Dr. Hoffman stated that he informed appellant that he felt she could "return to a limited[-]duty job" but further testing was required.

In an April 11, 2002 letter, appellant informed the Office that she saw Dr. Hoffman on April 8, 2002 and that he referred her for more tests as her condition had worsened.

In a May 14, 2002 work capacity evaluation (Form OWCP-5c), Dr. Hoffman released appellant to work eight hours per day with restrictions. The restrictions included no reaching above the shoulder for more than 3 hours, no pushing more than 10 pounds for 8 hours, no pulling more than 10 pounds for 8 hours, no lifting more than 10 pounds for 8 hours, no more than 1 hour of repetitive wrist movements and a break of 15 minutes every 2 hours. Dr. Hoffman also stated that appellant could not work more than eight hours per day "given her medical problems."

In a May 30, 2002 letter, appellant's representative stated that appellant elected disability retirement instead of accepting the job offer.

On June 3, 2002 the Office notified appellant that the position of modified distribution clerk was suitable to her work capabilities and was currently available. The Office gave appellant 30 days either to accept the position or to provide an explanation for refusing it. The Office notified appellant of the provision of 5 U.S.C. § 8106(c)(2).

In a July 16, 2002 treatment note, Dr. Hoffman reported a normal Phalen's test and ulnar nerve neuropathy of the left hand. Appellant related spasms in her first, second and third fingers of her left hand. Dr. Hoffman stated that he had referred appellant to Dr. Jim W. Roderique for consideration of ulnar nerve decompression.

On July 17, 2002 the Office notified appellant that it had considered her reasons for refusing the position and had found them to be unacceptable. The Office afforded appellant an additional 15 days to accept the position.

In a letter dated July 21, 2002, appellant's counsel responded to the proposal to terminate appellant's compensation, noting that Dr. Hoffman stated that she required further surgery and that she was "unable to return to work until after the surgery is performed." Appellant requested the Office to accept that her bilateral ulnar condition was due to her carpal tunnel syndrome. Lastly, appellant requested an emotional condition be accepted and contended that her treatment for this condition also prevented her return to work.

Appellant submitted a June 17, 2002 clinical assessment from Smith Counseling and Psychological services in which Dr. Lynda R. Smith, a licensed professional counselor, diagnosed recurrent depression.

In an August 21, 2002 report, Dr. Roderique based upon a physical examination, reported:

“There was no pain or swelling over the dorsum of the hand or at the MP [metatarsophalangeal] joint. She could make a full fist without difficulty. Her palmar compression test, Phalen’s maneuver and Tinel[’s] sign were all negative as it related to both carpal tunnels.”

On August 26, 2002 Dr. Hoffman reviewed the offered position description and determined that appellant was able to perform the duties outlined in the limited-duty job offer.

By decision dated September 24, 2002, the Office terminated appellant’s wage-loss benefits and compensation payments for any schedule award effective September 25, 2002, on the basis that she refused an offer of suitable work. In reaching this decision, the Office relied upon the opinion of Dr. Hoffman that she was capable of performing the offered position.

On October 7, 2002 appellant underwent surgery for right carpal tunnel release and internal neurolysis of the median nerve. The surgery was performed by Dr. Roderique.

Appellant’s counsel requested a hearing by letter dated October 9, 2002. A hearing was held on May 29, 2003, at which appellant was represented by counsel and provided testimony.

By decision dated August 25, 2003, the Office hearing representative affirmed the termination of appellant’s wage-loss and schedule award compensation benefits.

### **LEGAL PRECEDENT**

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>3</sup> This burden of proof is on the Office when it terminates compensation, under 5 U.S.C. § 8106(c) for refusal to accept suitable work. The Office met its burden in the present case.

Section 8106(c)(2) of the Act provides in pertinent part, “[a] partially disabled employee who ... refuses or neglects to work after suitable work is offered ... is not entitled to compensation.”<sup>4</sup> To prevail under this provision, the Office must show that the work offered was suitable and must inform the employee of the consequences of refusal to accept such employment.<sup>5</sup> An employee who refuses or neglects to work after suitable work has been

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<sup>3</sup> *Fred Simpson*, 53 ECAB \_\_\_ (Docket No. 02-802, issued August 27, 2002).

<sup>4</sup> 5 U.S.C. § 8106(c)(2).

<sup>5</sup> *Dale K. Nunner*, 53 ECAB \_\_\_ (Docket No. 01-1374, issued February 14, 2002).

offered has the burden of showing that such refusal to work was justified.<sup>6</sup> The Board has recognized that section 8106(c) is a penalty provision that must be narrowly construed.<sup>7</sup>

The implementing regulation provides that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of showing that such refusal or failure to work was reasonable or justified and shall be provided with the opportunity to make such a showing before entitlement to compensation is terminated.<sup>8</sup> To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.<sup>9</sup>

### ANALYSIS

In the present case, the record reflects that on April 3, 2002 the employing establishment offered appellant reemployment as a modified distribution clerk, eight hours per day. Dr. Hoffman, appellant's attending Board-certified orthopedic surgeon, approved the offered position. The physician noted appellant was unable to work more than eight hours per day due to her "medical conditions." Accordingly, the Board finds that the medical evidence of record establishes that, at the time the job offer was made, appellant was capable of performing the modified position.<sup>10</sup>

The Office therefore found that the limited-duty position offered to appellant was suitable based on her work restrictions at that time. The issue is whether appellant has established that her refusal to work in that position was justified.<sup>11</sup> The Office must first inform the claimant of the consequences of refusal to accept suitable work and allow the claimant an opportunity to provide reasons for refusing the offered position. If the claimant presents reasons for refusing the offered position, the Office must inform the claimant if it finds the reasons inadequate to justify the refusal of the offered position and afford the claimant a final opportunity to accept the position. If the Office fails to inform appellant of whether or not the reasons offered were sufficient to justify refusal of the suitable work position, the Office has failed to meet the procedural requirements of section 8106(c)(2).<sup>12</sup>

In this case, the Office advised appellant in letters dated June 3 and July 17, 2002, that the offered position was suitable work and afforded appellant the opportunity to either accept the

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<sup>6</sup> *Joyce M. Doll*, 53 ECAB \_\_\_\_ (Docket No. 02-311, issued September 25, 2002).

<sup>7</sup> *Anna M. Delaney*, 53 ECAB \_\_\_\_ (Docket No. 00-2090, issued February 22, 2002).

<sup>8</sup> 20 C.F.R. § 10.516 (1999).

<sup>9</sup> *Id.*

<sup>10</sup> *See John E. Lemker*, 45 ECAB 258 (1993).

<sup>11</sup> *See Henry P. Gilmore*, 46 ECAB 709 (1995).

<sup>12</sup> *Howard Y. Miyashiro*, 51 ECAB 253 (1999); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

position, or provide her reasons for declining the offer. The Office thus met this element of the procedural requirement.

Subsequent to the July 17, 2002 15-day notification, appellant's counsel informed the Office that appellant was unable to accept the position until after surgery was performed. She also requested the Office to accept that her bilateral ulnar condition was employment related and disabling. However, Dr. Hoffman indicated that appellant was capable of working a limited duty with restrictions based on her medical conditions, in the May 14, 2002 work capacity evaluation (Form OWCP-5c). On August 26, 2002 the physician again concluded appellant was medically capable of performing the offered position. Appellant has not submitted any medical evidence that the position was outside her physical limitations as recommended by her attending physician.<sup>13</sup> There is nothing in the record, which supports a medical reason for appellant's refusal of the offered position. Appellant could have accepted the offer, started the position and then gone on total disability during her surgery and recovery period.

Appellant's counsel also requested that the Office accept the conditions of and an emotional condition, which she alleged prevented her from returning to work.

Appellant provided reports from Dr. Smith, a licensed professional counselor, who diagnosed depression, but offered no opinion on appellant's ability to work. However, this condition is not an accepted employment injury in this case. Although Dr. Smith has a Ph.D. and is licensed by the State of Georgia as a "professional counselor," these qualifications do not make her a "physician" as defined within the meaning of the Act.<sup>14</sup> For this reason she is not competent to render a medical opinion in this case.<sup>15</sup> As such, the evidence does not reflect an emotional condition which would prevent appellant from accepting the limited-duty job offer.

As appellant's reasons for rejecting the job were not valid and appellant has not demonstrated that she is medically unable to perform the job, the Board finds that the Office properly terminated appellant's compensation for refusing an offer of suitable work.

### **CONCLUSION**

The Board finds that the Office properly terminated appellant's wage-loss and schedule award compensation benefits effective under section 8106(c) of the Act, on the grounds that she refused an offer of suitable work.

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<sup>13</sup> *Karen L. Mayewski*, 45 ECAB 219 (1993).

<sup>14</sup> Section 8101(2) defines as "physician" those clinical psychologists within the scope of their practice as defined by state law. The "professional counselor" license held by Dr. Smith is distinct from Georgia State licensing of "psychologists."

<sup>15</sup> *See Arnold A. Alley*, 44 ECAB 912, 921 (1993).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 25, 2003 is affirmed.

Issued: September 14, 2004  
Washington, DC

Colleen Duffy Kiko  
Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member