

**United States Department of Labor
Employees' Compensation Appeals Board**

JEANETTE ALMODOVAR, Appellant

and

**U.S. POSTAL SERVICE, WEST VILLAGE
STATION, New York, NY, Employer**

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**Docket No. 04-1860
Issued: January 18, 2005**

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On July 20, 2004 appellant filed a timely appeal from the March 26, 2004 decision of the Office of Workers' Compensation Programs which terminated her compensation benefits on the grounds that she refused an offer of suitable work and denied her claim that she sustained a recurrence of disability on March 25, 2003 causally related to her accepted employment injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation by decision dated February 3, 2003 on the grounds that she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2); and (2) whether the Office properly denied appellant's recurrence claim on the grounds that she was barred from receiving compensation after the February 3, 2003 decision under 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On December 30, 1999 appellant, then a 32-year-old distribution window clerk, filed an occupational disease claim alleging that on June 1, 1993 she became aware of her bilateral carpal tunnel syndrome. She also alleged that on December 10, 1999 she first realized that her condition developed as a result of weighing and accepting parcels over 50 pounds, typing and writing, computer use, loading and unloading trucks and boxing mail as a distribution window clerk. Appellant stopped work on December 10, 1999. By letter dated April 4, 2000, the Office accepted her claim for aggravation of bilateral carpal tunnel syndrome. The Office authorized right carpal tunnel release which was performed on May 17, 2000.

The Office received a December 4, 2001 work capacity evaluation (Form OWCP-5c) from Dr. Vincent Ruggiero, appellant's treating Board-certified orthopedic surgeon, in which he indicated that she could work four hours a day. Dr. Ruggiero further indicated that appellant could sit, walk, stand, reach, reach above the shoulder, operate a motor vehicle, squat, kneel and climb eight hours a day. Appellant was limited to twisting and repetitive movements of the wrists and elbows four hours a day. Further, she could not push, pull or lift more than 15 pounds 4 hours a day. Dr. Ruggiero suggested that appellant take a 15-minute break every 2 hours.

On January 30, 2002 the employing establishment offered appellant a position as a limited-duty modified distribution window clerk working four hours per day from 2:30 p.m. to 6:30 p.m. The position involved answering telephones, taking messages, assisting at the inquiry window but excluded obtaining parcels for customers, making copies, assisting the general clerk with office duties as needed, performing lobby sweep duties such as assisting customers and expediting the waiting line, scanning and researching express mail, selling stamps and money orders on a relief basis as needed; assisting in station close-out, cutting out the address on return mail and return to sender mail and verifying unworked mail for missent mail. The physical demands included no lifting, pushing or pulling over 15 pounds more than 4 hours a day and no twisting more than 4 hours a day. Fifteen-minute breaks were permitted every two hours and no repetitive motion of the wrists and elbows was allowed. Appellant was permitted to work four hours a day.

In a February 4, 2002 letter, the Office advised appellant that the offered position was suitable, that she had 30 days to accept the position or provide an explanation for refusing it, and that a partially disabled employee who refused suitable work was not entitled to compensation pursuant to 5 U.S.C. § 8106(c).

On February 25, 2002 the Office received Dr. Ruggiero's February 19, 2002 Form OWCP-5c in which he stated that appellant had carpal tunnel syndrome, she could not perform repetitive tasks and she was willing to be retrained. Dr. Ruggiero indicated that appellant could sit, walk, stand, squat, kneel and climb eight hours a day. She was not allowed to reach and she was limited to reaching above the shoulder and twisting 2 hours a day, operating a motor vehicle 1 hour a day, repetitive movements of the wrists and elbows 2 hours a day and pushing, pulling and lifting up to 10 pounds 2 hours a day. Dr. Ruggiero recommended that appellant take 15-minute breaks. Appellant rejected the job offer stating that she and her physician felt she was unable to perform the modified window clerk duties. Appellant further indicated that she was awaiting authorization for surgery.

In an August 2, 2002 letter, the Office requested that Dr. Ruggiero provide whether appellant underwent right carpal tunnel release which was authorized on March 4, 2002 and if not, whether the surgery would take place in the near future. The Office further requested that he provide a narrative report discussing his prognosis and future plan and complete an accompanying Form OWCP-5c.

Dr. Ruggiero submitted an August 5, 2002 Form OWCP-5c indicating that appellant could not perform repetitive hand movements due to her carpal tunnel syndrome. He reiterated that she could sit, walk, stand, squat, kneel and climb eight hours a day. Dr. Ruggiero further reiterated that appellant was not allowed to reach and she was limited to reaching above the shoulder and twisting 2 hours a day, operating a motor vehicle 1 hour a day, repetitive movements of the wrists and elbows 2 hours a day and pushing, pulling and lifting up to 10 pounds 2 hours a day. He also reiterated that appellant should take 15-minute breaks. By letter dated September 16, 2002, the Office requested that Dr. Ruggiero provide the number of hours that appellant could work per day.

On October 25, 2002 appellant was offered limited-duty work as a modified clerk based on Dr. Ruggiero's August 5, 2002 Form OWCP-5c. The position required her to work from 10:30 a.m. until 7:00 p.m. five days a week. The job duties involved the same ones outlined in the employing establishment's January 30, 2002 job offer with the exception of receiving accountable mail and scanners from carriers upon their return to the station. The physical requirements involved the following: no lifting, pushing or pulling over 10 pounds; no reaching; no reaching above the shoulder and twisting more than 2 hours a day; no operating a motor vehicle more than 1 hour per day; and no repetitive movements of the wrists and elbows more than 2 hours a day. A break every 15 minutes for the wrists and elbows and an 8-hour work shift were permitted.

In an October 28, 2002 letter, the Office requested that Dr. Ruggiero review the limited-duty position offered to appellant and state whether she could perform the required job duties.

The Office held a telephone conference with the employing establishment on November 15, 2002 regarding the suitability of the offered position. The Office informed the employing establishment that the position did not cite all the restrictions delineated by Dr. Ruggiero and that it could not be deemed suitable until all of his restrictions were listed. The Office stated that Dr. Ruggiero limited pushing, pulling and lifting no more than 10 pounds 2 hours a day while the employing establishment's job offer did not list the 2-hour time limitation. Instead, the employing establishment only listed the 10-pound weight restriction.

On November 21, 2002 the employing establishment submitted an amended job offer for the modified distribution window clerk position working from 10:30 a.m. until 7:00 p.m. This position involved the same duties as outlined in the October 25, 2002 job offer. The physical requirements also remained the same with the exception that appellant was not allowed to lift, push or pull over 10 pounds more than 2 hours a day based on Dr. Ruggiero's restrictions.

By letter dated November 29, 2002, the Office advised appellant that the offered position was suitable and provided her with her procedural rights pursuant to 5 U.S.C. 8106(c). On December 20, 2002 she rejected the job offer stating that after reevaluation by her physician, her

symptoms remained the same and surgery was going to be scheduled after her next appointment. In addition, she noted that the amended job offer required her to perform repetitive movements. Appellant submitted Dr. Ruggiero's December 19, 2002 OWCP Form-5c which revealed that she was unable to work eight hours a day and that she had carpal tunnel syndrome which prevented her from performing repetitive tasks. Dr. Ruggiero noted that appellant was willing to be retrained. He provided the same physical abilities and limitations as set forth in his August 5, 2002 OWCP Form-5c.

In a January 16, 2003 letter, the Office found the reasons provided by appellant unacceptable. The Office advised appellant that the position was still open and available. The Office afforded her 15 days to accept the offered position or be subjected to termination of compensation benefits.

On January 22, 2003 appellant submitted Dr. Ruggiero's January 14, 2003 Form OWCP-5c which provided that she could not perform repetitive hand movements due to her carpal tunnel syndrome. Dr. Ruggiero indicated that appellant had the same physical abilities and limitations and length of time for breaks as listed in his August 5 and December 19, 2002 OWCP-5c forms. His January 14, 2003 treatment note revealed that appellant requested surgery for her carpal tunnel syndrome. Dr. Ruggiero noted that this would be revision surgery since surgery had been already performed on appellant. He discussed the risks and benefits associated with the surgery with appellant. Dr. Ruggiero related that appellant told him that her job description had changed at the employing establishment, she was unable to perform her work duties and she had not worked since 1999. He opined that appellant would never be able to perform her previous work duties and noted that she was in the process of reeducating herself for job retraining. Dr. Ruggiero submitted a form dated January 14, 2003 requesting authorization to perform revisions of appellant's carpal tunnel syndrome.

By decision dated February 3, 2003, the Office terminated appellant's compensation effective February 23, 2003 on the grounds that she refused an offer of suitable work. The Office indicated that appellant's medical benefits would continue for her employment-related injury.

In an April 6, 2003 letter, appellant stated that she returned to work with restrictions on March 3, 2003. She further stated that at that time she inadvertently filed a claim for a schedule award rather than a claim for disability. Appellant requested withdrawal of her schedule award claim and submitted a claim alleging that she sustained a recurrence of disability on March 25, 2003. She noted that she was scheduled for revision surgery with Dr. Ruggiero on March 26, 2003. Appellant explained why she did not immediately undergo this surgery following authorization from the Office on March 4, 2002. She stated that, after a discussion with Dr. Ruggiero, he referred her to a rheumatologist to rule out factors such as arthritis in her hands, to be followed by reevaluation by him. Appellant submitted a claim dated March 25, 2003 which alleged that she sustained a recurrence of disability on that date causally related to her accepted employment injury.

The employing establishment controverted appellant's claim in an April 22, 2003 letter, noting the Office's February 5, 2003 decision. The employing establishment stated that appellant returned to work on February 24, 2003 due to the termination of her compensation.

On March 26, 2003 appellant underwent revision of right open carpal tunnel release performed by Dr. Ruggiero. The Office received Dr. Ruggiero's May 8, 2003 letter in which he provided a history of appellant's accepted employment injury and medical treatment. Dr. Ruggiero explained that appellant required revision surgery because her condition did not improve from the initial surgery. He noted that her current condition involved the same claim since the same diagnosis was involved. Dr. Ruggiero recommended physical therapy so that appellant could fully recover and return to work in a near normal status.

In a June 28, 2003 decision, the Office denied appellant's recurrence claim on the grounds that she was barred from receiving further compensation after the Office's February 3, 2003 termination of compensation as she refused suitable work.

The Office received Dr. Ruggiero's treatment notes dated July 14, August 18 and October 27, 2003 revealing that appellant's surgery for carpal tunnel syndrome was successful but her symptoms related to this condition had returned and she was unable to perform repetitive movements required by her position.

By letter dated February 5, 2004, appellant requested reconsideration of the Office's February 3 and June 28, 2003 decisions. She submitted Dr. Ruggiero's January 26, 2004 report in which he provided a history of her employment injury and medical treatment. He noted that she was evaluated in his office on October 27, 2003 and that she continued to suffer from symptoms of her carpal tunnel syndrome. Dr. Ruggiero further noted that she was still out of work from the employing establishment due to repetitive use issues. He stated that she was unable to find any job that did not involve repetitive motion, she continued to be disabled from work and she was seeking vocational rehabilitation. Dr. Ruggiero further stated that appellant was still under his care for her condition and that he did not foresee any further improvement in her condition.

On March 26, 2004 the Office issued a decision denying modification of its prior decisions.

LEGAL PRECEDENT -- ISSUES 1 and 2

Section 8106(c)(2) of the Federal Employees' Compensation 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."¹ 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 employment. An employee who refuses or neglects to work after suitable work has been offered has the burden of showing that such refusal to work was justified.² Section 8106(c) will be narrowly construed as it serves as a penalty provision which may bar an

¹ 5 U.S.C. § 8106(c)(2).

² See *Michael. I. Schaffer*, 46 ECAB 845 (1995).

employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.³

The Office's implementing federal regulations provide that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of establishing that such refusal or failure to return to work was reasonable or justified and shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.⁴ To justify termination of compensation, the Office must show that the work offered was suitable and inform the employee of the consequences of refusal to accept such employment.⁵

The issue 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 resolved by medical evidence.⁶ In assessing medical evidence, the number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for and the thoroughness of physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.⁷

ANALYSIS -- ISSUE 1

The Office properly found that the position offered to appellant by the employing establishment on November 21, 2002 was suitable. In an August 5, 2002 Form OWCP-5c, Dr. Ruggiero stated that appellant could not perform repetitive hand movements due to her carpal tunnel syndrome. He further stated that she could sit, walk, stand, squat, kneel and climb eight hours a day. Appellant was not allowed to reach and she was limited to reaching above the shoulder and twisting 2 hours a day, operating a motor vehicle 1 hour a day, repetitive movements of the wrists and elbow 2 hours a day and pushing, pulling and lifting up to 10 pounds 2 hours a day. Dr. Ruggiero recommended that appellant take 15-minute breaks. These limitations were specifically incorporated into the November 21, 2002 job offer.

As required, the Office advised appellant that it had found the offered position suitable and afforded her 30 days to accept the offer or provide reasons for not doing so.⁸ In response to the Office, appellant submitted Dr. Ruggiero's December 19, 2002 OWCP-5c form along with

³ See *Robert Dickerson*, 46 ECAB 1002 (1995).

⁴ 20 C.F.R. § 10.517 (1999).

⁵ *Arthur C. Reck*, 47 ECAB 339 (1995).

⁶ See *Marilyn D. Polk*, 44 ECAB 673 (1993).

⁷ See *Connie Johns*, 44 ECAB 560 (1993).

⁸ 20 C.F.R. § 10.516 states that the Office shall advise the employee it has found the offered work suitable and afford the employee 30 days to accept the job or present reasons to counter the Office's finding of suitability.

argument. Although Dr. Ruggiero stated that appellant could not perform repetitive tasks due to her carpal tunnel syndrome, he indicated that she could perform repetitive movements with her wrists and elbow two hours a day. To properly terminate appellant's compensation under section 8106 of the Act, the Office must provide appellant notice of its finding that an offered position is suitable and give her an opportunity to accept or provide reasons for declining the position. The record in this case indicates that the Office met the procedural requirements of its regulation on suitable work by affording appellant 30 days to accept the offer or present reasons for her refusal in its November 29, 2002 letter.⁹ Consistent with Board precedent and Office procedure,¹⁰ the Office, by letter dated January 16, 2003, gave appellant 15 days to accept the position after it informed her that the reasons for refusing the offer were unacceptable and that the position was still open and available. In response, appellant submitted a January 14, 2003 treatment note and OWCP-5c of Dr. Ruggiero. The treatment note stated that appellant would be unable to perform her previous work duties and that she was reeducating herself for job training but did not address the suitability of the offered position. The Board finds that the Office correctly found that she had submitted no probative evidence to support her contentions that the job was unsuitable and that the Office properly complied with its procedural requirements in terminating appellant's wage-loss benefits. Therefore, under section 8106 of the Act, appellant's compensation was properly terminated effective February 23, 2003.

As the Office had properly terminated appellant's compensation based on her refusal to accept suitable work, the burden shifts to appellant to show that her refusal to work in that position was justified.¹¹ Appellant, in support of her request for reconsideration of the Office's termination decision, submitted a January 26, 2004 report of Dr. Ruggiero that appellant was still experiencing symptoms of her carpal tunnel syndrome and that she was out of work due to repetitive use issues. His opinion that he did not foresee any further improvement in appellant's condition fails to provide reasoned medical rationale as to why she was unable to perform the modified clerk position under his previous physical limitations. Therefore, the Board affirms the March 26, 2004 Office decision denying modification of its February 3, 2003 decision as appellant has failed to meet her burden of proof to show that her refusal to accept the suitable work was justified.

ANALYSIS -- ISSUE 2

The Office denied appellant's claim alleging that she sustained a recurrence of disability on March 25, 2003 causally related to her accepted aggravated carpal tunnel syndrome on the grounds that she was barred from receiving further compensation after its February 3, 2003 termination of compensation because she refused an offer of suitable work. The Board finds that, because appellant refused suitable employment, section 8106 of the Act serves as a bar to her receipt of further compensation arising from the accepted employment injury.¹² As such, the

⁹ 20 C.F.R. § 10.516.

¹⁰ See *Maggie L. Moore*, 42 ECAB 484 (1991), *aff'd on recon.*, 43 ECAB 818 (1992).

¹¹ *Gloria J. Godfrey*, 52 ECAB 486, 488 (2001).

¹² 5 U.S.C. § 8106; 20 C.F.R. § 10.517.

Board finds that the Office properly denied appellant's recurrence claim arising from her accepted employment-related aggravated carpal tunnel syndrome on June 28, 2003 and in its March 26, 2004 decision denying modification of its prior decision.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation by decision dated February 3, 2003 on the grounds that she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2). The Board further finds that the Office properly denied appellant's recurrence claim on the grounds that she was barred from receiving compensation after the February 3, 2003 decision under 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the March 26, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 18, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member