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

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| **MARY E. JOHNSON, Appellant** | ) | |
| **and** | ) | **Docket No. 06-324** |
| | ) | **Issued: July 24, 2006** |
| **U.S. POSTAL SERVICE, POST OFFICE, Los Angeles, CA, Employer** | ) | |

*Appearances:*
*Mary E. Johnson, pro se*
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

### ***JURISDICTION***

On November 22, 2005 appellant filed timely appeals from the Office of Workers' Compensation Programs' decisions dated September 8, 2005. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

### ***ISSUES***

The issues are: (1) whether appellant met her burden of proof to establish that she sustained a recurrence of disability on August 5, 2002; and (2) whether the Office properly terminated appellant's compensation on February 26, 2004 on the grounds that she abandoned suitable work.

### ***FACTUAL HISTORY***

On September 19, 1990 appellant, then a 37-year-old carrier/clerk, filed a Form CA-2, occupational disease claim for bilateral carpal tunnel syndrome. The claim was initially denied. By decision dated November 27, 1992, the Office accepted that appellant sustained employment-

related bilateral carpal tunnel syndrome.[1] Appellant came under the care of Dr. Joan Wright, a Board-certified general and plastic surgeon specializing in hand surgery. She performed a left carpal tunnel release on June 21, 1993. Appellant was placed on the periodic rolls and on October 25, 1993 underwent a right carpal tunnel release. She returned to work on March 1, 1994 and was assigned to permanent limited duty on June 3, 1994.[2] Appellant continued under the care of Dr. Wright and received intermittent compensation. In an October 24, 1996 decision, the Office denied certain periods of compensation claimed, noting that appellant did not have an accepted elbow condition. On February 27, 1997 she was granted a schedule award for a 20 percent permanent impairment of the left upper extremity and a 33 percent impairment of the right upper extremity.[3] In an August 24, 2001 report, Dr. Wright advised that appellant had permanent light-duty restrictions of no repetitive use of her hands to grip, push, pull or lift with no prolonged writing or keyboard use, and that she should not answer the telephone or write for more than 4 hours in an 8-hour tour and should not drive more than 30 minutes back and forth to work.

On April 16, 2002 the employing establishment offered appellant a position as a video coding technician (VCT) at the Los Angeles Package and Delivery Center. The general duties of the position were described as reading addresses into a headset microphone as individual pieces of mail were displayed on a video screen. She could sit or stand as needed for comfort with five-minute breaks each hour. Physical requirements were -- the ability to see a computer screen and read displayed text, to speak with voice-recognition software provided and no use of the hands in an indoor environment with no identified environmental hazards. The work shift was 6:15 p.m. to 2:45 a.m. In June 2002, appellant began training as a VCT but stopped work on July 10, 2002.

In reports dated July 10 to November 6, 2002, Dr. Wright noted residuals of appellant's carpal tunnel syndrome and elbow epicondylitis caused by a change in her work schedule, use of a computer mouse and working in a cold environment. She provided permanent restrictions that appellant could not use a computer mouse or keyboard, could not be exposed to cold or damp conditions, was restricted from gripping or five-finger manipulation, pushing, pulling or lifting, that she could not drive more than 30 minutes to and from work and should not write or answer the telephone for more than 4 hours in an 8-hour day. Prolonged writing and keyboard use were restricted.

By letter dated November 25, 2002, the employing establishment noted that appellant had stopped work. In a letter dated December 9, 2002, the Office advised her that the VCT position was suitable. Appellant was notified of the penalty provisions of section 8106 of the Federal Employees' Compensation Act[4] and given 30 days to respond. In a December 22, 2002 response, she stated that the offered position was not suitable as it neglected to include additional

[1] Appellant had two additional accepted claims: a March 2, 1986 dog bite to the left leg and ankle, and a slip and fall injury on October 7, 1987 that was accepted for a back strain and open wound of the left leg.

[2] In August 2000, appellant began answering telephones with a headset, assigning equipment and monitoring the security system.

[3] An overpayment in compensation in the amount of $272.69 was written off in November 2001.

[4] 5 U.S.C. §§ 8101-8193.

accepted injuries, was at night when it was colder and the workroom was too cold. In a December 10, 2002 report, Dr. Melanie Hinson, Board-certified in internal and geriatric medicine, noted treating appellant for 16 years. She advised that appellant reported that her back pain had become worse since she began working at night due to an improper chair and from the long walk from the parking lot. Dr. Hinson noted magnetic resonance imaging (MRI) scan findings of Grade 2 spondylolisthesis of L5 on S1 and a moderate degree of spinal stenosis and spondylolysis. Dr. Wright submitted reports in which she repeated appellant's permanent restrictions. A March 26, 2003 electromyography of both upper extremities demonstrated no evidence of cervical radiculopathy with findings consistent with mild bilateral carpal tunnel syndrome.

In a letter dated November 22, 2003, appellant's representative requested that the Office reconsider the December 9, 2002 letter, arguing that the VCT position did not comply with appellant's medical restrictions and provided a November 24, 2003 report in which Dr. Hinson noted diagnoses of lumbar spondylolisthesis with moderate to severe spinal stenosis and bilateral carpal tunnel syndrome. Examination findings included a positive straight leg raise on the right. She stated:

> "I have recommended that she work daytime hours so that she may get proper sleep at night according to our biological clocks. Also she has increased pain with cold weather and with cold ambient temperatures. I have therefore recommended the following work situation to keep her pain at a tolerable level:
>
> 1. Work daytime hours so that she may sleep well throughout the night.
>
> 2. Work in a room with the ambient temperature greater than or equal to 70 degrees.
>
> 3. Ergo dynamically (sic) correct chair.
>
> 4. No lifting.
>
> 5. No prolonged standing.
>
> 6. Limit walking to 100 feet.
>
> 7. No pushing, pulling, squatting or twisting.
>
> 8. No climbing.
>
> 9. No heavy machinery operation."

On December 29, 2003 and January 9, 2004 appellant, through her representative, filed CA-7 claims for compensation for the period August 5, 2003 to January 30, 2004.[5]

[5] The claim indicates that the period of claimed compensation began on August 5, 2003. Appellant's representative later cited to August 5, 2002, which is closer to the time appellant stopped work.

On January 26 and 27, 2004 the employing establishment advised that the VCT position was still available, that appellant last signed in for training on July 16, 2002 and that she voluntarily stopped work on September 16, 2002. The employing establishment noted that the video coding workroom had central air and heat, that the thermostat was set at 76 degrees and that appellant was provided an ergonomic chair. The employing establishment further noted that appellant had recently lost an Equal Employment Opportunity (EEO) Commission discrimination case.

By letters dated January 27, 2004, the Office again informed appellant of the penalty provisions of section 8106(c)(2) and advised that her reasons for refusing the offered position were not acceptable. She was given an additional 15 days to respond. Appellant, through her representative, responded that the VCT position did not comport with restrictions provided by Dr. Wright and Dr. Hinson. The employing establishment submitted an EEO decision dated January 28, 2004 which found that the employing establishment did not discriminate against appellant when she was transferred from the International Service Center to the Los Angeles General Mail Facility to begin training as a VCT. The decision noted that the sole issue was whether the employing establishment failed to accommodate appellant's disabilities when it transferred her and found that the VCT position was a good fit for appellant, based on her physical restrictions. The EEO judge noted that the job required very little use of appellant's hands, that the room temperature complied with her doctor's restrictions and that she could sit or stand. Regarding the 100 foot walking restriction, the judge relied on appellant's hearing testimony that she did her own housework and grocery shopping which made him question her claim that she was unable to walk 100 feet. The judge concluded that the employing establishment accommodated appellant's physical restrictions in the VCT position.

By decision dated February 26, 2004, the Office terminated appellant's wage-loss compensation on the grounds that she abandoned suitable work. On March 4, 2004 appellant, through her representative, requested a review of the written record.[6] It was noted that appellant had a 30-minute driving restriction and was denied due process since the Office did not issue a decision on her claim for recurrence beginning August 5, 2002 and erred by not issuing a decision for 14 months following the December 9, 2002 suitability letter.

In an October 26, 2004 decision, an Office hearing representative affirmed the February 26, 2004 decision. The hearing representative noted the EEO decision, weighed the medical evidence of record, and found that it did not establish that the VCT position was unsuitable. On July 6, 2005 appellant, through her representative, requested reconsideration, reiterating her previous contentions. She also submitted reports dated March 19, 2004 to July 6, 2005 in which Dr. Wright repeated her previous restrictions.[7]

In decisions dated September 8, 2005, the Office found that appellant had not established that she sustained a recurrence of disability on August 5, 2002 and denied modification of the October 26, 2004 decision which found that she abandoned an offer of suitable work. In the

[6] Appellant initially requested a hearing.

[7] Appellant also submitted medical evidence previously of record.

latter decision, the Office noted that the travel time from appellant's previous work location to the VCT work site was essentially the same.

## ***LEGAL PRECEDENT -- ISSUE 1***

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[8] This term also means an inability to work when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force), or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.[9]

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that light duty can be performed, the employee has the burden to establish by the weight of reliable, probative and substantial evidence a recurrence of total disability. As part of this burden of proof, the employee must show either a change in the nature and extent of the injury-related condition, or a change in the nature and extent of the light-duty requirements.[10]

Causal relationship is a medical issue, and the medical evidence required to establish a causal relationship is rationalized medical evidence.[11] Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[12] Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[13]

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[8] 20 C.F.R. § 10.5(x); *see Theresa L. Andrews*, 55 ECAB ____ (Docket No. 04-887, issued September 27, 2004).

[9] *Id.*

[10] *Shelly A. Paolinetti*, 52 ECAB 391 (2001); *Robert Kirby*, 51 ECAB 474 (2000); *Terry R. Hedman*, 38 ECAB 222 (1986).

[11] *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

[12] *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

[13] *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

## ***ANALYSIS -- ISSUE 1***

The Board finds that appellant has not established that she sustained a recurrence of disability when she stopped work in July 2002. The medical evidence most contemporaneous with her work stoppage is a July 10, 2002 report in which her attending hand surgeon, Dr. Wright, noted residuals of appellant's carpal tunnel syndrome and elbow epicondylitis caused by a change in her work schedule, use of a computer mouse and working in a cold environment. She provided permanent restrictions that appellant could not use a computer mouse or keyboard, could not be exposed to cold or damp conditions, was restricted from gripping or five-finger manipulation, pushing, pulling or lifting, could not drive more than 30 minutes to and from work and should not write or answer the telephone for more than 4 hours in an 8-hour day. Prolonged writing and keyboard use were restricted. Dr. Wright repeated these restrictions in many subsequent reports and in a December 10, 2002 report, Dr. Hinson, an attending internist, advised that appellant reported that her back pain had become worse since she began working at night due to an improper chair and from the long walk from the parking lot. In a November 24, 2003 report, Dr. Hinson noted that appellant had increased pain with cold weather and cold ambient temperatures. She recommended that appellant work in the daytime in a room with an ambient temperature of at least 70 degrees with an ergonomically correct chair, and provided restrictions of no lifting, prolonged standing, pushing, pulling, squatting, twisting or climbing, no heavy machinery operation and that she should limit walking to 100 feet.

The job description for the VCT position provides general duties of reading addresses into a headset microphone as individual pieces of mail are displayed on a video screen. Appellant could sit or stand as needed for comfort with five-minute breaks each hour. Physical requirements were the ability to see a computer screen and read displayed text, the ability to speak with voice-recognition software provided, and no use of the hands in an indoor environment with no identified environmental hazards. The work shift was 6:15 p.m. to 2:45 a.m. The employing establishment advised that the thermostat in the video coding workroom was set at 76 degrees, and that appellant had been provided with an ergonomic chair.

Under the Act, the term "disability" means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury. Disability is thus not synonymous with physical impairment, which may or may not result in incapacity to earn wages. An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in the Act.[14] Furthermore, whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.[15] Both Dr. Wright and Dr. Hinson provided restrictions to appellant's physical activity. The physical requirements of the VCT position itself, however, were well within these restrictions as the job required very little use of the hands. The employing establishment indicated that the workroom temperature was set at 76 degrees, higher than the 70 degrees recommended by Dr. Hinson. While both physicians implied that it was

[14] *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

[15] *Fereidoon Kharabi*, 52 ECAB 291 (2001).

better for appellant to work in the daytime, they provided no medical rationale for their reasoning other than Dr. Hinson's opinion that appellant should work in the daytime so she could sleep throughout the night. Disability is not compensable when it results from factors such as an employee's frustration from not being permitted to work in a particular environment or to hold a particular position.[16] The medical evidence therefore does not establish that appellant could not work at night. Likewise, appellant provided no evidence to show that her walk into work was unduly far, and Dr. Hinson provided no rationale for her opinion that appellant should limit walking to 100 feet. Appellant's current back condition has not been accepted as employment-related. The medical evidence therefore does not establish that this caused a recurrence of disability.

A claimant's burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the condition is causally related to the employment injury and supports that conclusion with sound medical rationale. Where no such rationale is present, the medical evidence is of diminished probative value.[17] Neither Dr. Wright nor Dr. Hinson provided an opinion that appellant was disabled from the specific job requirements of the VCT position. Their reports are therefore insufficient to establish that appellant's absence from work beginning in July 2002 was caused by her employment injuries,[18] and she did not establish a recurrence of disability.

## ***LEGAL PRECEDENT -- ISSUE 2***

Section 8106(c) of the Act 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.[19] To justify such a termination, the Office must show that the work offered was suitable.[20] An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.[21] 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.[22]

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

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[16] *See Roger W. Robinson*, 54 ECAB 846 (2003).

[17] *Mary A. Ceglia*, 55 ECAB ____ (Docket No. 04-113, issued July 22, 2004).

[18] *Leslie C. Moore*, *supra* note 12.

[19] *Joyce M. Doll*, 53 ECAB 790 (2002).

[20] *Id.*

[21] *Sandra R. Shepherd*, 53 ECAB 735 (2002).

[22] *Gloria G. Godfrey*, 52 ECAB 486 (2001).

opportunity to make such a showing before entitlement to compensation is terminated.[23] 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.[24] In determining what constitutes "suitable work" for a particular disabled employee, the Office considers the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work, and other relevant factors.[25]

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.[26] 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.[27]

## ***ANALYSIS -- ISSUE 2***

The record reflects that the physical restrictions of the modified position of VCT abandoned by appellant in July 2002 were in agreement with those provided by Dr. Wright, her attending hand surgeon. In an August 24, 2001 report, she advised that appellant had permanent light-duty restrictions of no repetitive use of her hands to grip, push, pull or lift with no prolonged writing or keyboard use, and that she should not answer the telephone or write for more than 4 hours in an 8-hour tour and should not drive more than 30 minutes back and forth to work. As discussed previously, the VCT position had general duty requirements of reading addresses into a headset microphone as individual pieces of mail are displayed on a video screen. Appellant could sit or stand as needed for comfort with five-minute breaks each hour. The physical requirements were the ability to see a computer screen and read displayed text, the ability to speak with voice-recognition software provided, and no use of the hands in an indoor environment with no identified environmental hazards. The work shift was 6:15 p.m. to 2:45 a.m. The employing establishment advised that the thermostat in the video coding workroom was set at 76 degrees, and that appellant had been provided with an ergonomic chair. The VCT position was offered to appellant on April 16, 2002 and appellant worked at that position until she stopped work on July 16, 2002. In reports dated July 10 to November 6, 2002, Dr. Wright provided further restrictions that appellant should not use a computer mouse or work

[23] 20 C.F.R. § 10.517(a).

[24] *Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[25] 20 C.F.R. § 10.500(b); *see Ozine J. Hagan*, 55 ECAB ____ (Docket No. 04-584, issued September 2, 2004).

[26] *Gayle Harris*, 52 ECAB 319 (2001).

[27] *Maurissa Mack*, 50 ECAB 498 (1999).

in a cold or damp environment. It is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.[28] The physical requirements of the VCT position were well within the physical restrictions provided by Dr. Wright. The Board therefore finds that the Office properly advised appellant that the VCT position was suitable on December 2, 2002.

Where the Office shows that an offered limited-duty position was suitable based on the claimant's work restrictions at that time, the burden shifts to the claimant to show that his or her refusal to work in that position was justified.[29] While appellant alleged that the VCT position was outside her physical requirements, there is no competent evidence in this case to meet this burden. Regarding the physical requirements of the VCT position *per se*, Dr. Wright advised that appellant should not use a mouse or keyboard and provided restrictions to appellant's use of her hands. Dr. Hinson advised that appellant should not lift. As the VCT position required very little use of the hands and no lifting, the physicians' opinions do not establish that the physical requirements of the VCT position were unsuitable. Appellant stated that the work site was too cold, and Dr. Hinson advised that she could work in a 70 degree temperature and needed an ergonomic chair. The employing establishment, however, advised that the thermostat in the workroom was set at 76 degrees and that a proper chair had been provided. Regarding working at night, neither Dr. Wright nor Dr. Hinson provided medical rationale to show that it was medically necessary for appellant to work a daytime shift. Furthermore, the medical evidence did not show that appellant should be restricted to walking 100 feet. While appellant had documented diagnoses of lumbar spondylolisthesis and spinal stenosis, Dr. Hinson did not explain her recommendation that appellant not walk a greater distance than 100 feet. Finally, while Office procedures state that acceptable reasons for refusing an offered position includes evidence of a claimant's inability to travel to the job,[30] the determination of whether a claimant is capable of performing the offered position is a medical question that must be resolved by medical evidence.[31] Dr. Wright advised that appellant should not drive more than 30 minutes each way to and from work. There is no evidence, however, to show that appellant could not travel to the VCT work site, and the employing establishment advised that the travel time from appellant's previous work location and to the VCT work site was essentially the same. The medical evidence of record thus establishes that appellant was capable of performing the VCT position.[32]

In order to properly terminate appellant's compensation under section 8106, the Office must provide appellant notice of its finding that an offered position is suitable and give appellant an opportunity to accept or provide reasons for declining the position.[33] The record in this case

[28] *Richard P. Cortes*, 56 ECAB ____ (Docket No. 04-1561, issued December 21, 2004).

[29] *Joan F. Burke*, 54 ECAB 406 (2003).

[30] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(5) (July 1997).

[31] *Les Rich*, 54 ECAB 290 (2003).

[32] *Deborah Hancock*, 49 ECAB 601 (1998).

[33] *See Maggie L. Moore*, *supra* note 24.

indicates that the Office properly followed the procedural requirements. By letter dated December 9, 2002, the Office advised appellant that a partially disabled employee who refused suitable work was not entitled to compensation and that the offered position had been found suitable. She was notified of the penalty provisions of section 8106 and allotted 30 days to either accept or provide reasons for refusing the position. On January 26, 2004 the employing establishment advised appellant that the offered position was still available, and in a letter dated January 27, 2004, the Office advised her that the reasons given for not accepting the job offer were unacceptable. She was given an additional 15 days in which to respond.[34] There is, therefore, no evidence of a procedural defect in this case as the Office provided appellant with proper notice. She was offered a suitable position by the employing establishment and such offer was refused. Thus, under section 8106 of the Act, appellant's compensation was properly terminated on February 26, 2004.[35]

## ***CONCLUSION***

The Board finds that the Office properly terminated appellant's wage-loss compensation on February 26, 2004 pursuant to 5 U.S.C. § 8106(a).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated September 8, 2005 be affirmed.

Issued: July 24, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

[34] The Board notes that in the interim between the December 9, 2002 letter advising appellant that the VCT position was suitable, and the second (15-day) letter dated January 27, 2004, appellant submitted the December 10, 2002 and November 24, 2003 reports from Dr. Hinson discussed above, and several reports from Dr. Wright in which she reiterated her previous permanent restrictions.

[35] *Joyce M. Doll*, *supra* note 19.