

arthroscopic surgery, which was performed on November 2, 1995.¹ Appellant returned to full-time duty on April 1, 1996.

On August 2, 2001 appellant filed a traumatic injury claim alleging that she injured her right knee while carrying a large parcel. The Office accepted the claim for right knee strain and right chondromalacia patella.² Appellant underwent right knee debridement surgery on August 24, 2001 and right knee arthroscopy on September 19, 2002. By letter dated December 29, 2003, the Office placed appellant on the periodic rolls for temporary total disability.³

On April 16, 2004 the Office received a March 18, 2004 fitness-for-duty examination by Dr. George B. McManama, Jr., a Board-certified orthopedic surgeon, who concluded that appellant was capable of working eight hours a day with restrictions.

On May 11, 2004 the Office received a progress note dated February 17, 2004 from Dr. Arthur P. Carriere, an attending Board-certified orthopedic surgeon, diagnosing bilateral osteochondral lesions. Dr. Carriere noted that appellant's bilateral knee condition has "given her chronic pain discomfort and it has limited her functional activity." He concluded that she was unable to perform her date-of-injury position.

In a May 18, 2004 report, Dr. Carriere noted that appellant "sustained osteochondral lesions to the femoral condyles of both knees with progressive degenerative changes involving both knees." He opined that appellant's condition has "limited her and will continue to limit her from function in her capacity, full time or on a part-time basis, in the postal service."

On August 27, 2004 the Office received progress notes dated May 17 and July 19, 2004 progress by Dr. Carriere. In the May 17, 2004 note, he diagnosed bilateral knee degenerative disease and reported that appellant had difficulty getting around and "she states that she cannot stand for more than about 15 to 20 minutes at a time." A physical examination reveal "some tenderness medially," full extension and flexion of 120 degrees. With regards to her ability to work, Dr. Carriere stated that, based upon appellant's subjective difficulty, she "probably ought to be considered out of the workplace in as much as she is having trouble on a day-to-day basis." In the July 19, 2004 report, he diagnosed bilateral osteochondrosis and chondromalacia and noted that she was waiting for retirement from the employing establishment.

The Office referred appellant, along with the entire medical record and a statement of accepted facts, to Dr. Richard A. Alemian, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated October 4, 2004, Dr. Alemian diagnosed status bilateral post debridement for loose bodies of both knees and bilateral osteoarthritis. A physical examination revealed bilateral full extension of the knees, "some crepitation with the

¹ This was assigned file number 01-0332967.

² This was assigned file number 01-2003102.

³ By letter dated June 2, 2004, the Office of Personnel Management approved appellant's request for disability retirement. On June 20, 2004 she filed a form electing to receive benefits under the Federal Employees' Compensation Act effective the date the form was signed.

patellofemoral motion on the right; none on the left,” left knee range of motion is 0 to 135 degrees and 0 to 135 for the right knee. Dr. Alemian also reported stable collateral ligaments in the knees bilaterally and a negative Lachman’s test. He concluded that appellant “did sustain development of loose bodies in either knee at different times” as a result of her employment and required surgery. Dr. Alemian reported that appellant has permanent residuals from her employment injury and that medial compartment arthritis and osteoarthritis are progressive conditions. In response to a question posed by the Office, Dr. Alemian stated that appellant had reached maximum medical improvement, “but again, it is going to be a progressive problem due to the medial compartment arthritis.” With regard to appellant’s work capability, he opined that appellant was capable of working four hours per day with restrictions including no kneeling, stooping or climbing and the ability to walk, stand, sit and change position as needed. In an accompanying work restriction evaluation dated October 4, 2004, Dr. Alemian found that appellant could currently work up to four hours with limited pulling, lifting and pushing; no squatting, stooping, kneeling and climbing; and up to four hours per day sitting, standing and walking.

On November 4, 2004 the employing establishment offered appellant a position as a modified part-time flexible clerk. The position description indicated that the tour-of-duty hours were from 3:00 a.m. to 7:00 a.m., Tuesday through Saturday, with limited pulling, lifting and pushing; no squatting, stooping, kneeling and climbing; and up to four hours per day sitting, standing and walking.

By letter dated November 10, 2004, the Office informed appellant that it had determined that the position offered by the employing establishment on November 4, 2004 was suitable and provided 30 days within which to accept the position or provide reasons for her refusal. The Office notified her that an employee who refused or neglected suitable work was not entitled to further compensation.

By letter dated December 13, 2004, the Office notified appellant that she had submitted no evidence in response to the November 10, 2004 letter. The Office provided her 15 days to accept the position.

On December 13, 2004 the Office received a December 2, 2004 report by Dr. Carriere and appellant’s December 6, 2004 refusal of the job offer. Dr. Carriere indicated that he had reviewed Dr. Alemian’s report and stated that, although appellant’s last evaluation was on September 20, 2004, he had “not changed my opinion as to her functional capacity,” which was that “she would not be a candidate to return to work on a four-hour-a-day basis.” He further noted that appellant had bilateral degenerative disease of the knees as a result of her employment injuries “and that the degree of discomfort that she gets from daily standing, walking and limitations that she has imposed on herself because of pain, are inappropriate.” Lastly, Dr. Carriere concluded that appellant had “not reached an end result” and he anticipated “further progression of her disease and a chronic degenerative process within these knees over her next many years.”

By decision dated December 29, 2004, the Office terminated appellant’s wage-loss compensation effective that date on the grounds that she refused an offer of suitable work.

On March 10, 2005 appellant filed an appeal with the Board. In a decision dated October 7, 2005, the Board set aside the December 29, 2004 decision terminating appellant's wage-loss benefits on the grounds that she refused an offer of suitable work.⁴ The Board remanded the case to the Office for reconstruction of the record as evidence was missing from the record on appeal, to be followed by proper assemblage and the issuance of an appropriate decision.

During the pendency of appellant's prior appeal with the Board, the Office received progress notes dated September 20 and December 20, 2004 by Dr. Carriere and an undated statement by appellant. Dr. Carriere, in the September 20, 2004 report, noted that appellant related intermittent swelling and discomfort "both proximally and distally into the hip and the ankle" as a result of her modified gait and walking style. He concluded that appellant remained unemployable. In the December 20, 2004 report, Dr. Carriere diagnosed bilateral knee degenerative arthritis with osteochondral defects and noted that appellant had retired from the employing establishment. A physical examination revealed "minimal varus, local tenderness over the medial joint line and over the femoral condyle bilaterally." Dr. Carriere reported difficulty walking, pain on motion and an inability to "stand for long periods of time because of pain."

By decision dated January 11, 2006,⁵ the Office reissued its termination of appellant's wage-loss compensation, effective December 29, 2004, on the grounds that she refused an offer of suitable work.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides at section 8106(c)(2) that a partially disabled employee who refuses or neglects to work after suitable work is offered is not entitled to compensation.⁶ Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits under section 8106 for refusing to accept or neglecting to perform suitable work.⁷ The Board has recognized that section 8106(c) serves as a penalty provision as it may bar an employee's entitlement to future compensation and, for this reason, will be narrowly construed.⁸ To establish that a claimant has abandoned suitable work, the Office must substantiate that the position offered was consistent with the employee's physical limitations and that the reasons offered for stopping work were unjustified.⁹ The issue of

⁴ Docket No. 05-962 (issued October 7, 2005).

⁵ The Office noted that this decision superseded the December 20, 2005 decision denying modification of the December 29, 2004 termination decision pursuant to 5 U.S.C. § 8106(c).

⁶ 5 U.S.C. § 8106(c)(2).

⁷ See *Bryant F. Blackmon*, 56 ECAB ____ (Docket No. 04-564, issued September 23, 2005); *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

⁸ See *Richard P. Cortes*, 56 ECAB ____ (Docket No. 04-1561, issued December 21, 2004); *H. Adrian Osborne*, 48 ECAB 556 (1997).

⁹ See *Wayne E. Boyd*, 49 ECAB 202 (1997).

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 the medical evidence of record.¹⁰

Section 10.517(a) of the Act's implementing regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured by the employee, has the burden of showing that such refusal or failure to work was reasonable or justified.¹¹ Pursuant to section 10.516, the employee shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.¹²

ANALYSIS

The Office accepted that appellant sustained a left knee strain, right knee strain and right chondromalacia patella due to factors of her federal employment. The Office terminated her compensation effective December 29, 2004 on the grounds that she refused a November 4, 2004 offer of suitable work by the employing establishment. The initial question in this case is whether the Office properly determined that the position was suitable. 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 the medical evidence.¹³

The Office found that the weight of the medical evidence established that the position was within her physical capabilities. This evidence consists of an October 4, 2004 medical report from Dr. Alemian, an Office referral physician, who examined appellant and stated that he was capable of working a modified position four hours per day with restrictions. Although Dr. Carriere disagreed with the assessment of Dr. Alemian regarding appellant's ability to work, he offered insufficient medical rationale in any of his reports to explain why appellant remained totally disabled and was unable to perform the modified position. In his December 2, 2004 report, Dr. Carriere stated that he had reviewed Dr. Alemian's report and disagreed with the conclusion that appellant was capable of working four hours per day. Dr. Carriere, in support of his opinion that appellant was incapable of working, stated that appellant had bilateral degenerative disease of the knees as a result of her employment injuries "and that the degree of discomfort that she gets from daily standing, walking and limitations that she as imposed on herself because of pain, are inappropriate." He further noted that he anticipated "further progression of her disease and a chronic degenerative process within these knees over her next many years." In subsequent reports dated September 20 and December 20, 2004, Dr. Carriere reiterated his opinion that appellant was totally disabled with no supporting rationale other than noting appellant had retired from the employing establishment and reporting physical findings. However, it is well established that medical reports which are not fortified by rationale are of

¹⁰ See *John E. Lemker*, 45 ECAB 258 (1993); *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

¹¹ 20 C.F.R. § 10.517(a); *Richard P. Cortes*, 56 ECAB ____ (Docket No. 04-1561, issued December 21, 2004); *Ronald M. Jones*, 52 ECAB 190 (2000).

¹² 20 C.F.R. § 10.516; *Mary E. Woodard*, 57 ECAB ____ (Docket No. 05-1023, issued November 14, 2005).

¹³ See *Gayle Harris*, 52 ECAB 319, 321 (2001); *Maurissa Mack*, 50 ECAB 498 (1999).

diminished probative value.¹⁴ As Dr. Carriere provided no supporting rationale explaining why appellant was totally disabled due to accepted employment injury, his reports are insufficient to create a conflict with Dr. Alemian.

The record reflects that the modified-duty clerk position offered to appellant on November 4, 2004 conformed to the work restrictions set by Dr. Alemian. The clear weight of the medical opinion evidence, as represented by the report of Dr. Alemian, establishes that appellant was no longer totally disabled for work and that she had the physical capacity to perform the modified duties as listed in the November 4, 2004 job offer for four hours a day.

The Office properly advised appellant in its December 13, 2004 letter that her reasons for refusing the offered position were not valid and that she must either accept the position within 15 days or face termination of her compensation benefits. However, appellant did not accept the offered position. Thus, the weight of the medical evidence established that appellant could perform the duties of the offered position and that she did not offer sufficient justification for refusing the offered position. Therefore, the Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective December 29, 2004 as she refused an offer of suitable work.¹⁵

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation benefits effective December 29, 2004 on the grounds that she refused an offer of suitable work under 5 U.S.C. § 8106.

¹⁴ *Cecelia M. Corley*, 56 ECAB ____ (Docket No. 05-324, issued August 16, 2005).

¹⁵ *Karen L. Yaeger*, 54 ECAB 323 (2003).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 11, 2006 is affirmed.

Issued: November 30, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board