



## **FACTUAL HISTORY**

On April 3, 2003 appellant, then a 46-year-old city carrier, filed an occupational disease claim alleging that she sustained tarsal tunnel in both of her feet as a result of walking her route and repetitive stress with activity. She walked approximately 8 to 10 miles a day, 5 days a week and carried approximately 20 to 25 pounds. By letter dated July 15, 2003, the Office accepted appellant's claim for bilateral tarsal tunnel syndrome and bilateral heel spurs. Appellant received compensation benefits until July 21, 2004 when she returned to work at light duty.

On November 3, 2005 appellant filed a claim for a recurrence of disability commencing September 24, 2005. The Office accepted her claim.

In a May 19, 2006 treatment note, Dr. David V. Robinson, a treating podiatrist, stated that appellant had tarsal tunnel syndrome and neuropathy that was still medically present and disabling. He noted that her condition was permanent and that she failed to improve with surgery, physical therapy, orthotics or medication. Dr. Robinson concluded that appellant was disabled for all work.

On August 17, 2006 the Office referred appellant to Dr. Howard Leslie Fowler, a Board-certified orthopedic surgeon, for a second opinion. In a September 22, 2006 report, Dr. Fowler concluded that appellant was not capable of performing her regular duties as a city carrier without restrictions. He noted that she had objective findings of hypersensitivity distal to the tarsal tunnel on both feet as well as persistent tightness in the heel cords bilaterally contributing to the plantar fasciitis. Dr. Fowler noted that appellant's compensable injuries had not resolved. He submitted a duty status report noting that she could work eight hours a day subject to a two-hour restriction walking, standing, twisting and bending/stooping. Dr. Fowler also limited appellant to two hours a day pushing, pulling, lifting, squatting, kneeling and climbing, with all these activities subject to a 20-pound restriction.

On December 21, 2006 the employing establishment made an offer of employment as a modified city carrier. This position was based on the restrictions set forth by Dr. Fowler. On December 27, 2006 appellant rejected this job offer stating it would require her to do repetitive work for five hours a day. She stated that delivering mail involved repetitive use of your hands, fingers and wrists and that is what caused her to have carpal tunnel syndrome. In a note of the same date, appellant stated that she continued to experience burning pain in her feet and ankles. She contended that until something was done to relieve the pain, she could not return to work.

On February 2, 2007 the employing establishment offered appellant another job for the position of modified distribution/window clerk. The physical restrictions involved no repetitive or prolonged pinching or gripping using her hands; no repetitive movement with the wrists; repetitive movements with her elbow, lifting, walking, standing, squatting, kneeling, climbing, twisting, bending and stooping limited to two hours a day; pushing/pulling limited to one-hour a day, reaching above shoulder limited to three hours a day and operating a motor vehicle at work limited to four hours a day. The job also put a weight limit for lifting, pushing, pulling, squatting, kneeling and climbing of 20 pounds. Appellant rejected this job offer. She stated that, although it was more within her restrictions, there were some questionable duties and that she could not return to work until something was done to relieve the burning pain in her feet and

ankles. Appellant noted that when she worked in September 2005 she was taking prescription pain medication every day.

After proper notification, by decision dated May 7, 2007, the Office terminated appellant's wage-loss compensation based on her refusal of suitable work. It found that the weight of the medical evidence supported that she was capable of performing the modified distribution/window clerk position.

In a May 9, 2007 report, Dr. Robinson stated that appellant's current diagnoses were carpal tarsal tunnel syndrome, calcaneal spur and neuropathy. He noted that the related medical conditions continue to persist and remain disabling. Dr. Robinson noted that appellant currently remained disabled from all work. He noted that she has failed to show any significant improvement with treatment, and that her condition is now chronic and permanent with maximum medical improvement. Dr. Robinson opined that appellant would not be able to return to work for the employing establishment in a suitable fashion considering her conditions and failure to improve with treatment. He recommended medical retirement.

On May 17, 2007 appellant requested review of the written record. In an October 19, 2007 decision, an Office hearing representative modified the May 7, 2007 decision. The Office hearing representative found however that the new evidence of Dr. Robinson created a conflict in medical evidence between appellant's treating physician and the second opinion physician, Dr. Fowler. The case was remanded for further medical development but wage-loss benefits were not reinstated.

On November 1, 2007 the Office referred appellant to Dr. Martin Pomphrey, a Board-certified orthopedic surgeon, for an impartial medical examination. In a report dated December 12, 2007, Dr. Pomphrey found that there were no objective findings of remaining disability present as a result of appellant's work injury. He concluded that she was capable of performing the duties of a modified clerk. On February 8, 2008 Dr. Pomphrey responded to questions from the Office. He opined that appellant's work-related conditions of bilateral tarsal tunnel syndrome and calcaneal spurs were resolved, but that the heel spurs remained. Dr. Pomphrey further opined that the heel spurs were not the cause of her pain. He advised that appellant had no objective findings that would prevent her from returning to full function as a city carrier, and that she could perform the same work she did in 2005 when she stopped working.

By letter dated March 7, 2008, the Office proposed terminating appellant's compensation benefits. By letter dated March 17, 2008, appellant responded that she did not agree with the proposed termination of compensation and medical benefits as she still had residuals.

By decision dated April 17, 2008, the Office finalized the proposed termination on the grounds that she had no employment-related disability and that her bilateral tarsal tunnel syndrome had resolved. It further found that entitlement to medical benefits would continue for the condition of bilateral heel spurs only.

On April 29, 2008 appellant requested an oral hearing. However, after conducting a preliminary review of the written record, an Office hearing representative, by decision dated

August 4, 2008, reversed the April 17, 2008 decision and remanded the case for a new impartial medical examination. The Office hearing representative found that the opinion of Dr. Pomphrey, the impartial medical examiner, was not well rationalized and his statements were inconsistent with the findings on physical examination.

On August 8, 2008 the Office referred appellant to Dr. John Weaver, a Board-certified orthopedic surgeon, for an impartial medical examination. In a September 12, 2008 report, Dr. Weaver reviewed appellant's medical records and conducted an extensive physical examination. He noted that her objective findings were heel spurs by x-ray and that these had not resolved. Dr. Weaver noted that appellant walked well with no limp. He stated that touching lightly over the dorsal aspect of both feet will cause a tingling in her toes. Dr. Weaver noted that appellant was nontender about the anterior and lateral ankle and that the Achilles was intact bilaterally. He found no apparent atrophy and no pretibial edema or obvious swelling to the ankle or foot. There appeared to be normal adipose tissue over the medial ankle area and no signs of reflex sympathetic dystrophy (RSD). Dr. Weaver noted minimal discomfort over the tarsal tunnel to percussion and no sign of hallux valgus to either foot and no significant clawing of any of the toes. He concluded that there were no objective findings to support disability from appellant's compensable injuries and would place her at a medium category for functional capacity as she may have some difficulty weight lifting. Dr. Weaver was not sure that appellant would be able to perform her regular duties as a city carrier, although he did note that she would be able to perform the duties of modified distribution/window clerk. In an attached work capacity evaluation, he opined that she was able to work eight hours a day limited to two hours walking, standing, bending/stooping and twisting. Dr. Weaver further noted that appellant was limited to two hours a day pushing, pulling, lifting, squatting, kneeling and climbing and that her weight limitation was 20 pounds.

On October 15, 2008 the Office verified that the modified-duty position previously offered by the employing establishment was still available. By letter dated October 21, 2008, it informed appellant that it found that the position of modified distribution/window clerk with the employing establishment was suitable to her work capabilities. The Office gave her 30 days to either accept the position or provide reasons for refusing. It noted that if appellant failed to accept the position and her reasons were found to be unjustified, her entitlement to further wage-loss compensation and a schedule award would be denied. The Office allotted her 30 days to respond. Appellant failed to provide a timely response detailing her reasons for refusing the position.

Accordingly, by letter dated January 13, 2009, the Office informed appellant that she had not provided a valid reason for refusing to accept the offered position. It informed her that she had 15 additional days to accept the position and that if she failed to accept the position within the allotted time, her entitlement for wage-loss compensation and a schedule award would be terminated. Appellant did not respond within the time allotted.

By decision dated January 30, 2009, the Office terminated appellant's compensation benefits effective that date due to her failure to accept suitable employment. It noted that she remained entitled to medical benefits for the effects of her heel spur condition.

On February 25, 2009 appellant requested an oral hearing before an Office hearing representative. At the hearing held on August 24, 2009, appellant stated that her doctor told her that she was unable to work and disagreed with Dr. Weaver's conclusion to the contrary. She noted that when she wore shoes her feet burned. Appellant argued that the opinion of her treating physician should be given decisive weight.

By decision dated October 28, 2009, an Office hearing representative affirmed the Office's January 30, 2009 decision.

### **LEGAL PRECEDENT**

One the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>2</sup> Section 8106(c)(2) of the Act<sup>3</sup> provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee is not entitled to compensation.<sup>4</sup> The Office may not terminate compensation without establishing that the disability ceased or that it is no longer related to the employment.<sup>5</sup> The Board has held that, as monetary compensation payable to an employee under section 8107 are payments made from the Employees' Compensation Fund, they are subject to the penalty provision of section 8106(c).<sup>6</sup>

Section 10.517(a) of the Act's implementing regulations provide that an employee who refuses to work after suitable work has been offered to or secured for the employee, has the burden of showing that such refusal or failure to work was reasonable or justified.<sup>7</sup> 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.<sup>8</sup>

In situations where there exists opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>9</sup>

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<sup>2</sup> *Barry Neutach*, 54 ECAB 313 (2003); *Lawrence D. Price*, 47 ECAB 120 (1995).

<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> *Id.* at § 8106(c)(2); *see also Linda D. Guerrero*, 54 ECAB 556 (2003).

<sup>5</sup> *Ronald M. Jones*, 52 ECAB 190 (2000); *Arthur R. Reck*, 47 ECAB 339 (1995).

<sup>6</sup> *Sandra A. Sutphen*, 49 ECAB 174 (1997); *Stephen R. Lubin*, 43 ECAB 564 (1992).

<sup>7</sup> 20 C.F.R. § 10.517(a); *see Ronald M. Jones*, *supra* note 5.

<sup>8</sup> *Id.* at § 10.516; *see Kathy E. Murray*, 55 ECAB 288 (2004).

<sup>9</sup> *Manuel Gill*, 52 ECAB 282 (2001).

## ANALYSIS

The Office accepted appellant's claim for bilateral tarsal tunnel syndrome and bilateral heel spurs. Appellant returned to work on July 21, 2004; however, she sustained a recurrence of disability on September 24, 2005.

Dr. Robinson, appellant's treating physician, found that appellant was totally disabled from work due to her accepted conditions. In a May 9, 2007 report, he explained that she had failed to show any significant improvement with treatment and that she will not be able to return to work for the employing establishment. This opinion was contrary to the second opinion physician, Dr. Fowler, who found that, although appellant was not capable of returning to work in her regular position, she was able to work as a modified city carrier with restrictions. Due to the conflict between the physicians with regards to appellant's disability and capacity for work, the Office referred her for an impartial medical examination. Dr. Pomphrey initially determined that she could return to work as a full function city carrier; however, an Office hearing representative found that his opinion was not well rationalized and remanded the case for referral to a new impartial medical examiner.<sup>10</sup>

The Office referred appellant to Dr. Weaver for an impartial medical examination, who found that she could work in a limited-duty capacity, working eight hours full time subject to limitations on two-hour walking, standing, bending, stooping and twisting. Appellant was also limited to two hours a day pushing, pulling, lifting, squatting, kneeling and climbing and that her weight limitation was 20 pounds. Dr. Weaver found that she could work as a modified window/distribution clerk, the position offered by her employing establishment. He based this opinion on his thorough physical examination of appellant and a review of the medical record. Dr. Weaver noted that her heel spurs had not resolved but that she walked well and had negative straight leg bilaterally. He noted that touching lightly over the dorsal aspect of both feet caused a tingling in appellant's toes, but that she was nontender about the anterior and lateral ankle. Dr. Weaver noted that the Achilles was intact bilaterally and that there was no apparent atrophy. He noted no pretibial edema nor any obvious swelling to ankle or foot. Dr. Weaver found normal adipose tissue over the medial ankle area. He noted no sign of RSD and that appellant was nontender over her metatarsal heads, plantar or dorsal and not tender out to her toes. Dr. Weaver noted dull sensation to the medial toes, right and left and minimal discomfort over the tarsal tunnel to percussion on the right. He noted that percussion of left medial incision causes pain more into the heel aspect medically and not into the toes. Dr. Weaver noted no sign of hallus valgus to either foot and no significant clawing between the toes.

The Board finds that Dr. Weaver provided a complete and rationalized opinion based on an accurate factual and medical background. Dr. Weaver's opinion that appellant could return to work with restrictions is accorded special weight due to his status as an impartial medical examiner.<sup>11</sup> He found that appellant was capable of full-time modified work based on residuals of the accepted bilateral heel spurs.

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<sup>10</sup> See *James P. Roberts*, 31 ECAB 1010 (1980).

<sup>11</sup> See *L.W.*, 59 ECAB 471 (2008).

In accordance with the procedural requirements under 5 U.S.C. § 8106(c), the Office advised appellant on October 21, 2008 that it found the job offer to be suitable and gave her an opportunity to provide reasons for refusing the position within 30 days. It advised her in a January 13, 2009 letter that she had 15 additional days to accept the offered position. The Board finds that the Office followed established procedures prior to the termination of compensation pursuant to section 8106(c) of the Act.

The Board finds that the position offered was medically and vocationally suitable and the Office complied with the procedural requirements of section 8106(c) of the Act. The Office met its burden of proof to terminate appellant's compensation benefits based on her refusal to accept suitable work.

**CONCLUSION**

The Board finds that the Office properly terminated appellant's compensation effective January 30, 2009 on the grounds that she refused suitable work.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated October 28, 2009 is affirmed.

Issued: April 18, 2011  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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