

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

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**K.L., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Spokane, WA, Employer**

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**Docket No. 10-2319  
Issued: September 16, 2011**

*Appearances:*  
*Howard L. Graham, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On September 14, 2010 appellant filed a timely appeal from a May 14, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) which affirmed the finding that she refused suitable work. Pursuant to the Federal Employees' Compensation Act (FECA)<sup>1</sup> and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

**ISSUE**

The issue is whether OWCP properly terminated appellant's compensation effective May 14, 2005, on the grounds that she refused an offer of suitable work.

**FACTUAL HISTORY**

This case has previously been before the Board. In a July 31, 1987 decision, the Board set aside an April 4, 1986 OWCP decision and remanded the case for further medical development. The Board found that there was a conflict in medical opinion between appellant's

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

treating physician and OWCP's referral physician as to whether the diagnosed right thoracic outlet syndrome was work related.<sup>2</sup> The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference.

On November 13, 2002 OWCP referred appellant to Dr. Scott V. Linder, a Board-certified orthopedic surgeon, for a second opinion examination. In a December 6, 2002 report, Dr. Linder, noted minimal objective findings and diagnosed bilateral thoracic outlet syndrome historically related to work activities with residuals despite surgery. He advised that appellant could not return to her date-of-injury job as she had not worked in 10 years and, when she was employed, she worked two hours daily in light duty that she found intolerable. Dr. Linder provided restrictions based on her tolerance and noted she could work part-time light duty. In a February 20, 2003 supplemental report, he diagnosed chronic pain syndrome and stated that appellant's symptoms were not supported by objective findings. The only objective finding was restricted range of motion that was due to appellant's limited effort. Dr. Linder reviewed a February 18, 2003 functional capacity evaluation that also showed inconsistent effort by appellant. He made no objective findings to support total disability. In a February 26, 2003 work capacity evaluation, Dr. Linder noted appellant could work eight hours daily with no reaching above the shoulder.

On May 2, 2003 the employing establishment offered appellant a full-time position as a general clerk, computer forwarding system, subject to the restrictions set forth by Dr. Linder. The duties included computer input, data entry, data extraction, affixing labels to mail manually and with mechanical devices, preparing forms for address correction, manually distributing processed markups and operating a photo copy machine. The requirements of the position included avoiding overhead work. Appellant did not respond to the job offer.

In a January 23, 2004 letter, OWCP advised appellant that the job offer constituted suitable work. Appellant was informed that she had 30 days to accept the job or provide reasons for refusing it; otherwise, she risked termination of her compensation benefits.

In a February 18, 2004 letter, appellant asserted that the offered position was not suitable and that there was a conflict between Dr. Linder and her physician, Dr. Royce Van Gerpen, Board-certified in occupational medicine, regarding whether she had the capacity to return to work. In a February 11, 2004 report, Dr. Van Gerpen reviewed Dr. Linder's opinion and disagreed with his conclusion. He diagnosed bilateral thoracic outlet syndrome with permanent aggravation of the left cervical rib with ongoing residuals, status post cervical disc surgery, status post bilateral mastectomies and chronic pain, osteoarthritis and fibromyalgia. Dr. Van Gerpen opined on February 26, 2002 that appellant was unable to work effective July 2000 and his opinion had not changed. He reviewed the general clerk job offer and found that appellant was not capable of performing the physical requirements of the job. Dr. Van Gerpen disagreed with Dr. Linder in that he found residuals of thoracic outlet syndrome involving the bilateral upper extremities and believed appellant was incapacitated.

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<sup>2</sup> Docket No. 86-1617 (issued July 31, 1987). Appellant's claim was accepted for permanent aggravation of left cervical rib and bilateral thoracic outlet syndrome. OWCP authorized surgery to remove the left cervical rib on February 20, 1979 and transaxillary resection of the first ribs bilaterally on November 4, 1981.

A conflict of medical opinion was found between Dr. Van Gerpen and Dr. Linder, for OWCP, regarding appellant's ability to work. OWCP referred appellant to Dr. David Schenkar, a Board-certified orthopedic surgeon, to resolve the conflict.

In an April 29, 2004 report, Dr. Schenkar noted appellant's history and reviewed the medical evidence. He diagnosed aggravation of left cervical rib and bilateral thoracic outlet syndrome, with no ongoing objective evidence, cervical osteoarthritis, bilateral brachial plexopathy, chronic pain disorder and significant emotional component to explain current complaints, including the appearance of feigning and bad pain behavior. Dr. Schenkar noted that the only diagnosis causally related to the work injury was brachial plexopathy and advised that the other diagnoses were not supported by clinical findings. He noted that nonindustrial preexisting conditions of generalized osteoarthritis and cervical disc disease. Dr. Schenkar advised that work related total disability ceased on December 6, 2002 based on the physical examination and functional capacity evaluation. He opined that appellant's restrictions included no work with arms greater than 45 degrees forward flexion or abduction to prevent range of motion stress on the supra clavicle area, wrist support when typing with forearm, feet on the ground with knees flexing at 90 degrees with a comfortable chair with back support. Dr. Schenkar opined that she could perform the offered position.

On May 18, 2004 OWCP requested clarification from Dr. Schenkar regarding whether the restrictions were due solely to work-related injuries. On May 24, 2004 Dr. Schenkar noted that appellant underwent surgery for the bilateral thoracic outlet syndrome which caused brachial plexopathy and was causally related to the work injury. He noted that the cervical disc condition and surgery and pain syndrome were unrelated to the work injury. In a work capacity evaluation dated May 24, 2004, Dr. Schenkar found appellant could work eight hours a day with restrictions on reaching above the shoulder and arm elevation greater than 45 degrees from the side. He found her to be functionally able to do the sedentary desk job without other restrictions.

On February 22, 2005 OWCP advised appellant that the position of a general clerk in the computer forward system was suitable work. It noted that it considered the reasons given by her for refusing the position and found them to be unacceptable. OWCP afforded appellant 15 additional days to accept the job offer.

In statements dated March 2 and 3, 2005, appellant asserted that Dr. Schenkar was on disciplinary probation at the time of examination and undergoing psychiatric treatment for acts of moral turpitude. She asserted that OWCP found that she could work based on Dr. Schenkar's report but, due to the disciplinary action against him, his report should be excluded. Appellant submitted a March 10, 2005 report from Dr. Van Gerpen, who recommended that she not accept the job offer. Dr. Van Gerpen noted that she had not worked an eight-hour day in 10 years and advised she was unable to lift or carry at the level required for the job.

On March 14, 2005 the employing establishment noted that appellant verbally refused a job offer and referenced the March 10, 2005 report from her physician.

In a May 18, 2005 decision, OWCP terminated appellant's monetary compensation, effective March 16, 2005, on the grounds that she refused an offer of suitable work.

Appellant requested an oral hearing which was held on October 26, 2005. She submitted reports from Dr. Van Gerpen dated June 7 and July 18, 2005. On July 18, 2005 Dr. Van Gerpen diagnosed reflex sympathetic dystrophy, brachial plexopathy and neurogenic thoracic outlet syndrome and noted that she remained markedly restricted in her functional capabilities.

In a January 11, 2006 decision, OWCP affirmed the May 18, 2005 decision. On October 30, 2006 appellant appealed to the Board. In a September 17, 2007 order, the Board remanded the case to OWCP for reconstruction and proper assemblage of the case record.<sup>3</sup>

On November 9, 2007 counsel asserted that Dr. Schenkar was disciplined and placed on probation in Hawaii, Idaho and Washington and his opinion in appellant's case should be excluded. Appellant also asserted that Dr. Schenkar's April 29 and May 24, 2004 reports, on which the termination was based, were a year old and therefore stale evidence. She should have been referred to another specialist for a current report. In a February 2, 2006 report, Dr. Stephen Penaskovic, Board-certified in emergency medicine, diagnosed body wall pain, left upper extremity paraspinal arterial insufficiency and history of brachial plexus problems. A December 15, 2006 cervical spine magnetic resonance imaging (MRI) scan showed bilateral moderate facet hypertrophy at C2-3, severe facet hypertrophy at C3-4 and mild bilateral facet hypertrophy at C4-5. Also submitted were reports from Dr. Lisa S. Bliss, a physiatrist, dated August 16 to November 30, 2006 who performed an electromyogram (EMG) which revealed mild left and borderline right carpal tunnel syndrome and mild bilateral C5, C6 and C7 radiculopathy.

On January 14, 2008 OWCP denied modification of the May 18, 2005 decision.

On November 9, 2009 appellant requested an oral hearing which was held on October 8, 2009. She asserted that OWCP improperly terminated her compensation based on stale medical evidence. Appellant submitted a January 29, 2009 report from Dr. Rebecca Meieres, an osteopath, who treated appellant for neck pain and headaches and diagnosed chronic neck pain. A June 2, 2009 report from Dr. John Demakas, a Board-certified neurosurgeon, diagnosed status post anterior fusion at C5-C7 with recurrent neck and arm pain, spondylosis and degenerative disc disease at C3-4 and C4-5 and possible vascular compromise of the upper extremities.

In a decision dated May 14, 2010, OWCP's hearing representative affirmed the January 14, 2008 decision.

### **LEGAL PRECEDENT**

Section 8106(c)(2) of FECA states that a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or secured for her is not entitled to compensation.<sup>4</sup> Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits under section 8106(c) for

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<sup>3</sup> Docket 07-161 (issued September 17, 2007).

<sup>4</sup> 5 U.S.C. § 8106(c)(2).

refusing to accept or neglecting to perform suitable work.<sup>5</sup> 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.<sup>6</sup> To establish that a claimant has refused or abandoned suitable work, OWCP must substantiate that the position offered was consistent with the employee's physical limitations and that the reasons offered for stopping work were unjustified.<sup>7</sup> 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 of record.<sup>8</sup> Additionally, it is well established that OWCP must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.<sup>9</sup>

To justify termination, OWCP must show that the work offered was suitable and that appellant was informed of the consequences of her refusal to accept such employment.<sup>10</sup> Section 10.516 of the regulations provide that OWCP shall advise the employee that it has found the offered work to be suitable and afford the employee 30 days to accept the job or present any reasons to counter its finding of suitability. If the employee presents such reasons, and OWCP determines that the reasons are unacceptable, it will notify the employee of that determination and that he or she has 15 days in which to accept the offered work without penalty. At that point in time, OWCP's notification need not state the reasons for finding that the employee's reasons are not acceptable.<sup>11</sup>

### ANALYSIS

OWCP accepted appellant's condition for permanent aggravation of left cervical rib and bilateral thoracic outlet syndrome. It terminated her monetary compensation effective May 18, 2005, based on her refusal of suitable work. The Board finds that OWCP did not meet its burden of proof.

When OWCP made its January 23, 2004 finding that the position of general clerk was suitable, it based its finding on the December 6, 2002 and February 20, 2003 reports of Dr. Linder, a referral physician. A January 23, 2004 letter advised appellant that the offered position was considered suitable and she had 30 days to accept the position or provide reasons for refusing the position. On February 19, 2004 OWCP determined that a conflict of medical

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<sup>5</sup> *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

<sup>6</sup> *H. Adrian Osborne*, 48 ECAB 556 (1997).

<sup>7</sup> *See Lizzie M. Greer*, 49 ECAB 681 (1998).

<sup>8</sup> *See Marilyn D. Polk*, 44 ECAB 673 (1993).

<sup>9</sup> *Richard P. Cortes*, 56 ECAB 200 (2004); *Gayle Harris*, 52 ECAB 319, 321 (2001).

<sup>10</sup> *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

<sup>11</sup> 20 C.F.R. § 10.516.

opinion existed between Dr. Van Gerpen and Dr. Linder, regarding appellant's ability to work, and it referred her to Dr. Schenkar to resolve the conflict.<sup>12</sup>

Therefore, prior to the final decision, OWCP undertook additional development of the medical evidence and eventually concluded that the reports from Dr. Schenkar were sufficient to establish the offered position as medically suitable.<sup>13</sup>

It is well established that, when OWCP undertakes further development of the medical evidence after it has issued a 30-day letter and seeks to terminate compensation under 5 U.S.C. § 8106(c)(2) based on new medical evidence, it must again provide a claimant with 30 days to accept the job offer or provide reasons for refusing.<sup>14</sup> OWCP cannot change the basis of its finding that the offered position was suitable, without providing a claimant notice and a meaningful opportunity to be heard on that basis.<sup>15</sup>

When it obtained the impartial specialist's report, OWCP should have given appellant 30 days to accept the offer or explain her reasons for refusing it.<sup>16</sup> By notifying her instead that she had 15 days to accept without penalty and that no further reasons for refusal would be considered, it deprived her of the due process protections addressed in *Maggie L. Moore*.<sup>17</sup> When OWCP changes the basis of its finding that the offered position is suitable, the claimant is entitled to notice and a meaningful opportunity to be heard on that basis.<sup>18</sup>

The Board therefore finds that OWCP did not afford appellant with the proper notice pursuant to Board precedent and its procedure before it terminated monetary benefits under 5

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<sup>12</sup> See 5 U.S.C. § 8123(a).

<sup>13</sup> In requesting a supplemental opinion on May 18, 2004, OWCP asked that Dr. Schenkar specify which work restrictions were "due solely" to appellant's work-related injuries. The Board notes that, in determining whether a position is suitable under 5 U.S.C. § 8106(c), it must consider preexisting and subsequently acquired conditions. See *supra* note 9. It was error for OWCP not to have the physician consider all of appellant's medical conditions in assessing appellant's ability to perform the offered position.

<sup>14</sup> See *Adrienne L. Curry*, 53 ECAB 750 (2002) (OWCP obtained an additional clarifying report from a referee physician after a letter finding the offered position was suitable; the Board held appellant was entitled to a new letter giving her 30 days to accept the position or provide reasons for refusing); *Barbara L. Chien*, 53 ECAB 579 (2002) (a conflict still existed at the time of the suitability letter and when OWCP later received a referee's report, it should have given appellant an additional 30 days to accept the position or provide reasons for refusal). See also *Y.A.*, 59 ECAB 701 (2008).

<sup>15</sup> *Id.*

<sup>16</sup> See *James W. Henson*, Docket No. 92-50 (issued December 18, 1992) (where a conflict at the time of OWCP's suitability finding was resolved after termination of compensation, the Board held that OWCP may not retroactively cure its original failure to establish that the position was suitable at the time it was offered); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(d). (July 1997) (if it is not possible to determine whether a claimant's reason for refusal is justified without further investigation of the issues, the claims examiner should contact the claimant for clarifying information and set another 30-day deadline).

<sup>17</sup> *Supra* note 10.

<sup>18</sup> See Federal (FECA) Procedure Manual, *supra* note 16.

U.S.C. § 8106(c). It is OWCP's burden of proof to terminate compensation under 5 U.S.C. § 8106(c) and it did not meet its burden of proof in this case.

**CONCLUSION**

The Board finds that OWCP did not comply with the procedural requirements of 5 U.S.C. § 8106(c) and therefore it did not properly terminate compensation for wage loss.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 14, 2010 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 16, 2011  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

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

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