

strain/sprain, right trapezius muscle strain/sprain and cervical disc herniations at C5-6 and C6-7 with myelopathy.² Appellant received compensation for periods of total disability.

On January 11, 2005 appellant underwent a posterior lateral partial vertebrectomy at C6-7 and a right anterior microforaminotomy and microdissection at C6-7. The procedures were authorized by OWCP.

The findings of March 2005 magnetic resonance imaging (MRI) scan testing showed two-level disc desiccation at C5-6 and C6-7 with leftward broad disc protrusion at C5-6 which butted into the foramen on the left.

In a February 20, 2006 report, Dr. William Paronish, an attending Board-certified family practitioner, indicated that appellant was totally disabled from all work due to her employment injury. He indicated that she had clinical findings of ongoing significant pain in her neck, right shoulder and right arm that were exacerbated by use of nearly any type. Dr. Paronish stated that this problem was severely impairing appellant in her activities of daily living.

Dr. Laurence Primack, an attending Board-certified neurologist, indicated that electromyogram (EMG) testing from December 2006 showed right cervical radiculopathy, right brachial plexopathy, chronic and severe right median nerve neuropathy and left median nerve neuropathy. On February 12, 2007 he indicated that appellant appeared in his office on that date with extraordinary pain in her right upper extremity due to a combination of cervical radiculopathy and brachial plexopathy. Dr. Primack indicated that she had muscle spasms and noted that he had prescribed Flexeril for this pain.³ Both Drs. Paronish and Primack continued to periodically examine appellant and found that her medical condition remained essentially unchanged.

In a May 13, 2008 report, Dr. Subrata P. Barua, a Board-certified orthopedic surgeon serving as an OWCP referral physician, detailed appellant's factual and medical history and reported examination findings. He noted that, upon physical examination, appellant exhibited residual neck and right trapezius pain and residual symptoms from her cervical discectomy and vertebrectomy at C6-7 with some objective findings of mild tenderness and limitation of range of motion. Dr. Barua indicated that she could not perform her regular work but was capable of performing light work for one to three hours a day in a sedentary position. In a May 12, 2008 work restrictions form, he indicated that appellant could work for one to three hours a day with restrictions such as lifting no more than 10 pounds for up to one hour a day.

OWCP determined that there was a conflict in the medical opinion evidence between Dr. Barua and appellant's attending physicians regarding her ability to work and referred her and the case record to Dr. Charles J. Harvey, a Board-certified orthopedic surgeon and osteopath, for an impartial medical examination and opinion on the matter.

² On August 4 and 30, 2004 appellant underwent carpal tunnel release surgery in her left and right arms.

³ Dr. Primack also indicated that appellant continued to have bilateral carpal tunnel syndrome.

In a December 4, 2009 report, Dr. Harvey provided a summary of the medical evidence of record and detailed his findings on physical examination. He noted that appellant complained of right-sided neck and trapezius pain, anterolateral right shoulder discomfort and lateral right forearm pain with numbness into the thumb and index and long fingers. Dr. Harvey indicated that, upon physical examination of her cervical spine, appellant had full flexion but 0 degrees and 60 degrees of right rotation. Appellant had 5/5 strength in her arms upon various motions, including flexion and extension of her elbow, wrists and fingers and external and internal rotation of her shoulders. Dr. Harvey diagnosed persistent neuritic pain of the right upper extremity and indicated that appellant remained symptomatic from her January 28, 2004 work injury. He indicated that appellant had a partial disability and noted that Dr. Barua indicated in 2008 that a functional capacity evaluation might prove useful “to help locate this person in the job force.” Dr. Harvey stated, “Otherwise, I would not expect any appreciable return of function or decrease in symptoms from this patient. Prognosis for recovery is poor.” In a December 4, 2009 return to work evaluation form, he indicated that appellant should avoid repetitive activity with her right arm but noted that she was allowed “unlimited use” of her left arm. Dr. Harvey stated that she could frequently lift and carry up to 10 pounds, sit for eight hours a day and stand, walk or drive for four hours.

OWCP requested that Dr. Harvey provide additional details about appellant’s work restrictions. In a February 24, 2010 work restrictions form, Dr. Harvey indicated that she could work eight hours a day with various restrictions. Appellant could reach, engage in repetitive wrist or elbow motion, lift, push or pull for up to one hour a day; sit for up to eight hours; walk or stand for up to four hours; and twist, bend, stoop, squat, kneel or climb for up to one hour. She could not reach above her shoulder level with her right arm.

On May 11, 2010 the employing establishment offered appellant a job as a modified clerk. The position involved sorting, distributing, forwarding and marking up mail for 3.5 hours a day, working the retail window for 2.5 hours a day, casing mail for 0.5 hours a day and delivering express mail for 1.5 hours a day. Appellant would be required to lift or carry for up to 1 hour a day; stand, walk or drive for up to 2.5 hours; sit for 4 hours a day; and reach, bend, climb, squat or twist for up to 0.5 hours a day.⁴

On May 11, 2010 appellant refused the offered position indicating that she was medically disabled.

In a May 14, 2010 letter, OWCP advised appellant of its determination that the modified clerk position offered by the employing establishment was suitable. It indicated that the opinion of Dr. Harvey, the impartial medical specialist, constituted the weight of the medical evidence with respect to her ability to work and showed that she could perform the modified clerk position. OWCP informed appellant that her compensation would be terminated if she did not accept the position or provide good cause for not doing so within 30 days.

⁴ The employing establishment offered appellant a similar position on April 28, 2010 but this job offer was superseded by the job offered on May 11, 2010. The first offer required that appellant engage in lifting and carrying for 1.5 hours per day and, on May 4, 2010, OWCP wrote the employer and asserted that changing the lifting and carrying requirement to one hour per day would make the first job offer suitable.

In May 23 and June 5, 2010 letters, appellant explained that she could not accept the modified clerk position offered by the employer because she was not physically capable of performing the duties of the job. She also asserted that her depression and anxiety prevented her from performing the offered position. Appellant submitted additional work restriction forms, including a May 19, 2010 form in which Dr. Paronish listed various work restrictions including no lifting more than five pounds and no engaging in pushing or pulling.⁵

In a June 16, 2010 letter, OWCP advised appellant that her reasons for not accepting the modified clerk position offered by the employing establishment were unjustified. It advised her that her compensation would be terminated if she did not accept the position within 15 days of the date of the letter.⁶

In a July 8, 2010 decision, OWCP terminated appellant's compensation effective August 1, 2010 on the grounds that she refused an offer of suitable work.

Appellant submitted additional treatment reports of Dr. Primack and Dr. Paronish from mid to late 2010.⁷ In an October 26, 2010 report, Dr. Lynda Federoff, an attending clinical psychologist, noted appellant's history of sustaining an employment injury. She indicated that appellant's chief area of complaint was in the shoulder area, with right shoulder pain greater than left. Dr. Federoff also reported constant pain down her right arm with pain occasionally radiating part way down her left arm. On the Visual Analog Scale, where 0 was no pain and 10 was the worst pain ever experienced or imagined, appellant reported a 6 at the time of the interview with her range of pain being a 3 or 4 with medication to a 7 or 8. Dr. Federoff diagnosed major depressive disorder, moderate, recurrent and panic disorder without agoraphobia. She stated as a result of appellant's work injury, treatment for her injury, and her inability to work, she appeared to be both depressed and experiencing panic attacks, which was common for patients experiencing chronic pain. Appellant had been prescribed medication for her depression (Lexapro) and her anxiety (Lorazepam) and she appeared to have coped well with her pain despite its high level of interference in her life. Dr. Federoff stated that appellant might benefit from referral to a chronic pain clinic.

Appellant requested a telephonic hearing with an OWCP hearing representative. During the November 1, 2010 hearing, appellant's counsel argued that the work restrictions recommended by Dr. Harvey would not allow her to perform the duties of the modified clerk position offered by the employing establishment.

In a January 19, 2011 decision, an OWCP hearing representative affirmed OWCP's July 8, 2010 decision finding that the opinion of Dr. Harvey showed that appellant could perform the modified clerk position offered by the employing establishment.

⁵ Appellant also submitted work restrictions forms of attending physicians, dated in 2008 and 2009, which had previously been submitted.

⁶ Prior to sending the letter, OWCP called the employing establishment and confirmed that the offered position was still available to appellant.

⁷ Appellant also resubmitted a number of medical reports from the 1990s and early 2000s.

LEGAL PRECEDENT

Section 8106(c)(2) of FECA 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.”⁸ However, to justify such termination, OWCP must show that the work offered was suitable.⁹ 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.¹⁰

According to OWCP procedure, a job offer must be in writing and contain a description of the duties to be performed and the specific physical requirements of the position.¹¹ The Board has held that all impairments, whether work related or not, must be considered in assessing the suitability of an offered position.¹²

Section 8123(a) of FECA provides in pertinent part: “If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.”¹³ When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.¹⁴ In situations where there exist 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.¹⁵

ANALYSIS

OWCP accepted that on January 28, 2004 appellant sustained a cervical strain/sprain, right trapezius muscle strain/sprain and cervical disc herniations at C5-6 and C6-7 with myelopathy. On May 11, 2010 the employer offered her a job as a modified clerk and, on May 14, 2010 OWCP determined that the offered position was suitable. Appellant refused the position and OWCP terminated her compensation effective August 1, 2010 due to this refusal.

The modified clerk position offered by the employing establishment involved sorting, distributing, forwarding and marking up mail for 3.5 hours a day, working the retail window for

⁸ 5 U.S.C. § 8106(c)(2).

⁹ *David P. Camacho*, 40 ECAB 267, 275 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341, 345 (1981).

¹⁰ 20 C.F.R. § 10.517; *see Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

¹¹ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(a) (December 1993).

¹² *See Mary E. Woodward*, 57 ECAB 211 (2005).

¹³ 5 U.S.C. § 8123(a).

¹⁴ *William C. Bush*, 40 ECAB 1064, 1075 (1989).

¹⁵ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

2.5 hours a day, casing mail for 0.5 hours a day and delivering express mail for 1.5 hours a day. The job description for the position indicated that appellant would be required to lift or carry for up to 1 hour a day; stand, walk or drive for up to 2.5 hours; sit for 4 hours a day; and reach, bend, climb, squat or twist for up to 0.5 hours a day.

The Board finds that the weight of the medical evidence regarding appellant's ability to work around the time the modified clerk position was offered is represented by the well-rationalized report of Dr. Harvey, a Board-certified orthopedic surgeon and osteopath who served as an impartial medical specialist.¹⁶ In December 4, 2009 and February 24, 2010 reports, Dr. Harvey indicated that appellant could perform limited-duty work for eight hours a day. He stated that she could reach, engage in repetitive wrist or elbow motion, lift, push or pull for up to one hour a day; sit for up to eight hours; walk or stand for up to four hours; and twist, bend, stoop, squat, kneel or climb for up to one hour. Appellant could only lift up to 10 pounds and she could not reach above her shoulder level with her right arm.

The Board finds that OWCP did not meet its burden of proof to show that the modified clerk position offered by the employing establishment was suitable and therefore its termination of appellant's compensation for refusing such employment was improper. The modified clerk position involved sorting, distributing, forwarding and marking up mail for 3.5 hours a day, working the retail window for 2.5 hours a day, casing mail for 0.5 hours a day and delivering express mail for 1.5 hours a day. The restrictions provided by Dr. Harvey dictate that appellant could only reach for one hour a day, lift, push or pull for one hour, engage in wrist motion for one hour, engage in elbow motion for one hour and lift up to 10 pounds.¹⁷ However, the description of the modified clerk position did not provide any indication of how much time per day appellant would be required to engage in repetitive wrist or elbow motion and did not specify how much time per day she would engage in pushing and pulling, actions which Dr. Harvey limited to one hour per day. As noted above, a job offer must be in writing and contain a description of the duties to be performed and the specific physical requirements of the position.¹⁸ The description of the modified clerk position is silent with respect to these physical actions which were restricted by Dr. Harvey. Moreover, Dr. Harvey indicated that appellant could only lift up to 10 pounds, but the description of the modified clerk position does not indicate how much weight appellant would be required to lift. He also indicated that appellant could not reach above her shoulder with her right arm, but the description of the modified clerk position does not indicate whether the position would require such activity. Because the

¹⁶ See *supra* notes 13 through 15. OWCP properly determined that there was a conflict in the medical opinion evidence requiring referral to an impartial medical specialist. In reports from May 2008, Dr. Barua, a Board-certified orthopedic surgeon serving as an OWCP referral physician, indicated that appellant could work for one to three hours a day with restrictions such as lifting no more than 10 pounds for up to one hour a day. In contrast, appellant's attending physicians, including Dr. Paronish, an attending Board-certified family practitioner, indicated that appellant was totally disabled.

¹⁷ In his December 4, 2009 report, Dr. Harvey indicated that appellant could "occasionally" engage in reaching and "frequently" engage in lifting. His more specific restrictions on reaching and lifting contained in his February 24, 2010 form report supersede his earlier recommendations. Dr. Harvey's restriction on appellant lifting more than 10 pounds, contained in his December 4, 2009 report, was not superseded by any later work restriction recommendation.

¹⁸ See *supra* note 11.

description of the offered position does not specify the extent to which appellant could engage in these activities, it cannot be found that the offered position is suitable when viewed in light of appellant's medical restrictions.

In addition, OWCP did not adequately consider whether appellant's total medical condition negatively affected her ability to work in the position offered by the employing establishment. The Board has held that all impairments, whether work related or not, must be considered in assessing the suitability of an offered position.¹⁹ For example, OWCP did not adequately consider whether appellant's diagnosed psychological condition affected her ability to perform the modified clerk position. Appellant submitted medical evidence regarding her psychiatric condition,²⁰ but OWCP did not provide any discussion in its decisions regarding the matter of whether she could perform the position in spite of her psychiatric condition.²¹

For these reasons, OWCP did not meet its burden of proof to show that the modified clerk position was suitable around the time it was offered in May 2010. Because the modified clerk position was not shown to be suitable, appellant's refusal of the offered position would not constitute a refusal of an offer of suitable work. Therefore, OWCP had no basis to terminate appellant's compensation effective August 1, 2010.

CONCLUSION

The Board finds that OWCP improperly terminated appellant's compensation effective August 1, 2010 on the grounds that she refused an offer of suitable work.

¹⁹ See *supra* note 12.

²⁰ In an October 26, 2010 report, Dr. Federoff, an attending clinical psychologist, indicated that appellant had depression and anxiety that were related, in part, to her work-related injuries. While these psychiatric conditions have not been accepted by OWCP as work related, they should be considered in determining the suitability of the modified clerk position.

²¹ On appeal, counsel argued that Dr. Harvey did not consider the affect of appellant's bilateral carpal tunnel condition on her ability to work. However, in his December 4, 2009 report, Dr. Harvey discussed this condition and fully evaluated appellant's arms.

ORDER

IT IS HEREBY ORDERED THAT the January 19, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 6, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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