



accident. OWCP accepted the claim for cervical and lumbar sprain, concussion without loss of consciousness, pelvic joint pain, transient arthropathy of the pelvic region and internal derangement of the right hip.<sup>2</sup> Appellant stopped work on July 5, 2005 and returned to part-time modified employment on November 14, 2005. She stopped work again on November 22, 2005.

On June 7, 2006 OWCP referred appellant to Dr. Kevin F. Hanley, a Board-certified orthopedic surgeon, and Dr. Steven Mandel, a Board-certified neurologist, for second opinion examinations. In a report dated July 11, 2006, Dr. Hanley diagnosed possible internal derangement of the right hip and recommended surgery. He found that appellant could work full duty with frequent changes of position.

On July 13, 2006 Dr. James Nicholson, an attending osteopath, disagreed with Dr. Hanley's opinion that appellant could return to full duty.

On July 18, 2006 Dr. Mandel discussed appellant's continued complaints of dizziness and vertigo without headaches. He determined that, considering only her head trauma, she could resume her usual employment.

By letter dated July 13, 2006, OWCP requested that Dr. Nicholson review Dr. Hanley's report and address whether he agreed that appellant could return to her regular employment. In an August 3, 2006 response, Dr. Nicholson diagnosed a resolving concussion and strain and found that appellant could not work.

OWCP determined that a conflict existed between Dr. Nelson and Drs. Mandel and Hanley. It referred appellant to Dr. Evelyn D. Witkin, a Board-certified orthopedic surgeon, for an impartial medical examination. Dr. Witkin examined appellant on September 29, 2006. On examination she found audible clicking of the right hip and pain with motion. Dr. Witkin recommended a right hip arthroscopy and attributed the need for surgery to appellant's July 5, 2005 work injury. She found that appellant could work with restrictions that included pushing, pulling and lifting no more than one to two pounds.

On October 20, 2006 Dr. Nelson performed an arthroscopy of the right hip with partial synovectomy.

On July 31, 2009 OWCP referred appellant back to Dr. Witkin for an updated opinion regarding appellant's physical limitations due to the accepted work injury.<sup>3</sup> In a report dated September 1, 2009, Dr. Witkin discussed her complaints of increased right hip pain radiating to the groin and low back. On examination, she found audible clicking of the right hip with decreased external rotation but no swelling. Dr. Witkin determined that appellant could work with limitations on lifting over 20 pounds or prolonged sitting. In a September 14, 2009 work restriction evaluation, she found that appellant could work four hours per day sitting, walking

---

<sup>2</sup> OWCP also accepted transient tachycardia due to pain medication, which resolved in March 2006.

<sup>3</sup> OWCP previously referred appellant back to Dr. Witkin on February 21, 2007. In a report dated June 11, 2007, Dr. Witkin found crepitus and clicking with right hip motion, decreased motion and tenderness in the groin on the right side. She concluded that appellant continued to experience residuals of her work injury but could work with restrictions. Dr. Witkin diagnosed snapping hip syndrome and reduced right hip motion.

and standing a total of two hours, pushing and pulling up to 5 pounds, lifting up to 10 pounds and no squatting, kneeling or climbing. Dr. Witkin further noted restrictions on reaching, twisting and operating a motor vehicle both at work and commuting.

On April 6, 2010 the employing establishment offered appellant a position as a modified rural carrier associate. The position required 1 hour of sitting, 30 minutes of lifting, 2 hours of driving and 30 minutes of walking. The duties included identifying undeliverable mail, delivering express mail for 2 hours a day, casing mail for 1 hour a day and answering the telephone for 30 minutes a day.

In a report dated May 4, 2010, Dr. Nicholson diagnosed a closed head injury, a resolved concussion, resolved cervical and thoracic strain and continued lumbosacral strain, right hip dysfunction and pain. He indicated that appellant could “return to modified work per [impartial medical examiner] and specialist.”

On May 11, 2010 Dr. Witkin reviewed the offered position of rural carrier associate and opined that appellant could perform the duties of the offered position “four hours a day, five days a week.”

By letter dated July 13, 2010, OWCP advised appellant that the offered position was suitable and allotted her 30 days to accept the position or provide reasons for her refusal. In a response dated August 11, 2010, her attorney asserted that she was “unable to accept the offered position due to continuing residuals of the concussion....” Counsel noted that recent testing revealed a cognitive deficit.

On August 18, 2010 OWCP advised appellant that her reasons for refusing the position were not valid. It informed her that she had 15 days to accept the position and that it would not consider any additional reasons for refusal.

On August 13, 2010 Dr. John D. Kelly, IV, a Board-certified orthopedic surgeon, diagnosed signs of labral degeneration by diagnostic studies and found a positive impingement sign. On August 30, 2010 he related that he had treated appellant for complaints of pain in the right hip. Dr. Kelly found that she could work in a sedentary capacity.

Appellant returned to work for one day on September 1, 2010 but then stopped work. On September 14, 2010 OWCP advised her that the position was suitable and currently available. It provided her 30 days to return to work or explain why she abandoned the position.

In a report dated September 22, 2010, Dr. John J. Park, a Board-certified anesthesiologist, noted that appellant went to the emergency room after trying to return to employment. He diagnosed lumbar discogenic pain and radiculitis and hip pathology. Dr. Park found that appellant was not currently able to work.<sup>4</sup>

---

<sup>4</sup> A functional capacity evaluation performed September 29, 2010 revealed that appellant could perform at a subsedentary physical level.

On October 20, 2010 OWCP advised appellant that the position was suitable and currently available. It provided her 30 days to return to work or explain why she abandoned the position.

In a report dated October 26, 2010, Dr. Jessica A. Feldman, a Board-certified neurologist, discussed appellant's history of headaches following her July 2005 motor vehicle accident and complaints of cognitive and psychiatric problems.<sup>5</sup> Appellant experienced headaches when she returned to work and anxiety trying to deliver mail. Dr. Feldman diagnosed a reported history of postconcussive syndrome, migraine headaches and chronic pain. She noted that appellant had not seen a neurologist since 2007 and questioned why there would be such a break in treatment with an actual neurological condition. Dr. Feldman advised that postconcussive syndrome usually resolved after one year and questioned whether secondary gain was involved.

Appellant submitted a November 8, 2010 psychiatric evaluation by Dr. Harry A. Doyle, a Board-certified psychiatrist, reviewed appellant's history of a July 5, 2005 motor vehicle accident and the medical evidence of record. He further discussed her current complaints of headaches, dizziness, vertigo memory problems depression, neck pain and right hip pain. Dr. Doyle interpreted diagnostic testing as showing dysthymic and cognitive disorders. He attributed these conditions due to appellant's July 5, 2005 motor vehicle accident based on his evaluation, the results of testing and his review of the record. Dr. Doyle stated:

“Based upon psychiatric evaluation, diagnostic test results and record review, it is my opinion, within a reasonable degree of medical certainty, that [appellant's] psychiatric diagnoses are [d]ysthymic [d]isorder and [c]ognitive [d]isorder, [not otherwise specified], both due to the work[-]related motor vehicle accident which occurred on July 5, 2005. [Appellant] is experiencing moderate/serious impairment in social and occupational functioning as a result of persistent cognitive and depressive symptoms. She is presently totally disabled by the combination of chronic pain and physical restrictions and persistent cognitive and depressive symptoms from performing the duties of her formal job or any other full or part[-] time gainful employment.”

By letter dated November 9, 2010, appellant's attorney related that the opinion of Dr. Doyle established that appellant was unable to work due to her brain injury and “consequential emotional conditions.”

On December 3, 2010 OWCP advised appellant that her reasons for abandoning her position were not valid and provided her 15 days to accept the position or have her compensation terminated. It confirmed that the job remained available.

In a report dated December 7, 2010, Dr. Feldman diagnosed postconcussive syndrome, chronic headaches and right S1 radiculopathy due to a motor vehicle accident and a “[s]ignificant

---

<sup>5</sup> In a report dated October 13, 2010, received by OWCP on October 29, 2010 Dr. Anupama Shahane, a Board-certified internist, diagnosed joint pain and multiple sites, muscle pain, depression, fibromyalgia and a sleep disorder. She noted that appellant was under stress “due to issues with infertility.”

underlying psychological pathology that could be contributing to some of her symptomatology.” She recommended treatment by a psychologist.

On December 18, 2010 appellant returned to work for four hours. She related not being able to work following the one day.

By decision dated January 4, 2011, OWCP terminated appellant’s compensation effective January 16, 2011 on the grounds that she refused an offer of suitable work under section 8106(c). It found that Dr. Doyle’s report was insufficiently rationalized to show that she sustained a work-related emotional condition and further noted that he did not discuss whether she could perform her abandoned position. OWCP confirmed that the position remained available.

On January 13, 2011 appellant’s attorney requested a telephone hearing by an OWCP hearing representative. On January 14, 2011 appellant filed a notice of recurrence of disability on December 18, 2010 due to her July 5, 2005 work injury. She related that standing and walking at work aggravated her hip condition and that the noise caused a migraine headache and nausea.

In a report dated January 17, 2011, Dr. Feldman diagnosed postconcussive syndrome, chronic headaches and right S1 radiculopathy. She related that there were no objective signs of headaches cognitive dysfunction.<sup>6</sup>

At the telephone hearing, held on April 6, 2011, appellant’s attorney argued that the duties of the position were not suitable. He asserted that Dr. Doyle’s report showed that appellant had a work-related psychiatric condition that OWCP failed to develop.<sup>7</sup>

By decision dated June 22, 2011, the hearing representative affirmed the January 4, 2011 decision. He found that the opinion of Dr. Witkin represented the weight of the evidence and established that appellant could perform the offered position. The hearing representative found that the medical evidence was insufficient to show that she had migraine headaches or postconcussion syndrome due to employment. He noted that Dr. Doyle’s opinion was not rationalized and dated after the job offer.

On appeal, appellant’s attorney asserted that OWCP terminated appellant’s compensation after she filed a recurrence of disability. He noted that she returned to work for four hours on September 1 and December 18, 2010 but stopped due to her migraine headache and filed a notice of recurrence of disability. Counsel contends that appellant did not refuse suitable work and that OWCP should have developed the alleged recurrence of disability.

---

<sup>6</sup> On January 19, 2011 Dr. Adrian Popescu, a Board-certified physiatrist, provided pain management for appellant.

<sup>7</sup> On March 3 and April 5, 2011 Dr. Marin D. Cheatle, a psychologist, provided a “behaviorally-based pain management program.”

## LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>8</sup> Section 8106(c)(2) of FECA 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>9</sup> To justify termination of compensation, OWCP must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.<sup>10</sup> 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.<sup>11</sup>

Section 10.517(a) of FECA's implementing regulations provide 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.<sup>12</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>13</sup>

Before compensation can be terminated, however, OWCP has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work, establishing that a position has been offered within the employee's work restrictions and setting forth the specific job requirements of the position.<sup>14</sup> In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, OWCP has the burden of showing that the work offered to and refused by appellant was suitable.<sup>15</sup>

Once OWCP establishes that the work offered is suitable, the burden shifts to the employee who refuses to work to show that the refusal or failure to work was reasonable or justified.<sup>16</sup> The determination of whether an employee is physically capable of performing a modified assignment is a medical question that must be resolved by medical evidence.<sup>17</sup> OWCP

---

<sup>8</sup> *Linda D. Guerrero*, 54 ECAB 556 (2003).

<sup>9</sup> 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

<sup>10</sup> *Ronald M. Jones*, 52 ECAB 190 (2000).

<sup>11</sup> *Joan F. Burke*, 54 ECAB 406 (2003).

<sup>12</sup> 20 C.F.R. § 10.517(a); *see Ronald M. Jones*, *supra* note 10.

<sup>13</sup> *Id.* at § 10.516.

<sup>14</sup> *See Linda Hilton*, 52 ECAB 476 (2001).

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

<sup>16</sup> 20 C.F.R. § 10.517(a).

<sup>17</sup> *Gayle Harris*, 52 ECAB 319 (2001).

procedures state that acceptable reasons for refusing an offered position include medical evidence of inability to do the work.<sup>18</sup>

Section 8123(a) provides that, 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.<sup>19</sup> When 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.<sup>20</sup>

### ANALYSIS

The Board finds that OWCP failed to meet its burden of proving that the April 6, 2010 modified-duty job was suitable as it did not properly consider appellant's contention that she was unable to perform the duties of the position due to an emotional condition.

OWCP accepted that appellant sustained cervical and lumbar sprains, a concussion without loss of consciousness, pelvic joint pain, transient arthropathy of the pelvic region and internal derangement of the right hip as the result of a July 5, 2005 motor vehicle accident. It determined that a conflict existed between Dr. Nelson, her attending physician, and Dr. Mandel and Dr. Hanley, OWCP referral physicians and referred her to Dr. Witkin for an impartial medical examination. OWCP terminated appellant's compensation effective January 4, 2011 on the grounds that she abandoned an offer of suitable work. It determined that the position was suitable as it was approved by the impartial medical examiner. In a report dated September 1, 2009, Dr. Witkin found that appellant could work with limitations on lifting over 20 pounds or prolonged standing. In a September 14, 2009 work restriction evaluation, she determined that appellant could work for four hours with restrictions. On May 4, 2010 Dr. Nicholson concurred that appellant could work within the restrictions set forth by the impartial medical examiner. On May 11, 2010 after reviewing the position offered by the employing establishment, Dr. Witkin opined that appellant could work in the position four hours a day five days a week.

When 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.<sup>21</sup> Dr. Witkin's findings are based on a complete factual and medical history and supported by rationale; consequently, her opinion is entitled to special weight as the impartial medical examiner and establishes that appellant could return to part-time modified work from a physical standpoint. On August 30, 2010 Dr. Kelly treated appellant for right hip pain and opined that she could work in a sedentary capacity. In a report

---

<sup>18</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(3) (July 1997).

<sup>19</sup> 5 U.S.C. § 8123(a).

<sup>20</sup> *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

<sup>21</sup> *Id.*

dated September 22, 2010, Dr. Park diagnosed lumbar disc pain and hip problems and found that she could not work. Neither physician, however, provided rationale supporting their disability findings.<sup>22</sup> Consequently, the opinions of Dr. Park and Dr. Kelly are insufficient to outweigh the special weight accorded Dr. Witkin as impartial medical examiner.

The medical evidence further does not support that appellant had any restrictions due to her accepted postconcussive syndrome. Dr. Feldman advised that she had no objective findings of headaches or postconcussive syndrome. She further found, however, that an underlying psychological condition possibly caused some symptoms and advised treatment by a psychologist.

On November 8, 2010 Dr. Doyle discussed appellant's work injury and reviewed the evidence and the results of diagnostic testing. He diagnosed a dysthymic and cognitive disorder due to the July 5, 2005 employment-related motor vehicle accident. Dr. Doyle opined that appellant's depression and cognitive impairment caused a moderate to severe loss of function. He concluded that she was totally disabled due to depression, chronic pain and limitations and cognitive difficulties.

It is well established that OWCP must consider preexisting and subsequently acquired conditions in evaluating the suitability of an offered position.<sup>23</sup> At the time it terminated appellant's compensation, it had a report from Dr. Doyle supporting that she was disabled from a combination of depression, chronic pain and a cognitive disorder. Dr. Doyle attributed the diagnosed conditions to her July 2005 work injury and explained that, the diagnostic testing, his clinical examination and his review of the medical evidence supported his conclusion. His opinion, while not adequately rationalized to establish that appellant sustained a disabling psychiatric condition, stands uncontradicted in the record and was sufficient to warrant further development of the issue of whether she had an emotional condition such that she was unable to perform the duties of the modified position.<sup>24</sup> As a penalty provision, section 8106(c)(2) must be narrowly construed.<sup>25</sup> The medical evidence does not clearly establish that the abandoned position was within appellant's capabilities; consequently, OWCP did not discharge its burden of proof to justify the termination of her compensation pursuant to section 8106(c)(2) of FECA.

### CONCLUSION

The Board finds that OWCP improperly terminated appellant's compensation effective January 16, 2011 on the grounds that she abandoned suitable work under 5 U.S.C. § 8106(c).

---

<sup>22</sup> Medical conclusions unsupported by rationale are of diminished probative value. *See Jacquelyn L. Oliver*, 48 ECAB 232 (1996).

<sup>23</sup> *See Richard P. Cortes*, 56 ECAB 200 (2004).

<sup>24</sup> *See Phillip L. Barnes*, 55 ECAB 426 (2004).

<sup>25</sup> *See Stephen A. Pasquale*, 57 ECAB 396 (2006); *Richard P. Cortes*, *supra* note 23.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 22, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 4, 2012  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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