

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

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C.W., Appellant

and

**DEPARTMENT OF THE TREASURY,  
INTERNAL REVENUE SERVICE,  
Philadelphia, PA, Employer**

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**Docket No. 13-1537  
Issued: December 20, 2013**

*Appearances:*

*Jason S. Lomax, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA HOWARD FITZGERALD, Judge  
ALEC J. KOROMILAS, Alternate Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On June 18, 2013 appellant filed a timely appeal from the January 7, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether OWCP met its burden of proof to terminate appellant's compensation effective May 8, 2011 on the grounds that she refused an offer of suitable work.

**FACTUAL HISTORY**

OWCP accepted that prior to July 23, 2007 appellant, then a 44-year-old tax examination assistant, sustained bilateral carpal tunnel syndrome due to her work duties. It also accepted that

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

she sustained articular cartilage disorder of her right forearm. Appellant underwent left carpal tunnel release on July 24, 2007, right carpal tunnel release on December 17, 2007 and arthroscopic triangular fibrocartilage complex debridement of her right wrist on April 18, 2008. The procedures were authorized by OWCP. Appellant did not return to work and received wage-loss compensation.

In a March 2, 2010 report, Dr. Noubar Didizian, a Board-certified orthopedic surgeon serving as an OWCP referral physician, reported the findings from examination of appellant on February 25, 2010. He discussed her medical history, noting that the case had been accepted for bilateral carpal tunnel syndrome and articular cartilage disorder of her right forearm. Dr. Didizian advised that the prognosis was fair for appellant's bilateral carpal tunnel and her triangular fibrocartilage complex. Appellant had some triangular fibrocartilage complex symptoms with pronation and supination movement with clicking, which could be on the basis of the distal radioulnar joint and degenerative disease. She had weakness in her hands, right more than left and this was attributable to residuals of the carpal tunnel and triangular fibrocartilage complex surgery on the right side. Dr. Didizian noted that this was a chronic condition and that there were permanent residuals of the right and left wrist surgeries. He also noted, "There is a secondary problem with diabetes, which can cause neuropathy. [Appellant] does feel numbness in the toes and numbness symptoms could very well be on the basis of diabetes, but not the [triangular fibrocartilage complex] findings. So in totality, there are residuals from the postsurgery affect and the [triangular fibrocartilage complex] and possibly the median nerve."

In a March 5, 2010 report, Dr. Didizian further stated that appellant had permanent partial disability related to the work injury and noted, "Capacity is provided based on today's examination. The capacity is strictly for the accepted injury." Appellant had other medical issues which included possibly collagen disease and that a rheumatologic workup showed an increase in sedimentation rate and C-reactive proteins. Dr. Didizian stated that magnetic resonance imaging (MRI) scan of the brain and cervical spine and angiography did not explain appellant's upper extremity weakness, but that the cervical spine MRI scan showed degenerative changes. In a March 1, 2010 work capacity form, he found that she could work eight hours per day with restrictions of lifting up to 5 pounds for one hour, pushing up to 10 pounds for one hour, pulling up to 10 pounds for one hour and engaging in repetitive wrist movements for one hour. Dr. Didizian noted that appellant had arm tremors, right greater than left, which were not related to her work injury. In an August 2, 2010 letter, he clarified his March 1, 2010 work capacity form by stating, "It is my medical opinion that [appellant] can work one hour at a time with 15-minute rests in between as far as the use of the wrists are concerned. This is also true for lifting, pushing and pulling activities."

On September 2, 2010 the employing establishment offered appellant a full-time job as a customer service representative. The position involved entering data on a computer while helping callers with customer service matters. The physical requirements of the position included using a keyboard, continuously or intermittently, not to exceed a maximum of 1 hour at a time for 6.5 hours per day; simple grasping, continuously or intermittently, not to exceed 1 hour at a time for 6.5 hours per day; reaching above shoulder level not to exceed 1 hour at a time for 6.5 hours per day; and pulling and pushing, continuously or intermittently, not to exceed 1 hour at a time for 6.5 hours per day. Lifting, carrying, pulling and pushing were limited to 10 pounds on a continuous or intermittent basis.

Appellant initially rejected the customer service representative position. She submitted medical evidence in support of her contention that she could not perform its duties. In a May 4, 2009 note, Dr. John S. Taras, an attending Board-certified orthopedic surgeon, indicated that appellant could not push, pull or lift more than three pounds or engage in repetitive overhead activities. In an October 15, 2010 note, Dr. Nora Sandorfi, an attending Board-certified internist, stated that appellant “is still unable to fulfill the requirements of her job. [Appellant] should be considered disabled.”<sup>2</sup> In an October 27, 2010 note, Dr. George E. Fisher, an attending Board-certified internist, noted that she was “still unable to fulfill the requirements of the present job due to carpal tunnel syndrome and articular cartilage injury. [Appellant] is totally disabled.”

Appellant later accepted the customer service representative position, worked on January 12 and 13, 2011 and then stopped work. She claimed that her medical condition prevented her from performing the duties of the position.

In a February 17, 2011 letter, OWCP advised appellant of its determination that the customer service representative position offered by the employer was suitable. It informed her that her wage-loss benefits would be terminated if she did not reaccept the position or provide good cause for not doing so within 30 days of the date of the letter.

In an April 7, 2011 letter, OWCP advised appellant that her reasons for not returning to the customer service representative position were not support by the evidence. It reviewed the October 15, 2010 report of Dr. Sandorfi and the October 27, 2010 report of Dr. Fisher and found the opinions were not sufficiently well rationalized to establish that she could not perform the customer service representative position. OWCP informed appellant that the position was still available. It advised her that her compensation would be terminated if she did not reaccept the position within 15 days of the date of the letter. Appellant did not return to customer service representative position within the allotted period.

In an April 25, 2011 decision, OWCP terminated appellant’s entitlement to wage-loss and schedule award compensation effective May 8, 2011 on the grounds that she refused an offer of suitable work. It again indicated that the opinion of Dr. Didizian showed that she could work as customer service representative.

Appellant requested a hearing before an OWCP hearing representative that was held on September 15, 2011. She argued that her numerous nonwork-related conditions, as well as the medications she took for them, prevented her from working as a customer service representative.

In a March 7, 2011 report, Dr. Fisher diagnosed bilateral carpal tunnel syndrome, chronic low back pain, Arnold-Chiari malformation, left ear tinnitus, glaucoma, gastroesophageal reflux disease, diverticulosis, congestive heart failure, bilateral complex ovarian cyst, dystonia, alopecia, triangular fibrocartilage complex tears of her right wrist, diabetes mellitus (type 2), hypertension, obstructive sleep apnea, hypothyroid and partial right elbow tear at the common extensor tendon. He advised that appellant had permanent restrictions that included no repetitive activity of her upper extremities. Appellant could not push, pull, lift, reach or carry anything

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<sup>2</sup> In a January 19, 2010 note, Dr. Sandorfi stated that appellant should remain out work and noted that she was still undergoing testing and treatment.

above three pounds and she could not engage in any overhead work. She was prescribed one Percocet every eight hours as needed for pain and it was indicated that she had already been prescribed more than a dozen medications that were taken daily including Fentanyl and Oxycodone.

In a November 30, 2011 decision, an OWCP hearing representative affirmed the April 24, 2011 decision.

On October 4, 2012 appellant requested reconsideration. Her counsel asserted that OWCP did not consider all of her disability medical conditions.

In a January 7, 2013 decision, OWCP affirmed its November 30, 2011 decision terminating appellant's compensation. It discussed her argument that she had numerous nonwork-related conditions, which prevented her from working as a customer service representative. The decision stated:

“In order for a medical condition to be covered under FECA, medical evidence must demonstrate that it is related to the accepted injury. A physician must explain how the work event(s) caused or affected your condition, based upon an accurate factual and medical history, citing objective findings in support of the opinion.

“The other medical conditions of [appellant] mentioned by the attorney and Dr. Fisher are not shown to be caused or aggravated by the injury sustained on June 3, 1994.

“The weight of medical evidence remains with Dr. Didizian who opined, with rationalization, that the claimant could perform the job of customer service representative with the [employing establishment], based on the restrictions that resulted from the accepted, work[-]related conditions of bilateral carpal tunnel syndrome and the right wrist condition.”

### **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.”<sup>3</sup> However, to justify such termination, OWCP must show that the work offered was suitable.<sup>4</sup> An employee who refuses or neglects to work after suitable work has been offered to him or her has the burden of showing that such refusal to work was justified.<sup>5</sup> The Board has

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<sup>3</sup> 5 U.S.C. § 8106(c)(2).

<sup>4</sup> *David P. Camacho*, 40 ECAB 267, 275 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341, 345 (1981).

<sup>5</sup> 20 C.F.R. § 10.517; see *Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

held that all impairments, whether work related or not, must be considered in assessing the suitability of an offered position.<sup>6</sup>

### ANALYSIS

OWCP accepted that appellant sustained bilateral carpal tunnel syndrome and articular cartilage disorder of her right forearm. Appellant underwent OWCP-authorized a bilateral tunnel release, right carpal tunnel release and arthroscopic triangular fibrocartilage complex debridement of her right wrist.

On September 2, 2010 the employing establishment offered appellant a full-time job as a customer service representative. The position involved inputting data on a computer while helping callers with customer service matters. The physical requirements of the position included using a keyboard for up to 6.5 hours of an 8-hour workday, engaging in overhead work and lifting, carrying, pulling and pushing up to 10 pounds. Appellant worked in the position for two days in January 2011 but then stopped work and did not return.

In finding that appellant could physically perform the position, OWCP relied on March 1, 2 and August 2, 2010 reports of Dr. Didizian, an OWCP referral physician. The Board finds, however, that his reports do not establish that she can physically perform the customer service representative position. Therefore, OWCP did not meet its burden of proof to show that the position was suitable.

In a March 1, 2010 work capacity form, Dr. Didizian indicated that appellant could work eight hours per day with restrictions of lifting up to 5 pounds for one hour, pushing up to 10 pounds for one hour, pulling up to 10 pounds for one hour and engaging in repetitive wrist movements for one hour. In an August 2, 2010 supplemental letter, he stated that she could work one hour at a time with 15-minute rests in between as far as the use of the wrists are concerned. Dr. Didizian noted that this was also true for lifting, pushing and pulling activities. The Board notes, however, that he explicitly indicated in his reports that these work restrictions were based only on appellant's accepted work injuries, bilateral carpal tunnel syndrome and articular cartilage disorder of her right forearm. They did not incorporate her many nonwork-related conditions. The Board has held that all impairments, whether work related or not, must be considered in assessing the suitability of an offered position.<sup>7</sup>

Dr. Didizian noted that there were nonwork-related conditions that could affect appellant's ability to work. For example, he stated that she had diabetes which "very well" could have caused her neuropathy, including numbness in her toes. Dr. Didizian also indicated that appellant had possible systemic collagen disease affecting her extremities, noting that a rheumatologic workup showed an increase in sedimentation rate and C-reactive proteins. Appellant also had degenerative cervical disease as well as arm tremors, right greater than left, which Dr. Didizian noted were not related to her work injuries. Dr. Didizian explicitly indicated that her work restrictions were based only on her accepted work injuries; he did not provide a

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<sup>6</sup> See *Mary E. Woodard*, 57 ECAB 211 (2005).

<sup>7</sup> *Id.*

clear opinion on her ability to work based on her overall medical condition. OWCP did not request that he clarify his opinion to whether appellant could physically work as a customer service representative.

The record also contains medical evidence concerning appellant's capacity to work as a customer service representative. In a May 4, 2009 note, Dr. Taras, an attending Board-certified orthopedic surgeon, indicated that appellant could not push, pull or lift more than three pounds. The requirements of the customer service representative required lifting, carrying, pulling and pushing up to 10 pounds on a continuous or intermittent basis. In an October 27, 2010 note, Dr. Fisher, an attending Board-certified internist, noted that appellant was "still unable to fulfill the requirements of the present job due to carpal tunnel syndrome and articular cartilage injury. [Appellant] is totally disabled."<sup>8</sup>

In a March 7, 2011 report, Dr. Fisher diagnosed bilateral carpal tunnel syndrome, chronic low back pain, Arnold-Chiari malformation, left ear tinnitus, glaucoma, gastroesophageal reflux disease, diverticulosis, congestive heart failure, bilateral complex ovarian cyst, dystonia, alopecia, triangular fibrocartilage complex tears of her right wrist, diabetes mellitus (type 2), hypertension, obstructive sleep apnea, hypothyroid and partial right elbow tear at the common extensor tendon. He indicated that appellant had permanent restrictions that included no repetitive activity of her upper extremities and no pushing, pulling, lifting or carrying anything above three pounds.<sup>9</sup>

For these reasons, OWCP did not establish the suitability of the customer service representative position on which the offer of suitable work was based. Therefore, it improperly terminated her compensation effective May 8, 2011.

### **CONCLUSION**

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation effective May 8, 2011 on the grounds that she refused an offer of suitable work.

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<sup>8</sup> In an October 15, 2010 note, Dr. Sandorfi, an attending Board-certified internist, stated that appellant "is still unable to fulfill the requirements of her job. She should be considered disabled."

<sup>9</sup> Dr. Fisher also noted appellant's considerable medication regimen, including pain medications such as Percocet, Fentanyl and Oxycodone. Appellant had argued that her medications would prevent her from working as a customer service representative.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 7, 2013 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 20, 2013  
Washington, DC

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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