

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

A.W., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Huntington Beach, CA, Employer**

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**Docket No. 13-1735
Issued: December 17, 2013**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 15, 2013 appellant, through her attorney, filed a timely appeal from the April 22, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 properly terminated appellant's entitlement to wage-loss compensation effective September 23, 2012 on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

In December 1998, OWCP accepted that appellant, then a 42-year-old postal supervisor, sustained bilateral carpal tunnel syndrome, bilateral lateral epicondylitis and left wrist sprain due

¹ 5 U.S.C. §§ 8101-8193.

to performing her repetitive work duties over time. Appellant underwent right carpal tunnel release surgery in 1999 which was authorized by OWCP. She returned to light-duty work until February 21, 2012, when the employing establishment could no longer accommodate her employment-related medical restrictions.

Dr. Martin Tynan, an attending Board-certified orthopedic surgeon, provided periodic updates of appellant's work restrictions. In a Form CA-17 completed on September 7, 2011, he delineated extensive work restrictions including no lifting more than two pounds.

OWCP referred appellant for a second opinion examination with Dr. Steven Ma, a Board-certified orthopedic surgeon. In a July 25, 2012 report, Dr. Ma diagnosed bilateral carpal tunnel syndrome and provided work restrictions including limitations on repetitive movements of the wrists for two hours a day and of the elbows for two hours a day.

OWCP provided the employing establishment with Dr. Ma's restrictions and asked it to offer appellant limited-duty within those restrictions. It placed appellant on the periodic compensation rolls.

On August 13, 2012 the employing establishment offered appellant a modified full-time position of customer service supervisor. The duties were noted on the offer as "supervise city carriers" and the physical requirements of the position were two hours of repetitive wrist/elbow movement and eight hours of pushing/pulling/lifting of five pounds or less.

In an August 17, 2012 letter, OWCP advised appellant of its determination that the customer service supervisor position offered by the employing establishment was suitable. It invited her to provide reasons justifying any refusal of the offered position. Appellant was informed that her compensation would be terminated if she did not accept the position or provide good cause for not doing so within 30 days of the date of the letter.

Appellant responded to OWCP's August 17, 2013 letter arguing that the job offer did not describe specific duties with their physical requirements, the offered job did not provide for restrictions on fine manipulation and Dr. Ma's restrictions did not note whether daily wrist and elbow use of two hours was intermittent or continuous. She stated the task of "supervising city carriers" involved extensive use of her hands and was not within her restrictions. Appellant submitted September 6, 2012 reports of Dr. Tynan, including a duty status report in which Dr. Tynan delineated extensive work restrictions including no lifting more than two pounds.

In a September 21, 2012 decision, OWCP terminated appellant's wage-loss compensation effective September 23, 2012 on the grounds that she refused an offer of suitable work.²

Appellant requested a telephonic hearing with an OWCP hearing representative. During the February 13, 2012 hearing, she argued that the offered position of customer service supervisor did not address the work restrictions from her attending physician.

² OWCP did not terminate appellant's medical benefits.

In an April 22, 2013 decision, OWCP's hearing representative affirmed OWCP's September 21, 2012 termination decision. She found that there was no evidence showing that the duties of the customer service supervisor position were beyond appellant's work restrictions.

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."³ However, to justify such termination, OWCP must show that the work offered was suitable.⁴ 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.⁵

ANALYSIS

The Board finds that OWCP denied appellant a reasonable opportunity to comply with 5 U.S.C. § 8106(c). When OWCP informed appellant in its August 17, 2013 notification that it had determined the customer service supervisor position offered by the employing establishment to be suitable, it informed her of a preliminary determination. By inviting her to write and give reasons for not accepting, OWCP acknowledged that its determination was not yet final and that a reasonable explanation would justify her refusal and result in the continuation of her compensation for disability. Certain explanations will, of course, justify a claimant's refusal to accept an offer of employment. OWCP's procedure manual itself lists a number of reasons that are considered acceptable.⁶ If a claimant refuses the employment offered and provides such a reason, OWCP will consider appellant's refusal justified and will continue her compensation for disability.⁷

If a claimant chooses to respond within 30 days and gives reasons for not accepting the offered position, OWCP must consider these reasons before it can make a final determination on the issue of suitability. Only after it has made a final determination on the issue of suitability can OWCP afford appellant an opportunity to accept or refuse an offer of suitable work and only after it has finalized its decision on suitability can OWCP notify her that refusal to accept shall

³ 5 U.S.C. § 8106(c)(2).

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

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

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage Earning Capacity*, Chapter 2.814.5 (June 2013).

⁷ *Id.* OWCP 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 OWCP's 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. 20 C.F.R. § 10.516.

result in the termination of compensation, as the language of 5 U.S.C. § 8106(c) clearly mandates.⁸

In this case, OWCP did not afford appellant an opportunity to accept the position offered after making a final determination that the position was suitable. It therefore denied her a reasonable opportunity to accept an offer of “suitable” work. Without such an opportunity, appellant cannot be held to have refused an offer of suitable work within the meaning of 5 U.S.C. § 8106(c). She submitted evidence in support of her refusal to accept the offered position within 30 days of August 17, 2012, the date that OWCP advised her that she had 30 days to accept the offered position or provide justification for not accepting it. On September 21, 2012 OWCP issued a decision in which it determined that appellant had refused an offer of suitable work. In issuing this decision, it implicitly determined that the evidence submitted by her in support of her refusal to accept the offered position was unacceptable, and in doing so it finalized its preliminary decision on suitability. At the same instant, however, OWCP terminated appellant’s compensation for disability, thereby denying her an opportunity to accept the position after determining it to be a suitable one. As noted, its regulations provide that, if the employee presents reasons to counter OWCP’s suitability finding, and OWCP determines that the reasons are unacceptable, it will notify the employee of that determination and that she has 15 days in which to accept the offered work without penalty.⁹

For these reasons, OWCP improperly terminated appellant’s entitlement to wage-loss compensation effective September 23, 2012 on the grounds that she refused an offer of suitable work.

CONCLUSION

The Board finds that OWCP improperly terminated appellant’s entitlement to wage-loss compensation effective September 23, 2012 on the grounds that she refused an offer of suitable work.

⁸ See *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff’d on recon.*, 43 ECAB 818 (1992).

⁹ See *supra* note 7.

ORDER

IT IS HEREBY ORDERED THAT the April 22, 2013 merit decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 17, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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