



## **FACTUAL HISTORY**

On July 26, 2001 appellant, then a 46-year-old nurse, filed an occupational disease claim alleging bilateral carpal tunnel syndrome due to continuously opening bottles of medication in the performance of her job duties. OWCP accepted her claim for bilateral carpal tunnel syndrome with surgical releases. Appellant underwent a left carpal tunnel release on July 19, 2002. She underwent a right carpal tunnel release on October 11, 2002. By decision dated December 12, 2006, OWCP granted appellant schedule awards for 14 percent impairment of each upper extremity. Appellant returned to light-duty work. OWCP accepted her claim for the additional condition of bilateral hand and wrist osteoarthritis on July 16, 2009.

Appellant underwent right thumb surgery on September 11, 2009. She requested wage-loss compensation beginning September 11, 2009. On December 17, 2009 appellant underwent surgery for degenerative arthritis in her left thumb. Her attending physician opined that she would be totally disabled until April 1, 2010. Appellant did not return to work.

Appellant received information regarding disability retirement on March 16, 2010. In a note dated March 23, 2010, Dr. John M. Downey, an osteopath, opined that she was totally disabled due to several accepted claims including cervical sprain, concussion, lumbar sprain, brachial neuritis, chronic pain syndrome, hand contusions, carpal tunnel arthritis, metatarsal fracture, cervical sprain, lumbosacral neuritis, torn meniscus, hip contusion and enthesopathy.

Appellant underwent a functional capacity evaluation on May 28, 2010 which demonstrated limited walking and standing, limited lifting, carrying and pulling, diminished ability to pinch and grip, the inability to get up or down to the floor for kneeling and squatting and limited fine motor hand tasks.

OWCP entered appellant on the periodic rolls on September 2, 2010. It referred her with a statement of accepted facts, for a second opinion evaluation. The statement of accepted facts listed 6 additional claims encompassing 18 additional accepted conditions. Dr. James Bethea, a Board-certified orthopedic surgeon, examined appellant on January 3, 2011. He stated that, if her only problem was her accepted conditions, which he listed as bilateral carpal tunnel syndrome and bilateral hand and wrist osteoarthritis, she could return to light-duty work. Dr. Bethea completed a work capacity evaluation and determined that appellant could work for eight hours a day with restrictions, including no operating a motor vehicle, two hours each of repetitive movements of the wrist, pushing, pulling and lifting up to 20 pounds. He completed a supplemental report on April 18, 2011. Dr. Bethea reiterated that appellant was not totally disabled and was capable of either light or sedentary work.

On March 23, 2011 the employing establishment offered appellant a position as a patient services assistant which entailed sedentary work with some walking, bending, standing and carrying light items as well as pushing record carts.

A conflict of medical opinion was found between Dr. Downey and Dr. Bethea.

On June 15, 2011 OWCP referred appellant and a statement of accepted facts listing all her accepted conditions for an impartial medical examination to Dr. Henry Deriso, a Board-

certified orthopedic surgeon. In a report dated July 26, 2011, he examined appellant and noted her numerous work injuries, including cervical spine surgery, right knee surgery and bilateral carpal tunnel and metacarpocarpal arthritis surgeries. Dr. Deriso noted that appellant currently described back pain with referred pain down her leg. He noted that back pain was appellant's primary complaint and stated that there were no objective findings to substantiate her inability to perform light-to-moderate-duty work. Dr. Deriso completed a work capacity evaluation and advised that appellant could work eight hours a day with restrictions on bending and stooping, two hours a day, and pushing, pulling, 25 pounds and lifting for 10 pounds, four hours a day.

On September 21, 2011 appellant noted that she had been approved for disability retirement and would be requesting benefits from the Office of Personnel Management (OPM).

The employing establishment offered appellant a light-duty position on September 21, 2011 as patient services assistant with some walking, bending, standing, carrying light items and pushing record carts. The employing establishment stated, "All duties will be carried out within your permanent restrictions; it is your responsibility not to exceed your restrictions while performing your duties." Appellant elected OPM benefits on September 26, 2011 effective November 20, 2011.

In a letter dated January 25, 2012, OWCP informed appellant that the position of patient services assistant was found suitable to her limitations. It allowed her 30 days to accept the position or offer her reasons for refusal. On March 9, 2012 OWCP noted that appellant retired on OPM disability, which was not a valid reason for refusing a suitable work position. It allowed her 15 days to accept the suitable work position.

By decision dated April 24, 2012, OWCP terminated appellant's entitlement to monetary benefits on the grounds that she refused a suitable work position.

Appellant requested an oral hearing before an OWCP hearing representative on May 22, 2012. She testified at the August 14, 2012 oral hearing that she requested disability retirement in November 2010 and began receiving benefits in November 2011.

By decision dated October 19, 2012, the hearing representative found that, although appellant elected a disability retirement after receiving the suitable work job offer, it was not a justified reason for refusing a light-duty job offer. He affirmed the suitable work termination.

### **LEGAL PRECEDENT**

It is well settled that, once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>2</sup> As OWCP in this case terminated appellant's compensation under 5 U.S.C. § 8106(c),<sup>3</sup> it must establish that she refused an offer of suitable work. Section 8106(c) of FECA<sup>4</sup> provides that a partially disabled employee who

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<sup>2</sup> *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

<sup>3</sup> 5 U.S.C. §§ 8101-8193, 8106(c).

<sup>4</sup> *Id.* at § 8106(c)(2).

refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee is not entitled to compensation. OWCP's regulations provide that it 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 the 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.<sup>5</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>6</sup> In determining what constitutes suitable work for a particular disabled employee, OWCP considers the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work and other relevant factors.<sup>7</sup> OWCP's procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.<sup>8</sup>

### ANALYSIS

OWCP accepted that appellant developed bilateral carpal tunnel syndrome with resulting surgical releases as well as bilateral hand and wrist osteoarthritis due to her employment. The record also reveals that appellant had 6 additional claims encompassing 18 additional accepted conditions. Dr. Downey advised that appellant was totally disabled due to cervical sprain, concussion, lumbar sprain, brachial neuritis, chronic pain syndrome, hand contusions, carpal tunnel arthritis, metatarsal fracture, cervical sprain, lumbosacral neuritis, torn meniscus, hip contusion and enthesopathy. OWCP referred appellant for a second opinion evaluation with Dr. Bethea, who opined that if her only problem was her accepted conditions of bilateral carpal tunnel syndrome and bilateral hand and wrist osteoarthritis she could return to light work. It found a conflict of medical opinion evidence and referred appellant to Dr. Deriso, for an impartial medical examination.

When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of FECA. The statute 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 and resolve the conflict of medical evidence.<sup>9</sup> This is called a

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<sup>5</sup> 20 C.F.R. § 10.516.

<sup>6</sup> *Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

<sup>7</sup> 20 C.F.R. § 10.500(b); *see Ozone J. Hagan*, 55 ECAB 681 (2004).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity, Refusal of a Job Offer*, Chapter 2.814.5a(1) (July 1997); *see Lorraine C. Hall*, 51 ECAB 477 (2000).

<sup>9</sup> 5 U.S.C. §§ 8101-8193, 8123; *B.C.*, 58 ECAB 111 (2006); *M.S.*, 58 ECAB 328 (2007).

referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.<sup>10</sup> The Board finds that, due to the differing opinions on appellant's disability between Dr. Downey and Dr. Bethea, OWCP properly determined that there was a conflict of medical evidence.

Dr. Deriso examined appellant on July 26, 2011 and noted her numerous work injuries. He stated that back pain was her primary complaint and stated that there were no objective findings to substantiate her inability perform light-to-moderate-duty work. Dr. Deriso completed a work capacity evaluation and indicated that appellant could work eight hours a day with restrictions on bending and stooping, two hours a day, and pushing, pulling, 25 pounds, and lifting for 10 pounds, four hours a day. The Board finds that Dr. Deriso's opinion is entitled to the special weight of the medical evidence accorded an impartial medical examiner. Dr. Deriso based his evaluation on a proper factual background including all of appellant's accepted conditions and opined that she was capable of light-duty work.

The employing establishment provided appellant with a limited-duty position as a patient services assistant on September 21, 2011. The employing establishment listed the duties of the position as walking, bending, standing, carrying light items and pushing record carts. The employing establishment stated that it was appellant's responsibility not to exceed her restrictions while performing her duties.

The Board finds, however, that the employing establishment did not provide sufficient specificity in defining the physical requirements of appellant's offered position. Dr. Deriso specifically limited appellant to bending for no more than two hours a day, lifting no more than 10 pounds and pushing no more than 25 pounds. 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.<sup>11</sup> The position description of record included some bending, but did not define the extent required, lifting of light items, weight undefined and pushing record carts of an undefined weight. Rather, the employees noted it was appellant's responsibility not to exceed her work restrictions. Given that appellant has specific limitations on bending, lifting and pushing, the Board finds that the position description is deficient and does not adequately set forth appellant's work restrictions as found by Dr. Deriso.<sup>12</sup>

As a penalty provision, section 8106(c)(2) must be narrowly construed.<sup>13</sup> The medical evidence does not clearly establish that the offered position was within appellant's capabilities. Consequently, OWCP did not discharge its burden of proof to support the termination of her

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<sup>10</sup> *R.C.*, 58 ECAB 238 (2006).

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

<sup>12</sup> *See N.W.*, Docket No. 11-661 (issued July 6, 2012) (finding that, when the description of the offered position is silent with respect to physical activities restricted by a physician, it cannot be found that the offered position is suitable.)

<sup>13</sup> *A.M.*, Docket No. 12-1301 (issued March 14, 2013).

monetary compensation pursuant to section 8106(c)(2). The offered position fails to conform to appellant's work restrictions.

**CONCLUSION**

The Board finds that OWCP improperly terminated appellant's monetary compensation effective April 24, 2012 on the grounds that she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 19, 2012 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 14, 2013  
Washington, DC

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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