United States Department of Labor
Employees' Compensation Appeals Board

Y.M., Appellant	)	
and	)	**Docket Nos. 14-1050 & 14-1193**
DEPARTMENT OF LABOR, OFFICE OF WORKERS' COMPENSATION, DIVISION OF FEDERAL EMPLOYEES' COMPENSION, Philadelphia, PA, Employer	)	**Issued: December 24, 2014**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 2, 2014 appellant filed a timely appeal from a March 20, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP), in which an OWCP hearing representative affirmed a denial that additional conditions be accepted as compensable/work related. On April 29, 2014 she filed a timely appeal from an April 23, 2014 OWCP decision in which a hearing representative affirmed the termination of her wage-loss compensation on the grounds that she refused an offer of suitable work.[1] Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of these cases.

[1] The April 2, 2014 appeal was assigned Docket No. 14-1050; the April 29, 2014 appeal was assigned Docket No. 14-1193.

[2] 5 U.S.C. §§ 8101-8193.

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish additional conditions that were caused or aggravated by factors of her federal employment; and (2) whether OWCP properly terminated her compensation benefits effective November 16, 2013 pursuant to 5 U.S.C. § 8106(c).

On appeal, appellant asserts that the decisions were based on inaccurate statements of accepted facts, that the physician who rendered a second-opinion evaluation was asked leading questions, and that the referee physician relied on tainted documents. She maintained that the medical evidence established cervical and brachial plexus conditions and that OWCP erred in terminating her monetary compensation because she established an additional consequential injury to her left hand and could not perform the duties of the offered position.

FACTUAL HISTORY

On July 30, 2012 appellant, then a 47-year-old claims examiner, filed an occupational disease claim alleging that typing, keying, and scrolling for eight plus hours daily caused pain, numbness and tingling in both wrists. She indicated that she had carpal tunnel syndrome and cervical and brachial plexus nerve entrapment. On the claim form, the employing establishment indicated that appellant's regular work hours were 8:15 a.m. to 4:45 p.m. Monday through Friday. Appellant stopped work on July 26, 2012 and did not return. On August 24, 2012 OWCP accepted that she sustained bilateral carpal tunnel syndrome and bilateral radial tunnel syndrome. Appellant received appropriate compensation and was placed on the periodic compensation rolls.

Appellant came under the care of Dr. Scott M. Fried, a Board-certified osteopath specializing in orthopedic surgery at the Upper Extremity Institute and began physical therapy.

On August 23, 2012 John W. McKenna, district director of the employing establishment, informed OWCP that it was proposing a modified position for appellant in which she would mentor new trainees and less experienced claims examiners. The job would require minimal writing and typing with no repetitive activity and no head and neck posturing, and a headset would be provided for telephone use. Mr. McKenna forwarded a copy of an August 16, 2012 letter in which he asked Dr. Fried to provide physical restrictions and asked whether appellant could perform the mentor position. By letter dated September 19, 2012, he asked appellant to provide a duty status report and informed her that speech recognition software had been installed on her computer and instruction in its use had been arranged. On September 25, 2012 Mr. McKenna notified OWCP that Dr. Fried had not responded to the August 16, 2012 letter.

In September 2012, appellant was referred to a medical management nurse. The nurse attempted to contact her on multiple occasions but she did not respond. Nursing services were closed in March 2013.

In a report dated September 27, 2012, Dr. Fried indicated that he had reviewed a September 14, 2012 functional capacity evaluation (FCE). He indicated that this demonstrated

that appellant could occasionally move her head and neck and could not perform fine manipulation, firm grasping or pushing and pulling, and could not perform even sedentary work.

On October 2, 2012 appellant asked that her claim be expanded to include cervical radiculopathy and brachial plexopathy. She enclosed a September 20, 2012 letter in which Dr. Fried noted that her arm symptoms began in 2003 or 2004 and progressed to her current complaints of bilateral pain in the upper trapezial area and neck with decreased neck range of motion. Dr. Fried described appellant's work as computer entry and writing and reported that she was in a motorcycle accident on April 29, 2010 that involved minor injuries to her left hip and shoulder and her right elbow. He provided findings and indicated that she had significant upper extremity bilateral repetitive strain injury including significant brachial plexus involvement caused by prolonged posturing of the head, neck, and arms and aggressive reaching of the mouse. Dynamic testing of the brachial plexus thoracic outlet on the right hand was consistent with a cervical radiculopathy/brachial plexopathy, caused by the repetitive work activities. Dr. Fried continued to advise that appellant could not work.

An October 3, 2012 electrodiagnostic evaluation, performed by Richard L. Read a physical therapist working at the Upper Extremity Institute, showed right brachial plexus level nerve compromise, moderate left ulnar nerve compromise at the medial elbow level, and right posterior interosseous nerve compromise at the radial tunnel. The remainder of the test was normal.[3]

On October 18, 2012 Dr. Daniel D. Zimmerman, an OWCP medical adviser, stated that the electrodiagnostic testing from the Upper Extremity Institute should not be authorized because it was not done by a physician. He advised that OWCP should not accept additional conditions.

In an October 26, 2012 letter, OWCP asked that Dr. Fried provide medical rationale explaining why appellant could not work, asked that he provide a treatment plan for her work injuries, and inquired about Mr. Read's credentials. On November 5, 2012 Dr. Zimmerman reported that the FCE noted by Dr. Fried, was not in the record. He recommended that additional conditions not be accepted. In a November 30, 2012 treatment note, Dr. Fried again discussed a September 14, 2012 FCE without comment to questions posed by OWCP.

Dr. Fried continued to submit treatment notes reiterating his diagnoses and advising that appellant was medically disabled from work due to employment injuries. On January 24, 2013 he recommended additional procedures. On February 4, 2013 Dr. Zimmerman, the medical adviser, indicated that additional procedures and studies should not be authorized.

On February 8, 2013 OWCP referred appellant to Dr. Robert F. Draper, a Board-certified orthopedic surgeon, for a second-opinion evaluation. In a February 22, 2013 report, Dr. Draper noted his review of a January 29, 2013 statement of accepted facts and medical record. He indicated that appellant reported that she typed 12 hours a day, four days a week and that these duties caused burning in the trapezius area, neck pain, and carpal tunnel syndrome bilaterally, and that she felt a little better since she stopped work in July 2012. Dr. Draper provided extensive physical examination findings and diagnosed cervical strain, right and left trapezius

[3] The report was not cosigned by a physician.

strains, mild bilateral carpal tunnel syndrome, and bilateral radial tunnel syndrome. He advised that he saw no evidence of cervical radiculopathy or brachial plexopathy, indicating that his examination did not show any definite motor or sensory deficits in the upper extremities, noting that appellant had subjective complaints. Dr. Draper concluded that the diagnoses were directly causally related to the repetitive use of the upper extremities associated with typing and computer functions for six years, 12 hours a day, four days a week and advised that appellant was capable of working 8 hours of modified duty daily. He provided restrictions that she could not lift more than 20 pounds occasionally and 10 pounds frequently, and that she could stand and sit for six hours in an eight-hour workday. Reaching above the shoulder was limited to two hours, and computer use should not exceed four hours in an eight-hour workday.

Dr. Fried continued to submit reports based upon his evaluations of appellant. In a March 6, 2013 report, Dr. A.J. Palmaccio, Jr., an orthopedic surgeon, advised that he first saw appellant that day for complaints of right arm weakness. He found positive Tinel's and Phalen's signs on the right and indicated that she demonstrated no significant motor or sensory loss on the left. Dr. Palmaccio recommended a cervical magnetic resonance imaging (MRI) scan study to rule out pathology.

On March 10, 2013 OWCP informed Dr. Draper that appellant's normal workday was eight hours a day, five days a week. It asked him to explain the standing and sitting restrictions as they did not seem appropriate for arm conditions related to typing and computer functions. OWCP asked whether the strain conditions had resolved and, if not, asked that he provide temporary restrictions for the diagnosed cervical and trapezius strains and whether the restrictions for the bilateral carpal and radial tunnel conditions were permanent or temporary. It also asked Dr. Draper to clarify the computer work restriction in more specific terms.

A March 29, 2013 MRI scan cervical spine study showed mild disc protrusions at C2-3 and C4-5, and broad-based disc protrusions at C3-4 and C5-6. In a March 20, 2013 report, Dr. Palmaccio noted the MRI scan findings and indicated that appellant was still having neck pain with radiculopathy down the right arm. He recommended cervical epidural injections.

In an April 14, 2013 supplemental report, Dr. Draper advised that her diagnoses and accepted conditions were bilateral carpal tunnel syndrome and bilateral radial tunnel syndrome, which were related to repetitive use of the arms associated with fine manipulations and simple grasping in keyboard and mouse use. He indicated that appellant had no restrictions on sitting and standing and added a restriction that fine manipulation (keyboard and mouse use) and simple grasping were limited to four hours per day in an eight-hour workday.

On May 9, 2013 Dr. Fried advised that appellant remained symptomatic, noting that she was bothered on the left, secondary to overuse, and that she could not return to her regular work duties.

OWCP determined that a conflict in medical opinion had been created between the opinions of Dr. Fried and Dr. Draper regarding the conditions caused by appellant's work and regarding her ability to work. On June 3, 2013 it referred her to Dr. William H. Simon, a Board-certified orthopedic surgeon, for an impartial evaluation.

In a July 6, 2013 report, Dr. Simon noted his review of a May 30, 2013 statement of accepted facts that included a description of appellant's regular duties, his review of the medical record, and a history that appellant was in a 2010 motorcycle accident. Appellant reported intermittent symptoms for over 10 years but left work on July 26, 2012 because she "could not live with them anymore." She noted that she did not return to light duty because Dr. Fried had not released her. Dr. Simon indicated that he was unaware of a neuromuscular ultrasound that was performed by Dr. Fried and that the electrodiagnostic study performed by Mr. Read did not confirm bilateral carpal tunnel syndrome and bilateral radial tunnel syndrome. Dr. Simon advised that a review of the record showed that appellant reported that her symptoms increased after she stopped work which indicated that the symptoms were subjective in nature. He added that the cervical MRI scan findings indicated degenerative disc disease, noting that this condition was not caused by repetitive trauma in the workplace but was a naturally progressive disease, and that any increase in symptoms, as reported by appellant and Dr. Fried, would be due to the degenerative disc disease of the cervical spine. Dr. Simon noted reviewing Dr. Draper's reports and indicated that the cervical and bilateral trapezius strain diagnoses could not be due to work-related incidents as they would heal in a matter of weeks, noting that Dr. Draper examined appellant after months of therapy. He described her complaints of right worse than left neck tension which was always there, difficulty in turning her head, tension headaches one to two times weekly, tension and burning in the right trapezius, intermittent right forearm throbbing pain, a dull right wrist ache, decreased right grip strength, intermittent tingling and numbness in the last three fingers of the right hand, and tenderness between the blades of the scapula, more on the right. On examination appellant complained of pain in cervical and shoulder range of motion. Upper extremities demonstrated no measurable atrophy, and range of motion of the elbows and wrists was normal, including normal motion in radial, and ulnar deviation. Tinel's and Phalen's signs were negative bilaterally and grip strength was good bilaterally. Sensation was intact in the arms. There was no tenderness to palpation over the normal entrapment site in the right forearm, and spine examination showed no tenderness in the midline from the base of the skull to the lumbosacral junction with some tenderness to palpation of the right trapezius, but no involuntary paravertebral muscle spasm. Dr. Simon advised that, based on physical examination, neurologic examination, and review of the 900-page plus medical record, appellant had degenerative disc disease in multiple levels of the cervical spine and subjective symptoms compatible with mild cervical radiculopathy involving the right upper extremity, greater than the left, which were not supported by objective testing. He agreed with Dr. Draper regarding her work status and indicated that she could perform the duties of the mentoring job which appellant indicated she had previously done.

On July 18, 2013 OWCP asked the employing establishment to provide a job offer for appellant that was in conformance with the restrictions provided by Dr. Draper and agreed upon by Dr. Simon. On August 8, 2013 the employing establishment offered her a modified claims examiner job requiring four hours of repetitive wrist and elbow movements, fine manipulation, and simple grasping. An example of the duties to be performed included using office automation equipment and a variety of software to read and review training, reference, and claims material, and adjudicate claims, produce various documents/decisions which could include specialized terminology and/or complex formats; review incoming mail; receive and refer telephone calls to appropriate coworkers; assist staff members on individual projects; document telephone calls; prepare written responses to incoming correspondence; determine claims actions that needed to be taken to facilitate returns to work; update coding of claims in the computer system; determine

pay rates; make compensation payments; certify payments; calculate overpayments; and maintain time and attendance records. The physical requirements indicated that appellant could intermittently lift/carry up to five pounds; intermittently sit eight hours per day; intermittently stand eight hours per day; intermittently walk up to two hours per day; intermittently pull/push up to 15 minutes a day; grasp intermittently four hours per day; intermittently use fine manipulation (keyboarding and mouse) four hours per day; and intermittently reach above shoulder height up to 15 minutes per day. Her hours of work would be in accordance with the flextime agreement and her scheduled days off would be Saturday and Sunday. A copy of a regular claims examiner GS-12 position description was attached.

Appellant replied on August 13, 2013 that she had an outstanding work-related condition that had not been addressed. On August 20, 2013 the employing establishment indicated that the job offered was a permanent position and on August 26, 2013 indicated that the position was still available.

By letter dated August 27, 2013, OWCP advised appellant that the position offered was suitable. Appellant was notified that, if she failed to report to work or failed to demonstrate that the failure was justified, pursuant to section 8106(c)(2) of FECA, her right to compensation for wage loss or a schedule award would be terminated. She was given 30 days to respond.

In correspondence dated September 10 and 20, 2013, appellant disagreed that the offered position was suitable. She noted that the offer did not indicate what she would be doing for the four hours a day she was not keying and maintained that OWCP had not addressed whether cervical radiculopathy and brachial plexopathy were employment related. Appellant also claimed that she had a consequential injury to her left hand, noting that she typically had worse grip strength, pain and numbness in the right hand and therefore overused her left hand. She indicated that pain and symptoms in the left hand had been gradually increasing in the past few months due to overuse.

In support of her assertions, appellant submitted an August 22, 2013 report from Dr. Fried who indicated that she had a flare of symptoms on the left secondary to overuse with progressive pain that was spreading into the fingers and was greatest with grip and pinch. Dr. Fried diagnosed scapholunate ligament injury of the right wrist, bilateral carpal tunnel median neuropathy, right posterior occipital neuralgia, bilateral radial neuropathy, brachial plexopathy, and right cervical radiculopathy. He recommended massage therapy, ultrasound, and TENS stimulation and indicated that appellant was medically disabled.

On September 19, 2013 Dr. Fried disapproved of the offered job because it fell outside appellant's limitations, based on a September 14, 2012 FCE. He attached his November 30, 2012 treatment note that discussed the September 14, 2012 FCE. Dr. Fried reported that a September 24, 2013 neuromusculoskeletal ultrasound of the left second digit with special attention to the metacarpophalageal joint demonstrated grade 2 laxity of the radial collateral ligament with chronic partial tearing and early spur formation, which indicated radial sensory neuritis. A September 24, 2013 neuromusculoskeletal ultrasound of the left brachial plexus showed pathologic findings including perineural scarring, tractional fixation, substantial swelling, nerve compression, and thoracic outlet syndrome. A September 24, 2013 neuromusculoskeletal ultrasound of the left median nerve and carpal tunnel demonstrated

perineural scarring, substantial swelling, and nerve compression. In September 24 and October 3, 2013 treatment notes, Dr. Fried noted these findings and reiterated his prior diagnoses. He indicated that appellant's plexus issues remained, right greater than left, and that the left hand was bothersome due to overuse to compensate for the right and that carpal tunnel issues also remained.

By decision dated October 9, 2013, OWCP denied appellant's claim that cervical radiculopathy and brachial plexopathy were caused by her federal job duties.

On October 10, 2013 the employing establishment confirmed that the modified job remained available. On October 11, 2013 OWCP advised appellant that her reasons for refusing the offered position were not valid, and she was given an additional 15 days to accept. In an October 16, 2013 response, appellant maintained that the offered job was invalid as it did not delineate her duties after her four-hour restriction on computer work. She maintained that the medical evidence showed that she had additional left hand conditions and that the consequential conditions should be accepted.

In a request postmarked October 28, 2013, appellant requested a review of the written record of the October 9, 2013 OWCP decision. She maintained that the statements of accepted facts were incorrect because they indicated that she worked eight hours a day when she actually worked up to 11 hours daily, incorrectly stated that a September 11, 2012 neuromusculoskeletal ultrasound procedures was performed by Mr. Reed, that the second-opinion evaluator changed his opinion based on leading questions from OWCP, and that the reports of the medical adviser were inflammatory, inaccurate and biased, and contaminated the opinion of the referee examiner, Dr. Simon, who reviewed the medical adviser reports. Appellant further indicated that the record contained evidence that the claims examiner and OWCP referral nurse were biased, and that OWCP did not follow proper procedures because section 3.600 of OWCP's procedures indicated that an OWCP medical adviser was to remain neutral as to whether a case or medical condition should be accepted. Appellant further noted that Dr. Fried referred her to Dr. Steven J. Valentino, a Board-certified osteopath specializing in orthopedic surgery, but that his May 13, 2013 report was not discussed. She maintained that she worked over 8 hours a day on a flexible work schedule, and worked on average 9 hours a day and sometimes up to 11 hours daily.

Appellant submitted a May 21, 2013 report in which Dr. Valentino, a Board-certified osteopath specializing in orthopedic surgery, noted her complaints of neck pain with radiation into both arms, paresthesias, and weakness, right greater than left. Neck motion was severely limited in all planes. Appellant had decreased sensation with pulsatile sign over the radial and carpal tunnels bilaterally. Deep tendon reflexes were intact and otherwise, the motor and sensory examinations were normal. Dr. Valentino diagnosed carpal tunnel syndrome and lesion of the radial nerve, opining that these were secondary to repetitive work. He recommended activity and posture modification. On October 28, 2013 Dr. Fried reiterated his findings and conclusions. He found appellant disabled until November 25, 2013.

On November 6, 2013 the employing establishment informed OWCP that the offered position remained available. By decision dated November 8, 2013, OWCP terminated appellant's compensation benefits, effective November 16, 2013, on the grounds that she refused

to accept an offer of suitable work. It found that the weight of medical evidence rested with the opinion of Dr. Simon who provided an impartial evaluation.

In a request postmarked November 19, 2013, appellant requested a review of the written record of the November 8, 2013 decision. She maintained that the offered position was not suitable, noting that OWCP ignored her consequential injury claim for overuse of the left hand and reiterated her contention that OWCP and the referral physicians demonstrated bias. Appellant also noted that the referee report predated the onset of symptoms for a claimed consequential condition of her left hand and that OWCP erred in not considering this additional condition involving the radial collateral ligament of the proximal phalanx of the left hand.

In a November 25, 2013 treatment note, Dr. Fried indicated that appellant attempted to type appeal letters but could not finish due to elevated symptoms. He reiterated his diagnoses and continued to find her disabled. On December 16, 2013 Dr. Fried noted treating appellant since July 26, 2013 and described her care. He stated that an FCE was completed on November 4, 2013 which indicated that she could work at a strict sedentary level and that she could not perform any regular writing, pulling, pushing, gripping, keying, grasping, reaching, overhead reaching, and could not perform her regular work duties. Dr. Fried added that appellant showed the ability to see, speak, and interact but did not show a regular ability to utilize her hands for regular work activities. He noted his review of Dr. Draper's and Dr. Simon's reports and took issue with Dr. Simon's conclusions. Dr. Fried indicated that appellant could not perform the duties of the modified position but could return to work using a headset for the telephone and voice-activated software but could not perform any work with her hands. He continued to submit reports reiterating his findings and conclusions.

On March 20, 2014 an OWCP hearing representative affirmed the October 9, 2013 decision. The hearing representative found that the weight of the medical evidence rested with the Dr. Simon who rendered an impartial opinion, and found that cervical radiculopathy and brachial plexopathy were not causally related to employment factors.[4]

On April 23, 2014 a second OWCP hearing representative affirmed the November 8, 2013 decision. The hearing representative found that the weight of the medical evidence rested with Dr. Simon, the impartial specialist, and found that OWCP met its burden to terminate appellant's monetary benefits on the grounds that she refused an offer of suitable work.

LEGAL PRECEDENT -- ISSUE 1

Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.[5] The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the

[4] The Board notes that the March 20, 2014 decision contains a typographical error on the first page, indicating that a November 8, 2013 decision was affirmed. A careful reading of the March 20, 2014 decision clearly indicates that the October 9, 2013 decision was affirmed by the hearing representative.

[5] *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

relationship between the diagnosed condition and the specific employment factors identified by the employee.[6] Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[7]

Section 8123(a) of FECA 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.[8] The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination, and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[9] 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.[10]

ANALYSIS -- ISSUE 1

As a preliminary matter, the Board finds that the statements of accepted facts provided to Drs. Draper and Simon, dated January 29 and May 30, 2013 respectively, did not include incorrect information. Appellant maintained that they included incorrect information because they stated that she worked eight hours daily when she typically worked additional hours each day. A careful reading of the statements, however, merely includes a description of the requirements of her claims examiner position. Moreover, while appellant was permitted to work a flexible schedule, the statements also include her assertion that she worked more than eight hours daily. The Board further finds that OWCP did not pose leading questions to Dr. Draper, who provided a second-opinion evaluation for OWCP. After receiving his initial February 22, 2013 report, OWCP noted that it contained inconsistencies and asked him specific questions about items in his report and to clarify his restrictions. The Board finds these questions necessary and therefore appropriate.[11]

The Board also finds that appellant did not meet her burden of proof to establish that the conditions of cervical radiculopathy and brachial plexopathy were caused by her job duties. In May 2013, OWCP determined that a conflict in medical opinion had been created between the opinions of Dr. Fried and Dr. Draper regarding the conditions caused by appellant's work and regarding her ability to work, and on June 3, 2013 referred her to Dr. Simon for an impartial

[6] *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

[7] *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

[8] 5 U.S.C. § 8123(a); *see Y.A.*, 59 ECAB 701 (2008).

[9] 20 C.F.R. § 10.321.

[10] *V.G.*, 59 ECAB 635 (2008).

[11] *See D.R.*, Docket No. 12-1441 (issued February 13, 2013).

evaluation. In a comprehensive report dated July 6, 2013, Dr. Simon advised that, because appellant reported that her symptoms increased after she stopped work, this indicated that the symptoms were subjective. He added that the cervical MRI scan findings indicated degenerative disc disease, which was not caused by repetitive trauma at work but was rather a naturally progressive disease, and that any increase in symptoms would be due to the degenerative disc disease of the cervical spine. Dr. Simon noted his review of Dr. Draper's reports and indicated that the diagnoses of cervical and bilateral trapezius strains could not be due to work-related incidents as they would heal in a matter of weeks. He described appellant's complaints and noted that on physical examination she complained of pain in cervical and shoulder range of motion, but that range of motion of the elbows and wrists was normal, including normal motion in radial and ulnar deviation. Dr. Simon found no measurable atrophy of the arms and she had good bilateral grip strength and intact sensation. He found no tenderness to palpation over the normal entrapment site in the right forearm. Spinal examination revealed no involuntary paravertebral muscle spasm. Dr. Simon concluded that, based on physical and neurologic examinations, and examination of the 900-page plus medical record, appellant had degenerative disc disease in the cervical spine and subjective symptoms compatible with mild cervical radiculopathy involving the right upper extremity which were not supported by objective testing. He found no basis on which to attribute these conditions to her work. Dr. Simon agreed with Dr. Draper regarding appellant's work status and indicated that she could perform the duties of the mentoring job which she had previously done.

The additional medical evidence submitted in response to Dr. Simon's report is insufficient to overcome the weight accorded to him as an impartial medical specialist regarding this issue. While Dr. Fried submitted additional reports, he had been on one side of the conflict in medical opinion regarding whether additional diagnoses were employment related. Reports from a physician who was on one side of a medical conflict that an impartial specialist resolved, are generally insufficient to overcome the weight accorded the opinion of the impartial physician or to create a new conflict.[12] Appellant also submitted a May 21, 2013 report in which Dr. Valentino merely diagnosed carpal tunnel syndrome and lesion of the radial nerve. Dr. Valentino did not indicate that she had cervical radiculopathy and brachial plexopathy.

The Board therefore concludes that Dr. Simon's opinion that appellant did not have the conditions of cervical radiculopathy and brachial plexopathy is entitled to the special weight accorded an impartial medical examiner.[13] The additional medical evidence submitted is insufficient to overcome the weight accorded him as an impartial medical specialist regarding this issue. Appellant therefore did not meet her burden of proof to establish that these conditions were causally related to employment duties as a claims examiner.

LEGAL PRECEDENT -- ISSUE 2

Section 8106(c) 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."[14]

[12] *Jaja K. Asaramo*, 55 ECAB 200 (2004).

[13] *See Sharyn D. Bannick*, 54 ECAB 537 (2003).

[14] 5 U.S.C. § 8106(c).

It is OWCP's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.[15] The implementing regulations provide that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of showing that such refusal or failure to work was reasonable or justified and shall be provided with the opportunity to make such a showing before entitlement to compensation is terminated.[16] To justify termination, OWCP must show that the work offered was suitable and that appellant was informed of the consequences of his or her refusal to accept such employment.[17] 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.[18] The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by medical evidence.[19] 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.[20]

ANALYSIS -- ISSUE 2

The Board finds that OWCP met its burden of proof in terminating appellant's wage-loss compensation on the grounds that she refused an offer of suitable work. The accepted conditions in this case are bilateral carpal tunnel syndrome and bilateral radial tunnel syndrome. Appellant refused the offered position and asserted that she could not perform its duties and also claimed that she had a disabling consequential injury to her left hand that OWCP did not address. In September 2013, she maintained that symptoms in her left hand had been gradually increasing due to overuse because she was limited by loss of use of her right hand. OWCP has not issued a decision on the issue of whether appellant sustained a consequential left hand injury, and the Board's jurisdiction extends only to the review of final decisions by OWCP.[21] However, in a suitable work determination, OWCP must consider preexisting and subsequently acquired medical conditions.[22]

[15] *Joyce M. Doll*, 53 ECAB 790 (2002).

[16] 20 C.F.R. § 10.517(a).

[17] *Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[18] 20 C.F.R. § 10.500(b); *see Ozine J. Hagan*, 55 ECAB 681 (2004).

[19] *Gayle Harris*, 52 ECAB 319 (2001).

[20] Federal (FECA) Procedure Manual, Part -- 2 Claims, *Reemployment: Determining Wage-Earning Capacity, Refusal of Job Offer*, Chapter 2.814.5 (June 2013); *see Lorraine C. Hall*, 51 ECAB 477 (2000).

[21] 20 C.F.R. § 501.2(c).

[22] *See Richard P. Cortes*, 56 ECAB 200 (2004).

The Board finds that, in his July 6, 2013 report, Dr. Simon provided thorough physical examination findings, advising that appellant had good bilateral grip strength and normal sensation. Dr. Simon agreed with the restrictions provided by Dr. Draper who advised that she could work eight hours daily with restrictions that she not lift more than 20 pounds occasionally and 10 pounds frequently. Reaching above the shoulder was limited to 1 hour, and computer use should not exceed four hours in an eight-hour workday. Dr. Simon did not indicate that the restrictions were solely due to the accepted conditions.

The modified position offered to appellant was within these restrictions. It limited repetitive wrist and elbow movements, fine manipulations and simple grasping, including using the keyboard and mouse, to four hours daily. Reaching above the shoulder was limited to 15 minutes, with a five-pound weight restriction.

As noted above, in situations where there are 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 on a proper factual background, must be given special weight.[23] Dr. Fried first reported left overuse problems on May 9, 2013, before Dr. Simon's examination in July. While he advised that appellant could not perform the duties of the modified position because she could not perform any work with her hands, as noted above, reports from a physician who was on one side of a medical conflict that an impartial specialist resolved, are generally insufficient to overcome the weight accorded the opinion of the impartial physician or to create a new conflict.[24]

The Board finds that, as Dr. Simon provided a comprehensive, well-rationalized opinion in which he provided physical examination findings that indicated that appellant could work eight hours a day with the above restrictions, his opinion is entitled to the special weight accorded an impartial examiner and constitutes the weight of the medical evidence.[25]

There is also no evidence of a procedural defect in this case as OWCP provided appellant with proper notice. Appellant was offered a suitable position by the employing establishment and the offer was refused. Thus, under section 8106(c) of FECA, appellant's monetary compensation was properly terminated effective November 16, 2013 on the grounds that she refused an offer of suitable employment.[26]

OWCP therefore met its burden of proof to terminate appellant's wage-loss compensation on the grounds that she refused an offer of suitable work.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

[23] *Supra* note 10.

[24] *Supra* note 12.

[25] *Supra* note 10.

[26] *Supra* note 15.

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation effective November 16, 2013 pursuant to section 8106(c) of FECA. The Board further finds that she did not establish that her cervical radiculopathy and brachial plexopathy conditions are casually related to employment.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 23 and March 20, 2014 are affirmed.

Issued: December 24, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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