

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

M.W., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Northport, NY, Employer)

Docket No. 14-0621
Issued: August 20, 2015

Appearances:
Paul Kalker, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 24, 2014 appellant, through counsel, filed a timely appeal of a December 18, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) concerning the termination of her monetary compensation based on her refusal of suitable work. 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 compensation effective March 19, 2013 on the grounds that she refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 10, 2012 appellant, then a 56-year-old civilian pay technician, filed an occupational disease claim alleging that on June 14, 2007 she first realized that her bilateral carpal tunnel syndrome was due to her employment duties. OWCP accepted the claim for bilateral carpal tunnel syndrome and authorized right carpal tunnel surgery which occurred on October 8, 2012. Appellant stopped work on December 20, 2011.

OWCP referred appellant to Dr. Leon Sultan, a Board-certified orthopedic surgeon.

In an April 21, 2012 report, Dr. Sultan, reviewed the statement of accepted facts and medical evidence and conducted a physical examination. He diagnosed bilateral carpal tunnel syndrome which he attributed to appellant's duties as a civilian pay technician. Dr. Sultan concluded that she was totally disabled from her date-of-injury position, but was capable of working full time in a limited-duty job with no repetitive movement of her wrists or hands. He stated that the duties appellant was able to perform included working as a receptionist, light clerical work, and answering the telephone. In concluding, Dr. Sultan related that following bilateral carpal tunnel surgery and postoperative exercises she could return to work for eight hours a day about three months after surgery.

On December 21, 2012 OWCP referred appellant back to Dr. Sultan for a determination on her work capability.

In a January 10, 2013 report, Dr. Sultan provided physical and range of motion findings for both hands and wrists. Based on this examination, he found appellant has restricted right wrist dorsiflexion and palmar flexion and the right carpal tunnel syndrome appeared in remission. However, Dr. Sultan noted that she had positive residual findings due to postoperative changes. He concluded that appellant's left carpal tunnel syndrome appeared to be in remission as testing did not confirm any residual carpal tunnel. Dr. Sultan stated that left hand sensory testing revealed unremarkable provocative testing and a well preserved hand. Based on the positive right hand and wrist clinical findings, he indicated that appellant was capable of working an eight-hour day in sedentary or strict light work. Restrictions included avoiding repetitive activities such as computer work and typing and no lifting, pushing, or pulling more than 20 pounds at a time with both hands. Work activities appellant was capable of performing included: light file work; opening mail; and answering the telephone.

On January 24, 2013 the employing establishment offered appellant the light-duty position of civilian pay technician. The job provided receptionist and telephone duties including: greeting visitors; scanning paperwork; proof reading; and working with payroll, accounting. The employing establishment noted the physical demands included up to one-hour of computer work (intermittent only), no over head lifting and a maximum 20 pounds of lifting, pushing and pulling. It stated that "[I]f necessary, assistive devices such as telephone headsets, worksite adjustments, ergonomic assessments, or tools may be considered." The job offer also provided that the employee will be free to change positions as needed.

By letter dated January 28, 2013, OWCP advised appellant of its determination that the civilian pay technician position offered by the employing establishment was suitable. It

indicated that the position was based upon the opinion of Dr. Sultan who opined that appellant was capable of working eight hours a day with restrictions. The employing establishment confirmed that the position remained available to appellant. OWCP instructed appellant that she must, within 30 days, either accept the position or provide a written explanation of the reason she did not accept the position or she could lose her right to compensation under 5 U.S.C. § 8106(c) of FECA.

In a January 28, 2013 letter, appellant noted that she had been approved to receive social security disability benefits and submitted a copy of the award.

On February 1, 2013 OWCP received a January 23, 2013 disability note from Dr. Gus Katsigiorgis, a treating osteopathic and Board-certified orthopedic surgeon, indicating that she had received medical treatment that day and was totally disabled from working.

In a February 4, 2013 letter, appellant stated that she refused the offered position as the right carpal tunnel surgery was only partially successful and she continues to have difficulty working with her right hand. She related that she had been approved for social security disability benefits and submitted an application for disability retirement with the Office of Personnel Management. Appellant stated that she is currently attending physical therapy three times a week and she continues to experience a lot of pain in her right arm and hand.

On February 15, 2013 OWCP received a February 1, 2013 report from Dr. Katsigiorgis prescribing physical therapy and restricting activities. A physical examination revealed restricted range of motion and tenderness of the right hand as well as increasing numbness.

In a March 1, 2013 letter, OWCP found the reasons given by appellant for refusing the offered position were not valid. It gave her 15 additional days to accept the position or to make arrangements to report to this position. OWCP noted that if appellant did not accept the position within 15 days of the date of the letter, her right to compensation for wage loss or a schedule award would be terminated pursuant to section 8106 of FECA. It would not consider any further reasons for refusal. In a March 6, 2013 disability note, Dr. Katsigiorgis, indicated that appellant had received medical treatment that day and was totally disabled from working.

By decision dated March 20, 2013, OWCP terminated appellant's wage-loss compensation benefits effective March 19, 2013 on the grounds that she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c).

Subsequent to the decision OWCP received a March 14, 2013 report from Dr. Katsigiorgis prescribing physical therapy and restricted activities. A physical examination revealed restricted range of motion and tenderness of the right hand as well as increasing numbness.

In an April 17, 2013 disability note, Dr. Katsigiorgis indicated that appellant had received medical treatment that day and was totally disabled from working.

In a July 18, 2013 report, Dr. Katsigiorgis prescribed continued physical therapy and restricted activity. A physical examination of both hands revealed tenderness and intact neurovascularly.

In an August 13, 2013 report, Dr. Katsigiorgis noted the medical and work histories. A physical examination of the right hand revealed tenderness and reduced range of motion in dorsiflexion and palmar flexion. Dr. Katsigiorgis reported left hand thenar atrophy, a positive carpal tunnel compression test for the left hand as well as positive Tinel's and Phalen's signs. Diagnoses included continued symptomatology in the right hand following carpal tunnel release and left carpal tunnel syndrome. Dr. Katsigiorgis recommended continued physical therapy and indicated that appellant was disabled from working.

In a letter dated September 24, 2013, counsel requested reconsideration and submitted physical therapy notes for services rendered on behalf of Dr. Katsigiorgis as well as progress notes from himself in support of appellant's request. He also argued that there was an unresolved conflict in the medical opinion evidence.

By decision dated December 18, 2013, OWCP denied appellant's request for modification of the March 20, 2013 decision terminating her wage-loss compensation pursuant to section 8106(c).

LEGAL PRECEDENT

Section 8106(c)(2) of FECA states that a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or secured for her is not entitled to compensation.² Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits under section 8106(c) for refusing to accept or neglecting to perform suitable work.³ The Board has recognized that section 8106(c) serves as a penalty provision as it may bar an employee's entitlement to future compensation and, for this reason, will be narrowly construed.⁴ 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.⁵ According to OWCP procedure, 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.⁶ Section 10.516 of the Code of Federal Regulations⁷ provides 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 showing before a determination is made with respect to termination of entitlement to compensation.⁸

² *Id.* at § 8106(c)(2).

³ *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

⁴ *H. Adrian Osborne*, 48 ECAB 556 (1997).

⁵ *T.S.*, 59 ECAB 490 (2008); *Ronald M. Jones*, 52 ECAB 190 (2000).

⁶ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(a) (July 1997).

⁷ 20 C.F.R. § 10.516.

⁸ See *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

ANALYSIS

OWCP accepted appellant's claim for bilateral carpal tunnel syndrome and authorized right carpal tunnel surgery which occurred on October 8, 2012. In reports dated April 21, 2012 and January 10, 2013, Dr. Sultan, a Board-certified orthopedic surgeon and OWCP referral physician, concluded that appellant's positive clinical findings with regard to her right hand and wrist will prevent her from full unrestricted work activity as a civilian pay technician, however, she was capable of working eight hours a day in a limited-duty position such as answering the telephone, light clerical work and working as a receptionist. In his January 10, 2013 report, he indicated that she may engage in strict light or sedentary work for eight hours a day but should avoid repeated activities such as typing or doing computer work, light clerical work activities however would be permitted. Further, Dr. Sultan limited appellant to no more than 20 pounds of lifting, pushing, and pulling.

On January 24, 2013 the employing establishment offered appellant a full-time position as a civilian pay technician, requiring up to one hour of intermittent computer work and scanning of paperwork. Appellant declined the position and noted that she had been approved for social security disability. Dr. Katsigiorgis indicated in various reports and disability notes that she was disabled from working and required continued physical therapy.

OWCP advised appellant by a January 28, 2013 letter that the offered position was suitable work within her medical limitations. On March 1, 2013 it afforded her 15 days to accept the position or her wage-loss compensation benefits would be terminated. OWCP terminated appellant's wage-loss compensation benefits and schedule award eligibility effective March 19, 2013 under section 8106(c) of FECA on the grounds that she had refused an offer of suitable work. The Board finds that the offered civilian pay technician position was suitable work as it was within medical restrictions provided by Dr. Sultan.

The civilian pay technician position offered to appellant on January 24, 2013 required light or sedentary employment activity. Dr. Sultan is clear in his work restrictions that appellant avoid repetitive activities such as typing or computer work. The job offer provides for specific amounts of time for each series of light-duty activities. Included in the duties is intermittent use of a computer up to one hour a day. This singular activity of up to one hour a day does not constitute a repetitive activity through the course of an eight-hour workday.

The Board therefore finds that the offered position was medically suitable and as such has met its burden of proof in terminating appellant's wage-loss compensation.

On appeal, appellant contends that the offered position was outside her work restrictions and that OWCP failed to consider medical evidence submitted by her treating physician.

CONCLUSION

The Board finds that OWCP met its burden to terminate appellant's compensation benefits pursuant to 5 U.S.C. § 8106.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 18, 2013 is affirmed.

Issued: August 20, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

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