

ISSUE

The issue is whether OWCP properly terminated appellant's compensation effective August 7, 2015 as she refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c).

On appeal appellant's representative contends that the offered position was not suitable because of limitations arising from her psychological condition and, thus, OWCP erred in terminating her compensation under section 8106(c).

FACTUAL HISTORY

On March 15, 2013 appellant, then a 44-year-old claims representative, filed an occupational disease claim (Form CA-2) alleging that on June 1, 2012 she first became aware that her carpal tunnel condition was due to her work duties. OWCP accepted her claim for bilateral upper arm, shoulder, and other specified sites strain and right carpal tunnel syndrome. Appellant stopped work on August 11, 2014³ and received wage-loss compensation for temporary total disability from August 25 to September 30, 2014 and February 12 to March 19, 2015.

In periodic progress reports dated September 10 and October 15, 2014, Dr. David Kassel, a treating physician, diagnosed cervical spondylosis with myelopathy; myofascial pain, numbness, and tingling; overuse syndrome; hypermobility syndrome; carpal tunnel syndrome; and wrist strain/sprain. He opined that appellant continued to be disabled from work. Physical findings included decreased neck and bilateral wrist range of motion.

On December 4, 2014 OWCP referred appellant for a second opinion evaluation with Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, to determine the extent of appellant's disability, nature of her condition, and appropriate treatment.

The record contains periodic progress reports covering the period November 14 to December 15, 2014 from San Hye Kim, a nurse practitioner (NP), noting that appellant was currently off work. In the November 14, 2015 report, NP Kim noted that appellant was off work until December 15, 2014 on Dr. Kassel's orders. Diagnoses included: cervical spondylosis with myelopathy; myofascial pain, numbness, and tingling; overuse syndrome; hypermobility syndrome; carpal tunnel syndrome; and wrist strain/sprain.

In a periodic progress report, attending physician's report (Form CA-20), and work status form dated December 10, 2015, Dr. Kassel indicated that appellant was disabled from working. Diagnoses remained unchanged. Appellant reported a pain level of 9 in the periodic progress report.

In a January 6, 2015 report, Dr. Swartz noted appellant's history of injury and treatment. He conducted an examination, noted her pain complaints, and her claim that she had extreme depression due to her severe pain. Dr. Swartz noted that appellant had worked for the employing

³ Appellant used leave when stopping work on August 11, 2014, leave without pay beginning August 25, 2014, and sick leave after September 30, 2014.

establishment for 18 years and had not worked since August 7, 2014 due to her employment injury. Physical examination findings included tenderness and spasm in the cervical spine, tenderness in the upper back and both anterior shoulders, tenderness in the right elbow lateral epicondyle, slight tenderness in both medial epicondyles, a positive Phalen's test bilaterally in the wrists and hands, and positive Tinel's testing. Dr. Swartz opined that appellant had resolved bilateral shoulder girdles repetitive strain syndrome, and chronic bilateral carpal tunnel syndrome, which was confirmed by clinical examination and unsupported by electrodiagnostic studies. He determined her disability ended as of the date of his examination, January 6, 2015 and that she was capable of returning to work. With respect to appellant's work capability, Dr. Swartz recommended a functional capacity evaluation (FCE) be performed.

A February 3, 2015 FCE was performed at Dr. Swartz' request. The test reported appellant's range of motion was restricted by her arm and neck pain complaints. The FCE summary reported that she was capable of lifting five pounds from floor to counter and two and one-half pounds overhead, and sitting up to 30 minutes. No restriction was provided regarding repetitive grasping. The FCE also reported shoulders, forearm, wrists, and cervical range of motion deficits.

In a supplemental report dated February 25, 2015, Dr. Swartz provided work restrictions based on his review of the February 3, 2015 FCE. He noted that the FCE had been affected by appellant's complaints of neck and upper shoulder discomfort and pain. Dr. Swartz completed a work capacity evaluation on February 25, 2015 which included restrictions of walking up to four to five hours per day; standing up to six hours per day; reaching up to seven hours per day; reaching above the shoulder up to three hours per day; twisting, bending, and stooping up to three to four hours per day; up to four hours per day of operating a motor vehicle at work and to and from work; up to four hours of repetitive wrist movement; up to six hours of repetitive elbow movement; up to two to three hours of pushing, pulling, and lifting 5 to 10 pounds; up to one-half hour per day of squatting and climbing stairs; and up to one hour per day of kneeling.

In a March 12, 2015 report, Dr. Robert J. Balaban, a treating Board-certified psychiatrist, diagnosed a single moderate major depressive episode without psychotic features. Based on his examination and employment injury history, he attributed appellant's psychiatric condition to her employment injury. Dr. Balaban reported that it was clear that her pain overwhelmed her and was a significant contributor to her depression.

On March 18, 2015 the employing establishment offered appellant the position of social insurance specialist (claims representative, bilingual), which was based on the restrictions provided by Dr. Swartz. The position involved working on a computer terminal with a headset, ergonomic chair, and ergonomic workstation. The employing establishment noted appellant's work restrictions included up to eight hours sitting, up to six hours of standing, four to five hours of walking, seven hours of reaching, up to three hours of reaching above the shoulder, three to four hours of stooping and ending, up to four hours of operating a motor vehicle and driving to and from work; up to four hours of repetitive wrist use; up to six hours of repetitive elbow use; 5 to 10 pounds of pushing, pulling, and lifting two to three hours per day; up to one-half hour per day of squatting and climbing stairs, and up to one hour of kneeling.

On March 20, 2015 appellant accepted the job offer, but indicated that she was in the appeals process, required treatment, and would return when she was well.

By letter dated April 9, 2015, OWCP advised appellant that the social insurance specialist (claims representative, bilingual) position was deemed medically suitable based on the February 25, 2015 opinion of Dr. Swartz. Appellant was advised that the employing establishment had confirmed that the position remained available to her. OWCP informed her that she should accept the position or provide an explanation for refusing the position within 30 days. Finally, it informed appellant that, if she failed to accept the offered position and failed to demonstrate that the failure was justified, her compensation would be terminated.

In an April 14, 2015 psychiatric progress report, Dr. Balaban diagnosed moderate single major depressive episode and noted that appellant was not working. Under history of illness, he noted that she had significant pain and difficulty holding objects in her hand. Dr. Balaban reported that appellant had feelings of being upset and anxious about returning to work and remarkable pain. He observed that she had severe pain and significant functional limitation. Dr. Balaban concluded that appellant was incapable of returning to work.

In an April 16, 2015⁴ report, Dr. Kassel noted his disagreement with Dr. Swartz' opinion including the conclusion that the FCE was invalid. He attributed the diagnosed conditions of cervical spondylolysis, hypermobility, carpal tunnel syndrome, numbness and tingling, and wrist strain/sprain to appellant's employment duties. Dr. Kassel opined that all the diagnosed conditions had been confirmed by objective evidence and clinical and historical findings. He concluded that appellant's injury complaints supported the validity of the FCE and her significant work restrictions. Dr. Kassel observed that FCE showed the impact of prolonged pain due to her carpal tunnel, cervical radiculopathy, and repetitive stress could have when optimized treatment had not been provided.

By letter dated June 3, 2015, OWCP advised appellant that her reasons for refusing to accept the social insurance specialist (claims representative, bilingual) position were not supported by the evidence. It found that the reports from Drs. Balaban and Kassel were insufficient to create a conflict with Dr. Swartz' opinion or establish that the duties of the offered position were outside her work restrictions. OWCP informed appellant that the position was still available. It advised her that her compensation and entitlement to a schedule award would be terminated if she did not accept the position with 15 days of the date of the letter.

In a June 8, 2015 letter, appellant's counsel contended that the offered position was unsuitable as OWCP failed to consider appellant's work and nonwork-related conditions. He also argued that the FCE was valid contrary to Dr. Swartz' opinion. Lastly, counsel contended that there was an unresolved conflict in the medical opinion evidence between Dr. Swartz and Dr. Kassel regarding her work capability.

In a June 10, 2015 psychological evaluation report, Scott Lingen, Psy.D, clinical psychologist, reported appellant related being overwhelmed by her depression and anxiety symptoms. According to appellant the stressors in her life included work difficulties due to her

⁴ The year noted on the report is 2016, which appears to be a typographical error.

pain, excessive pain, difficulties with sex due to pain, and financial problems. She reported symptoms of sadness, depression, loss of interest, sleeping difficulties, feelings of guilt, fatigue and worthlessness, loss of energy and decreased concentration, and a feeling of complete helplessness. Dr. Lingen noted appellant's repetitive history and that in 2012 she began treatment for psychiatric distress and worsening depression. Medical diagnoses included: cervical radiculitis, cervical spondylosis with myelopathy, carpal tunnel syndrome, headaches, brachial neuritis or radiculitis, and overuse syndrome. Psychological testing was performed and results provided. The tests revealed positive clinical range of psychiatric disturbance acute depression, anxiety, and impaired concentration. Response from the Minnesota Multiphasic Personality Inventory -- 2 revealed post-traumatic stress disorder, which Dr. Lingen attributed to traumatization due to stress and pain from appellant's last year of work. He diagnosed mood disturbance and anxiety to her physical conditions, severe recurrent major depressive disorder without psychotic features, which he attributed to her accepted employment injuries and the employing establishment's failure to provide ergonomic furniture and acknowledge her employment injuries. Dr. Lingen concluded that appellant was totally disabled due to her psychological conditions and recommended psychiatric disability retirement.

In periodic progress reports dated June 10 and July 10, 2015, Dr. Kassel reviewed Dr. Lingen's report and concurred with his opinion that appellant's depression and severe anxiety had been caused by her pain from her accepted employment conditions.

In work restriction form reports dated June 10 and July 10, 2015, Dr. Kassel determined that appellant was totally disabled from June 10 to September 30, 2015.

By decision August 7, 2015, OWCP terminated appellant's compensation benefits as she refused an offer of suitable work effective that day. It found that the position offered by the employing establishment was within the prescribed work restrictions of Dr. Swartz, and that Dr. Kassel's opinion was speculative and of diminished probative value. Next, OWCP found Dr. Lingen's report insufficient to establish that the diagnosed psychiatric conditions were causally related to appellant's accepted employment conditions. It also noted that she had been afforded the requisite 15-day notice and opportunity to comply with 5 U.S.C. § 8106(c).

On August 24, 2015 appellant and her counsel requested a telephonic hearing before an OWCP hearing representative, which was changed to a request for a review of the written record by letter dated December 16, 2015.

In a November 4, 2015 periodic progress report, Dr. Kassel reiterated findings and diagnoses from prior reports and indicated that appellant continued to be totally disabled from work.

In a letter dated December 4, 2015, counsel requested reconsideration and submitted an October 21, 2015 report by Dr. Kassel in support of appellant's request.

By decision dated February 2, 2016, OWCP's hearing representative affirmed the August 7, 2015 decision terminating appellant's compensation pursuant to section 8106(c). Regarding her alleged psychiatric condition, the hearing representative found that appellant had

not provided rationalized medical opinion explaining why the condition prevented her from performing the offered position.

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.⁵ 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.⁶ 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.⁷ 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.⁸

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.⁹ It is well established that OWCP must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.¹⁰ All of appellant's medical conditions, whether work related or not, must be considered in assessing the suitability of the position.¹¹

ANALYSIS

OWCP accepted that appellant sustained bilateral upper arm, shoulder, and other specified sites strain and right carpal tunnel syndrome due to her employment duties. On March 18, 2015 the employing establishment offered her a job as a modified social insurance specialist (claims representative, bilingual). By letters dated April 9 and June 3, 2015, OWCP informed appellant that the position was suitable based on the opinion of Dr. Swartz, a second opinion physician. Appellant refused the position and OWCP terminated her compensation effective August 7, 2015 due to her refusal.

The Board finds that OWCP did not meet its burden of proof to establish that modified social insurance specialist (claims representative, bilingual) position offered by the employing

⁵ 5 U.S.C. § 8106(c)(2).

⁶ *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

⁷ *H. Adrian Osborne*, 48 ECAB 556 (1997).

⁸ *T.S.*, 59 ECAB 490 (2008); *Ronald M. Jones*, 52 ECAB 190 (2000).

⁹ *Gayle Harris*, 52 ECAB 319 (2001).

¹⁰ *Richard P. Cortes*, 56 ECAB 200 (2004).

¹¹ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(c)(7) (June 2013); *Mary E. Woodard*, 57 ECAB 211 (2005).

establishment was suitable. Therefore, OWCP's termination of appellant's compensation for refusing such employment was improper.

OWCP did not adequately consider whether all of appellant's diagnosed medical conditions impacted her ability to work in the position offered by the employing establishment. The Board has held that all impairments, whether work related or not, must be considered in assessing the suitability of an offered position.¹² In this case, OWCP did not adequately consider whether appellant's diagnosed psychological condition affected her ability to perform the modified social insurance specialist (claims representative, bilingual) position. Appellant submitted medical evidence from Dr. Balaban, a treating Board-certified psychiatrist, and Dr. Lingen, a clinical psychologist, opining that she was totally disabled due to her pain, anxiety, and depression. While these psychiatric conditions have not been accepted by OWCP as work related, they should be considered in determining the suitability of the modified social insurance specialist (claims representative, bilingual) position. In the decision dated August 7, 2015, OWCP improperly discounted the evidence from Drs. Balaban and Lingen regarding appellant's psychiatric condition, finding that it was not an accepted condition.

OWCP's hearing representative further discounted the psychiatric condition as she found that the opinions expressed by Dr. Balaban and Dr. Lingen were not well rationalized and did not sufficiently explain why appellant could not perform the offered position. By doing so the hearing representative placed the burden of proof on her.

Dr. Balaban opined in his April 14, 2015 report that appellant was diagnosed with a major depressive episode and that she was incapable of returning to work. In his June 10, 2015 report, Dr. Lingen noted that psychological testing had been performed which revealed psychiatric disturbance, acute depression, anxiety, and impaired concentration. Like Dr. Balaban, Dr. Lingen opined that appellant was totally disabled due to her psychiatric conditions.

In *J.J.*,¹³ the Board explained that at the time OWCP terminates benefits for refusal of suitable work, it is OWCP's burden to determine whether appellant was disabled from the offered position due to any impairment. If at the time of the termination there is no evidence that appellant has an impairment which prevents her from accepting the position, the termination is justified. Following the termination of benefits the burden of proof shifts to her to establish that her refusal to accept employment was justified.¹⁴

¹² See *Mary E. Woodward*, 57 ECAB 211 (2005).

¹³ Docket No. 09-0975 (issued April 9, 2010).

¹⁴ In *J.J.* the Board noted that at the time benefits were terminated the medical evidence established that the employee took medication for back pain, but did not list any impairment due to the effects of the medication. Only after the termination of benefits did the employee offer medical evidence that the sedative properties of her medication prevented her from performing the duties of the position. As this evidence was provided following the termination of benefits, the burden of proof was on appellant to provide a well-rationalized medical opinion to justify her refusal of suitable work.

As of August 7, 2015, the date appellant's benefits were terminated, the evidence of record included the April 14, 2015 report from Dr. Balaban, and the June 10, 2015 report from Dr. Lingen, which opined that appellant was totally disabled due to her psychiatric condition.

Because section 8106(c) of FECA is a penalty provision, it must be narrowly construed.¹⁵ The medical evidence did not clearly establish that the modified social insurance specialist (claims representative, bilingual) position was within appellant's capabilities, at the time of the suitable work termination. Consequently, OWCP did not discharge its burden of proof to justify the termination of her compensation pursuant to section 8106(c).

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to establish that appellant refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 2, 2016 is reversed.

Issued: August 24, 2016
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹⁵ See *Stephen A. Pasquale*, 57 ECAB 396 (2006); *Richard P. Cortes*, 56 ECAB 200 (2004).