



## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>3</sup> The facts and circumstances as presented in the prior appeal are incorporated herein by reference. The relevant facts are as follows.

On July 30, 2009 appellant, then a 38-year-old library technician, filed a traumatic injury claim (Form CA-1) alleging that her bilateral wrist condition was due to factors of her federal employment. OWCP accepted the claim for bilateral carpal tunnel syndrome and paid appropriate benefits. Appellant underwent a left carpal tunnel release on August 6, 2009 and a right carpal tunnel release on September 4, 2012, which OWCP authorized. By decision dated October 26, 2012, OWCP accepted a recurrence of disability on September 4, 2012 due to the authorized surgery. Appellant stopped work and received medical and wage-loss compensation benefits.

On July 17, 2013 the employing establishment offered appellant a full-time permanent position as a library technician GS-1411-06 with limitations.<sup>4</sup>

By decision dated November 13, 2013, OWCP terminated appellant's entitlement to wage-loss compensation and schedule award benefits effective November 17, 2013 as she refused to accept suitable employment. It found that the weight of the medical evidence rested with Dr. Stanley Askin, a Board-certified orthopedic surgeon and OWCP referral physician, who found that appellant was capable of performing the offered position. Appellant requested an oral hearing before an OWCP hearing representative and, by decision dated July 8, 2014, the hearing representative affirmed the November 13, 2013 decision. Appellant appealed to the Board. On February 3, 2015 the Board affirmed OWCP's November 3, 2013 decision terminating compensation benefits, effective November 17, 2013, pursuant to 5 U.S.C. § 8106(c)(2) as appellant had refused an offer of suitable work.<sup>5</sup>

Following the Board's February 3, 2015 decision, appellant, through counsel, requested reconsideration. Counsel submitted April 21 and May 13, 2015 medical reports from Dr. Scott M. Fried, an osteopathic physician, in support of appellant's claim.

In an April 21, 2015 medical report, Dr. Fried reported that appellant had been out of work since 2012 as a result of her left and right wrist injuries. He noted that appellant reported progressively worsening symptoms since his initial evaluation on June 5, 2014. Dr. Fried provided findings on physical examination and diagnosed sympathetically mediated pain syndrome of the left upper extremity with reactive depression; status post surgery right for median nerve carpal tunnel decompression in August 2008 with recurrence; status post surgery

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<sup>3</sup> Docket No. 14-1886 (issued February 3, 2015).

<sup>4</sup> The duties of the position were modified so that appellant would: lift one book at a time and lift no more than 10 pounds at one time; use a telephone headset to answer telephone calls; limit repetitive wrists movements of typing and use of computer mouse to two hours per day; and stock a bookmobile cart with books one at a time, but no pushing/pulling of the cart.

<sup>5</sup> *Supra* note 3.

left for median nerve carpal tunnel decompression in September 2012 with ongoing symptoms and recurrence; palmar cutaneous neuroma of the left wrist; and carpal tunnel median neuropathy (repetitive strain injury) of the bilateral upper extremities secondary to work activities. He explained that appellant could not return to her regular work activities and she remained symptomatic. Dr. Fried noted that she required functional capacity testing to evaluate her capabilities and limitations, including sensibility testing, dexterity testing, work and activity simulation, a Lido work simulator, and actual performance of writing and keying. He further recommended electromyography (EMG) and nerve conduction velocity (NCV) studies to evaluate continued and significant nerve symptoms and continued therapy.

In a May 13, 2015 report, Dr. Fried provided physical examination findings, a history of injury, and review of past medical reports. He explained that appellant's initial secretary library job involved significant computer work, causing her to develop bilateral carpal tunnel problems in 2008. Appellant underwent right carpal tunnel surgery in August 2008 and returned to work eight weeks later, performing highly repetitive activities with her hands and wrists which caused her to become progressively symptomatic. Dr. Fried reported that she underwent left carpal tunnel surgery in September 2012. However, the surgery was unsuccessful and caused ongoing pain and burning which did not exist prior to the surgery. Dr. Fried explained that appellant remained symptomatic and noted ongoing and increased symptoms when compared to her preop status on the left, with increased pain and burning in the median nerve distribution and the dysesthesias.

Dr. Fried reported that Dr. Christopher R. Ferrante, a Board-certified orthopedic surgeon, had similar findings as he reported evidence of ongoing carpal tunnel median nerve involvement and a neuroma in a February 27, 2013 EMG study. He reported that testing and treatment was repeatedly denied by OWCP including a request for a magnetic resonance imaging (MRI) scan. Dr. Fried noted that appellant related that she could not drive a car or hold the steering wheel due to ongoing pain and discomfort with any activities, such as gripping, grasping, lifting, posturing, keying, and writing. He noted that use of a computer was severely problematic and appellant was not capable of performing these activities on a minimal basis. Dr. Fried stated that it was inconceivable for appellant to key and use a mouse for two hours at a time, which were never addressed in Dr. Askin's report. He reported that there remained evidence of ongoing median nerve carpal tunnel involvement. Dr. Fried noted that appellant had a work-related accepted injury of bilateral carpal tunnel, but despite her surgical intervention, had ongoing evidence of carpal tunnel and recurrent carpal tunnel. He explained that she did not get relief with surgery, which could have been due to a partial release, incomplete release, recurrent scarring or scarring, and possible injury to the palmar cutaneous branch of the median nerve at the left wrist with neuroma.

Dr. Fried reported that reasonable medical treatment and diagnostics had been requested from OWCP to assess her ongoing clinical complaints and symptoms which had been denied. He disagreed with Dr. Askin, as he found that the job offer was outside of appellant's limitations. Dr. Fried opined that appellant's return to those work activities would worsen, aggravate, and exacerbate her condition, likely leading to either full blown chronic pain syndrome or further surgery. He noted that his opinion was based on objective clinical findings which were positive for Phalen's test, reversed Phalen's test, compression test, Tinel's test, and evidence of sympathetic reactivity with color changes and vascular instability in the hand and wrist.

Dr. Fried further cited review of the February 27, 2013 EMG study which showed evidence of bilateral carpal tunnel involvement, left greater than right. He reported that appellant could not resume work until her status could be fully determined through ultrasound, a new EMG/NCV study, and a formal modified course of therapy. Dr. Fried reported that, once she stabilized, in approximately 12 to 24 weeks, formal functional capacity evaluation testing could be performed to specifically address and assess any job offers. Specifically, he noted testing for her ability to write, key, lift, push, pull, and grasp was requested to determine her capabilities and limitations. Dr. Fried concluded that appellant was restricted to strict sedentary capabilities, could answer a telephone with a headset, and could not perform any regular keying, writing, pushing, pulling, or grasping activities.

By decision dated December 1, 2015, OWCP denied modification of its prior decision.

### **LEGAL PRECEDENT**

Once OWCP has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.<sup>6</sup> It has authority under section 8106(c)(2) of FECA to terminate compensation for any partially disabled employee who refuses or neglects to work after suitable work is offered. To justify termination, OWCP must show that the work offered was suitable, that appellant was informed of the consequences of her refusal to accept such employment, and that she was allowed a reasonable period to accept or reject the position or submit evidence or provide reasons why the position is not suitable.<sup>7</sup>

Section 8106(c) will be narrowly construed as it serves as a penalty provision, which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.<sup>8</sup> Section 10.517(a) of FECA's implementing regulations provide that an employee who refuses or neglects to work after suitable work has been offered or secured, has the burden of showing that such refusal or failure to work was reasonable or justified.<sup>9</sup> Pursuant to section 10.516, the employee shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.<sup>10</sup>

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<sup>6</sup> *Bernadine P. Taylor*, 54 ECAB 342 (2003).

<sup>7</sup> See *Ronald M. Jones*, 52 ECAB 190 (2000); see also *Maggie L. Moore*, 42, ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992). See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4 (June 2013) (the claims examiner must make a finding of suitability, advise the claimant that the job is suitable and that refusal may result in application of the penalty provision of 5 USC § 8106(c)(2) and allow the claimant 30 days to submit his or her reasons for abandoning the job. If the claimant submits evidence and/or reasons for abandoning the job, the claims examiner must carefully evaluate the claimant's response and determine whether the claimant's reasons for doing so are valid).

<sup>8</sup> *Joan F. Burke*, 54 ECAB 406 (2003); see *Robert Dickerson*, 46 ECAB 1002 (1995).

<sup>9</sup> 20 C.F.R. § 10.517(a); *Ronald M. Jones*, *supra* note 7.

<sup>10</sup> *Id.* at § 10.516.

After termination or modification of benefits clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant.<sup>11</sup>

### ANALYSIS

OWCP accepted that appellant developed bilateral carpal tunnel as a result of her employment-related duties and sustained a recurrence of disability on September 4, 2012 following her surgery. Effective November 13, 2013, it terminated appellant's compensation benefits because she refused an offer of suitable work. OWCP found that the weight of the medical evidence established that the modified library technician position was within the physical restrictions set forth by Dr. Askin, the OWCP referral physician.

The Board previously affirmed OWCP's decision to terminate compensation benefits for refusing suitable work. The Board's February 3, 2015 decision was based on the record compiled as of July 8, 2014, the date of decision by an OWCP hearing representative, which included Dr. Askin's July 5, 2013 report, as well as subsequent studies and reports from appellant's treating physicians. The Board's previous review of evidence regarding the suitable work termination is *res judicata*.<sup>12</sup> The issue currently on appeal is whether the evidence later submitted established that the termination decision should be modified.

The Board has explained that, if a claimant requests reconsideration of a suitable work termination, the issue remains whether appellant has established that she was unable to perform the duties of the offered position, as of the date of the termination.<sup>13</sup>

Appellant requested reconsideration and submitted Dr. Fried's April 21 and May 13, 2015 reports in support of her claim. Dr. Fried disagreed with Dr. Askin's assessment and concluded that appellant was restricted to strict sedentary capabilities, could answer a telephone with a headset, and could not perform any regular keying, writing, pushing, pulling, or grasping activities. He described the work restrictions provided with the job offer and opined that it was outside appellant's limitations. Dr. Fried argued that she could not perform activities of daily living, let alone on a repetitive basis for two to four hours per day, and a return to the described work activities would worsen, aggravate, and exacerbate her condition. The Board has long held that prophylactic work restrictions do not establish a basis for wage-loss compensation.<sup>14</sup> A fear of future injury is not compensable under FECA.<sup>15</sup> Moreover, the physician's opinion that appellant could not drive a car or perform activities of daily living are based on appellant's self-reported assertions and lack specific testing to make these determinations.<sup>16</sup>

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<sup>11</sup> *Talmadge Miller*, 47 ECAB 673, 679 (1996); *see also George Servetas*, 43 ECAB 424 (1992).

<sup>12</sup> *See G.S.*, Docket No. 14-408 (issued June 10, 2014).

<sup>13</sup> *See J.J.*, Docket No. 14-951 (issued September 2, 2014).

<sup>14</sup> *D.N.*, Docket No. 14-657 (issued June 26, 2014).

<sup>15</sup> *Manuel Gill*, 52 ECAB 282, 286 n.5 (2001).

<sup>16</sup> *B.B.*, Docket No. 06-1033 (issued November 30, 2006).

While Dr. Fried found that appellant continued to experience residuals of her bilateral carpal tunnel injury through bilateral carpal tunnel median nerve involvement, he failed to sufficiently explain why appellant was unable to perform the duties of the offered position as of the date of termination.<sup>17</sup> Dr. Fried reported that additional diagnostic testing was needed in the form of EMG, MRI, and muscle ultrasound. He further argued that functional capacity testing was necessary to evaluate her capabilities and limitations, including sensibility testing, dexterity testing, work and activity simulation, a Lido work simulator, and actual performance of writing and keying. Dr. Fried's reports do not support that appellant was unable to perform the limited-duty position at the time of the termination decision as he stated that further testing was required to assess her capabilities. Without concrete objective testing to back his assertions, Dr. Fried's reports are insufficient to establish total disability.<sup>18</sup>

Dr. Fried reported that, although appellant had surgical intervention, she had ongoing evidence of carpal tunnel and recurrent carpal tunnel. He reported that appellant received no relief from her surgery. The Board notes that Dr. Fried's opinion is speculative with no concrete assertion that appellant's surgical intervention failed, resulting in injury and disability. Dr. Fried's opinion that the September 2012 left carpal tunnel surgery was unsuccessful due to more severe complaints postop is equivocal with no objective medical support. Moreover, he failed to explain why appellant's condition continued to worsen despite not having worked in over three years. Such an explanation is necessary to support that appellant was disabled from performing the offered position to reverse the termination decision.<sup>19</sup> 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.<sup>20</sup> As appellant has failed to provide sufficient justification for refusing suitable work, OWCP properly denied modification of its November 13, 2013 decision.<sup>21</sup>

On appeal counsel argues that the reports of Dr. Fried established that appellant was not offered suitable work and OWCP failed to meet its burden of proof. However, these additional medical reports were not submitted until after OWCP's hearing representative's July 8, 2014 decision. The Board, in its February 3, 2015 decision, already determined that OWCP met its burden of proof and properly terminated appellant's compensation, effective November 17, 2013. The findings of the February 3, 2015 Board decision are *res judicata* absent any further review by OWCP under section 8128 of FECA.<sup>22</sup> As previously noted, it is currently appellant's burden of proof to establish that her refusal to accept the offered modified-duty position was justified.<sup>23</sup>

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<sup>17</sup> *E.R.*, Docket No. 07-1769 (issued April 28, 2008).

<sup>18</sup> *R.T.*, Docket No. 16-0543 (issued May 20, 2016).

<sup>19</sup> *Supra* note 13.

<sup>20</sup> 5 U.S.C. § 8106(c)(2).

<sup>21</sup> *T.S.*, Docket No. 15-1539 (issued November 18, 2015).

<sup>22</sup> *See Robert G. Burns*, 57 ECAB 657 (2006).

<sup>23</sup> *R.K.*, Docket No. 14-476 (issued September 12, 2014).

Counsel also argues that, at the very least, a conflict has been created between Dr. Askin, serving as the referral physician, and Dr. Fried. When two physicians give reasoned, but differing opinions concerning causal relationship and one physician's opinion is based on an inaccurate or incomplete factual or medical background, the opinion based on an accurate factual or medical history typically has more probative value.<sup>24</sup> For the reasons noted above, Dr. Fried's opinion was not fully rationalized to create a conflict in the case.

Accordingly, the Board finds that the evidence submitted insufficient to establish that appellant's refusal to accept the suitable job offer was justified. It is appellant's burden of proof and she has not met her burden in this case.<sup>25</sup>

Appellant may submit additional evidence, together with a written request for reconsideration, to OWCP within one year of the Board's merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 and 10.607.

### **CONCLUSION**

The Board finds that appellant has not established that her refusal of suitable work was justified.

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<sup>24</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.6(a)(1) (September 2010).

<sup>25</sup> See, e.g., *Hazel N. Clark*, Docket No. 04-0905 (issued August 13, 2004) (the Board had previously found the offered position to be suitable. Appellant requested reconsideration. The Board affirmed OWCP's finding that appellant had not met her burden of proof to establish that her refusal to accept the suitable job offer was justified.

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 1, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 18, 2016  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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