

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

P.S., Appellant	)	
	)	
and	)	Docket No. 18-0548
	)	Issued: October 1, 2018
DEPARTMENT OF VETERANS AFFAIRS,	)	
BIRMINGHAM VETERANS MEDICAL	)	
CENTER, Birmingham, AL, Employer	)	
	)	

*Appearances:*  
Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On January 22, 2018 appellant, through counsel, filed a timely appeal from an October 19, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award compensation, effective March 15, 2017, as she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

## FACTUAL HISTORY

On May 19, 2015 appellant, then a 51-year-old licensed practical nurse, filed an occupational disease claim (Form CA-2) alleging that, on August 1, 2014, she first became aware of her bilateral hand and elbow conditions. It was not until April 13, 2015 that she first realized that the condition was due to her using the computer and other duties requiring the use of her hands at work. Appellant did not stop work. By decision dated February 19, 2016, OWCP accepted the claim for bilateral upper limb carpal tunnel syndrome and authorized carpal tunnel surgery. Left carpal tunnel surgery was performed on June 1, 2016. Appellant was released to return to work with restrictions on June 6, 2016, but she stopped work again on June 8, 2016.

In an August 25, 2016 report, Dr. Duane Michael Tippetts, a treating osteopath specializing in orthopedic surgery, provided examination findings. He found that appellant was capable of working light duty with restrictions. The restrictions included no bilateral upper extremity lifting, pulling, or pushing, and no driving at work.

On September 15, 2016 Dr. Tippetts reviewed a list of job duties provided by the employing establishment. He was asked to note whether appellant was physically able to do various tasks and he wrote "yes" to the activities of telephone calls, photocopying, answering telephones and delivering message, delivers supplies/water to patients, passing nourishment, delivering specimens, and straightening bedside tables. As to mouth care, feeding patients, shaving, and nail care, Dr. Tippetts wrote "no."

Dr. Tippetts, in a September 16, 2016 report, wrote that appellant was cleared to return to work with the same restrictions noted in his prior report. He discharged her from his care.

In a letter dated November 8, 2016, the employing establishment offered appellant a modified licensed practical nurse position. The position was classified as light-duty work with no bilateral upper extremity lifting, pushing, or pulling and no patient mouth feeding, shaving, or nail care. The duties of the position were described as completing errands including pharmacy pick-up and delivery, recording/documenting and delivering messages, answering telephones, assisting with time-out procedures, responding to physician questions or requests, photocopying, taking vital signs, setting up procedural trays, and "document in CPRS."

On December 20, 2016 OWCP referred appellant for a second opinion evaluation with Dr. Richard Rex Harris, a Board-certified orthopedic surgeon, for an evaluation of her work capacity and work-related residuals.

By letter dated December 21, 2016, OWCP advised appellant that it found that the job offer from the employing establishment was suitable. It notified her of the provisions of 5 U.S.C.

§ 8106(c)(2), and indicated that the case record would be held open for 30 days for submission of additional evidence. No response was received.

OWCP received progress notes and a work status form dated January 23, 2017 from Dr. Anthony L. Tropeano, an attending Board-certified orthopedic surgeon. On the work status form, Dr. Tropeano noted that right carpal tunnel release surgery was planned and that appellant was unable to work at that time.

In a letter dated February 7, 2017, OWCP indicated that appellant had not provided a valid reason for refusing to accept the offered position. It afforded her 15 additional days to accept the position or her entitlement to wage-loss compensation and schedule award benefits would be terminated.

In a letter dated February 13, 2017, appellant denied refusing the offered position. She related that Dr. Harris had recommended that she not return to work until he received the results of a functional capacity evaluation (FCE). In addition, Dr. Tropeano, on January 23, 2017, found that appellant was unable to return to work.

On February 22, 2017 the employing establishment advised that appellant had not reported to work and that the offered position was still available.

On March 1, 2017 OWCP received Dr. Harris' January 14, 2017 report. Dr. Harris, based upon a review of the medical evidence, employment injury history, and statement of accepted facts, noted the claim had been accepted for bilateral carpal tunnel syndrome. He reported that appellant disagreed with the requirements in the offered position as she objected to using a keyboard and the computer for eight hours per day and opposed the requirement of fine manipulation and keyboarding for less than an hour per day. Physical examination findings were provided including decreased range of motion, left wrist volar aspect scar, bilateral hand decreased finger flexion, bilateral hand medial nerve distribution tingling and numbness, and diminished bilateral medial nerve distribution sensation. Based on the objective physical findings, he concluded that appellant was unable to perform her job as a licensed practical nurse without restrictions. He recommended that an FCE be performed to determine her work capacity.

On March 1, 2017 OWCP received a February 10, 2017 FCE report noting that appellant tended to self-limit activities, but was capable of working with restrictions. The restrictions detailed were avoiding high force output and high volume exertions.

On March 3, 2017 Dr. Tropeano reviewed the position offered by the employing establishment and opined that appellant was capable of performing the offered position until her pending right carpal tunnel release surgery.

On March 13, 2017 the employing establishment confirmed that the offered position was still available and that appellant had yet to return to work.

By decision dated March 14, 2017, OWCP terminated appellant's wage-loss compensation and entitlement to schedule award compensation, effective March 15, 2017, as she refused an offer of suitable work. It found that she had not provided valid reasons or probative evidence to support her refusal of suitable work.

On March 22, 2017 Dr. Tropeano performed right carpal tunnel release surgery.

On April 12, 2017 OWCP received a form requesting an oral hearing before an OWCP hearing representative. A telephonic hearing was held on August 30, 2017. During the hearing, counsel asserted that appellant was unable to return to work in March 2017 as she underwent right carpal tunnel surgery on March 22, 2017 and thus, the time for accepting or refusing the offered position should have been restarted. He further argued that the position should have been offered to appellant in May or June after she had recovered from the surgery.

By decision dated October 19, 2017, the hearing representative affirmed the March 14, 2017 decision, finding that appellant refused an offer of suitable work. She noted that, both of appellant's treating physicians, Dr. Tippet and Dr. Tropeano, reviewed the offered position and opined that it was within her work restrictions. Moreover, the hearing representative found that the case record did not contain evidence establishing that the offered position was outside of appellant's work restrictions.

### **LEGAL PRECEDENT**

Section 8106(c)(2) of FECA provides 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 him is not entitled to compensation.<sup>3</sup> Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits under section 8106(c) for refusing to accept or neglecting to perform suitable work.<sup>4</sup> 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.<sup>5</sup>

To justify termination, OWCP must show that the work offered was suitable and that the claimant was informed of the consequences of his or her refusal to accept such employment.<sup>6</sup> According to OWCP's 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.<sup>7</sup> Section 10.516 of the Code of Federal Regulations<sup>8</sup> 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 proof to show that such refusal or failure to work was reasonable or justified, and shall be provided with the

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<sup>3</sup> *Id.* at § 8106(c)(2).

<sup>4</sup> *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

<sup>5</sup> *H. Adrian Osborne*, 48 ECAB 556 (1997).

<sup>6</sup> *T.S.*, 59 ECAB 490 (2008); *Ronald M. Jones*, 52 ECAB 190 (2000).

<sup>7</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.4(a) (June 2013).

<sup>8</sup> 20 C.F.R. § 10.516.

opportunity to make such showing before a determination is made with respect to termination of entitlement to compensation.<sup>9</sup>

The determination of whether an employee is capable of performing modified duty is a medical question that must be resolved by probative medical opinion.<sup>10</sup> OWCP's procedures provide that an acceptable reason for refusing a job offer includes medical evidence that the claimant's refusal was based upon the attending physician's advice, and that such advice included medical rationale in support of the opinion.<sup>11</sup>

### ANALYSIS

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award compensation, effective March 15, 2017, as she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

Appellant's attending physician, Dr. Tippetts, indicated that appellant could work eight hours a day with restrictions including no bilateral upper extremity lifting, pulling, or pushing and no driving at work. On September 15, 2016 he reviewed a list of job duties provided by the employing establishment. Based on Dr. Tippetts's restrictions, the employing establishment offered appellant a position as modified licensed practical nurse which required no patient mouth feeding, shaving, or nail care and no bilateral upper extremity lifting, pushing, or pulling. The duties of the offered position included completing errands including pharmacy pick-up and delivery, recording/documenting and delivering messages, answering telephones, assist with time out procedures, respond to physician questions or request, photocopy, take vital signs, set up procedural trays, and "document in CPRS."

OWCP also referred appellant to Dr. Harris for a second opinion evaluation. In his initial report dated January 14, 2017, Dr. Harris recommended an FCE to determine appellant's work capacity. An FCE was performed on February 10, 2017 which confirmed that appellant was able to work with restrictions to avoid high force output and high volume exertions.

On March 3, 2017 Dr. Tropeano, an attending physician reviewed the offered position and opined that appellant was capable of performing the position until right carpal tunnel release surgery was performed. He performed her right carpal tunnel release on March 22, 2017.

The Board finds that the offered modified licensed practical nurse position was within appellant's physical limitations. The Board further finds that OWCP complied with its procedural requirements in advising her that the position was found to be suitable, providing her with the opportunity to accept the position or provide her reasons for refusing the job offer, and notifying her of the penalty provision of section 8106(c)(2).<sup>12</sup> There is no dispute that the offered position

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<sup>9</sup> See *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

<sup>10</sup> See *Gloria J. Godfrey*, 52 ECAB 486 (2001); *Robert Dickerson*, 46 EAB 1002 (1995).

<sup>11</sup> *Supra* note 7 at Chapter 2.814.5(a)(4) (June 2013); see *B.H.*, Docket No. 11-379 (issued October 17, 2011).

<sup>12</sup> See *Bruce Sanborn*, 49 ECAB 176 (1997).

was within appellant's physical restrictions and that the offered job was located at the same facility as her date-of-injury job.

Counsel argues on appeal that appellant could not have returned to work at the time as she had surgery scheduled and would have returned after the surgery. The Board notes Dr. Tropeano, appellant's surgeon, reviewed the offered position and indicated that she was capable of performing the job prior to surgery. There is no evidence in the record supporting counsel's contention that appellant could not have performed the offered position prior to her scheduled surgery. The Board finds that she did not provide an acceptable reason for neglecting to work in the suitable work position. Therefore, OWCP met its burden of proof pursuant to 5 U.S.C. § 8106(c)(2).

**CONCLUSION**

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award compensation, effective March 15, 2017, as she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated October 19, 2017 is affirmed.

Issued: October 1, 2018  
Washington, DC

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

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

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