

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of TASHA D. FORD and U.S. POSTAL SERVICE,  
POST OFFICE, Oakland, CA

*Docket No. 03-1710; Submitted on the Record;  
Issued September 5, 2003*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly in terminated appellant's compensation based on her refusal to accept suitable employment; and (2) whether the Office properly denied reconsideration of appellant's claim under 5 U.S.C. § 8128(a).

On June 20, 2002 appellant, then a 28-year-old mail processor, filed an occupational disease claim, alleging that running the flat sorter machine caused right carpal tunnel syndrome. She had stopped work on June 6, 2002. Appellant submitted a report dated June 7, 2002, in which Dr. Hiroshi Terashima, a Board-certified internist, diagnosed right carpal tunnel syndrome. On September 10, 2002 appellant was referred to a case management nurse. By letter dated September 11, 2002, the Office accepted that appellant sustained right carpal tunnel syndrome and authorized wage-loss compensation for the period June 28 to September 13, 2002. She was placed on the periodic roll on October 22, 2002.

Dr. Terashima continued to submit reports and on September 15, 2002 advised that appellant would remain disabled through December 1, 2002. By letter dated November 7, 2002, the Office referred appellant, along with a statement of accepted facts, a set of questions and the medical record to Dr. Thomas D. Schmitz, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated November 25, 2002, Dr. Schmitz diagnosed right carpal tunnel syndrome and advised that appellant could return to work for eight hours a day with restrictions on the use of her right hand and recommended that she be seen by a hand surgeon. In a report dated December 10, 2002, Dr. James N. St. John, a Board-certified neurosurgeon, recommended decompression surgery on the right. In a December 16, 2002 report, Dr. St. John advised that appellant could work 8 hours per day with restrictions on the use of the her right hand except for a 10-day period following surgery. In a January 21, 2003 report, he advised that surgery was scheduled for March 21, 2003 and appellant would not be able to work for six weeks after that date.

On January 17, 2003 the employing establishment offered appellant a position as a night shift data conversion operator.<sup>1</sup> By letter dated January 23, 2003, the Office advised appellant that the position offered was suitable. She was notified of the penalty provisions of section 8106 and given 30 days to respond. On January 28, 2003 appellant refused the job, stating that she could not work nights. In reports dated February 3, 2003, Dr. Terashima advised that appellant could return to work with restrictions and specifically advised that she could perform the duties of a video coding system technician.<sup>2</sup>

In a letter dated February 26, 2003, the Office advised appellant that her reasons for refusing the offered position were not acceptable and she was given an additional 15 days to respond. In a report dated March 13, 2003, Dr. St. John advised that appellant could not work at night “because of the severity of her pain accentuation at night.” By decision dated March 17, 2003, the Office terminated appellant’s wage-loss compensation, effective that day, on the grounds that she declined an offer of suitable work.

On March 28, 2003 appellant requested reconsideration, stating that her pain was worse in the evening. She submitted a March 27, 2003 report in which Dr. Terashima advised that appellant’s carpal tunnel release surgery was scheduled for April 16, 2003 and that she could work the modified position while awaiting surgery “but because of accentuated discomfort at night she is not able to work a night shift,” stating that he agreed with Dr. St. John’s opinion that appellant should work during the day. In a history and physical report dated April 28, 2003, Dr. St. John provided a history of injury, findings on examination and advised that appellant had provided consent to undergo right carpal tunnel decompression. By decision dated May 20, 2003, the Office denied appellant’s reconsideration request. The instant appeal follows.

The Board notes that, in its May 20, 2003 decision, the Office performed a merit review of appellant’s claim. In discussing the March 27, 2003 medical report submitted by Dr. Terashima, the Office stated that, “[a]lthough Dr. Terashima has indicated that you [a]re able to work the position, which was offered you in January 23, 2003 [sic], he [has] recommended that you work the day shift only; this recommendation appears to be based on your child care needs, not for any medically rationalized reasons.” The Office concluded that, as appellant neither raised substantive legal questions nor included new and relevant evidence, her request was insufficient to warrant merit review. The Board finds, however, that the Office claims examiner weighed Dr. Terashima’s report and determined that it was not rationalized. The Office thus conducted a merit review.

The Board further finds that the Office met its burden to terminate appellant’s compensation benefits.

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<sup>1</sup> The position was also described as “video coder.” The job description indicated that the worker would initially receive two weeks of training. The job consisted of reading addresses into a headset microphone. The worker could sit or stand as needed for comfort and would receive a 5-minute break every hour and a 30-minute lunch. The physical requirements were the ability to see a computer screen and read displayed text and the ability to speak with complex voice recognition software provided. The work entailed no use of the hands and no manual mailhandling.

<sup>2</sup> The Board notes that the offered position was described as “data conversion operator” and “video coder.”

Section 8106(c)(2) of the Federal Employees' Compensation Act<sup>3</sup> provides in pertinent part, "A partially disabled employee who ... refuses or neglects to work after suitable work is offered ... is not entitled to compensation."<sup>4</sup> To prevail under this provision, the Office must show that the work offered was suitable and must inform the employee of the consequences of refusal to accept such employment. 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>5</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.

The implementing regulation 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 a showing before entitlement to compensation is terminated.<sup>6</sup> To justify termination, the Office 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.<sup>7</sup>

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.<sup>8</sup> In assessing medical evidence, the number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for and the thoroughness of physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.<sup>9</sup>

In the present case, the record reflects that the physical restrictions of the modified position offered to appellant on January 17, 2003 were in agreement with those provided by Drs. Schmitz, St. John and Terashima. While Dr. St. John later indicated that appellant could not work at night due to pain attenuation, the Board finds that the weight of the medical evidence rests with the opinions of Dr. Schmitz, who performed a second opinion evaluation for the Office and Dr. Terashima, appellant's treating internist. It is noted that prior to the termination on March 17, 2003 Dr. Terashima advised that appellant could perform the duties of "video coder."

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<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> 5 U.S.C. § 8106(c)(2).

<sup>5</sup> See *Michael I. Schaffer*, 46 ECAB 845 (1995).

<sup>6</sup> 20 C.F.R. § 10.517(a) (1999).

<sup>7</sup> *Maggie L. Moore*, 42 ECAB 484 (1991), *aff'd on recon.*, 43 ECAB 818 (1992).

<sup>8</sup> See *Marilyn D. Polk*, 44 ECAB 673 (1993).

<sup>9</sup> See *Connie Johns*, 44 ECAB 560 (1993).

Office procedures provide that unacceptable reasons for refusal of a suitable job offer include the employee's dislike of the position offered or the work hours scheduled.<sup>10</sup> In this case, appellant refused an offer of suitable work after stating a personal preference for a day shift instead of the offered night shift due to child care concerns. After the Office advised her that her reasons for rejecting the job offer were not justified and allowed her another 15 days to accept the position. The Office terminated appellant's compensation benefits when appellant did not accept the position. Although Dr. St. John opined that appellant could not work at night due to increased pain, the Board finds that his report contains insufficient medical rationale explaining the day shift preferred by appellant. The medical evidence establishes that she had the physical ability to perform the offered position and the Office properly found the job suitable.<sup>11</sup>

In order to properly terminate appellant's compensation under section 8106, the Office must further provide appellant notice of its finding that an offered position is suitable and give appellant an opportunity to accept or provide reasons for declining the position.<sup>12</sup> The record establishes that the Office properly followed the procedural requirements. In a letter dated January 23, 2003, the Office advised appellant that a partially disabled employee who refused suitable work was not entitled to compensation, that the offered position had been found suitable and allotted her 30 days to either accept or provide reasons for refusing the position.

By letter dated February 26, 2003, the Office advised appellant that the reasons given for not accepting the job offer were unacceptable. She was given an additional 15 days, in which to respond. There is, therefore, no procedural defect in this case as the Office provided appellant with proper notice. She was offered a suitable position by the employing establishment and such offer was refused. Thus, under section 8106 of the Act, her compensation was properly terminated effective March 17, 2003.

Once the Office establishes that the work offered was suitable, the burden of proof shifts to the employee who refuses to work to show that such refusal was justified.<sup>13</sup> The employee may then submit new medical evidence to the Office and request reconsideration. The new medical evidence must address, with medical rationale, the employee's ability to perform the offered position, at the time of the job offer.<sup>14</sup> In the instant case, at the time appellant's compensation was terminated for refusal of a light-duty job, her treating physician, Dr. Terashima, had indicated that she could perform duties consistent with such a position. Although with her request for reconsideration appellant submitted a report dated March 27, 2003, in which Dr. Terashima advised that appellant could not work at night "because of accentuated discomfort," he did not again fully address appellant's inability to perform the specific light-duty job offered. Appellant did not submit sufficient medical evidence to establish

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<sup>10</sup> *Patricia M. Finch*, 51 ECAB 165 (1999).

<sup>11</sup> *Id.*

<sup>12</sup> *See Maggie L. Moore*, *supra* note 7.

<sup>13</sup> *Ronald M. Jones*, 48 ECAB 600 (1997).

<sup>14</sup> *Lizzie M. Greer*, 49 ECAB 681 (1998).

that she was not physically capable of performing the duties of the light-duty position offered.<sup>15</sup> She is, therefore, not entitled to receipt of further monetary benefits.

The decision of the Office of Workers' Compensation Programs dated May 20, 2003 is hereby affirmed as modified. The decision dated March 17, 2003 is hereby affirmed.

Dated, Washington, DC  
September 5, 2003

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>15</sup> *Id.*