



and arm sprains and wrist enthesopathy.<sup>1</sup> In March 2002, it accepted that he sustained lumbago due to walking on cement and standing for a significant portion of his workday. Appellant began working in jobs for the employing establishment which did not require lifting more than 20 pounds or repetitively moving his arms. He stopped work for various periods and received appropriate disability compensation.

In August 2002, the Office referred appellant to Ronald W. Anderson, Ph.D., a clinical psychologist. In a September 20, 2002 report, Dr. Anderson obtained testing which showed that appellant has a full-scale intelligence quotient of 66 which placed him in the mild mental retardation range. He stated that appellant appeared to be functionally illiterate, performed arithmetic at a second grade level and generally had poor learning ability. Dr. Anderson advised that appellant would not be able to perform tasks of a technical nature or which required a long series of detailed steps.

On May 17, 2004 appellant returned to work for the employing establishment in a light-duty position. He fell at work on that same date and the Office accepted that he sustained a lumbar strain/sprain, cervical strain/sprain and bilateral knee contusions. Appellant stopped work on May 17, 2004. Dr. Dehaan determined that he was totally disabled from work. The Office paid compensation for total disability.

In an August 10, 2004 report, Dr. Robert Chouteau, an osteopath and Board-certified orthopedic surgeon serving as an Office referral physician, stated that appellant continued to suffer from residuals of his April 21, 2000 employment injury. He found bilateral median nerve neuropathy and a right leg radiculopathy. Dr. Chouteau arranged for appellant to participate in a functional capacity evaluation which showed the ability to perform "sedentary" work and obtained electromyogram (EMG) and nerve conduction velocity (NCV) tests which showed evidence of bilateral median radiculopathies at the wrist or carpal tunnel syndrome (moderate on the right and mild on the left), bilateral ulnar neuropathies at the elbows, and a right S1 radiculopathy. He found that appellant could work eight hours per day with restrictions, including lifting no more than 10 pounds, engaging in repetitive wrist or elbow motions for no more than one hour per day, and lifting, pulling, pushing, reaching (including above the shoulder), bending, twisting and kneeling for no more than two hours per day.

The Office determined that there was a conflict in the medical evidence between Dr. Dehaan and Dr. Chouteau regarding appellant's ability to work and referred him to Dr. David R. Willhoite, a Board-certified orthopedic surgeon, for an impartial medical examination.

On December 6, 2004 Dr. Willhoite stated that on examination the cervical spine revealed no tenderness to palpation in the cervical region, but there was mild restriction of the

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<sup>1</sup> Appellant was working at the Red River Army Depot in Texarkana at the time of his injury. The preservation servicer job involved preparing vehicles for shipment and storage. Appellant had to lift up to 70 pounds and repetitively use his arms while performing such tasks as sanding, greasing, changing oil and replacing fuel cells. On December 14, 2001 Dr. Jeffrey T. Dehaan, an attending Board-certified orthopedic surgeon, performed left carpal tunnel release surgery which was authorized by the Office.

cervical spine in all directions which he felt was voluntary. There was a negative Tinel's sign and negative Phalen's test bilaterally and two-point discrimination was normal in both hands. Examination of appellant's lumbar spine revealed no tenderness to palpation in the lumbar region, but he would only forward flex to approximately 60 degrees. Dr. Willhoite indicated that there were no motor or sensory deficits in the lower extremities. He diagnosed cervical strain, post left carpal tunnel release and lumbosacral strain with no evidence of any internal derangement of the knees and no evidence of any type of residual problem affecting both shoulders. Dr. Willhoite advised that appellant's condition relating to the April 21, 2000 work injury had resolved, including his bilateral carpal tunnel syndrome and bilateral shoulder and upper arm sprains. He could not find any objective evidence on examination and diagnostic testing that appellant had any residual problems and characterized his examination as being "basically normal." Dr. Willhoite stated that appellant's complaints far outweighed his findings on physical examination and determined that he could perform his date-of-injury job.

In a February 9, 2005 report, Dr. Dehaan stated that he had been treating appellant for chronic lower back problems, neurological problems in his lower extremities and bilateral carpal tunnel syndrome. He indicated that appellant could not return to the workforce due to the medications he had to take for these conditions.

The Office requested that Dr. Willhoite provide clarification of his December 6, 2004 report. It asked him to comment on the relevance of several documents of record, including the August 10, 2004 report of Dr. Chouteau and the functional capacity evaluation and EMG and NCV studies from August 2004. In a May 5, 2005 supplemental report, Dr. Willhoite stated that he had reviewed additional evidence, including EMG and NCV studies of the upper and lower extremities which were obtained by Dr. Chouteau in August 2004 and a functional capacity evaluation performed in August 2004. He indicated that the testing showed that appellant had bilateral carpal syndrome and a right S1 radiculopathy. In response to a question regarding appellant's ability to work, Dr. Willhoite stated:

"After reviewing the additional medical evidence, I feel that [appellant] still has some problem related to his work conditions and that he is most likely not able to perform full duties as a preservation officer. The functional capacity evaluation revealed that [appellant] was functioning at a sedentary level and I feel this is most likely so."

In a May 5, 2005 work restrictions form, Dr. Willhoite stated that appellant could work eight hours per day and lift up to 10 pounds. He could perform the following activities for two hours per day: walk, stand, reach (including above the shoulders), twist, engage in repetitive wrist and elbow motion, push, pull, lift, squat, kneel and climb.

In June 2005, appellant was referred to an Office-sponsored vocational rehabilitation program. In October 2005, the rehabilitation counselor closed the file because rehabilitation was

determined not to be feasible. He stated, “The work-related disability is too severe for employment and is unlikely to improve.”<sup>2</sup>

On November 3, 2005 the employing establishment offered appellant a position as a woodworker. The position involves making and repairing small and medium boxes, crates, pallets, and other similar items based upon specific instructions and complete construction plans. This process requires using carpentry squares to align corners and simple joints, measuring correct dimensions, cutting boards or sheets of wood to specified lengths and using a variety of common assembly procedures and work sequences to band, bolt, screw, or otherwise fasten parts together using existing jigs, templates, models, or guides. The woodworker position requires knowledge of a limited range of woodworking techniques and processes, skill in basic layout procedures for repetitive assignments, knowledge of a limited variety of frequently used wood and wood substitute materials and knowledge of frequently used types and sizes of hardware. It requires the ability to use a variety of basic assembly and fastening procedures to measure, cut, nail, staple, band, screw, bolt, and join wood framing boards, panes, sheets and parts used in making and repairing containers. The woodworker must have skill in the use of common hand and power tools such as drills, hammers, circular saws, banding equipment, pneumatic nailers and drill presses to cut, drill, band and assemble work products. The woodworker position requires the performance of each of the following activities for about two hours per day: standing, bending, stooping, reaching, moving the arms and lifting, carrying and using tools and materials weighing up to 10 pounds.

In a November 18, 2005 letter, the Office advised appellant of its determination that the woodworker position offered by the employing establishment was suitable. On November 3, 2005 the employing establishment confirmed that the position was still available to appellant. The Office noted that Dr. Willhoite’s medical opinion showed that appellant could perform the position. It informed appellant that his compensation would be terminated if he did not accept the woodworker position or provide good cause for not doing so within 30 days of the date of the letter.

In a December 13, 2005 letter, appellant advised the employing establishment that he was declining the offered woodworker position because cramping in his hands made it impossible for him to hold tools. He indicated that he had constant back and knee pain.

In a January 5, 2006 letter, the Office advised appellant that his reasons for not accepting the position offered by the employing establishment were unjustified. It advised him that his compensation would be terminated if he did not accept the position within 15 days of the date of the letter.

In a January 24, 2006 decision, the Office terminated appellant’s compensation effective January 24, 2006 on the grounds that he refused an offer of suitable work. In a November 1, 2006 letter, appellant’s attorney argued that appellant was not physically or vocationally able to

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<sup>2</sup> On January 10, 2006 appellant’s rehabilitation counselor stated, “On October 11, 2005 and October 12, 2005 I received and reviewed a job offer for this [injured worker]. I sent the job offer back to the employer with my recommendations. I received a [Form] OWCP-3 ... on or about October 30, 2005 instructing me to close this file as the case had been determined as not feasible. I have not heard anything else on this file.

work as a woodworker. He indicated that appellant still suffered from serious work-related residuals which prevented him from performing repetitive work with his upper extremities and asserted that his limited mental faculties prevented him from performing the complicated tasks required by the job. In an August 26, 2008 decision, the Office affirmed its January 24, 2006 decision.

### **LEGAL PRECEDENT**

Section 8106(c)(2) of the Federal Employees' Compensation Act provides in pertinent part, "A partially disabled employee who-- ... (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation."<sup>3</sup> However, to justify such termination, the Office must show that the work offered was suitable.<sup>4</sup> An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.<sup>5</sup>

Section 8123(a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."<sup>6</sup> When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.<sup>7</sup> In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>8</sup>

### **ANALYSIS**

In mid 2001, the Office accepted that appellant sustained several conditions due to his repetitive work duties including tenosynovitis of his left hand and wrist and the bilateral conditions of carpal tunnel syndrome, brachial neuritis, shoulder and arm sprains and wrist enthesopathy. On December 14, 2001 appellant underwent left carpal tunnel release surgery which was authorized by the Office. In March 2002, the Office accepted that he sustained lumbago due to standing and walking. On May 17, 2004 appellant fell at work and the Office accepted that he sustained a lumbar strain/sprain, cervical strain/sprain and bilateral knee contusions.

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<sup>3</sup> 5 U.S.C. § 8106(c)(2).

<sup>4</sup> *David P. Camacho*, 40 ECAB 267, 275 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341, 345 (1981).

<sup>5</sup> 20 C.F.R. § 10.517; *see Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

<sup>6</sup> 5 U.S.C. § 8123(a).

<sup>7</sup> *William C. Bush*, 40 ECAB 1064, 1075 (1989).

<sup>8</sup> *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

The Office terminated appellant's compensation effective January 24, 2006 on the grounds that he refused an offer of suitable work, a position as a woodworker. The position involves making and repairing small and medium boxes, crates, pallets, and other similar items based upon specific instructions and complete construction plans. This process requires using carpentry squares to align corners and simple joints, measuring correct dimensions, cutting boards or sheets of wood to specified lengths and using a variety of common assembly procedures and work sequences to band, bolt, screw, or otherwise fasten parts together using existing jigs, templates, models, or guides. The woodworker position requires the performance of each of the following activities for about two hours per day: standing, bending, stooping, reaching, moving the arms and lifting, carrying and using tools and materials weighing up to 10 pounds. The Office based its determination that appellant was physically able to perform the position on the opinion of Dr. Willhoite, a Board-certified orthopedic surgeon who served as an impartial medical specialist.

The Office properly determined that there was a conflict in the medical opinion between Dr. Dehaan, an attending Board-certified orthopedic surgeon and Dr. Chouteau, a Board-certified orthopedic surgeon acting as an Office referral physician, regarding appellant's ability to work.<sup>9</sup> In order to resolve the conflict, the Office properly referred appellant, pursuant to section 8123(a) of the Act, to Dr. Willhoite for an impartial medical examination and an opinion on the matter.

The Board finds that the opinion of Dr. Willhoite is not sufficiently well rationalized to constitute the weight of the medical evidence with respect to appellant's ability to work and, therefore, the Office did not present sufficient medical evidence to show that appellant was physically capable of performing the woodworker position. In a May 5, 2005 report, Dr. Willhoite stated that he had reviewed EMG and NCV studies of the upper and lower extremities which were obtained by Dr. Chouteau in August 2004 and a functional capacity evaluation performed in August 2004. He indicated that the testing showed that appellant had bilateral carpal tunnel syndrome and a right S1 radiculopathy. In response to a question regarding appellant's ability to work, Dr. Willhoite stated, "I feel that [appellant] still has some problem related to his work conditions and that he is most likely not able to perform full duties as a preservation officer."<sup>10</sup> The functional capacity evaluation revealed that [appellant] was functioning at a sedentary level and I feel this is most likely so." In a May 5, 2005 work restrictions form, Dr. Willhoite stated that appellant could work eight hours per day and lift up to 10 pounds. Appellant could perform the following activities for two hours per day: walk, stand, reach (including above the shoulders), twist, engage in repetitive wrist and elbow motion, push, pull, lift, squat, kneel and climb.

Dr. Willhoite did not provide sufficient explanation for why he felt that appellant's physical condition allowed him to perform the level of work that he recommended in his May 5,

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<sup>9</sup> In several May 2004 reports, Dr. Dehaan determined that appellant was totally disabled from work. In contrast, Dr. Chouteau determined on August 10, 2004 that appellant could work eight hours per day with restrictions, such as lifting no more than 10 pounds and engaging in repetitive wrist or elbow motions for no more than one hour per day.

<sup>10</sup> Appellant's date-of-injury job as a preservation officer had required him to lift up to 70 pounds and repetitively use his arms while performing such tasks as sanding, greasing, changing oil and replacing fuel cells.

2005 work restrictions form. He appeared to have based his recommendations, at least in part, on the August 2004 functional capacity evaluation as interpreted by Dr. Chouteau on August 10, 2004. Dr. Chouteau had recommended that appellant could only engage in repetitive wrist and elbow motion for one hour per day. However, Dr. Willhoite did not adequately address why appellant could engage in repetitive wrist and elbow motion to a greater extent, *i.e.*, for two hours per day. He did not explain how appellant's bilateral median and ulnar neuropathies would allow him to perform the fine hand manipulation and arm motion required by the woodworker position.

Moreover, the Board notes that it has not been shown that appellant has the vocational ability to perform the woodworker position. The description of the woodworker position notes under the "Skill and Knowledge" section that the job requires knowledge of a limited range of woodworking techniques and processes, skill in basic layout procedures for repetitive assignments, knowledge of a limited variety of frequently used wood and wood substitute materials and knowledge of frequently used types and sizes of hardware. The job requires the ability to use a variety of basic assembly and fastening procedures to measure, cut, nail, staple, band, screw, bolt and join wood framing boards, panes, sheets and parts used in making and repairing containers. The woodworker must have skill in the use of common hand and power tools such as drills, hammers, circular saws, banding equipment, pneumatic nailers and drill presses to cut, drill, band and assemble work products.

There is no evidence in the record that appellant has any of these woodworking skills which are apparent prerequisites for the woodworker position. There is no indication that appellant could obtain these skills through on-the-job training. He participated in a vocational rehabilitation program, but no rehabilitation counselor provided an opinion that he could perform the woodworker position.<sup>11</sup> In addition, it appears that appellant's apparent limited mental faculties might prevent him from having the ability to perform the fairly complicated tasks required by the woodworker position. In September 2002, the Office referred appellant to Dr. Anderson, a clinical psychologist, who indicated that appellant has a full-scale intelligence quotient of 66 which placed him in the mild mental retardation range. Dr. Anderson stated that appellant appeared to be functionally illiterate, performed arithmetic at a second grade level and generally had poor learning ability. He provided an opinion that appellant would not be able to perform tasks of a technical nature or which required a long series of detailed steps. The Office did not provide any discussion of how appellant could perform the woodworker position in light of these apparent limitations.

Therefore, the Office did not meet its burden of proof to show that the woodworker position offered by the employing establishment was suitable and it improperly terminated appellant's compensation effective January 24, 2006 on the grounds that he refused an offer of suitable work.

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<sup>11</sup> In October 2005, appellant's rehabilitation counselor at the time closed his file because rehabilitation was determined not to be feasible. He stated, "The work-related disability is too severe for employment and is unlikely to improve."

**CONCLUSION**

The Board finds that the Office improperly terminated appellant's compensation effective January 24, 2006 on the grounds that he refused an offer of suitable work.

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' August 26, 2008 decision is reversed.

Issued: November 23, 2009  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board