



authorized multiple carpal tunnel release surgeries.<sup>1</sup> After each surgery, appellant eventually returned to full-time limited-duty work. On May 24, 2007 she was released to full-time limited duty with restrictions. On September 4, 2008 appellant underwent a functional capacity evaluation (FCE) which indicated she could perform simple grasping/fine manipulation for no more than 30 minutes continuously, could overhead lift and reach up to 15 pounds occasionally, could carry with two hands and lift no more than 10 pounds frequently and no more than 20 pounds occasionally, could stand and lift no more than 20 pounds frequently and 30 pounds occasionally, could push no more than 48 pounds occasionally and could pull no more than 58 pounds occasionally. It also noted appellant could not stoop, squat, kneel or crawl due to nonwork-related knee condition. Appellant stopped work on October 8, 2008. The Office accepted a recurrence of disability and placed her on its periodic compensation rolls. Appellant did not return to work.

In an October 7, 2008 form report, appellant's attending physician, Dr. Keith A. Kattner, an osteopath specializing in neurosurgery, advised appellant would be off work indefinitely until she could be accommodated within the FCE results of September 4, 2008.

On October 16, 2008 the employing establishment offered appellant limited-duty work based on the September 4, 2008 FCE. The work involved nixie mail and sales and service positions. In an October 16, 2008 letter, the Office requested that Dr. Kattner review the proposed activities of nixie mail and sales and service positions to see if appellant could perform those duties.

On December 17, 2008 Dr. Kattner indicated that appellant had cervical radiculopathy. He advised that she could return to work within the September 4, 2008 FCE recommendations and with no repetitive reaching or pulling. Dr. Kattner also indicated that appellant could do "supervisory work." In a December 27, 2007 report, he stated her symptoms seemed to be worsening due to the type of work she did. Dr. Kattner recommended that appellant be placed in a job which did not require aggressive use of her hands.

In a January 28, 2009 letter, the Office requested that Dr. Kattner review and indicate whether appellant could perform the physical duties of the jobs outlined in the employing establishment's letter of October 16, 2008. Dr. Kattner was provided a copy of the October 16, 2008 job offer and asked to provide restrictions which would allow her to return to work if he found that the offered position was not suitable.

On February 24, 2009 the Office referred appellant to Dr. Lisa E. Snyder, a Board-certified physiatrist and second opinion physician.

In a March 24, 2009 report, Dr. Kattner set forth appellant's treatment history and complaints of continued symptoms and pain. In an April 27, 2009 OWCP-5c form, he opined that she could work full-time limited duty with restrictions. Appellant was restricted from repetitive reaching and repetitive reaching above shoulder, could engage in repetitive movements

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<sup>1</sup> The record reflects appellant underwent left carpal tunnel releases on April 21, 1999 and January 10, 2007. She had right carpal tunnel releases performed on January 27, 2000 and October 25, 2006. Appellant also underwent nonwork-related ulnar nerve transposition surgery on August 16, 1999.

of the wrists and elbow for no more than one hour a day, could push and pull no more than 40 pounds for one hour a day, and could lift no more than 20 pounds for 30 minutes a day. Dr. Kattner further advised that she was unable to bend/stoop, kneel and climb.

Based on Dr. Kattner's April 27, 2009 work restrictions, the employing establishment offered appellant an updated modified sales and service distribution associate position doing nixie mail and sales and services duties effective May 21, 2009. The position had no restrictions on standing, walking or twisting; total restriction on squatting, kneeling and bending/stooping; lifting and carrying no more than 20 pounds per 30 minutes; pushing weight no more than 40 pounds for one hour and climbing and repetitive movements limited to one hour a day with no repetitive movements for overhead and normal reaching. The position description described appellant's duties and noted that the duties were to be performed intermittently and tasks performed at her own pace with breaks to avoid repetition.

In a June 19, 2009 report, Dr. Snyder noted the history of injury and that appellant had not worked since October 2008. She reviewed the statement of accepted facts as well as the medical record. Examination of the upper extremities demonstrated normal tone and full range of motion (ROM) throughout the shoulders, elbows, wrists and digits, without any evidence of muscle wasting or atrophy. The neurological examination revealed good manual muscle strength, with normal strength in the biceps, triceps and shoulder abduction. The cervical ROM was noted to be full in all planes of movement. Dr. Snyder noted that, since the FCE, appellant had decreased grip strength and a positive Tinel's sign at both wrists and elbows. In her report as well as in an OWCP-5c form, Dr. Snyder opined that appellant could perform limited-duty work with restrictions of no lifting or carrying beyond 35 pounds seldomly and frequent lifting, carrying, pushing and pulling of no more than 20 pounds.

On July 7, 2009 Dr. Kattner opined that appellant was not capable of performing the duties contained in the May 21, 2009 modified job offer. On July 17, 2009 the employing establishment advised the Office that Dr. Kattner did not concur with its updated job offer of May 21, 2009 and did not explain his decision or recommend any changes.

On July 20, 2009 the Office requested that Dr. Snyder review the employing establishment's May 21, 2009 modified job offer and indicate whether it was within appellant's restrictions.

On August 3, 2009 the Office received treatment notes from Dr. Kattner dated February 12, March 19 and July 7, 2009. The February 12, 2009 note indicated that appellant was seen for neck and shoulder pain and that a magnetic resonance imaging (MRI) scan showed bilateral foraminal stenosis at C5-6. The March 19, 2009 note indicated that she had positive Phalen's sign on the left and Tinel's sign bilaterally. There was also evidence of cubital tunnel syndrome with flexion of appellant's elbow and moderately decreased grip strength in both hands. The July 7, 2009 note indicated there were no changes in her work-related restrictions.

In an August 3, 2009 report, Dr. Snyder reviewed Dr. Kattner's April 27, 2007 work restrictions along with the employing establishment's May 21, 2009 modified job offer. She advised that the restrictions in the May 21, 2009 modified job offer corresponded to those of

Dr. Kattner. Dr. Snyder opined that, upon review of appellant's chart and previous FCE, appellant was able to perform the physical duties of the May 21, 2009 modified job offer.

In an August 19, 2009 letter, the Office advised appellant that the modified sales and service distribution associate position offered effective May 21, 2009 was suitable with her work capabilities and that the position remained open and available to her. It informed her of the penalty provisions of 5 U.S.C. § 8106(c)(2) regarding refusal of suitable work and allowed her 30 days to accept the position or to explain her reasons for rejecting the position.

On September 8, 2009 the employing establishment indicated that appellant refused the proposed job offer.

In a September 23, 2009 letter, the Office informed appellant that her reasons for refusing the position had been considered and were not found acceptable. Appellant was afforded an additional 15 days to accept the position or provide medical evidence to support that she was not capable of returning to modified work.

The Office subsequently received medical reports from Dr. Kattner dated August 24 and October 7, 2009. In his August 24, 2009 report, Dr. Kattner noted that appellant was apparently approved to return to servicing customers working at the counter and advised that it was his impression that over-the-counter working required typing, reaching, handling packages which would continue to aggravate her arm neuropathies. He stated his recommendation continued to be no repetitive activities, which included a combination of typing, handling packages and reaching over the counter. Dr. Kattner opined that appellant was best suited in a position that would allow her to limit her lifting to 30 pounds with no combination of activity that would result in arm symptoms. In his October 7, 2009 report, he stated that the August 19, 2009 modified assignment was not acceptable because she was not allowed to do repetitive activity at all with her arms due to her overuse syndrome. Dr. Kattner indicated that "it would seem that this modified assignment continues to aggravate her arm and requires a significant amount of reaching, working on keyboards and handling mail, which are the things that have currently disabled her."

By decision dated October 16, 2009, the Office terminated appellant's entitlement to monetary compensation and schedule award benefits finding that she had refused an offer of suitable employment. The weight of the medical evidence rested with the second opinion of Dr. Snyder. Appellant's entitlement to medical benefits was not terminated.

### **LEGAL PRECEDENT**

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>2</sup> Section 8106(c)(2) of the Federal Employees' Compensation Act<sup>3</sup> provide that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee is not entitled to

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<sup>2</sup> *Barry Neutach*, 54 ECAB 313 (2003); *Lawrence D. Price*, 47 ECAB 120 (1995).

<sup>3</sup> 5 U.S.C. §§ 8101-8193.

compensation.<sup>4</sup> The Office may not terminate compensation without establishing that the disability ceased or that it is no longer related to the employment.<sup>5</sup> The Board has held that, as monetary compensation payable to an employee under section 8107 are payments made from the Employees' Compensation Fund, they are subject to the penalty provision of section 8106(c).<sup>6</sup>

Section 10.517(a) of the Act's implementing regulations provide that an employee who refused to work after suitable work has been offered to or secured for the employee, has the burden of showing that such refusal or failure to work was reasonable or justified.<sup>7</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>8</sup>

### ANALYSIS

The Office accepted that appellant sustained bilateral carpal tunnel syndrome while in the performance of her job duties. While appellant returned to work for short periods of time following carpal tunnel releases, she stopped work on October 8, 2008 and received wage loss for total disability. The Office terminated her compensation benefits effective on October 25, 2009, finding that the May 21, 2009 offered position was medically suitable.

The employing establishment offered appellant a modified sales and service distribution associate position doing nixie mail and sales and services duties effective on May 21, 2009. This was based on Dr. Kattner's April 27, 2009 work restrictions. The physical requirements for the position included: total restriction on squatting, kneeling and bending/stooping; a lifting and carrying restriction of no more than 20 pounds per 30 minutes; a pushing restriction of no more than 30 pounds a hour; and climbing and repetitive movements restricted to one hour a day with no repetitive movements for overhead and normal reaching. Appellant was specifically instructed to perform the duties of the modified position on an intermittent basis with breaks to avoid any repetition.

The issue of whether an employee has the physical ability to perform a modified position is a medical question that must be resolved by probative medical evidence.<sup>9</sup> The Board finds that the physical requirements of the offered modified sale and service distribution associate position fall within appellant's work restrictions.

In a June 19, 2009 report, Dr. Snyder reviewed appellant's medical record, a statement of accepted facts and described her physical examination. She advised that there were current residuals of the accepted work injury, appellant could return to limited-duty work. Dr. Snyder

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<sup>4</sup> *Id.* at § 8106(c)(2); *see also* *Linda D. Guerrero*, 54 ECAB 556 (2003).

<sup>5</sup> *Ronald M. Jones*, 52 ECAB 190 (2000); *Arthur R. Reck*, 47 ECAB 339 (1995).

<sup>6</sup> *Sandra A. Sutphen*, 49 ECAB 174 (1997); *Stephen R. Lubin*, 43 ECAB 564 (1992).

<sup>7</sup> 20 C.F.R. § 10.517(a); *see Ronald M. Jones*, *supra* note 5.

<sup>8</sup> *See id.* at § 10.516; *see Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

<sup>9</sup> *See Gayle Harris*, 52 ECAB 319 (2001).

listed restrictions of no lifting or carrying beyond 35 pounds seldom and frequent lifting, carrying, pushing and pulling of no more than 20 pounds. She was provided with a copy of the May 21, 2009 offered position. In an August 3, 2009 report, Dr. Snyder advised the restrictions noted on the May 21, 2009 job offer corresponded to Dr. Kattner's April 27, 2007 work restrictions. Upon review of appellant's records and the previous FCE, she opined that appellant was able to perform the duties of the May 21, 2009 modified job offer.

The Board finds that Dr. Snyder provided a complete and rationalized opinion based on an accurate factual and medical background. Dr. Snyder's opinion that appellant could return to full-time limited-duty work with restrictions and that the May 21, 2009 modified job offer was within appellant's physical capabilities is accorded the weight of the medical opinion evidence. Appellant did not submit sufficient medical evidence showing that she could not return to the limited-duty work as set forth in the May 21, 2009 modified job offer. The position offered by the employing establishment was based on Dr. Kattner's April 27, 2007 work restrictions. Dr. Kattner's July 7, 2009 report opined that appellant could not perform the duties of the offered position but he provided no reasoning regarding the basis of his opinion. Although he later submitted reports recommending no repetitive activities, his reports did not contain a rationalized opinion explaining how or why appellant was now medically unable to perform the May 21, 2009 modified job offer. Moreover, Dr. Kattner's later reports appear to base his opinion on his impression of the perceived duties of the modified position, not the actual duties of the modified position. For example, he advised that appellant could not perform the job because it entailed repetitive activities. However, the actual description of duties and physical activities of the offered job indicated that appellant was to perform the duties in a manner to avoid repetition. Thus, Dr. Kattner's reports are insufficient to cause a conflict of medical opinion with Dr. Snyder. The Board finds that Dr. Snyder's medical opinion constitutes the weight of the medical evidence and establishes that appellant is no longer totally disabled for work due to the effects of the employment-related bilateral carpal tunnel syndrome.

In accordance with the procedural requirements under 5 U.S.C. § 8106(c), the Office advised appellant on August 19, 2009 that it found the job to be suitable and gave her an opportunity to provide reasons for refusing the position within 30 days. After reviewing the medical evidence of record, the Office advised appellant in a September 23, 2009 letter that the evidence submitted was insufficient to support her refusal to accept the job offer and provided her an additional 15 days to accept the position without penalty. Dr. Kattner, as noted, opined that she could work restricted duty, but he did not provide reasoning to explain why she now remained disabled from performing the offered position that was created to conform with his previous work restrictions. The weight of the medical evidence does not support inability to perform the duties of the offered position. The Board finds that the Office followed established procedures prior to the termination of compensation pursuant to section 8106(c) of the Act.<sup>10</sup>

The position offered was medically and vocationally suitable and the Office complied with the procedural requirements of section 8106(c) of the Act. The Office met its burden of proof to terminate appellant's monetary compensation benefits.

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<sup>10</sup> See *supra* note 8.

**CONCLUSION**

The Board finds that the Office met its burden to terminate appellant's monetary compensation effective October 25, 2009 on the grounds that she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 16, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 18, 2011  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board