

United States Department of Labor
Employees' Compensation Appeals Board

_____)
A.S., Appellant)

and)

U.S. POSTAL SERVICE, PROCESSING &)
DISTRIBUTION CENTER, Capitol Heights, MD,)
Employer)
_____)

Docket No. 10-2142
Issued: June 16, 2011

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 18, 2010 appellant filed a timely appeal from a February 23, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) terminating her compensation for refusing suitable work.¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ Under the Board's *Rules of Procedure*, the 180-day time period for determining jurisdiction is computed beginning on the day following the date of OWCP's decision. *See* 20 C.F.R. § 501.3(f)(2). As OWCP's decision was issued February 23, 2010, the 180-day computation begins on February 24, 2010. Since using August 25, 2010, the date the appeal was received by the Clerk of the Board, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is August 18, 2010, which renders the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly terminated appellant's entitlement to compensation effective October 1, 2009 on the grounds that she refused an offer of suitable employment under 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On August 27, 1999 appellant, then a 45-year-old contract technician, filed an occupational disease claim alleging that she sustained right carpal tunnel syndrome causally related to factors of her federal employment. OWCP accepted the claim for bilateral wrist tendinitis and bilateral carpal tunnel syndrome. Appellant underwent a right carpal tunnel release on October 29, 1999 and a left carpal tunnel release on December 5, 1999. She returned to part-time work with restrictions on March 27, 2000. OWCP accepted that appellant sustained a recurrence of disability beginning March 6, 2001.³

In work capacity evaluation dated June 4, 2008, Dr. Melisande Smith, a Board-certified internist, found that appellant could work four hours a day with restrictions on sitting, walking, standing, reaching, twisting, bending, squatting, kneeling and climbing up to four hours a day. She asserted that appellant could not perform repetitive movements of the hands.

On January 12, 2009 appellant accepted the employing establishment's offer of the position of contract technician working four hours a day. The position required using a hand-held scanner intermittently for four hours and walking, bending and standing four hours. The duties included printing placards, pushing trays of mail and scanning mail for four hours intermittently. The start date for the position was February 2, 2009.

On January 15, 2009 a rehabilitation counselor noted that appellant "signed the job offer for fear of losing her job and retirement benefits...." The counselor noted that the June 4, 2008 work restriction evaluation was "inaccurate since it does not address her hands."

In a January 26, 2009 work restriction evaluation, Dr. Smith found that appellant could not perform repetitive movements of the wrists or elbows and could not push, pull or lift.

Appellant did not return to work on February 2, 2009. On February 18, 2009 OWCP advised her of its finding that the position of contract technician was suitable and provided her 30 days to accept the position or provide her reasons for refusal. On February 20, 2009 the employing establishment added a notation to the job offer that any "additional hand activity would be intermittent."

On March 5, 2009 OWCP informed appellant that she had 15 days to accept the position or have her compensation terminated.

³ OWCP referred appellant for vocational rehabilitation in 2007.

In a March 12, 2009 work restriction evaluation, Dr. Smith stated:

“My patient, [appellant] was recently offered new duties which do not fall within the parameters of her previously prescribed job restrictions/limitations: [n]o keyboard activity to print placards (no repetitive movement of hands), no grasping and pulling a trigger to scan mail with a hand-held scanner (no repetitive movements of hands with [zero] lifting pounds), no pushing trays, tubs or containers as clearly stated in her restrictions. She can walk, bend and stand.

“Additionally, the duty listed “[a]ny additional hand activity” is too vague. [Appellant] has chronic pain in both hands and currently takes pain medication daily. This is due to an overuse injury that occurred on the job.”

On March 9, 2009 appellant related that she signed the job offer under duress because the employing establishment told her that she had to respond to the offer right away. On January 29, 2009 her physician reviewed the offer and told her that she could not perform the job duties.

By letter dated March 23, 2009, OWCP advised appellant that the job duties required clarification. It informed her that her rehabilitation counselor would “work with you and the [employing establishment] to work out a solution to the physical limitations posed by your [physician]....”

On March 31, 2009 the rehabilitation counselor related that she conducted a job analysis to see if appellant could perform the duties of a modified mail processing clerk. She described the position as requiring appellant to enter ZIP codes into a computer, hit the print button, walk to the end of a conveyor belt, place a sheet of paper on a container, scan a bar code on the paper, press enter or scan the bar code and then repeat the process. The rehabilitation counselor asserted that the position was within her “physical capabilities since [appellant] does not have to utilize her hands, wrist or elbow in a repetitive manner.”

On August 10, 2009 OWCP advised appellant that the position of contact technician was suitable and within the limitations provided by Dr. Smith on March 13, 2009. It provided her 30 days to accept the position or provide a written explanation for her refusal.

In a modified job offer dated July 8, 2009, received by OWCP on August 11, 2009, the employing establishment described the duties of the position as set forth by the rehabilitation counselor. The duties included using a computer, printing placards and using a scanner.

On August 24, 2009 appellant noted that she had applied for retirement. She asserted that the offered position was not within her restrictions as she was unable to use a computer to enter ZIP codes.

By letter dated September 14, 2009, OWCP advised appellant that it had considered her reasons and found that they were not suitable. It afforded her an additional 15 days to accept the position and arrange to return to duty or have her entitlement to compensation terminated. OWCP notified appellant that it would not consider any additional reasons for refusal.

On September 18, 2009 appellant informed OWCP that she had retired from the employing establishment.

By decision dated October 1, 2009, OWCP terminated appellant's compensation effective October 1, 2009 for refusing suitable work. It found that electing retirement was not a suitable reason for refusing employment.

On October 23, 2009 appellant requested a review of the written record. By decision dated February 23, 2010, the hearing representative affirmed the October 1, 2009 decision.

On appeal, appellant contends that OWCP erred in terminating her compensation, noting that she had retired from work. She requests reinstatement of workers' compensation benefits.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.⁴ Section 8106(c)(2) of FECA⁵ provides 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 compensation.⁶ To justify termination of compensation, OWCP must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.⁷ 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.⁸

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 by the employee, has the burden of showing that such refusal or failure to work was reasonable or justified.⁹ 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.¹⁰ The issue of whether an employee is physically capable of performing a modified assignment is a medical question that must be resolved by medical evidence.¹¹

⁴ *Linda D. Guerrero*, 54 ECAB 556 (2003).

⁵ 5 U.S.C. §§ 8101-8193.

⁶ *Id.* at § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

⁷ *Ronald M. Jones*, 52 ECAB 190 (2000).

⁸ *Joan F. Burke*, 54 ECAB 406 (2003).

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

¹⁰ *Id.* at § 10.516.

¹¹ *Gayle Harris*, 52 ECAB 319 (2001).

ANALYSIS

The Board finds that OWCP improperly terminated appellant's entitlement to compensation benefits as the January 12, 2009 job offer was not suitable. It accepted that she sustained bilateral wrist tendinitis and bilateral carpal tunnel syndrome due to factors of her federal employment. On June 4, 2008 appellant's attending physician, Dr. Smith, found that appellant could work four hours a day with restrictions, including no repetitive hand movements. On January 12, 2009 the employing establishment offered appellant a position of a contract technician working four hours a day. The duties of the position included using a hand-held scanner printing placards, pushing trays of mail and scanning mail intermittently four hours a day. On February 20, 2009 the employing establishment specified that any additional hand movements would be intermittent. In a report dated March 12, 2009, Dr. Smith found that appellant was unable to perform the duties of the offered position. She asserted that she could not print placards, scan mail with a hand-held scanner or push trays of mail. Dr. Smith also found that the employing establishment's statement that additional hand activity would be intermittent was insufficiently explained.

Dr. Smith clearly found that the job offer was not within appellant's work restrictions. The rehabilitation counselor, at the request of OWCP, visited the work location and determined that the offered position was within her medical restrictions. She described the duties as appellant entering ZIP codes into a computer, printing out a placard, scanning a bar code and then repeating the process. On July 8, 2009 the employing establishment provided a more detailed description of her work duties consistent with the description of the rehabilitation counselor.

OWCP relied upon the opinion of the rehabilitation counselor in finding the position suitable; however, the issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is a medical question that must be resolved by probative medical evidence.¹² The rehabilitation counselor's opinion is relevant in determining whether an offered position is vocationally suitable and reasonably available.¹³ The issue of whether the position is within a claimant's work restrictions is a determination for a physician. Dr. Smith found that the position was not medically suitable and there is no contrary medical evidence. Accordingly, OWCP improperly terminated appellant's compensation benefits for refusing to accept the offered position.

CONCLUSION

The Board finds that OWCP improperly terminated appellant's entitlement to compensation effective October 1, 2009 on the grounds that she refused an offer of suitable employment under section 8106(c)(2).

¹² See *Harris, id.*; *Maurissa Mack*, 50 ECAB 498 (1999).

¹³ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(b)(2) (October 2009); *Dorothy Jett*, 52 ECAB 246 (2001).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 23, 2010 is reversed.

Issued: June 16, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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