

ISSUE

The issue is whether appellant has established that her refusal of suitable work was justified.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as presented in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On July 30, 2009 appellant, then a 38-year-old library technician, filed a claim alleging that her bilateral wrist conditions were due to factors of her federal employment. OWCP accepted the claim for bilateral carpal tunnel syndrome and paid intermittent wage-loss compensation benefits on the supplemental rolls as of August 6, 2009. Appellant underwent a left carpal tunnel release on August 6, 2009 and a right carpal tunnel release on September 4, 2012, both of which were authorized by OWCP. By decision dated October 26, 2012, OWCP accepted a recurrence of disability on September 4, 2012 due to the authorized surgery. Appellant stopped work and received wage-loss compensation benefits on the supplemental rolls until April 7, 2013, when she began receiving wage-loss compensation benefits on the periodic rolls.

On July 17, 2013 the employing establishment offered appellant a full-time, permanent position as a modified library technician GS-1411-06.⁴

By decision dated November 13, 2013, OWCP terminated appellant's entitlement to wage-loss compensation and schedule award benefits, effective November 17, 2013, as she refused to accept suitable employment. It found that the weight of the medical evidence rested with Dr. Stanley Askin, a Board-certified orthopedic surgeon and OWCP referral physician, who found that appellant was capable of performing the duties of the offered position.

On November 19, 2013 appellant requested an oral hearing before an OWCP hearing representative. By decision dated July 8, 2014, the hearing representative affirmed the November 13, 2013 decision.

Appellant appealed to the Board on August 26, 2014. On February 3, 2015 the Board affirmed OWCP's November 13, 2013 decision terminating compensation benefits, effective November 17, 2013, as appellant had refused an offer of suitable work.⁵ The Board found that the suitable work position was within the restrictions provided by Dr. Askin, and appellant's

³ Docket No. 14-1886 (issued February 3, 2015), Docket No. 16-0846 (issued August 18, 2016).

⁴ The duties of the position were modified so that appellant would: lift one book at a time and lift no more than 10 pounds at one time; use a telephone headset to answer telephone calls; limit repetitive wrist movements of typing and use of computer mouse to two hours per day; and stock a bookmobile cart with books one at a time, but no pushing/pulling of the cart.

⁵ Docket No. 14-1886 (issued February 3, 2015).

treating physicians had not explained why she could not perform the duties of the suitable work position.

Appellant, through counsel, subsequently requested reconsideration. Counsel submitted April 21 and May 13, 2015 medical reports from Dr. Scott M. Fried, an osteopathic physician, in support of appellant's claim.

By decision dated December 1, 2015, OWCP denied modification of its prior decision. Appellant appealed to the Board. By decision dated August 18, 2016, the Board affirmed OWCP's December 1, 2015 decision, finding that appellant had not established that her refusal of suitable work was justified, as of the date of the termination.⁶

On February 21, 2017, appellant, through counsel, requested reconsideration. Counsel submitted September 28, 2016 electromyography (EMG) testing and multiple medical reports from Dr. Fried in support of appellant's claim. He argued that a conflict in medical opinion evidence had been created between Dr. Askin and Dr. Fried relative to appellant's ability to return to work.

In a September 22, 2016 medical report, Dr. Fried reported that appellant's bilateral carpal tunnel symptoms continued to progressively worsen. He reported that she was unable to return to her regular work activities and recommended EMG and nerve conduction velocity (NCV) studies to evaluate continued and significant nerve symptoms.

EMG testing was conducted on September 28, 2016 with findings of bilateral median nerve impairments at the wrists, mild on the right and moderate on the left. Testing also revealed that both wrists were more compromised now than reported on appellant's prior February 27, 2013 study. The study also revealed moderate left posterior interosseous nerve impairment at the radial tunnel level, normal on the right.

In an October 25, 2016 report, Dr. Fried diagnosed sympathetically mediated pain syndrome of the left upper extremity with reactive depression, status post-surgery for right median nerve carpal tunnel decompression August 2008 with recurrence, status post surgery for left median nerve carpal tunnel decompression September 2012 with ongoing symptoms and recurrence, palmar cutaneous neuroma of the left wrist, and carpal tunnel median neuropathy (repetitive strain injury) of the bilateral upper extremities secondary to work activities. He reported that appellant remained severely symptomatic and disabled. Dr. Fried recommended education regarding activity modification, as well as functional capacity testing to outline her limits and restrictions. He concluded that appellant could not return to any regular work activities.

In another October 25, 2016 medical report, Dr. Fried reported that the findings of an October 25, 2016 ultrasound were consistent with appellant's ongoing injuries and complaints. He discussed various Phalen's and Tinel's testing with positive findings pertaining to the bilateral wrists and elbows. Dr. Fried reported that appellant had ongoing evidence of her work-related carpal tunnel problems and neuroma postoperatively with recurrence of the bilateral

⁶ Docket No. 16-0846 (issued August 18, 2016).

median nerve involvement. He reported that she required therapy and could not perform her previous activities. Dr. Fried further explained that appellant's EMG and ultrasound clearly corroborated her ongoing issues objectively consistent with the history and examination.

By decision dated May 22, 2017, OWCP denied modification of its prior decision.

LEGAL PRECEDENT

Once OWCP has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.⁷ It has authority under section 8106(c)(2) of FECA to terminate compensation for any partially disabled employee who refuses or neglects to work after suitable work is offered. To justify termination, OWCP must show that the work offered was suitable, that appellant was informed of the consequences of her refusal to accept such employment, and that she was allowed a reasonable period to accept or reject the position or submit evidence or provide reasons why the position is not suitable.⁸

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.⁹ 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, has the burden of showing that such refusal or failure to work was reasonable or justified.¹⁰ 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.¹¹

After termination or modification of benefits, clearly warranted on the basis of the evidence at the time of the decision, the burden for reinstating compensation benefits shifts to appellant.¹²

⁷ *Bernadine P. Taylor*, 54 ECAB 342 (2003).

⁸ See *Ronald M. Jones*, 52 ECAB 190, 191 (2000); see also *Maggie L. Moore*, 42 ECAB 484, 488 (1991), *reaff'd on recon.*, 43 ECAB 818, 824 (1992). See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4 (June 2013) (the claims examiner must make a finding of suitability, advise the claimant that the job is suitable, and that refusal of it may result in application of the penalty provision of 5 USC § 8106(c)(2), and allow the claimant 30 days to submit his or her reasons for abandoning the job. If the claimant submits evidence and/or reasons for abandoning the job, the claims examiner must carefully evaluate the claimant's response and determine whether the claimant's reasons for doing so are valid).

⁹ *Joan F. Burke*, 54 ECAB 406 (2003); see *Robert Dickerson*, 46 ECAB 1002 (1995).

¹⁰ 20 C.F.R. § 10.517(a); *Ronald M. Jones*, *supra* note 8.

¹¹ *Id.* at § 10.516.

¹² *Talmadge Miller*, 47 ECAB 673, 679 (1996); see also *George Servetas*, 43 ECAB 424 (1992).

ANALYSIS

OWCP accepted appellant's July 30, 2009 claim that she developed bilateral carpal tunnel as a result of her employment-related duties. It also accepted that appellant sustained a recurrence of disability on September 4, 2012 following her surgery. Effective November 13, 2013, OWCP terminated appellant's compensation benefits because she refused an offer of suitable work. It found that the weight of the medical evidence established that the modified library technician position was within the physical restrictions set forth by Dr. Askin, OWCP's referral physician and constituted suitable work.

On February 3, 2015 and August 18, 2016 the Board previously affirmed OWCP's decision to terminate appellant's entitlement to compensation benefits due to her refusal of suitable work. The Board's previous review of evidence regarding the suitable work termination is *res judicata*.¹³

The Board has explained that, if a claimant requests reconsideration of a suitable work termination, the issue remains whether appellant has established that she was unable to perform the duties of the offered position, as of the date of the termination.¹⁴

Following the Board's August 18, 2016 decision, appellant requested that OWCP reconsider the termination of her compensation benefits. She submitted a September 28, 2016 EMG study as well as Dr. Fried's October 25, 2016 medical reports. The Board finds that the additional medical evidence is insufficient to establish that the refusal to accept the suitable job offer was justified.¹⁵

Appellant submitted EMG testing dated September 28, 2016, which revealed that her bilateral median nerve impairments had worsened when compared to her prior February 27, 2013 study. In his October 25, 2016 report, Dr. Fried discussed the diagnostic testing and provided findings on physical examination. He diagnosed sympathetically mediated pain syndrome of the left upper extremity with reactive depression, status post surgery for right median nerve carpal tunnel decompression August 2008 with recurrence, status post surgery for left median nerve carpal tunnel decompression September 2012 with ongoing symptoms and recurrence, palmar cutaneous neuroma of the left wrist, and carpal tunnel median neuropathy (repetitive strain injury) of the bilateral upper extremities secondary to work activities.

The Board notes that the additional medical evidence submitted failed to cure all of the deficiencies noted in the prior Board decisions. Dr. Fried reported that appellant had ongoing evidence of her work-related carpal tunnel problems and neuroma postoperatively with recurrence of the bilateral median nerve involvement. While EMG and ultrasound testing corroborate her ongoing issues and examination, the new medical reports failed to provide a reasoned medical opinion regarding appellant's inability to perform the duties of the offered

¹³ See *G.S.*, Docket No. 14-0408 (issued June 10, 2014).

¹⁴ See *J.J.*, Docket No. 14-0951 (issued September 2, 2014).

¹⁵ *D.V.*, Docket No. 15-1845 (issued February 2, 2016).

position as of November 17, 2013, the date her compensation benefits were terminated for refusal of suitable work.¹⁶ As such, the additional evidence submitted is insufficient to establish that the refusal to accept the suitable job offer was justified.¹⁷

On appeal counsel argues that Dr. Askin's report could not carry the weight of the medical opinion due to deficiencies in his report. As previously noted, the findings of the February 3, 2015 Board decision are *res judicata* absent any further review by OWCP under section 8128 of FECA.¹⁸ It is currently appellant's burden of proof to establish that her refusal to accept the offered modified-duty position was justified.¹⁹

Counsel also argues that, at the very least, a conflict has been created between Dr. Askin, serving as the referral physician, and Dr. Fried. The Board notes that, while Dr. Fried's report and the submission of diagnostic testing indicate that appellant continues to experience residuals of her bilateral carpal tunnel injury, the medical evidence remains deficient with respect to the level of her disability and ability to perform the duties of a modified library technician, as of November 17, 2013.²⁰ For the reasons noted above, Dr. Fried's opinion was not fully rationalized to create a conflict in the case.

Accordingly, the Board finds that the evidence submitted is insufficient to establish that appellant's refusal to accept the suitable job offer was justified.²¹ Appellant has not met her burden of proof in this case.²²

Appellant may submit additional evidence, together with a written request for reconsideration, to OWCP within one year of the Board's merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not established that her refusal of suitable work was justified.

¹⁶ *Hazel N. Clark*, Docket No. 04-0905 (issued August 13, 2004).

¹⁷ *C.H.*, Docket No. 17-0938 (issued November 27, 2017).

¹⁸ See *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁹ *R.K.*, Docket No. 14-0476 (issued September 12, 2014).

²⁰ See generally *supra* note 16. See also *I.J.*, 59 ECAB 408, 414 (2008).

²¹ *D.V.*, Docket No. 15-1845 (issued February 2, 2016).

²² *Supra* note 17 (the Board had previously found the offered position to be suitable. Appellant requested reconsideration. The Board affirmed OWCP's finding that appellant did not meet her burden of proof to establish that her refusal to accept the suitable job offer was justified.

ORDER

IT IS HEREBY ORDERED THAT the May 22, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 5, 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