

ISSUE

The issue is whether OWCP properly terminated appellant's wage-loss compensation and entitlement to schedule award compensation, effective October 14, 2018, because she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On March 28, 2003 appellant, then a 56-year-old administrative assistant, filed an occupational disease claim (Form CA-2) alleging that she sustained injury to her arms and hands due to typing on a computer and handling files while in the performance of duty. She indicated that she first became aware of her claimed injury and realized its relation to factors of her federal employment on March 14, 2003.

OWCP accepted appellant's claim for bilateral carpal tunnel syndrome, villonodular synovitis of the forearms/wrists, bilateral tenosynovitis (de Quervain's), and abscesses of the tendon sheath of each hand. Appellant stopped work on September 9, 2003 and, on the same date, underwent OWCP-authorized right carpal tunnel syndrome surgery. OWCP paid her wage-loss compensation benefits on the daily rolls commencing September 9, 2003 and on the periodic rolls commencing March 20, 2005.³

Beginning in 2004, appellant participated in vocational rehabilitation efforts, but these efforts did not result in her returning to employment for an extended period.⁴ She retired from the employing establishment in 2008. By decision dated January 15, 2009, OWCP reduced appellant's wage-loss compensation effective January 18, 2009 based on her ability to earn wages in the constructed position of receptionist.

Appellant received treatment for her medical problems from several attending physicians, including Dr. Reza Ghorbani, a Board-certified anesthesiologist. In a January 26, 2017 report, Dr. Ghorbani diagnosed several conditions, including carpal tunnel syndrome, low back pain, radiculopathy (lumbar region) affecting the right leg, and intervertebral lumbar disc displacement.⁵

In February 2017, OWCP referred appellant to Dr. Donald B. Haskins, a Board-certified orthopedic surgeon, for a second opinion examination and opinion on her ability to work.

In a March 28, 2017 report, Dr. Haskins reported his physical examination findings and diagnosed bilateral carpal tunnel syndrome, degenerative joint disease of both hands, and bilateral tenosynovitis/de Quervain's syndrome. He opined that appellant could perform work requiring limited data entry on a full-time basis. In an attached March 30, 2017 work capacity evaluation (Form OWCP-5c), Dr. Haskins indicated that appellant could perform repetitive wrist motion for

³ By decision dated January 15, 2009, OWCP reduced appellant's wage-loss compensation effective January 18, 2009 based on her ability to earn wages in the constructed position of receptionist.

⁴ Appellant returned to part-time work for a brief period beginning in mid-2004, but she later stopped work.

⁵ In 2014 appellant underwent first carpometacarpal joint arthroplasty of the left hand and, in 2016, she underwent right thumb trigger release surgery.

up to one hour per day, repetitive elbow motion for up to one hour, and engage in pushing/pulling/lifting of up to five pounds (for up to two hours per day for each action). Appellant could not engage in climbing.

On May 5, 2017 the employing establishment offered appellant a job as a program assistant on a full-time basis. The position involved using a computer to enter information pertaining to agency case file records, retrieving and scanning records relating to the Freedom of Information Act and the Privacy Act, filing documents, and drafting documents on the computer. The position required up to one hour per day of repetitive wrist motion, up to one hour of repetitive elbow motion, and engaging in pushing/pulling/lifting of up to five pounds (for up to two hours per day for each action). The program assistant position did not require climbing.

Appellant refused the offered program assistant position and advised the employing establishment that she had no intention of returning to work.

Appellant submitted a June 23, 2017 report from Dr. Ricardo Pyfrom, a Board-certified orthopedic surgeon, who diagnosed left-sided lumbago with sciatica, trigger finger of the right ring finger, unilateral primary osteoarthritis of the first carpometacarpal joint of the right hand, and radial styloid tenosynovitis (de Quervain's). Dr. Pyfrom advised that she was not a candidate for return to work doing repetitive hand/wrist activities given the condition of her hands.

In an August 7, 2017 medical conflict statement, OWCP determined that there was a conflict in the medical opinion evidence between Dr. Haskins and Dr. Pyfrom regarding appellant's ability to work. On August 7, 2017 it referred appellant to Dr. Sankara Kothakota, a Board-certified orthopedic surgeon, for an impartial medical examination and his opinion on her ability to work.

In a September 12, 2017 report, Dr. Kothakota detailed appellant's factual and medical history and reported the findings of his physical examination. He noted that her grip strength was within normal limits bilaterally and that the Tinel's sign was negative bilaterally. Dr. Kothakota indicated that there was no significant loss of upper extremity sensation and that there was no significant atrophy. He noted that appellant had successful carpal tunnel surgery in 2003 and that her present bilateral carpal tunnel symptoms were minimal and he indicated that, based on this condition, she could perform the duties of the program assistant position offered by the employing establishment.

Appellant submitted a December 14, 2017 report from Dr. Pyfrom, who diagnosed left-sided lumbago with sciatica, bilateral carpal tunnel syndrome, trigger finger of the right ring finger, unilateral primary osteoarthritis of the first carpometacarpal joint of the right hand, and radial styloid tenosynovitis (de Quervain's). Dr. Pyfrom advised that she was not a candidate for return to work doing repetitive hand/wrist activities and that she was limited from pulling, carrying, and lifting more than five pounds with either hand.

In a February 1, 2018 letter, OWCP discussed the contents of Dr. Pyfrom's December 14, 2017 report and requested that Dr. Kothakota examine appellant again and provide a supplemental report regarding her ability to work which considered all her medical conditions.

In a June 4, 2018 supplemental report, Dr. Kothakota reported the findings of his reexamination of appellant on that date. He noted that she did not have any signs of bilateral de Quervain's syndrome upon examination. When appellant's attention was diverted, she did not have pain upon ulnar deviation over the thumbs and there was no evidence of any nodule over the first dorsal compartments. Dr. Kothakota indicated that she exhibited full flexion of the lumbar spine without weakness or loss of sensation. Appellant did not exhibit signs of triggering of the right thumb, the left index finger, or any other digit. Dr. Kothakota concluded that her medical conditions did not prevent her from working as a program assistant.

In a July 12, 2018 letter, OWCP advised appellant of its determination that the program assistant position offered by the employing establishment was suitable. It informed her that her compensation would be terminated if she did not accept the position or provide good cause for not doing so within 30 days of the date of the letter.⁶

Appellant asserted that she was unable to work and she submitted several reports from attending physicians detailing her treatment for various medical problems. In a June 28, 2018 report, Dr. Pyfrom indicated that her lumbar spine condition affected her ability to stand, sit, or walk for long periods. He noted that appellant's left leg had paresthesias and that "it is also one of the reasons [appellant] is unable to work."⁷

In an August 13, 2018 letter, OWCP advised appellant that her reasons for not accepting the program assistant position offered by the employing establishment were unjustified. It advised her that her compensation would be terminated if she did not accept the position within 15 days of the date of the letter.⁸

In an October 1, 2018 decision, OWCP terminated appellant's wage-loss compensation and entitlement to schedule award compensation, effective October 14, 2018, because she refused an offer of suitable work. It found that the special weight of the medical evidence with respect to her ability to work rested with the well-rationalized opinion of Dr. Kothakota, the impartial medical specialist.

On November 5, 2018 appellant requested reconsideration of the October 1, 2018 decision. She subsequently submitted additional medical reports, including October 4, November 1, and December 27, 2018 reports from Dr. Ghorbani. In these reports, Dr. Ghorbani discussed appellant's medical problems. In an October 18, 2018 report, Dr. Pyfrom indicated that he advised her to consider applying for disability retirement.

⁶ In late-2017, OWCP confirmed with the employing establishment that the program assistant position was still available.

⁷ Dr. Pyfrom also indicated that appellant was not a candidate for return to work doing repetitive hand/wrist activities and that she was limited from pulling, carrying, and lifting more than five pounds with either hand.

⁸ After receiving the August 13, 2018 letter, appellant submitted an August 9, 2018 report from Dr. Ghorbani who discussed her various upper extremity and back complaints. She also submitted an August 16, 2018 report in which Dr. Pyfrom provided an opinion on her ability to work which was similar to that provided in his June 28, 2018 report.

By decision dated January 31, 2019, OWCP denied modification of the October 1, 2018 decision, finding that appellant had not submitted probative medical evidence justifying her refusal of suitable work.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying termination or modification of an employee's compensation benefits.⁹ Section 8106(c)(2) of FECA 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.¹⁰ To justify termination of compensation, OWCP must show that the work offered was suitable, that the employee was informed of the consequences of refusal to accept such employment, and that he or she was allowed a reasonable period to accept or reject the position or submit evidence to provide reasons why the position is not suitable.¹¹ 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.¹²

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.¹³ 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.¹⁴

The determination of whether an employee is physically capable of performing a modified assignment is a medical question that must be resolved by medical evidence.¹⁵ OWCP procedures provide that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.¹⁶ In a suitable work determination, OWCP must consider preexisting and subsequently-acquired medical conditions in evaluating an employee's work capacity.¹⁷

⁹ See *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

¹⁰ 5 U.S.C. § 8106(c)(2); see also *Geraldine Foster*, 54 ECAB 435 (2003).

¹¹ See *R.A.*, Docket No. 19-0065 (issued May 14, 2019); *Ronald M. Jones*, 52 ECAB 190 (2000).

¹² *S.D.*, Docket No. 18-1641 (issued April 12, 2019); *Joan F. Burke*, 54 ECAB 406 (2003).

¹³ 20 C.F.R. § 10.517(a).

¹⁴ *Id.* at § 10.516.

¹⁵ *M.A.*, Docket No. 18-1671 (issued June 13, 2019); *Gayle Harris*, 52 ECAB 319 (2001).

¹⁶ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.5a (June 2013); see *E.B.*, Docket No. 13-0319 (issued May 14, 2013).

¹⁷ See *G.R.*, Docket No. 16-0455 (issued December 13, 2016); *Richard P. Cortes*, 56 ECAB 200 (2004).

Section 8123(a) of FECA 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.”¹⁸ 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.¹⁹

ANALYSIS

The Board finds that OWCP properly terminated appellant’s wage-loss compensation and entitlement to schedule award compensation, effective October 14, 2018, because she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

The evidence of record shows that appellant is capable of performing the program assistant position offered by the employing establishment in May 2017 and determined to be suitable by OWCP in July 2018. The position involved using a computer to enter information pertaining to agency case file records, retrieving and scanning records, filing documents, and drafting documents on the computer. The position required up to one hour per day of repetitive wrist motion, up to one hour of repetitive elbow motion, and engaging in pushing/pulling/lifting of up to five pounds (for up to two hours per day for each action). The record does not reveal that the program assistant position was temporary in nature.²⁰

The Board finds that case record reflects that appellant was vocationally and educationally capable of performing the program assistant position as she formerly worked in similar position as an administrative assistant.

In determining that appellant was physically capable of performing the program assistant position, OWCP properly relied on the opinion of Dr. Kothakota, the impartial medical specialist. It properly determined that there was a conflict in the medical opinion evidence regarding her ability to work between Dr. Pyfrom, an attending physician, and Dr. Haskins, an OWCP referral physician and referred appellant to Dr. Kothakota in order to resolve this conflict, pursuant to section 8123(a) of FECA.²¹ In September 12, 2017 and June 4, 2018 reports, Dr. Kothakota noted that he had reviewed the description of the program assistant position offered by the employing establishment and determined that appellant was able to perform the position. In these reports, he collectively considered her various medical conditions and their effect on her ability to work. Dr. Kothakota noted that appellant had no significant back condition and had limited or no signs

¹⁸ 5 U.S.C. § 8123(a).

¹⁹ *D.M.*, Docket No. 18-0746 (issued November 26, 2018); *R.H.*, 59 ECAB 382 (2008); *James P. Roberts*, 31 ECAB 1010 (1980).

²⁰ If the employing establishment offers a claimant a temporary light-duty assignment, and the claimant held a permanent job at the time of injury, the penalty language of section 8106(c) cannot be applied. *See supra* note 16 at Chapter 2.814.4c(5), 9 (June 2013).

²¹ *See supra* note 18.

of such conditions as bilateral carpal tunnel syndrome, bilateral de Quervain's syndrome, and trigger finger.

The Board finds that OWCP properly accorded the special weight of the medical evidence opinion to Dr. Kothakota, who reported that appellant was capable of working as a program assistant.²² Dr. Kothakota based his opinion on a proper factual and medical history and physical examination findings, and he provided medical rationale for his opinion. The Board finds that he provided a well-rationalized opinion regarding appellant's ability to work. Accordingly, OWCP properly relied on Dr. Kothakota's September 12, 2017 and June 4, 2018 reports relative to work tolerances and limitations in terminating her wage-loss compensation and entitlement to schedule award compensation, effective October 14, 2018, due to her refusal of an offer of suitable work.²³

Appellant submitted reports from attending physicians regarding her ability to work which were contemporaneous with Dr. Kothakota's reports. For example, she submitted December 14, 2017, June 28, and August 16, 2018 reports in which Dr. Pyfrom opined that she had hand, wrist, and back conditions which limited her ability to work. The Board has reviewed these reports and finds that they are insufficient to outweigh the well-rationalized opinion of Dr. Kothakota who addressed both the accepted and concurrent conditions.

The Board finds that, therefore, OWCP has established that the program assistant position offered by the employing establishment is suitable. As noted above, once OWCP has established that a particular position is suitable, 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. The Board has reviewed the evidence and argument submitted by appellant in support of her refusal of the program assistant position and notes that they are insufficient to justify her refusal of the position. The Board finds that OWCP complied with its procedural requirements prior to terminating her compensation, including providing her with an opportunity to accept the position offered by the employing establishment after informing her that her reasons for initially refusing the position were not valid.²⁴

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this 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 OWCP properly terminated appellant's wage-loss compensation and entitlement to schedule award compensation, effective October 14, 2018, because she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

²² See *supra* note 19.

²³ See *A.F.*, Docket No. 16-0393 (issued June 24, 2016).

²⁴ See generally *D.M.*, Docket No. 19-0686 (issued November 13, 2019); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

ORDER

IT IS HEREBY ORDERED THAT the January 31, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 14, 2020
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board