

**United States Department of Labor  
Employees' Compensation Appeals Board**

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<b>J.N., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 24-0136</b>
	)	<b>Issued: April 23, 2024</b>
<b>U.S. POSTAL SERVICE, FORT WORTH POST</b>	)	
<b>OFFICE, Fort Worth, TX, Employer</b>	)	
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*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On November 29, 2023 appellant filed a timely appeal from September 5 and November 14, 2023 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that, following the issuance of the November 14, 2023 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## ISSUE

The issue is whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award compensation, effective September 5, 2023, because she refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

## FACTUAL HISTORY

On March 15, 2021 appellant, then a 58-year-old occupational health nurse, filed an occupational disease claim (Form CA-2) alleging that she developed pain in her neck and her hands, fingers, wrists, and forearms due to factors of her federal employment. She noted that she first became aware of her condition and realized its relationship to her federal employment on March 15, 2021. Appellant stopped work on May 3, 2021. OWCP accepted her claim for bilateral carpal tunnel syndrome, bilateral shoulder impingement syndrome, bilateral shoulder rotator cuff tears, bilateral hand strains, and bilateral wrist tenosynovitis. It paid appellant on the supplemental rolls, effective May 3, 2021, and on the periodic rolls, effective May 22, 2022.

Appellant continued to receive medical treatment. In a report dated June 10, 2022, Dr. Dina Rahhal, a Board-certified hand surgeon, noted appellant's complaints of right wrist problems. She reported that recent diagnostic testing showed bilateral moderate carpal tunnel syndrome, worse on the right side. Dr. Rahhal diagnosed bilateral carpal tunnel syndrome and recommended that appellant proceed with surgical release of the right carpal tunnel.

OWCP referred appellant, the medical record, a statement of accepted facts, and a series of questions, to Dr. George M. Cole, an osteopath Board-certified in orthopedic surgery, for a second opinion evaluation to determine the status of her accepted conditions and work capacity. In a report dated July 6, 2022, Dr. Cole, reviewed her history of injury and noted her accepted conditions. On physical examination of the shoulders, he observed reduced range of motion of the shoulders, wrists, and fingers. Dr. Cole reported that appellant's Phalen's test on the left was negative for any median neuropathy and that she had paresthesia on the right into the small finger with no tingling or numbness in the median distribution. He diagnosed chronic degenerative changes in the shoulders and the wrists and hands. In response to OWCP's questions, Dr. Cole indicated that appellant's accepted conditions had resolved and that her current symptoms were related to degenerative changes. He reported that she could return to her date-of-injury job with mild restrictions on working overhead.

On August 16, 2022 appellant underwent OWCP-authorized right carpal tunnel release surgery.

OWCP determined that a conflict in medical opinion existed between Dr. Rahhal, appellant's treating physician, and Dr. Cole, the second-opinion examiner, regarding the recommended right hand carpal tunnel surgery and aquatic therapy. It referred appellant along with SOAF, and a series of questions to Dr. Terry J. Beal, a Board-certified orthopedic surgeon, for an impartial medical examination in order to resolve the conflict of medical opinion. In a report dated March 1, 2023, Dr. Beal noted appellant's accepted conditions and indicated that she had worked for many years as an occupational health nurse and administrative assistant for the employing establishment. On physical examination of the shoulders, he observed intact rotator

cuff and no crepitation of the glenohumeral joints. Sensory examination revealed decreased sensation in the left-hand medial nerve distribution and intact sensation in the right median nerve.

In response to OWCP's questions, Dr. Beal indicated that appellant had reached maximum medical improvement (MMI) on February 28, 2023. He reported that there was no documentation that further right shoulder intra-articular injections were going to be performed or that there would be further treatment for the left shoulder. Dr. Beal also indicated that there was no documentation for recommended procedures for the wrists or left carpal tunnel syndrome. He explained that appellant could resume some clerical work, with restrictions. Dr. Beal further indicated that, guidelines categorized occupational nurse practitioner work as light work and, accordingly, this would be another option for appellant to return to work. In an attached work capacity evaluation form (Form OWCP-5c), he provided work restrictions for a part-time sedentary position, for four to five hours per day, with restrictions of reaching above the shoulder up to one hour, typing up to 30 minutes an hour, and alternating typing and non-typing activities. Dr. Beal also noted that appellant should be allowed to use wrist splints at work as needed.

In a duty status report (Form CA-17) and attending physician's report (Form CA-20), both dated April 18, 2023, Dr. Lashondria Simpson-Camp, a general surgeon, described a history of injury that appellant complained of worsening pain and symptoms with each keystroke and/or movement. She provided diagnosis codes for several conditions and recommended physical therapy and pain medication. Dr. Simpson-Camp indicated that appellant was scheduled for right carpal tunnel release surgery on August 16, 2022 and would be off work for postoperative recovery and physical rehabilitation. She noted that appellant was totally disabled from work from April 18 through May 15, 2023.

In a progress report, Form CA-20 and Form CA-17, all dated May 15, 2023, Dr. Simpson-Camp discussed appellant's duties as an occupational health nurse and clerk. She noted appellant's accepted conditions and reviewed the medical treatment that appellant had received. Dr. Simpson-Camp reported that appellant currently complained of bilateral shoulder pain. On physical examination, she observed mild tenderness to palpation of the trapezius. Examination of appellant's wrists demonstrated tenderness to palpation at the right anterior and left lateral and medial wrists. Phalen's test was positive on the left. Dr. Simpson-Camp assessed bilateral carpal tunnel syndrome, bilateral hand strains, tears of the bilateral shoulder rotator cuffs, bilateral shoulder impingement syndrome, other synovitis and tenosynovitis, cervical radiculopathy, displacement of intervertebral disc of cervical region, wrists chondromalacia, spondylosis of the cervical spine, and tear of the triangular fibrocartilage complex (TFCC) of the wrists. She indicated that appellant was totally disabled from work from May 15 through June 13, 2023.

In a letter dated May 25, 2023, the employing establishment offered appellant a part-time, limited-duty assignment as a modified occupational health nurse. The work hours were Monday to Friday, from 12:00 p.m. to 5:00 p.m. The duties of the job required assisting in the development and implementation of health promotion programs, serving as a resource and answering questions from the field concerning, but not limited to the following programs: fitness-for-duty examinations, return to work, reasonable accommodation, and serious accident reviews, supporting activities related to the preemployment medical assessment process, assisting in scheduling required medical examinations, preparing and maintaining confidential employee health folders, providing guidance and medical assistance related to the injury compensation

process, serving as a resource for various safety programs as they relate to occupational health services, and providing emergency medical care as needed. The physical requirements of the job involved lifting up to five pounds, reaching above the shoulder to retrieve documents, standing and walking to retrieve files as needed for 0 to 1 hour intermittently, sitting to perform health nurse duties, simple grasping to perform duties, and repetitive wrist movements for typing 30 minutes an hour for 0 to 5 hours intermittently. It noted that the job was available effective June 1, 2023.

On June 1, 2023 appellant rejected the job offer. In an attached statement, she explained that her primary reason for refusal of the modified job offer was due to a hostile work environment and deprivation of her rights as an employee to be fairly treated by her manager. Appellant also indicated that, since Dr. Beal recommended that she return to work as an occupational health nurse practitioner, she requested to return to work as a nurse practitioner with a minimum grade level of GS-11.

On June 12, 2023 the employing establishment confirmed that the May 25, 2023 job offer remained available to appellant.

By letter dated June 12, 2023, OWCP advised appellant of its determination that the modified occupational health nurse position offered by the employing establishment was suitable in accordance with the medical limitations provided by Dr. Beal in his March 1, 2023 report. It informed her that her compensation would be terminated, pursuant to 5 U.S.C. § 8106(c)(2), if she did not accept the position or provide good cause for not doing so within 30 days of the date of the letter.

In a report and Form CA-17 dated June 13, 2023, Dr. Simpson-Camp noted appellant's accepted conditions and discussed her recent medical treatment. She indicated that appellant could return to part-time work for three hours per day with restrictions of typing up to 15 minutes per hour, lifting and pulling/pushing up to five pounds, standing, walking, and fine manipulation for 0 to 1 hour, sitting and simple grasping for 0 to 3 hours, and no reaching above the shoulder.

A left shoulder magnetic resonance imaging scan revealed undersurface partial tearing of the supraspinatus tendon and the anterior half of the infraspinatus tendon, stable intra-articular long head biceps tendinopathy and tenosynovitis, mild glenohumeral osteoarthritis, and glenohumeral joint effusion and subacromial-subdeltoid bursitis.

On July 20, 2023 the employing establishment confirmed that the May 25, 2023 job offer was still available.

By letter dated July 20, 2023, OWCP notified appellant that her reasons for refusing the position offered by the employing establishment were unjustified. It provided her 15 days to accept the position or have her entitlement to wage-loss compensation and schedule award compensation, pursuant to 5 U.S.C. § 8106(c)(2).

In a report and Form CA-17 dated July 25, 2023, Dr. Simpson-Camp discussed appellant's history of injury and noted her accepted conditions. She reported that appellant complained of pain in the bilateral shoulders. Dr. Simpson-Camp indicated that appellant could return to part-time work for three hours per day with restrictions. She also noted that appellant may wear wrist splints at work as needed.

In a report dated August 1, 2023, Dr. Richard Levy, a Board-certified orthopedic surgeon, indicated that appellant was evaluated for follow up of left shoulder rotator cuff tear. On examination of the left upper extremity, he observed no swelling or bruising. Dr. Levy diagnosed incomplete rotator cuff tear or rupture of the left shoulder.

In a Form CA-17 dated August 31, 2023, Dr. Simpson-Camp indicated that appellant could work part time, modified duty for three hours per day.

By decision dated September 5, 2023, OWCP terminated appellant's wage-loss compensation and entitlement to schedule award benefits, effective that date, pursuant to 5 U.S.C. § 8106(c)(2), as she refused an offer of suitable work. It found that the job offer was suitable based upon her current work restrictions as provided by Dr. Beal in his March 1, 2023 report. OWCP also found that appellant's reasons for job refusal were not justified.

On October 26, 2023 appellant requested reconsideration. She noted that the job offer was based on Dr. Beal's March 1, 2023 report and not based on the reports of her treating physician. Appellant alleged that OWCP disregarded the opinion of Dr. Simpson-Camp, her treating physician.

Appellant submitted reports and CA-17 forms dated July 26 through November 6, 2023 by Dr. Simpson-Camp who reviewed appellant's history of injury and noted her accepted conditions. Dr. Simpson-Camp indicated that appellant worked as an occupational health nurse since April 27, 2019, and reviewed the medical treatment that she received. She recounted appellant's complaints of bilateral shoulder pain. Dr. Simpson-Camp reported that appellant could return to part-time and modified-duty work for three hours per day.

By decision dated November 14, 2023, OWCP denied modification of the September 5, 2023 decision.

### **LEGAL PRECEDENT**

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of an employee's compensation benefits.<sup>3</sup> 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.<sup>4</sup> To justify termination of compensation, OWCP must show that the work offered was suitable, that the employee was informed of the consequences 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.<sup>5</sup> Section 8106(c)(2) will be narrowly construed as it

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<sup>3</sup> See *S.W.*, Docket No. 20-0240 (issued January 26, 2021); *A.D.*, Docket No. 18-0497 (issued July 25, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

<sup>4</sup> 5 U.S.C. § 8106(c)(2); see also *B.H.*, Docket No. 21-0366 (issued October 26, 2021); *Geraldine Foster*, 54 ECAB 435 (2003).

<sup>5</sup> See *R.A.*, Docket No. 19-0065 (issued May 14, 2019); *Ronald M. Jones*, 52 ECAB 190 (2000).

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.<sup>6</sup>

Section 10.517(a) of FECA's implementing regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured by the employee, has the burden of proof to show 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>

The determination of whether an employee is physically capable of performing a modified assignment is medical question that must be resolved by medical evidence.<sup>9</sup> 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.<sup>10</sup> In a suitable work determination, OWCP must consider preexisting and subsequently acquired medical conditions in evaluating an employee's work capacity.<sup>11</sup>

Section 8123(a) of FECA provides that, if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical examiner (IME)) who shall make an examination.<sup>12</sup> This is called an impartial medical examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.<sup>13</sup> When a case is referred to an IME 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>14</sup>

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<sup>6</sup> *S.D.*, Docket No. 18-1641 (issued April 12, 2019); *Joan F. Burke*, 54 ECAB 406 (2003).

<sup>7</sup> 20 C.F.R. § 10.517(a).

<sup>8</sup> *Id.* at § 10.516; see *Ronald M. Jones*, 52 ECAB 406 (2003).

<sup>9</sup> *M.A.*, Docket No. 18-1671 (issued June 13, 2019); *Gayle Harris*, 52 ECAB 319 (2001).

<sup>10</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.5a (June 2013); *E.B.*, Docket No. 13-0319 (issued May 14, 2013).

<sup>11</sup> See *G.R.*, Docket No. 16-0455 (issued December 13, 2016); *Richard P. Cortes*, 56 ECAB 200 (2004).

<sup>12</sup> 5 U.S.C. § 8123(a); see *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

<sup>13</sup> 20 C.F.R. § 10.321.

<sup>14</sup> *K.D.*, Docket No. 19-0281 (issued June 30, 2020); *J.W.*, Docket No. 19-1271 (issued February 14, 2020); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001); *James P. Roberts*, 31 ECAB 1010 (1980).

## ANALYSIS

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award compensation, effective September 5, 2023.

In a March 1, 2023 report, Dr. Beal, OWCP's referral physician, noted appellant's accepted conditions and her employment as an occupational health nurse and administrative assistant for the employing establishment. He reported examination findings of intact rotator cuff and no crepitation of the glenohumeral joints. Sensory examination revealed decreased sensation in the left-hand medial nerve distribution and intact sensation in the right median nerve. Dr. Beal indicated that appellant had reached MMI on February 28, 2023. He reported that she could resume light work with restrictions. Dr. Beal completed a Form OWCP-5c, which indicated that appellant could perform part-time sedentary work, for four to five hours per day, with restrictions of reaching above the shoulder up to one hour, typing up to 30 minutes an hour, and alternating typing and non-typing activities. He also noted that she should be allowed to use wrist splints at work as needed.

In contrast, Dr. Simpson-Camp, appellant's treating physician, indicated in a May 15, 2023 report that appellant currently complained of bilateral shoulder pain. She reported physical examination findings of mild tenderness to palpation of the trapezius. Examination of appellant's bilateral wrists demonstrated tenderness to palpation at the right anterior and left lateral and medial wrists. Phalen's test was positive on the left. Dr. Simpson-Camp assessed bilateral carpal tunnel syndrome, bilateral hand strains, rotator cuff tears, bilateral shoulder impingement syndrome, other synovitis and tenosynovitis, cervical radiculopathy, displacement of intervertebral disc of cervical region, wrists chondromalacia, spondylosis of the cervical spine, and tear of the TFCC of the wrists. She indicated that appellant was totally disabled from May 15 to June 13, 2023. In addition, beginning in a report dated June 13, 2023, Dr. Simpson-Camp indicated that appellant could return to part-time work for three hours per day with restrictions of typing up to 15 minutes per hour, lifting and pulling/pushing up to five pounds, standing, walking, and fine manipulation for 0 to 1 hour, sitting and simple grasping for 0 to 3 hours, and no reaching above the shoulder.

Due to this unresolved conflict in the medical opinion evidence with regard to appellant's work capacity, the Board finds that OWCP failed to meet its burden of proof.<sup>15</sup>

## CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award compensation, effective September 5, 2023, because she refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

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<sup>15</sup> See *supra* notes 4 through 6.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 14, 2023 decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 23, 2024  
Washington, DC

Alec J. Koromilas, 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