



## **FACTUAL HISTORY**

On October 9, 2009 appellant, then a 55-year-old mail handler, filed a traumatic injury claim alleging that on October 5, 2009 he strained his low back and right shoulder in the performance of duty. He stopped work on October 5, 2009. OWCP accepted the claim for lumbar sprain, right shoulder sprain, lumbosacral spondylosis without myelopathy and lumbar stenosis. It paid appellant compensation for total disability beginning February 3, 2010. On November 9, 2010 he underwent a right distal clavicle resection and subacromial decompression.

On October 19, 2011 OWCP referred appellant to Dr. Glenn L. Scott, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated November 2, 2011, Dr. Scott determined that he was unable to perform his usual employment due to residuals of his work injury but could perform part-time sedentary employment.

In a report dated January 3, 2012, Dr. Leon E. Hunt, a Board-certified orthopedic surgeon, opined that appellant had to use “numerous mobility devices” and be cautious in performing movement.

OWCP determined that a conflict existed between Dr. Hunt and Dr. Scott regarding the extent of appellant’s disability from employment. It referred him to Dr. Alfred Dawson, a Board-certified orthopedic surgeon, for an impartial medical examination. On May 9, 2012 Dr. Dawson discussed appellant’s work history and provided findings on examination. He diagnosed hallux rigidus of the left foot, spinal stenosis, lumbar spondylolysis without myelopathy and a history of right shoulder surgery and Morton neuroma surgery. Dr. Dawson found that appellant was disabled from his regular employment but could perform “sedentary or light-duty work for up to eight hours a day.”

In a May 17, 2012 work restriction evaluation, Dr. Dawson determined that appellant could work full time sitting for four hours per day, walking for three hours per day, standing for two hours per day, reaching above his shoulder for two hours per day, lifting up to 6 pounds and pushing and pulling up to 10 pounds. He further advised that he could bend, stoop, and twist for a half hour per day, rarely kneel and could not squat or operate a motor vehicle at work.

In a June 6, 2012 work restriction evaluation, Dr. Dawson found that appellant could sit and stand for six hours per day, walk and reach for four hours per day, reach above the shoulder for two hours per day, push and pull up to 40 pounds for four hours per day and lift up to 15 pounds for two hours per day. He further opined that appellant could not bend, stoop, kneel, squat or climb or operate a motor vehicle at work.

On June 19, 2012 the employing establishment offered appellant a position as a modified mail handler. The physical requirements of the position consisted of sitting four hours per day, walking three hours per day, standing two hours per day, twisting, bending and stooping for a half hour per day, pushing and pulling 10 pounds, lifting 6 pounds, reaching above the shoulder two hours per day lifting 5 pounds. The position did not require operating a motor vehicle at

work, squatting, kneeling or climbing.<sup>2</sup> In an accompanying rehabilitation position description, the duties required lifting up to 10 pounds per day for one to eight hours.

On June 22, 2012 appellant refused the offered position. He indicated that he was receiving medical treatment for continued disability.

By letter dated July 11, 2012, OWCP advised appellant that the offered position was suitable and that he had 30 days to either accept the position or provide an explanation for his refusal. It notified him that he would be paid for any difference in salary between the offered position and his date-of-injury position. OWCP informed appellant that, if he refused suitable work without justification, it would terminate his compensation under section 8106(c)(2).

In a July 24, 2012 notification of personnel action, the employing establishment indicated that the Office of Personnel Management (OPM) had approved appellant's application for disability retirement as he was "totally disabled for useful and efficient service in [his] position."

On August 9, 2012 appellant again refused the offered position. He noted that he was receiving treatment for his right rotator cuff and lumbar spine and was unable to perform the requirements of the position. Appellant submitted medical evidence regarding his July 25, 2012 L4 nerve root injection.

By letter dated August 27, 2012, OWCP advised appellant that his reasons for refusing the offered position were not valid. It notified him that he had 15 days to accept the position or have his compensation benefits and entitlement to a schedule award terminated.

On September 17, 2012 the employing establishment informed OWCP that appellant had not returned to work and that the position remained available. By decision dated September 17, 2012, OWCP terminated his compensation effective September 22, 2012 on the grounds that he refused an offer of suitable work under section 8106(c).

On September 25, 2012 appellant, through his attorney, requested a telephone hearing before an OWCP hearing representative.<sup>3</sup> At the telephone hearing, held on January 10, 2013, his attorney argued that the employing establishment had to state that there was no work available in order for him to obtain disability retirement from OPM. Counsel thus contended that the employing establishment did not make a good faith job offer. Appellant related that he watched a supervisor performing his modified job duties and asserted that the duties were not within his restrictions. He maintained that the impartial medical examiner told him that he should not work.

By letter dated February 1, 2013, the employing establishment related that the job offer was valid. It advised that an employee had to show only that he could not perform his usual duties to obtain disability retirement. In a February 14, 2013 response, appellant alleged that he was harassed into filing for disability retirement by federal inspectors and accused of making

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<sup>2</sup> The record also contains a job offer dated June 12, 2012 containing a lifting requirement of 10 pounds.

<sup>3</sup> Appellant submitted medical reports dated June 10 and September 23, 2011.

false statements. He experienced depression due to the unfair treatment. Appellant submitted progress notes regarding his treatment in February 2012 for depression and post-traumatic stress disorder.

By decision dated March 29, 2013, OWCP's hearing representative affirmed the September 17, 2012 decision.

### **LEGAL PRECEDENT**

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>4</sup> It terminated appellant's compensation under section 8106(c)(2) of FECA,<sup>5</sup> which 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>6</sup> 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.<sup>7</sup> 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.<sup>8</sup>

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.<sup>9</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>10</sup>

Before compensation can be terminated, however, OWCP has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work, establishing that a position has been offered within the employee's work restrictions and setting for the specific job requirements of the position.<sup>11</sup> In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, OWCP has the burden of showing that the work offered to and refused by appellant was suitable.<sup>12</sup>

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<sup>4</sup> *Linda D. Guerrero*, 54 ECAB 556 (2003).

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

<sup>6</sup> 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

<sup>7</sup> *Ronald M. Jones*, 52 ECAB 190 (2000).

<sup>8</sup> *Joan F. Burke*, 54 ECAB 406 (2003).

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

<sup>10</sup> 20 C.F.R. § 10.516.

<sup>11</sup> *See Linda Hilton*, 52 ECAB 476 (2001).

<sup>12</sup> *Id.*

When 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.<sup>13</sup>

### ANALYSIS

OWCP accepted that on October 5, 2009 appellant sustained lumbar sprain, right shoulder sprain, lumbosacral spondylosis without myelopathy and lumbar stenosis. It determined that a conflict arose between Dr. Scott, an OWCP referral physician, and Dr. Hunt, an attending physician, regarding the extent of his physical limitations. OWCP referred appellant to Dr. Dawson, for an impartial medical examination.

When 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.<sup>14</sup> In a report dated May 9, 2012, Dr. Dawson provided detailed findings on examination and reviewed the history of injury. He diagnosed hallux rigidus of the left foot, spinal stenosis, lumbar spondylolysis without myelopathy and a history of right shoulder surgery and Morton neuroma surgery. Dr. Dawson determined that appellant could work full time in a sedentary or light capacity. In a May 17, 2012 work restriction evaluation, he advised that he could sit for four hours per day, walk for three hours per day, stand and reach above his shoulders for two hours per day, lift up to 6 pounds and push and pull up to 10 pounds. Dr. Dawson determined that appellant could also bend, stoop, and twist for a half hour per day but could not squat or operate a motor vehicle at work. In another work restriction evaluation dated June 6, 2012, he found that appellant could sit and stand for six hours per day, walk and reach for four hours per day, reach above the shoulder and lift up to 15 pounds for two hours per day, push and pull up to 40 pounds for four hours per day, and could not bend, stoop, kneel, squat or climb or operate a motor vehicle at work. The Board finds that Dr. Dawson provided a reasoned opinion based on an accurate background, and thus his opinion is entitled to special weight due to his status as impartial medical examiner.<sup>15</sup>

The Board finds, however, that OWCP improperly terminated appellant's compensation as the medical evidence failed to establish that he was capable of performing the position offered by the employing establishment. On June 19, 2012 the employing establishment offered appellant the position of modified mail handler. The position required twisting, bending and stooping for a half an hour per day. In the work restriction evaluation of June 6, 2012, however, Dr. Dawson advised that appellant could not bend or stoop. Consequently, the evidence does not establish that the offered position was consistent with the work restrictions set forth by Dr. Dawson.<sup>16</sup>

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<sup>13</sup> *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

<sup>14</sup> *Id.*

<sup>15</sup> *See U.A.*, 59 ECAB 701 (2008); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

<sup>16</sup> *See D.G.*, Docket No. 11-617 (issued January 17, 2012).

As a penalty provision, section 8106(c)(2) must be narrowly construed.<sup>17</sup> The medical evidence does not clearly establish that the offered position was within appellant's capabilities. Consequently, OWCP did not discharge its burden of proof to support the termination of his monetary compensation pursuant to section 8106(c)(2).

**CONCLUSION**

The Board finds that OWCP improperly terminated appellant's entitlement to compensation effective September 22, 2012 on the grounds that he refused an offer of suitable work under section 8106(c).

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 29, 2013 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 12, 2013  
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

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<sup>17</sup> See *Karen M. Nolan*, 57 ECAB 589 (2006); *Stephen A. Pasquale*, 57 ECAB 396 (2006).