



lumbosacral strain and herniated L5-S1 disc with radiculopathy. It also accepted that he sustained a sacroiliac strain due to a lifting incident on June 9, 1981. Appellant received disability compensation on the periodic rolls. He stopped work for the employing establishment in 1996 but continued to receive disability compensation.

In a September 20, 2010 report, Dr. Kenneth H. Yuska, a Board-certified orthopedic surgeon serving as an OWCP referral physician, determined that appellant could work on a full-time basis with restrictions. He listed occasionally lifting up to 30 pounds, frequently lifting up to 15 pounds and avoiding repetitive spine flexion, squatting and kneeling.

On October 21, 2011 Dr. Daniel E. Sajdak, an attending osteopath and Board-certified family practitioner, provided an opinion that appellant's work-related back injury disabled him from all work.

OWCP determined that there was a conflict in the medical opinion regarding appellant's ability to work. It referred appellant to Dr. Peter A. Cederberg, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on this matter. In an April 6, 2012 report, Dr. Cederberg found that appellant could return to sedentary work on a full-time basis with restrictions of no lifting more than 20 pounds.

On December 4, 2012 the employing establishment offered appellant a full-time job as a military pay technician in Fort McCoy, WI. The position involved reviewing military pay account transactions for reservists and required some physical effort, including standing, walking, sitting and bending.<sup>2</sup>

In letters dated December 11 and 15, 2012, appellant asserted that he was unable to work due to debilitating back pain. He argued that it was improper for the employing establishment to offer him a job outside of his commuting area. On December 15, 2012 appellant checked a box on a form declining the military pay technician job. He added a notation, "I am not declining the job but I have to decline relocating."

In a December 21, 2012 letter, OWCP advised appellant of its preliminary determination that the military pay technician position offered by the employing establishment on December 4, 2012 was suitable. It asserted that the duties of the position were in accordance with the work restrictions provided on April 6, 2012 by Dr. Cederberg and that the weight of the medical evidence regarding his ability to work rested with the medical referee's opinion. OWCP stated:

"Upon acceptance of this position, you will be paid compensation based on the difference (if any) between the pay of the offered position and the current pay of your position on the date of injury. You are expected to accept the position and report to duty, or arrange for a report date, within 30 days of the date of this letter. If you fail to accept this position, you must provide a written explanation of your reasons within 30 days.

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<sup>2</sup> At the time, appellant's residence was in Campbellsport, WI, about 150 miles from Fort McCoy.

“5 U.S.C. § 8106(c)(2) states that ‘A partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for him is not entitled to compensation.’ Therefore, any claimant who refuses an offer of suitable employment (or fails to report for work when scheduled) is not entitled to any further compensation for wage loss or schedule award.

“If you fail to report to the offered position, and fail to demonstrate that the failure is justified, your right to compensation and schedule award will be terminated.”

In a January 7, 2013 letter, appellant stated that he was attaching a letter from Dr. Sajdak who requested that he undergo an evaluation of his current lower back condition before he returned to any employment, rather than relying on the evaluation obtained some 27 months prior by Dr. Yuska. He asserted that there should also be a follow-up examination by another attending physician before he returned to work. Appellant contended that his condition had significantly worsened in the cold winter months and that he had been immobile or in serious pain for several days in the last couple weeks.

In the attached January 7, 2003 letter, Dr. Sajdak stated that he was currently providing medical care. He advised that appellant had recently experienced increased sciatic pain in his lower back which caused mobility issues and noted, “Due to his current condition, I am recommending he complete a disability evaluation to accurately determine his physical limitations along with his ability to work. This evaluation should be done prior to any employment so as to avoid the possibility of exacerbating his current condition.”

In a February 5, 2013 decision, OWCP terminated appellant’s wage-loss and schedule award compensation effective February 10, 2013 finding that he refused an offer of suitable work.<sup>3</sup> It stated:

“In response to our [December 21, 2012] letter you submitted a medical report dated [January 7, 2013] from Dr. Sajdak that continued to opine that you were not capable of work due to sciatic pain. Pain is considered a subjective complaint and there has been no objective medical evidence provided to support any change in your ability to work. Dr. Sajdak is a family physician and he has not provided sufficient medical evidence to refute the well-rationalized opinion of Dr. Cederberg.”

### **LEGAL PRECEDENT**

Section 8106(c)(2) of FECA provides in pertinent part, “A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation.”<sup>4</sup> However, to justify such termination, OWCP must show that the work offered

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<sup>3</sup> OWCP indicated that it was not terminating appellant’s medical benefits.

<sup>4</sup> 5 U.S.C. § 8106(c)(2).

was suitable.<sup>5</sup> An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.<sup>6</sup>

When OWCP informs a claimant that it has determined that a given offered position is suitable and invites him to write and give reasons for not accepting, OWCP acknowledges that its determination is not yet final and that a reasonable explanation would justify the claimant's refusal of the position and result in the continuation of his compensation for disability. Certain explanations will, of course, justify a claimant's refusal to accept an offer of employment. OWCP's procedure manual itself lists a number of reasons that are considered acceptable.<sup>7</sup> If a claimant refuses the employment offered and provides such a reason, OWCP will consider his refusal justified and will continue his compensation for disability.<sup>8</sup>

If a claimant chooses to respond within 30 days and gives reasons for not accepting the offered position, OWCP must consider these reasons before it can make a final determination on the issue of suitability. Only after it has made a final determination on the issue of suitability can OWCP afford the claimant an opportunity to accept or refuse an offer of suitable work. Only after it has finalized its decision on suitability can OWCP notify the claimant that refusal to accept shall result in the termination of compensation, as the language of 5 U.S.C. § 8106(c) clearly mandates.<sup>9</sup>

OWCP's regulations provide that OWCP shall advise the employee that it has found the offered work to be suitable and afford the employee 30 days to accept the job or present any reasons to counter OWCP's finding of suitability. If the employee presents such reasons, and OWCP determines that the reasons are unacceptable, it will notify the employee of that determination and that he or she has 15 days in which to accept the offered work without penalty. At that point in time, OWCP's notification need not state the reasons for finding that the employee's reasons are not acceptable.<sup>10</sup>

### ANALYSIS

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation effective February 10, 2013 on the grounds that he refused an offer of suitable work.

In this case, OWCP did not afford appellant an opportunity to accept the military pay technician position offered by the employing establishment after making a final determination that the position was suitable. It therefore denied him a reasonable opportunity to accept the

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<sup>5</sup> *David P. Camacho*, 40 ECAB 267, 275 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341, 345 (1981).

<sup>6</sup> 20 C.F.R. § 10.124; *see Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5 (June 2013).

<sup>8</sup> *Id.*

<sup>9</sup> *See Maggie L. Moore*, 42 ECAB 484 (1991); *reaff'd on recon.*, 43 ECAB 818 (1992).

<sup>10</sup> 20 C.F.R. § 10.516.

offer of “suitable” work. Without such an opportunity, appellant cannot be held to have refused an offer of suitable work within the meaning of 5 U.S.C. § 8106(c). He submitted evidence in support of his refusal to accept the offered position within 30 days of December 21, 2012, the date that OWCP advised appellant that he had 30 days to accept the offered position or provide justification for not accepting it.<sup>11</sup> On February 5, 2013 OWCP issued a decision in which it determined that appellant had refused an offer of suitable work. It determined that the evidence submitted by him in support of his refusal to accept the offered position was unacceptable, and in doing so it finalized its preliminary decision on suitability. At the same instant, however, OWCP terminated appellant’s compensation for disability, without notifying him that he had 15 days in which to accept the offered work without penalty. Thus, it denied appellant an opportunity to accept the position after determining it to be a suitable one.

In view of the foregoing, the Board finds that OWCP has not met its burden of justifying termination of appellant’s compensation.

### **CONCLUSION**

The Board finds that OWCP did not meet its burden of proof to terminate appellant’s compensation effective February 10, 2013 on the grounds that he refused an offer of suitable work.

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<sup>11</sup> Appellant submitted a January 7, 2013 letter and a January 7, 2013 report of Dr. Sajdak, an attending osteopath and Board-certified family practitioner.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 5, 2013 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 26, 2013  
Washington, DC

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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