

FACTUAL HISTORY

On April 12, 2010 appellant, then a 73-year-old laborer, filed a claim alleging that on April 5, 2010 he sustained pain and swelling in the left groin in the performance of duty. He stopped work on April 7, 2010. OWCP accepted the claim for a bilateral inguinal hernia without obstruction or gangrene. On April 13, 2010 appellant underwent a left inguinal hernia repair and on August 25, 2010 he underwent a right hernia repair. OWCP paid him compensation for total disability beginning May 24, 2010.

By letter dated September 8, 2010, OWCP requested that Dr. Eric Amy, an attending Board-certified surgeon, address whether appellant could work full time and provide a narrative report discussing his current condition and any resulting disability. In response, Dr. Amy indicated by checkmark that appellant could return to restricted duty with permanent restrictions. In a work restriction evaluation dated September 30, 2010, Dr. Amy found that he could not perform his usual employment but could work full time with restrictions of no lifting, pushing or pulling over 20 pounds. In response to the question of whether appellant had other conditions to consider prior to identifying a position, he stated, "Yes, [appellant] has a pulmonary condition [for] which he sees another physician."

On October 19, 2010 the employing establishment offered appellant a position as a modified laborer working eight hours per day in an office lifting, pushing and pulling no more than 10 pounds.

By letter dated November 29, 2010, OWCP notified appellant of its determination that the offered position was suitable. It provided him 30 days to accept the position or provide a written explanation for his refusal. OWCP advised appellant that, if he did not accept the offered position and it did not find his refusal justified, it would terminate his compensation.

On December 7, 2010 appellant asserted that he was unable to accept the position due to another work injury. He explained that a few months prior he received a diagnosis of respiratory disease that was accepted by OWCP as work related in file number xxxxxx933. Appellant related that the physician who treated him for his respiratory condition had not released him to work and did not want him to resume work at the location of the job offer. He provided OWCP with the name of his claims examiner for file number xxxxxx933. Appellant also submitted a September 3, 2010 letter from OWCP advising him that it had accepted his occupational disease claim in file number xxxxxx933 for a cough, pneumonitis, unspecified allergic alveolitis and pneumonitis, emphysema, shortness of breath and nonspecific abnormal radiologic findings in other intrathoracic organs.

On January 27, 2011 OWCP informed appellant that his reasons for refusing the position were not valid and allowed him 15 days to accept the position or have his compensation terminated.

On February 10, 2011 appellant advised OWCP that he had accepted the position on February 2, 2011 but the employing establishment told him that he no longer had a job. On March 10, 2011 the employing establishment notified OWCP that the offered position remained available.

By decision dated March 10, 2011, OWCP terminated appellant's compensation effective March 13, 2011 after finding that he refused an offer of suitable work under section 8106(c). It noted that he had an accepted pulmonary claim with a date of injury of February 18, 2010 under another file number that was open for medical care. OWCP based its finding that the position was suitable on Dr. Amy's September 30, 2010 work restrictions.

On March 31, 2011 appellant requested an oral hearing and review of the written record. He asserted that the offered position was not available after January 5, 2011. Appellant discussed Dr. Amy's finding that his lung condition should be considered prior to releasing him for work.

On July 2, 2011 appellant again asserted that he could not return to work due to his lung condition. He called the employing establishment following OWCP's January 27, 2011 letter to accept the position but was informed that the job was no longer available.

By decision dated July 12, 2011, following a review of the written record, an OWCP hearing representative affirmed the March 10, 2011 decision.

On appeal appellant questions how OWCP expected him to accept the position when he was unable to work due to another work injury. He notes that he was not diagnosed with a lung condition until after his hernia repair.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.² Section 8106(c)(2) of FECA³ 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.⁴ 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.⁵ 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.⁶

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.⁷ Pursuant

² *Linda D. Guerrero*, 54 ECAB 556 (2003).

³ 5 U.S.C. §§ 8101-8193.

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

⁵ *Ronald M. Jones*, 52 ECAB 190 (2000).

⁶ *Joan F. Burke*, 54 ECAB 406 (2003).

⁷ 20 C.F.R. § 10.517(a); *see Ronald M. Jones*, *supra* note 5.

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.⁸

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 forth the specific job requirements of the position.⁹ 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.¹⁰

Once OWCP establishes that the work offered is suitable, the burden shifts to the employee who refuses to work to show that the refusal or failure to work was reasonable or justified.¹¹ 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.¹² OWCP procedures state that acceptable reasons for refusing an offered position include medical evidence of inability to do the work.¹³

ANALYSIS

OWCP accepted that appellant sustained a bilateral inguinal hernia due to an April 5, 2010 employment injury. Appellant underwent a left hernia repair on April 13, 2010 and a right hernia repair on August 25, 2010. He received compensation for total disability from OWCP until March 13, 2011, when it terminated his compensation for refusing an offer of suitable work.

In a work restriction evaluation dated September 30, 2010, Dr. Amy released appellant to return to work full time with restrictions of no lifting, pushing or pulling over 20 pounds. He advised that appellant had a pulmonary condition that should be considered prior to identifying a work position.

On October 19, 2010 the employing establishment offered appellant a modified position working in an office with no lifting, pushing or pulling over 10 pounds. Appellant declined the position, asserting that he was unable to work because of an employment-related respiratory condition. He referred OWCP to his claims examiner for the respiratory condition in file number xxxxxx933. Appellant also submitted a September 3, 2010 letter from OWCP in file number xxxxxx933 accepting his occupational disease claim for a cough, pneumonitis, unspecified

⁸ *Id.* at § 10.516.

⁹ See *Linda Hilton*, 52 ECAB 476 (2001).

¹⁰ *Id.*

¹¹ 20 C.F.R. § 10.517(a).

¹² *Gayle Harris*, 52 ECAB 319 (2001).

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(3) (July 1997).

allergic alveolitis and pneumonitis, emphysema, shortness of breath and nonspecific abnormal radiologic findings in other intrathoracic organs. In its March 10, 2011 decision terminating compensation, OWCP discussed its acceptance of his pulmonary disease claim under file number xxxxxx933, with a February 18, 2010 date of injury. It did not, however, consider whether the pulmonary condition prevented appellant from performing the offered position.

The Board finds that OWCP did not meet its burden of proof to terminate appellant's monetary compensation. It is well established that before benefits can be terminated under section 8106(c), OWCP has to demonstrate that the employee has the physical capacity to perform the duties of the offered position.¹⁴ In reaching this determination, it must consider both preexisting and subsequently acquired conditions.¹⁵ OWCP did not properly consider appellant's accepted claim for a respiratory condition before terminating compensation. Dr. Amy noted that his respiratory condition should be considered prior to identifying a work position. Appellant submitted evidence to OWCP showing that it had accepted numerous respiratory conditions as employment related. As a penalty provision, section 8106(c)(2) must be narrowly construed.¹⁶ OWCP, consequently, did not discharge its burden of proof to justify the termination of appellant's compensation.

CONCLUSION

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

¹⁴ See *Sharon L. Dean*, 56 ECAB 175 (2004).

¹⁵ See *Richard P. Cortes*, 56 ECAB 200 (2004).

¹⁶ See *Karen Spurling*, 56 ECAB 189 (2004); *Christine P. Burgess*, 43 ECAB 449 (1992).

ORDER

IT IS HEREBY ORDERED THAT the July 12 and March 10, 2011 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: October 14, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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