



## **FACTUAL HISTORY**

On September 22, 1992 appellant, then a 54-year-old registered nurse, sustained a left knee contusion when he struck his knee against a hospital bed. On June 22, 1993 he sustained a lumbar strain when transferring a patient from a bed to a chair. Appellant returned to modified duty for four hours a day on September 7, 1993. By decision dated November 6, 1993, OWCP found that his actual earnings fairly and reasonably represented his wage-earning capacity and reduced his wage-loss compensation. Appellant was terminated for cause, effective January 11, 1994. On March 7, 1994 he filed an occupational disease claim that was accepted for bilateral carpal tunnel syndrome. Appellant underwent a right carpal tunnel release on November 3, 1994.

On September 23, 1999 appellant was granted a schedule award for three percent impairment of the right leg. On October 15, 1999 he was granted a schedule award for 10 percent impairment of the right and left arms.<sup>2</sup> In a November 20, 2002 work capacity evaluation, Dr. Trinh Tang, an internist, advised that appellant could work at a maximum, two hours a day. She provided restrictions to his physical activity.

Dr. V.P. Dhalla, an attending Board-certified orthopedic surgeon, provided a work capacity evaluation on July 14, 2008. He advised that appellant could not perform his usual job duties but could work eight hours a day with permanent restrictions limiting bending, stooping, repetitive wrist motion, pushing, pulling and lifting to four hours a day, with a 15-pound weight restriction.

On September 20, 2008 the employing establishment offered appellant a modified position, based on the restrictions provided by Dr. Dhalla. By report dated October 8, 2008, Dr. Dhalla advised that appellant continued to have complaints in regards to both upper extremities. He provided examination findings and diagnosed carpal tunnel release on the right, possible carpal tunnel syndrome on the left and peripheral neuropathy. Dr. Dhalla advised that appellant remained totally disabled.

On October 9, 2008 appellant stated that he could not accept or reject the job offer until he saw his physician in November. By report dated November 19, 2008, Dr. Dhalla noted that electromyographic testing would be scheduled. He stated, "patient has retired from his job and continues to remain retired."<sup>3</sup> In reports dated January 12 and February 23, 2009, Dr. Dhalla advised that appellant continued to have bilateral upper extremity complaints and that appellant felt he could not perform the duties of the offered position. He advised that appellant remained totally disabled.

On May 4, 2009 OWCP referred appellant for vocational rehabilitation services. On June 24, 2009 appellant underwent vocational assessment testing. In a July 10, 2009 report, Dr. Allen Gustafson, a Board-certified orthopedic surgeon, advised that appellant should not

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<sup>2</sup> In a nonmerit decision dated October 25, 2000, OWCP denied appellant's request for reconsideration of the September 23, 1999 schedule award. Appellant had brief outside employment in 2000.

<sup>3</sup> There is no indication in the record that appellant retired from the employment establishment.

return to work until January 10, 2010. On July 28, 2009 the employing establishment again offered appellant a modified position. Appellant accepted the offered position with the caveat that he could not begin work until January 10, 2010 because he was having left knee replacement surgery. Rehabilitation services were closed.

In a May 3, 2010 report, Dr. Dhalla provided upper extremity examination findings. He diagnosed tendinitis of the left shoulder, lateral epicondylitis of the left elbow and carpal tunnel syndrome of the left wrist. Dr. Dhalla advised that appellant should not return to his regular job and provided restrictions of four hours of repetitive motion of the wrist, gripping, grasping, pushing and pulling daily, with a weight restriction of 10 pounds.

On May 28, 2010 OWCP referred appellant to Dr. Bunsri T. Sophon, a Board-certified orthopedic surgeon, for a second-opinion evaluation. In a June 29, 2010 report, Dr. Sophon provided findings on examination and noted that appellant had nonemployment-related diagnoses of herniated disc at C6-7 and osteoarthritis of the left knee, status post total knee replacement. He found that appellant could work eight hours a day with permanent restrictions of six hours of sitting, walking and standing and four hours of lifting daily, with a 20-pound weight restriction and no repetitive motion of the wrists.

Rehabilitation services were reopened on September 13, 2010. On January 20, 2011 the employing establishment offered appellant a modified position for eight hours a day. The physical restrictions were based on those recommended by Dr. Sophon, and the duties described in the cover letter were processing work orders, preparing equipment requests and purchase card procurement. Attached to the cover letter was a two-page description of specific job duties which indicated that appellant would contact 12 patients each hour *via* telephone, with a telephone headset provided. He could sit, stand and walk intermittently and repetitive hand/wrist movements, forceful gripping, grasping, twisting or turning of the wrist or hands were not required. On January 24, 2011 appellant stated that he was awaiting his doctor's approval of the job offer.

By letter dated February 8, 2011, OWCP advised appellant that the position offered was suitable. Appellant was notified that if he failed to report to work or failed to demonstrate that the failure was justified, pursuant to section 8106(c)(2) of FECA, his right to compensation for wage loss or a schedule award would be terminated. He was given 30 days to respond.

On February 14, 2011 appellant's attorney responded that the duties of the position in processing work orders, preparing equipment requests and purchase card procurement, did not comport with Dr. Sophon's restriction of zero repetitive motions of the wrist as keyboarding and writing required repetitive motions. On February 15, 2011 the employment establishment provided a corrected job offer letter, with duties described as contacting patients *via* a push button telephone with a headset. A copy was forwarded to counsel. On February 17, 2011 counsel asserted that operating a push button telephone required repetitive motion. On February 22, 2011 OWCP furnished a copy of the offered position to Dr. Sophon and asked that he address its suitability. In a report dated March 9, 2011, Dr. Sophon noted that he had reviewed the job offer with duties of operating a push button telephone. He opined that the position was within appellant's restrictions.

On March 16, 2011 OWCP advised appellant that his reasons for refusing the offered position were not valid. Appellant was again informed of the penalty provision of section 8106(c)(2), and was given an additional 15 days to accept.

In a March 10, 2011 report, received by OWCP on March 28, 2011, Dr. Jacob E. Tauber, Board-certified in orthopedic surgery, reported the history of injury as provided by appellant, his current complaints and past medical history. He listed physical examination findings and diagnosed bilateral carpal tunnel syndrome with history of decompression on the right and spinal stenosis with sciatica. Dr. Tauber advised that he had reviewed a submitted job description and advised that it was inappropriate for appellant to carry out duties that required long periods of sitting and inappropriate for him to carry out any repetitive motion duties with his upper extremities.

On April 5, 2011 OWCP confirmed that the offered position remained available.

By decision dated April 5, 2011, OWCP terminated appellant's monetary compensation benefits, effective April 10, 2011, finding that he refused to accept an offer of suitable work.<sup>4</sup>

### **LEGAL PRECEDENT**

Section 8106(c) 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>5</sup> It is OWCP's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.<sup>6</sup> The Board has long held that section 8106(c) will be narrowly construed as it serves as a penalty provision that may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.<sup>7</sup>

### **ANALYSIS**

The Board finds that OWCP failed to meet its burden of proof in terminating appellant's compensation benefits as it did not comply with its procedural requirements. On January 20, 2011 the employing establishment offered appellant a modified position based on the restrictions provided by Dr. Sophon, an OWCP referral orthopedic surgeon. In a February 8, 2011 letter, OWCP informed appellant that the offered position was suitable, informed him of penalty provisions of section 8106(c)(2) and afforded him 30 days to respond. Counsel asserted on

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<sup>4</sup> On March 30, 2011 appellant approved a \$5,022.50 attorney fee request. On April 8, 2011 OWCP approved the fee request. On April 14, 2011 counsel advised OWCP that he no longer represented appellant. On May 16, 2011 appellant requested reconsideration of the attorneys' fee decision. In a May 26, 2011 nonmerit decision, OWCP denied the reconsideration request. Appellant did not appeal the attorneys' fee decisions, rather, in the instant appeal, he stated that he was appealing an April 10, 2011 decision, the effective date of the termination of monetary compensation.

<sup>5</sup> 5 U.S.C. § 8106(c).

<sup>6</sup> *Joyce M. Doll*, 53 ECAB 790 (2002).

<sup>7</sup> *Gloria J. Godfrey*, 52 ECAB 486 (2001).

February 14, 2011 that the offered position was not suitable because the duties described would require writing and computer use. The employing establishment provided a corrected job offer, which was forwarded to counsel on February 15, 2011.<sup>8</sup>

Following receipt of the corrected job offer, counsel asserted that pushing a telephone button required repetitive motion. OWCP forwarded a copy of the job offer to Dr. Sophon. In a March 9, 2011 report, Dr. Sophon opined that the duties of operating a push-button telephone were within appellant's restrictions. On March 16, 2011 OWCP advised appellant that his reasons for refusing the offered position were not valid, and gave him 15 days to respond. Appellant submitted additional medical evidence. OWCP confirmed that the offered position remained available and by decision dated April 5, 2011, terminated his wage-loss and schedule award benefits, effective April 10, 2011 on the grounds that he refused an offer of suitable employment.

It is well established that when OWCP undertakes further development of the medical evidence after it has issued a 30-day letter and seeks to terminate compensation under section 8106(c)(2) of FECA based on new medical evidence, it must again provide the employee with 30 days to accept the job offer or provide reasons for refusing.<sup>9</sup> OWCP terminated appellant's wage-loss compensation, effective April 10, 2011, without issuing a new 30-day letter following receipt of Dr. Sophon's supplemental report in which he opined that the offered position was suitable. It did not comply with the proper notice requirements prior to termination. Accordingly, the Board finds that, under the facts of this case, the invocation of section 8106(c) of FECA constituted error. As such, OWCP improperly terminated appellant's monetary compensation benefits and the April 5, 2011 decision is reversed.

### CONCLUSION

The Board finds that OWCP did not properly terminate appellant's wage loss of schedule award benefits, effective April 10, 2011 under section 8106(c) of FECA.<sup>10</sup>

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<sup>8</sup> The Board finds that any error in the January 20, 2011 letter describing incorrect job duties is harmless because the physical restrictions comported with those provided by Dr. Sophon and a two-page description of the specific job duties of answering a push-button telephone, using a provided head-set, was attached to the cover letter.

<sup>9</sup> See *Adrienne L. Curry*, 53 ECAB 750 (2002) (OWCP obtained an additional clarifying report from a referee physician after issuing a letter finding the offered position suitable. The Board held that appellant was entitled to a new letter giving her 30 days to accept the position or provide reasons for refusing).

<sup>10</sup> The Board notes that appellant submitted evidence with his appeal to the Board. The Board cannot consider this evidence as its review of the case is limited to the evidence of record which was before OWCP at the time of its final decision. 20 C.F.R. § 501.2(c); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 5, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 24, 2012  
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