



appellant had refused an offer of suitable work.<sup>2</sup> The Board found that the offered position of modified mail processing clerk was medically suitable and the position remained available. It was noted that, according to the employing establishment, appellant had stated he was on disability retirement and had no intention of returning to work.

By decision dated February 1, 2011, the Board found that appellant was entitled to a merit review of his case.<sup>3</sup> The Board noted that he submitted a witness statement from a coworker that on May 6 and 27, 2004 appellant had come to work and was told that no work was available. This was found to be new and relevant evidence. The case was remanded for further merit review of the claim. The history of the case as provided in the Board's prior decisions is incorporated herein by reference.

Following remand, OWCP requested clarification from the employing establishment regarding the availability of the offered position. In a letter dated February 16, 2011, a health and resource management specialist responded that appellant had filed for disability retirement, which had been approved effective February 17, 2004. When appellant tried to return to work on May 6 and 27, 2004, he was told he could not work due to the processing of his disability retirement. The specialist stated that it was against employing establishment regulations to provide work for employees with approved disability retirement, but the offered job would have remained available if retirement had not been approved. The employing establishment included a "Form 50 History" that listed appellant as on disability retirement effective February 17, 2004.

In a letter dated March 11, 2011, appellant's representative replied that appellant had attempted to accept the job but had been turned down by the employing establishment. He argued that this was in effect a withdrawal of the offered position.

By decision dated March 29, 2011, OWCP reviewed the case on its merits and denied modification.

### **LEGAL PRECEDENT**

5 U.S.C. § 8106(c) 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." 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>4</sup> To justify such a termination, OWCP must show that the work offered 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>

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<sup>2</sup> Docket No. 07-544 (issued May 8, 2007).

<sup>3</sup> Docket No. 10-1300 (issued February 1, 2011).

<sup>4</sup> *Henry P. Gilmore*, 46 ECAB 709 (1995).

<sup>5</sup> *John E. Lemker*, 45 ECAB 258 (1993).

<sup>6</sup> *Catherine G. Hammond*, 41 ECAB 375, 385 (1990); 20 C.F.R. § 10.517(a).

### ANALYSIS

The Board previously affirmed the termination of compensation effective June 12, 2004 based on a refusal of suitable work under 5 U.S.C. § 8106(c)(2). After the Board's May 8, 2007 decision, appellant had submitted evidence from a coworker stating that appellant was told by the employing establishment in May 2004 that no work was available.

The employing establishment responded in a February 16, 2011 letter that appellant had requested disability retirement that was approved as of February 17, 2004. When appellant attempted to return to work in May 2004, he was told there was no work available pursuant to employing establishment regulations. A similar situation was presented in *R.F.*, where the claimant had applied and was approved for disability retirement and then returned to the work site with an intent to work.<sup>7</sup> The Board noted that retirement is not an acceptable reason for refusing an offer of suitable work and there was no evidence that the disability retirement had been rescinded or set aside. As the Board indicated, when the claimant accepted retirement she effectively removed herself from the employing establishment rolls. Therefore the Board found the suitable job offer had not been withdrawn and OWCP properly terminated compensation.

In the present case, the evidence indicates that appellant had an approved disability retirement with no evidence it had been rescinded or set aside. The employing establishment indicated that the offered position of modified mail processing clerk had remained available but since appellant was in disability retirement status he could not return to work at that time. While appellant's representative argued in his March 11, 2011 letter that the *R.F.* case was distinguishable, he did not explain why the offered position in the present case should be considered as withdrawn. The employing establishment clearly indicated that the job offer remained available and there was no contrary evidence.

The Board accordingly finds that OWCP properly terminated compensation effective June 12, 2004 for refusal of suitable work. There was no probative evidence of record establishing that OWCP failed to meet its burden of proof in terminating compensation pursuant to 5 U.S.C. § 8106(c)(2). Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### CONCLUSION

The Board finds that OWCP met its burden of proof to terminate compensation effective June 12, 2004 for refusal of suitable work.

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<sup>7</sup> Docket No. 10-1020 (issued January 13, 2011).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated March 29, 2011 is affirmed.

Issued: April 23, 2012  
Washington, DC

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

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

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