



of a lumbar intervertebral disc, displacement of a cervical intervertebral disc without myelopathy and cervical spondylosis without myelopathy. Appellant stopped work on February 22, 1999 and received compensation for total disability. On February 24, 2000 he underwent an anterior cervical discectomy at C5 and C6.

In a report dated September 18, 2007, Dr. Freddie L. Contreras, an attending Board-certified neurosurgeon, discussed appellant's complaints of continued neck pain.<sup>2</sup> He stated, "It is my opinion, based upon the condition of [appellant's] cervical and lumbar spine, that he is unable to return to any type of gainful employment." Dr. Contreras provided restrictions of no lifting over five pounds, no prolonged sitting or standing and no crawling, bending or climbing.

On November 15, 2007 OWCP referred appellant to Dr. Robert E. Holladay, IV, a Board-certified orthopedic surgeon, for a second opinion examination. On December 6, 2007 Dr. Holladay diagnosed a head contusion, herniated discs at C4-5 and C5-6, status post anterior cervical discectomy and fusion at C4-5 and C5-6, lumbar strain and lumbar degenerative disc disease. He found that appellant's head contusion, lumbar strain and cervical disc herniation had resolved but that he had continued neck pain from the surgery. Dr. Holladay found that appellant could work in a sedentary to light-duty capacity.

OWCP determined that a conflict in medical opinion arose between Dr. Contreras and Dr. Holladay. It referred appellant to Dr. Marco Ochoa, a Board-certified orthopedic surgeon, for an impartial medical examination. On February 11, 2008 Dr. Ochoa reviewed appellant's history of injury and medical treatment received. On examination, he found normal reflexes and sensation in the upper extremity and pain on palpation of the anterior area. Dr. Ochoa diagnosed cervical disc syndrome treated with a cervical fusion and C4-5 and C5-6. He referred appellant for a functional capacity evaluation (FCE). The FCE revealed that appellant could work in a light-duty capacity lifting up to 20 pounds occasionally and 10 pounds frequently and without frequent lifting at the shoulder level or above. Dr. Ochoa reviewed the FCE results and asserted that appellant could not perform his usual employment but could work full-time light duty with "occasional lifting of up to 20 pounds and frequent lifting of up to 10 pounds." He further found that appellant had "restrictions to frequent shoulder and above lifting."

By decision dated July 21, 2008, OWCP terminated appellant's compensation benefits after finding that the opinion of Dr. Ochoa established that appellant had no further employment-related disability.

On August 20, 2008 appellant requested a review of the written record. On April 29, 2009 OWCP's hearing representative vacated the July 21, 2008 decision. She found that Dr. Ochoa provided work restrictions that would prevent appellant from performing his usual employment.

On May 4, 2009 the employing establishment offered appellant a position as a clerk. The position was classified as light to medium duty, which was primarily sedentary, with use of fingers, ability to distinguish basic colors and hearing. The job did not require any lifting over 5

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<sup>2</sup> By decision dated July 19, 2007 and May 5, 2008, OWCP granted appellant a schedule award for a two percent impairment of each upper extremity.

to 10 pounds, no more than one hour a day of lifting, no prolonged sitting or standing, no crawling, bending or climbing.

On May 7, 2009 OWCP advised appellant that it had determined that the May 4, 2009 job offer was suitable and provided him 30 days to accept the position or provide a written explanation for his refusal.

By letter dated May 26, 2009, appellant related that returning to any kind of work would be detrimental to his health and aggravate his work injury. On June 17, 2009 OWCP informed him that his reasons for refusing the position were not valid. It notified appellant that he had 15 days to accept the position or have his compensation terminated.

On July 17, 2009 OWCP confirmed that the offered position remained available but that appellant had not returned to work.

By decision dated July 17, 2009, OWCP terminated his compensation for refusing an offer of suitable employment under section 8106(c)(2).

On June 28, 2010 appellant requested reconsideration. He submitted a February 24, 2010 x-ray of the cervical spine showing a prior cervical fusion at C4-5 and C5-6 and a February 24, 2010 magnetic resonance imaging scan study of the right hand.

In a decision dated July 20, 2010, OWCP denied modification of its July 17, 2009 decision.

On appeal, appellant maintains that residuals of his employment injury prevent him from returning to any work. He describes his history of injury and dealings with OWCP. Appellant noted that he had prior contact with Dr. Holladay, the second opinion examiner, when he was studying to be an emergency medical technician. He further asserts that OWCP's letter referring him to Dr. Holladay indicated that the purpose of the appointment was for a schedule award examination. Appellant maintains that Dr. Ochoa did not act in a neutral way but instead derisively during his examination.

### **LEGAL PRECEDENT**

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>3</sup> Section 8106(c)(2) of FECA<sup>4</sup> 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>5</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>6</sup> Section 8106(c) will be narrowly

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<sup>3</sup> *Linda D. Guerrero*, 54 ECAB 556 (2003).

<sup>4</sup> 5 U.S.C. §§ 8101-8193.

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

<sup>6</sup> *Ronald M. Jones*, 52 ECAB 190 (2000).

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>7</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>8</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>9</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>10</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>11</sup>

When there exist opposing medical reports of virtually equal weight and rationale and 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>12</sup>

### ANALYSIS

OWCP accepted that appellant sustained a right scalp contusion, cervical strain, degeneration of a lumbar intervertebral disc, displacement of a cervical intervertebral disc without myelopathy and cervical spondylosis without myelopathy due to a February 22, 1999 employment injury. It determined that a conflict arose between Dr. Contreras, his attending physician, and Dr. Holladay, an OWCP referral physician, regarding the extent of his physical limitations. OWCP referred appellant to Dr. Ochoa for an impartial medical examination.

When a case is referred to an impartial medical examiner for the purpose of resolving a conflict, the opinion of such specialist, is sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.<sup>13</sup> Dr. Ochoa reviewed appellant's medical and work history and listed detailed findings on examination. He diagnosed

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<sup>7</sup> *Joan F. Burke*, 54 ECAB 406 (2003).

<sup>8</sup> 20 C.F.R. § 10.517(a); *see Ronald M. Jones*, *supra* note 6.

<sup>9</sup> *Id.* at § 10.516.

<sup>10</sup> *See Linda Hilton*, 52 ECAB 476 (2001).

<sup>11</sup> *Id.*

<sup>12</sup> *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

<sup>13</sup> *See Nathan L. Harrell*, 41 ECAB 401 (1990).

cervical disc syndrome. Dr. Ochoa referred appellant for an FCE and, based on its results, opined that he could work with restrictions on lifting up to 20 pounds occasionally, 10 pounds frequently and no frequent lifting at the shoulder level or above. The Board finds that he provided a complete and rationalized opinion based on an accurate factual and medical background; consequently, his opinion that appellant could return to work with limitations is accorded special weight due to his status as impartial medical examiner.<sup>14</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 May 4, 2009 the employing establishment offered appellant a position as a clerk working light to medium duty with no lifting over 10 pounds or for more than one hour a day, no extended sitting or standing and no crawling, bending or climbing. OWCP reviewed the job offer and determined that it constituted an offer of suitable employment. The job offer, however, did not address whether the position required reaching above the shoulders. Consequently, the evidence does not show that the offered position was consistent with the work restriction established by Dr. Ochoa.

As a penalty provision, section 8106(c)(2) must be narrowly construed.<sup>15</sup> The medical evidence does not clearly establish that the offered position was within appellant's work restrictions as set forth by the impartial medical examiner; therefore, OWCP failed to meet its burden of proof to terminate compensation.

### **CONCLUSION**

The Board finds that OWCP improperly terminated appellant's benefits under 5 U.S.C. § 8106(c) because he refused an offer of suitable work.

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<sup>14</sup> See *U.A.*, 59 ECAB 701 (2008); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

<sup>15</sup> See *Karen M. Nolan*, 57 ECAB 589 (2006); *Stephen A. Pasquale*, 57 ECAB 396 (2006).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 20, 2010 decision of the Office of Workers' Compensation Programs is reversed.

Issued: January 17, 2012  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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