

FACTUAL HISTORY

On December 10, 2008 appellant, then a 50-year-old packer, filed a traumatic injury claim alleging that on November 26, 2008 he felt a pop in his right elbow with immediate pain and soreness while lifting a box weighing approximately 50 pounds. He stopped work that day. OWCP accepted a right distal biceps tendon tear and authorized surgery. It paid compensation for total disability as of February 2, 2009. Appellant underwent biceps tendon repair surgery on February 10, 2009. He later developed a heterotrophic bone calcification, which limited motion in his nondominant right hand.

On August 14, 2009 appellant underwent a functional capacity evaluation which found that he was capable of working at the sedentary physical demand level for eight hours a day with a 12-inch lift capability of 10 pounds and 0 pounds shoulder lift capability. In an August 31, 2009 note, Dr. Barbara G. Frieman, a Board-certified orthopedic surgeon, advised that he reached maximum medical improvement and had permanent right arm restrictions of lifting no more than 10 pounds and no supination/pronation.

On September 25, 2009 the employing establishment offered appellant a light-duty assignment as a packer with restrictions of no lifting greater than 10 pounds and no turning with right arm. Appellant declined this position. OWCP advised the employing establishment that the duties were not sufficiently described. On October 27, 2009 the employing establishment offered appellant a second job as a packer. On November 2, 2009 OWCP received a June 25, 2009 report from Dr. Frieman, who noted that appellant had a significant loss of supination from heterotrophic calcification of his distal biceps repair and was unable to curl. Dr. Frieman opined that he was permanently disabled from his job as he was unable to do any repetitive turning of the right wrist or supination-type activity with his right arm.

In a December 14, 2009 report, Dr. Robert F. Draper, Jr., a Board-certified orthopedic surgeon and an OWCP referral physician, reviewed a history of the employment injury and appellant's medical treatment. He provided examination findings and diagnosed rupture of the distal right biceps tendon with repair and heterotrophic calcification of the distal biceps repair with marked limited supination as a complication of the trauma and surgery. Dr. Draper found that appellant reached maximum medical improvement and could not return to regular-duty work. Based on the functional capacity evaluation and the physical examination, he found that appellant could perform full-time sedentary work with restrictions of no lifting more than 20 pounds occasionally and 10 pounds frequently with the right arm.

OWCP determined that a conflict in medical opinion arose between Dr. Frieman and Dr. Draper regarding appellant's work capacity. It referred appellant to Dr. Thomas DiBenedetto, a Board-certified orthopedic surgeon, for an impartial evaluation.

In a March 1, 2010 telephone call to OWCP, appellant indicated that he was considering disability retirement and, if no job offer was received by April 10, 2010, his retirement date would be April 10, 2010. On March 17, 2010 he elected retirement benefits effective April 11, 2010.

On April 1, 2010 OWCP received Dr. DiBenedetto's February 23, 2010 report. Dr. DiBenedetto reviewed the history of injury, the medical records and noted appellant's complaints of pain on supination. On physical examination he noted a mild visible atrophy of the biceps, zero degrees of supination activity and passively, full pronation, full extension and near full flexion. Strength was noted to be good in appellant's forearm and hand. Dr. DiBenedetto diagnosed a rupture of the right distal biceps. He stated that appellant was at maximum medical improvement but would not fully recover from his work injury. Dr. DiBenedetto stated that it would be difficult for appellant to perform the light-duty job offered by the employer on October 27, 2009. He opined that appellant was able to work in a sedentary job within the limits of his functional capacity evaluation, which was 10 pounds of lifting. Dr. DiBenedetto opined that appellant could do this repetitively but stated that he could not do any work which required him to place his right hand in supination because his arm was fixed in zero degrees of supination. He advised that appellant was not capable of returning to his regular job, with modifications, because of his lack of ability to supinate and not due to the repetitive nature of the job. On April 9, 2010 Dr. DiBenedetto completed a work capacity evaluation noting certain work restrictions, advising that appellant could work eight hours daily and indicating that his restrictions were permanent.

On June 3, 2010 the employer offered appellant a light-duty position as a supply clerk which required minimal use of the right wrist with no repetitive tasks. A duplicative job offer was made on June 10, 2010 with a later start date. The position description noted that appellant would perform clerical support primarily involving processing supply transactions. A computer would be used to enter, edit or retrieve data typing or office automation. Other major duties involved performing limited supply clerical work as well as clerical assignments. On June 10, 2010 appellant declined the position due to his medical restrictions and inadequate time in which to consult his physician or attorney.

On August 20, 2010 OWCP sent the June 10, 2010 job offer to Dr. DiBenedetto for his opinion on whether appellant was capable of performing the requested duties. In a November 15, 2010 report, Dr. DiBenedetto reviewed the statement of accepted facts and the February 23, 2010 report. He found that appellant could perform the job as outlined.

In a November 26, 2010 letter, OWCP advised appellant that the position of supply clerk offered was suitable to his work capacities. Appellant was notified that if he failed to report to the position or failed to demonstrate that, the failure was justified pursuant to section 8106(c)(2) of FECA, his right to monetary compensation would be terminated. He was given 30 days to respond.

In a December 7, 2010 letter to appellant's attorney, OWCP explained that, while appellant chose to retire prior to the receipt of the impartial medical examiner's report, his election of retirement benefits did not preclude adjudicating the extent of his disability and suitability of a job offer.

In a December 15, 2010 statement, appellant contended that the job offer was not suitable to his limitations. He elected Office of Personnel Management (OPM) benefits as of April 11, 2010 and did not know a job offer would come several months later. In a December 16, 2010

letter, appellant's attorney agreed that the June 10, 2010 job offer was found suitable after appellant elected OPM benefits and had retired.

On January 6, 2011 OWCP advised appellant that his reasons for refusing the offered position were not valid and he was given an additional 15 days to either accept the position or have his benefits terminated. In a January 18, 2011 letter, appellant advised that he was declining the supply clerk position on the basis it was an unsuitable job offer and the job offer came months after he separated from his employing establishment and the Federal Government.

In a February 10, 2011 decision, OWCP terminated appellant's monetary compensation on the grounds that he neglected an offer of suitable work under 5 U.S.C. § 8106(c)(2). Appellant remained entitled to medical benefits.

On February 14, 2011 appellant initially requested a telephonic hearing before an OWCP hearing representative but subsequently requested a review of the written record. In a June 9, 2011 letter, counsel stated that Dr. DiBenedetto provided no rationalized medical explanation that the current job offer was suitable. Counsel noted that Dr. DiBenedetto previously found the October 27, 2009 job offer unsuitable because of appellant's inability to place his right hand in supination.

In a June 24, 2011 letter, the employer responded that the June 3, 2010 job offer was for a supply clerk and was in accordance with Dr. DiBenedetto's restrictions. It noted that the revised offer of June 10, 2010 was in response to appellant's request to delay the job availability date for personal reasons.

By decision dated August 29, 2011, an OWCP hearing representative affirmed the February 10, 2011 decision.

LEGAL PRECEDENT

Section 8106(c) of FECA provides that a partially disabled employee who refuses or neglects to work after suitable work is offered is not entitled to compensation.³ It is OWCP's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.⁴ The implementing regulations provide that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of showing that such refusal or failure to work was reasonable or justified and shall be provided with the opportunity to make such a showing before entitlement to compensation is terminated.⁵ To justify termination, OWCP must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.⁶ In determining what constitutes suitable work for a particular disabled employee,

³ 5 U.S.C. § 8106(c).

⁴ *Joyce M. Doll*, 53 ECAB 790 (2002).

⁵ 20 C.F.R. § 10.517(a).

⁶ *Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

OWCP considers the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work and other relevant factors.⁷ OWCP's procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.⁸

Section 8123(a) of FECA provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.⁹ When 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 on a proper factual background, must be given special weight.¹⁰

ANALYSIS

OWCP accepted that on November 26, 2008 appellant sustained right distal biceps tendon tear and authorized surgery. Appellant later developed a heterotrophic bone calcification which limited the motion of his right hand. On September 29, 2011 an OWCP hearing representative affirmed a February 10, 2011 decision terminating his compensation benefits based on his refusal of work in a supply clerk position. Determinative weight was accorded to Dr. DiBenedetto, a Board-certified orthopedic surgeon serving as an impartial medical specialist, who opined that the supply clerk position was suitable.

OWCP properly determined that there was a conflict in the medical opinion between Dr. Frieman, an attending Board-certified orthopedic surgeon, and Dr. Draper, a Board-certified orthopedic surgeon serving as an OWCP referral physician, on the issue of appellant's work capacity. To resolve the conflict, it properly referred appellant, pursuant to section 8123(a) of FECA, to Dr. DiBenedetto for an impartial medical examination and an opinion on the matter. In a February 23, 2010 report, Dr. DiBenedetto opined that appellant was able to work in a sedentary job within the limits of his functional capacity evaluation, which was 10 pounds of lifting. He opined that appellant could do this repetitively but he could not do any work which required him to place his nondominical right hand in supination because his arm was fixed in zero degrees of supination. Following his review of the June 2010 job offer of supply clerk, Dr. DiBenedetto opined in a November 15, 2010 report, that appellant could perform the job as outlined.

The Board finds that Dr. DiBenedetto's February 23, 2010 report in conjunction with his November 15, 2010 report is sufficiently rationalized to establish that appellant is capable of

⁷ 20 C.F.R. § 10.500(b); see *Ozine J. Hagan*, 55 ECAB 681 (2004).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity, Refusal of Job Offer*, Chapter 2.814.5.a(1) (July 1997); see *Lorraine C. Hall*, 51 ECAB 477 (2000).

⁹ 5 U.S.C. § 8123(a); see *Geraldine Foster*, 54 ECAB 435 (2003).

¹⁰ *Manuel Gill*, 52 ECAB 282 (2001).

performing the supply clerk position.¹¹ As noted, Dr. DiBenedetto previously examined appellant and opined that he was able to work in a sedentary job with lifting restrictions of 10 pounds. He opined that, while appellant could do this repetitively, he could not do any work which required him to place his right hand in supination because his arm was fixed in zero degrees of supination. Although Dr. DiBenedetto's November 15, 2010 report simply responded to the question of whether the supply clerk position was suitable, his original report of February 23, 2010 contained an in-depth evaluation of appellant's medical condition based on an accurate factual and medical background which properly served as the basis upon which he could render an opinion as to whether the supply clerk position was suitable. Dr. DiBenedetto's opinion that appellant could work the supply clerk position is accorded special weight due to his status as an impartial medical examiner.¹² Thus, OWCP properly relied on Dr. DiBenedetto's opinion in finding the supply clerk position suitable.

In accordance with the procedural requirements under 5 U.S.C. § 8106(c), OWCP advised appellant on November 26, 2010 that it found the job offer of supply clerk to be suitable and gave him an opportunity to provide reasons for refusing the position within 30 days. It advised him in a January 6, 2011 letter that his reason that he already retired prior to the job offer was insufficient¹³ and that he had 15 additional days to accept the offered position. The Board finds that OWCP followed established procedures prior to the termination of compensation pursuant to section 8106(c) of FECA.

The Board finds that the position offered was medically and vocationally suitable and OWCP complied with the procedural requirements of section 8106(c) of FECA. OWCP met its burden of proof to terminate appellant's compensation benefits based on his refusal to accept suitable work.

On appeal, appellant's counsel argues that Dr. DiBenedetto failed to explain why he was no longer concerned about appellant's inability to place his right hand in supination in the offered supply clerk position. As noted Dr. DiBenedetto's opinion about the suitability of the offered supply clerk position was based on an accurate factual and medical background which formed the basis of his opinion. He reviewed the requirements of the offered position and opined that it was within appellant's capabilities.

CONCLUSION

The Board finds that OWCP met its burden of proof to justify the termination of appellant's wage-loss compensation on the grounds that he refused an offer of suitable employment.

¹¹ Before OWCP and on appeal, appellant's attorney argued that Dr. DiBenedetto's report is not rationalized.

¹² See *L.W.*, 59 ECAB 471 (2008).

¹³ The Board has long held that electing to receive retirement is not a justifiable reason to refuse an offer of suitable work. *Roy E. Bankston*, 38 ECAB 380 (1987). See Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 2.814.5(c) (July 1997).

ORDER

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

Issued: July 5, 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