

blade injury as a result of lifting water to the sink from the portable air conditioner. OWCP accepted the claim for right arm and upper shoulder strain, which was subsequently expanded to include complete right rotator cuff rupture.²

On May 28, 2009 appellant filed an occupational disease claim alleging that on March 31, 2009 she first became aware of left arm sprain due to overuse and its connection to her employment duties. OWCP accepted the claim for left shoulder and upper arm sprain, left rotator cuff tear and other affections of the left shoulder region not classified elsewhere.³

In a June 18, 2010 work restriction (Form OWCP-5c), Dr. Sanjay Misra, a treating Board-certified orthopedic surgeon, provided permanent work restrictions for appellant. The restrictions included up to eight hours of sitting, walking, reaching, reaching above the shoulder, pushing and pulling up to 20 pounds and lifting up to 10 pounds.

On December 21, 2010 the employing establishment offered appellant the modified position of medical support assistant with pay retention. It noted that she was unable to perform the essential functions of her date-of-injury position so another position within her restrictions was found. The salary of the position was \$52,192.00 per year based on pay retention. The physical requirements of the position were mostly sedentary with occasional/intermittent walking, bending and standing, no pushing or pulling more than 20 pounds and no lifting more than 10 pounds.

On February 14, 2011 OWCP advised appellant that the medical support assistant job offer from the employing establishment constituted suitable work. It informed her that she had 30 days to accept the job or provide reasons for refusing it; otherwise, he risked termination of his compensation benefits pursuant to 5 U.S.C. § 8106(c).

In a March 2, 2011 letter, appellant's representative stated that appellant did not refuse the offered job and that they tried to schedule a meeting with the employing establishment to discuss the ramifications of the offered job.

On March 11, 2011 appellant's representative informed OWCP that the employing establishment had withdrawn the offered job.

In a March 24, 2011 letter, the employing establishment denied withdrawing the offered position. It noted that appellant had been formally assigned to the position offered on January 16, 2011 even though he refused to sign the job offer.

On March 24, 2011 appellant filed a traumatic injury claim alleging that on March 16, 2011 she sustained pain and swelling in her forearm when she hit it on the doorway going to her space. OWCP accepted the claim for right forearm and elbow sprain.⁴

² OWCP assigned claim number xxxxxx798.

³ OWCP assigned claim number xxxxxx341.

⁴ OWCP assigned claim number xxxxxx103. It combined claim numbers xxxxxx103, xxxxxx341 and xxxxxx798 with xxxxxx798 as listed as the master file number.

In a March 30, 2011 letter, OWCP advised appellant that the position offered by the employing establishment was suitable work and she was given an additional 15 days to accept the job offer.

In an April 4, 2011 letter, appellant's representative contended that appellant has not refused an offer of suitable work as she is waiting to discuss the position details with the employing establishment.

In an April 7, 2011 letter, appellant's representative set forth the issues he wished to discuss with the employing establishment concerning the offered position in order to determine its suitability.

By letter dated April 15, 2011, appellant's representative argued that she had not refused an offer of suitable work. He argued that the offered job was a reclassification of appellant's current position and that the offered job had not been properly developed by the employing establishment.

By decision dated April 18, 2011, OWCP terminated appellant's wage-loss compensation effective April 15, 2011 based on her refusal of an offer of suitable work.

On April 25, 2011 appellant and her representative requested a telephonic hearing before an OWCP hearing representative, which was held on August 11, 2011.

On May 23, 2011 the employing establishment informed appellant that her duty station had been temporarily changed to her home address effective that day. Appellant was advised that this change was to remain in effect until June 23, 2011.

On July 11, 2011 the employing establishment removed appellant from federal employment effective July 22, 2011 based on her failure to accept a directed assignment.

In a September 2, 2011 letter, Arlen B. Rubin, an employing establishment Workers' Compensation Coordinator, responded to the hearing transcript testimony. She stated that appellant continued to be employed by the employing establishment despite her refusal to sign an acceptance of the offered position. Ms. Rubin noted that no disciplinary action was taken against appellant until OWCP's suitability determination was completed. Following the April 18, 2011 decision terminating appellant's wage-loss compensation pursuant to 5 U.S.C. § 8106(c), a proposed removal letter was issued on May 19, 2011 for her failure to accept a suitable job. On July 11, 2011 appellant was removed from service with the employing establishment. In concluding, Ms. Rubin noted that, although the offered job involved a reassignment to a lower grade, appellant was offered pay retention with no loss in salary.

By decision dated October 27, 2011, OWCP's hearing representative affirmed the termination of appellant's benefits pursuant to 5 U.S.C. § 8106(c).

LEGAL PRECEDENT

Section 8106(c)(2) of FECA states that a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or

secured for him or her is not entitled to compensation.⁵ Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits under section 8106(c) for refusing to accept or neglecting to perform suitable work.⁶ The Board has recognized that section 8106(c) serves as a penalty provision as it may bar an employee's entitlement to future compensation and, for this reason, will be narrowly construed.⁷ To justify termination, OWCP must show that the work offered was suitable and that appellant was informed of the consequences of her refusal to accept such employment.⁸ If it is aware that appellant has actual earnings, it must determine whether such earnings represent appellant's wage-earning capacity before it can invoke the penalty provision of section 8106(c) of FECA.⁹ Section 10.516 of the Code of Federal Regulations¹⁰ provides 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 showing before a determination is made with respect to termination of entitlement to compensation.¹¹

ANALYSIS

OWCP accepted the claim for right arm and upper shoulder strain and complete right rotator cuff rupture. The employing establishment offered appellant the modified position of medical support assistant with pay retention. At the time of the job offer, the record shows that she was performing the job. The employing establishment stated that a written job offer had been sent to appellant for an official job assignment with a change to a lower grade with no change in pay. Appellant refused to sign a formal acceptance of the job offer, but continued to work in the position on which the job offer was based. The record reveals that she continued to work for the employing establishment in that position until July 11, 2011. On July 11, 2011 the employing establishment removed appellant from federal employment based on her failure to accept a directed assignment.

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation for refusing suitable work. The record establishes that she had actual earnings at the employing establishment since she was performing the duties of the offered position. In correspondence to OWCP, the employing establishment acknowledged that appellant was working in the offered position, but that she refused to sign the form accepting the offered job. OWCP did not consider whether her actual earnings in the offered position fairly and reasonably

⁵ 5 U.S.C. § 8106(c)(2).

⁶ *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

⁷ *H. Adrian Osborne*, 48 ECAB 556 (1997).

⁸ *T.S.*, 59 ECAB 490 (2008); *Ronald M. Jones*, 52 ECAB 190 (2000).

⁹ *Michael E. Moravec*, 46 ECAB 492 (1995).

¹⁰ 20 C.F.R. § 10.516.

¹¹ *See Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

represented her wage-earning capacity. Such a determination must be made before invoking the penalty provision of section 8106(c) of FECA.¹²

CONCLUSION

OWCP did not meet its burden of proof to terminate appellant's compensation for refusing suitable work, as it did not consider whether her actual earnings in the offered position represented her wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 27, 2011 is reversed.

Issued: October 18, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

¹² See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a) (July 1993). See also *Mary E. Woodard*, 57 ECAB 211 (2005); *Joyce M. Doll*, 53 ECAB 790 (2002).