

FACTUAL HISTORY

OWCP accepted that on or before November 1, 1994 appellant, then a 51-year-old aircraft mechanic, sustained an aggravation of degenerative arthritis of both thumbs, the left wrist and both knees due to repetitive motion and strenuous activities in the performance of duty. He stopped work in early 1998 and did not return. Appellant received compensation for total disability on the daily rolls beginning on December 2, 1998 and on the periodic rolls as of January 3, 1999. He underwent a partial meniscectomy of the right knee on March 17, 1999. Appellant remained under medical treatment for the accepted arthritic conditions.

Dr. Thomas E. Bates, an attending Board-certified orthopedic surgeon, submitted reports from May 2006 through September 21, 2009 diagnosing severe degenerative arthritis of both knees, the left wrist and the carpometacarpal joints of both thumbs. He noted that appellant could perform a “desk-type” job. Dr. Bates performed a total left knee arthroplasty on November 10, 2009, approved by OWCP. Appellant sustained a myocardial infarction on November 12, 2009, necessitating an open quadruple bypass on November 16, 2009.

OWCP obtained a second opinion on November 2, 2010 from Dr. James A. Maulsby, a Board-certified orthopedic surgeon, including a functional capacity evaluation. Dr. Maulsby found that appellant could work eight hours a day with standing, twisting, pushing and pulling limited to two hours, lifting for one hour and no bending, stooping, climbing, kneeling or squatting. He restricted lifting to 5 pounds and pushing and pulling to 10 pounds. Dr. Maulsby opined that appellant had not yet attained maximum medical improvement.

Dr. Bates performed a total right knee arthroplasty on November 16, 2010, approved by OWCP. He submitted progress notes indicating that appellant was improving with physical therapy.

On October 13, 2011 the employing establishment offered appellant a full-time position as an aircraft mechanic helper, assisting in the disassembly, repair, rework and assembly of aircraft. The job required the use of hand and power tools, climbing, kneeling, crouching, stooping, walking on slippery or uneven surfaces, and frequent lifting and carrying “parts and equipment that weigh up to 40 pounds.” Appellant refused the position on October 25, 2011, contending that walking on uneven surfaces, kneeling and crouching exceeded his activity limitations following bilateral knee arthroplasties.

In a November 17, 2011 report, Dr. Bates noted that appellant’s left knee had improved and encouraged him to begin an exercise program. A March 27, 2012 functional capacity evaluation demonstrated that appellant could perform light duty for 40 hours a week, including “walking and standing to a significant degree.” Appellant was able to complete work tasks in a stooped position, but could not squat or kneel. His grip strength and hand tool dexterity were within normal limits. Appellant’s lift strength capacity was rated at 25 pounds on occasional basis. On April 19, 2012 Dr. Bates found that appellant was doing well after bilateral knee replacement and had reached maximum medical improvement. He cleared appellant for “extensive vocational rehabilitation for return to nonheavy labor.”

In a May 4, 2012 report and accompanying December 14, 2011 work capacity evaluation (Form OWCP 5), Dr. Bates noted that appellant could not return to full duty as an aircraft mechanic due to severe bilateral carpometacarpal arthrosis. He opined that appellant was “[f]it for duty otherwise, including desk work.” Dr. Bates permanently restricted appellant from any lifting and from excessive use of either or both hands.

By letter dated May 10, 2012, OWCP advised appellant that the offered position was suitable work within the limitations provided by Dr. Bates. It further advised him of the penalty provision under section 8106(c) of FECA for refusing suitable work. OWCP afforded him 30 days to either accept the offered position or provide valid reasons for his refusal.

In a June 4, 2012 letter, appellant responded that he could not perform the aircraft mechanic helper position as he could not perform complex repetitive tasks due to advanced arthritis in both thumbs, and could not walk on slippery or uneven surfaces, stoop or kneel due to bilateral knee replacements.

In a July 18, 2012 letter, OWCP advised appellant that it had considered his reasons for refusal and found them unacceptable. It afforded him 15 days in which to accept the position or his wage-loss compensation benefits would be terminated. OWCP noted that no further reasons for refusal would be considered.

In a July 25, 2012 telephone conversation with OWCP personnel, appellant asserted that his bilateral hand arthritis would prevent him from performing the offered mechanic helper position. On August 23, 2012 the employing establishment verified that the offered aircraft mechanic helper position remained open and available to appellant. Appellant did not accept the position or submit additional evidence prior to August 23, 2012.

By decision dated August 23, 2012, OWCP terminated appellant’s wage-loss compensation benefits and schedule award entitlement effective August 26, 2012 under 5 U.S.C. § 8106(c) on the grounds that he refused an offer of suitable work.² It found that the offered aircraft mechanic helper position conformed to Dr. Bates’ opinions and March 27, 2012 functional capacity evaluation demonstrating that appellant could perform sedentary to light work with permanent bilateral hand restrictions.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits. It has authority under section 8106(c)(2) of FECA to terminate compensation for any partially disabled employee who refuses or neglects to work after suitable work is offered. To justify termination, OWCP must show that the work offered was suitable, that appellant was informed of the consequences of her refusal to accept such employment and that she was allowed a reasonable period to accept or reject the position or submit evidence or

² The decision does not specify the date of the termination. An August 23, 2012 compensation payment log sheet provides August 26, 2012 as the termination date.

explain why the position is not suitable.³ In this case, it terminated appellant's compensation under section 8106(c)(2) of FECA, which 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."⁴

OWCP regulations provide factors to be considered in determining what constitutes "suitable work" for a particular disabled employee, include 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.⁵ The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by medical evidence.

Section 8106(c) will be narrowly 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.⁶ 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.⁷ 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.⁸

ANALYSIS

OWCP accepted that appellant sustained an aggravation of degenerative arthritis of both thumbs, the left wrist and both knees. Appellant underwent total left knee arthroplasty on November 10, 2009 and a total right knee arthroplasty on November 16, 2010, procedures approved by OWCP. Dr. Maultsby, a Board-certified orthopedic surgeon and second opinion physician, opined on November 2, 2010 that appellant could perform full-time light-duty work with lifting limited to five pounds.

³ See *Ronald M. Jones*, 52 ECAB 190, 191 (2000); see also *Maggie L. Moore*, 42 ECAB 484, 488 (1991), *reaff'd on recon.*, 43 ECAB 818, 824 (1992). See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.10 (July 1997). (The claims examiner must make a finding of suitability, advise the claimant that the job is suitable and that refusal of it may result in application of the penalty provision of 5 U.S.C. § 8106(c)(2) and allow the claimant 30 days to submit his or her reasons for abandoning the job. If the claimant submits evidence and/or reasons for abandoning the job, the claims examiner must carefully evaluate the claimant's response and determine whether the claimant's reasons for doing so are valid).

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

⁵ *Rebecca L. Eckert*, 54 ECAB 183 (2002).

⁶ *Joan F. Burke*, 54 ECAB 406 (2003); see *Robert Dickerson*, 46 ECAB 1002 (1995).

⁷ 20 C.F.R. § 10.517(a); *Ronald M. Jones*, 52 ECAB 190 (2000).

⁸ *Id.* at § 10.516.

On October 13, 2011 the employing establishment offered appellant a full-time position as an aircraft mechanic helper, requiring frequent lifting up to 40 pounds. Appellant declined the position on October 25, 2011, contending that he was medically unable to perform the required duties. A March 27, 2012 functional capacity evaluation showed a lifting capacity of 25 pounds occasionally. Dr. Bates, an attending Board-certified orthopedic surgeon, opined on May 4, 2012 that appellant could perform full-time duty with permanent restrictions against any lifting or excessive use of either or both hands.

OWCP advised appellant by May 10, 2012 letter that the offered position was suitable work within his medical limitations. On July 18, 2012 it afforded him 15 days to accept the position or his wage-loss compensation benefits would be terminated. OWCP terminated appellant's wage-loss compensation benefits and schedule award eligibility effective August 26, 2012 under section 8106(c) of FECA on the grounds that he had refused an offer of suitable work. The Board finds, however, that the offered aircraft mechanic helper position was not suitable work as it exceeded appellant's medical restrictions.

The aircraft mechanic helper position offered to appellant on October 13, 2011 required frequent lifting and carrying "parts and equipment that weigh up to 40 pounds." The 40-pound lifting requirement exceeds Dr. Maultsby's November 2, 2010 5-pound lifting limitation, the 25-pound lifting capacity demonstrated on the March 27, 2012 functional capacity evaluation and Dr. Bates' May 4, 2012 permanent restriction against any lifting. As the October 13, 2011 job offer exceeded Dr. Bates' and Dr. Maultsby's restrictions, it was not suitable work under section 8106(c) of FECA. Therefore, OWCP erred in terminating appellant's wage-loss compensation and schedule award eligibility.⁹ The case will be returned to OWCP for payment of all compensation due and owing and reinstatement of all appropriate compensation benefits.

The Board therefore finds that OWCP's August 23, 2012 decision terminating appellant's wage-loss compensation and schedule award eligibility was improper. The decision will be reversed and the case returned to OWCP for reinstatement of appropriate benefits.

On appeal, appellant contends that he refused the offered position as it exceeded his medical restrictions. He also alleges that the employing establishment omitted required tasks from job description to make the position appear light duty. As stated, OWCP's termination of appellant's wage-loss compensation and schedule award eligibility must be reversed as the offered position was not suitable work.

CONCLUSION

The Board finds that OWCP improperly terminated appellant's wage-loss compensation and schedule award eligibility effective August 26, 2012 on the grounds that he refused an offer of suitable work. The offered position was not suitable work as it exceeded his medical restrictions.

⁹ *W.F.*, Docket No. 10-1828 (issued May 13, 2011); *Mary E. Woodard*, 57 ECAB 211 (2005).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 23, 2012 is reversed.

Issued: April 22, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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