

FACTUAL HISTORY

OWCP accepted that on January 9, 2003 appellant, then a 50-year-old mail handler, sustained localized primary osteoarthritis of both hands, traumatic arthropathy of his right hand and right radial styloid tenosynovitis due to lifting a tub of mail at work. Appellant stopped work on January 10, 2003. He initially received total disability compensation on the daily rolls and later received it on the periodic rolls. On January 4, 2005 OWCP granted appellant a schedule award for two percent permanent impairment of his right arm. On November 3, 2011 it granted him a schedule award for seven percent permanent impairment of his left arm.

On April 20, 2010 Dr. Stephen M. Pearce, an attending Board-certified orthopedic surgeon, performed a tendon interposition arthroplasty of the left carpometacarpal joint of appellant's left thumb. On May 11, 2011 he carried out a tendon interposition arthroplasty of the basal joint of appellant's right thumb. Appellant developed a tendon ganglion on his right wrist and, on January 4, 2012, Dr. Pearce excised the tendon ganglion and performed a release of de Quervain's tendinitis of his right wrist. These procedures were authorized by OWCP and right wrist tendon ganglion was added as an accepted condition.³

In periodic reports, Dr. Pearce described appellant's recovery from the January 2012 right wrist surgery and his participation in physical therapy treatment. On May 14, 2012 he predicted that appellant could return to light-duty work in July 2012 and full-duty work in September 2012.

In a July 12, 2012 report of a July 10, 2012 physical examination, Dr. William Nemeth, a Board-certified orthopedic surgeon serving as an OWCP referral physician, diagnosed thumb, carpal-metacarpal arthrosis status post interposition arthroplasty bilaterally, ganglion right wrist resection, severe radial carpal arthrosis in both wrists by report on recent x-rays. He stated that appellant's hand and wrist conditions did not prevent him from working eight hours a day. Dr. Nemeth indicated that he completed a work restriction (Form OWCP-50) which showed that appellant could do sedentary-type work with his hands, noting that he should wear an orthosis on his right hand. He indicated that appellant should have breaks every two hours that lasted 15 minutes. Dr. Nemeth stated that appellant might start back first on a four-hour work shift and that this could easily be adjusted up to eight hours if he could do the type of work that was available to him. The Form OWCP-50 completed by him on July 10, 2012 indicated that appellant could sit for eight hours a day, walk for two hours a day and stand for two hours a day. Appellant could engage in pushing for two hours a day, pulling for two hours a day and lifting for one hour a day (with lifting limited to 15 pounds). He could not reach above his shoulders, squat, kneel or climb.

³ Appellant periodically returned to light-duty work for the employing establishment after recovering from these surgeries.

OWCP asked Dr. Pearce if he agreed with Dr. Nemeth's July 10, 2012 findings and, on August 22, 2012, he signed a form indicating that he agreed with them.⁴

On October 10, 2012 OWCP offered appellant a job as a modified sales and service associate for 4 hours a day and 20 hours a week.⁵ The position involved accepting mail from customers for four hours a day, applying postage, documents and other labels to mailings for four hours a day, lifting packages and other items (not to exceed 15 pounds) for one hour a day and performing other retail and financial transactions for four hours a day. The physical requirements included standing for two hours a day, sitting for two hours a day and lifting up to 15 pounds for one hour a day. The position description indicated that appellant would work at a modified window, could use a stool to sit (alternating with standing) and could take a break every two hours for 15 minutes.

In an October 16, 2012 letter, OWCP advised appellant of its determination that the modified sales and service associate position offered by the employing establishment was suitable. It noted that the July 2012 report of Dr. Nemeth showed that the offered position was suitable and that Dr. Pearce agreed on August 22, 2012 with Dr. Nemeth's findings. OWCP informed appellant that his compensation would be terminated if he did not accept the position or provide good cause for not doing so within 30 days of the date of the letter.

Appellant refused to accept the modified sales and service associate position offered by the employing establishment and submitted an October 17, 2012 letter in which Paul Labbe, a representative from an veterans advocacy group, stated that he had been awarded a "100 percent Social Security Disability due to physical and mental conditions."

OWCP requested clarification from Dr. Nemeth regarding appellant's physical capabilities. In response, Dr. Nemeth indicated on November 12, 2012 that appellant could perform such activities as answer a telephone, file papers in a cabinet or reach for a book on a shelf for up to eight hours a day, but that he could not reach above shoulder height with his left arm. Appellant could write notes or type on a computer for up to four hours a day. On November 12, 2012 Dr. Nemeth added handwritten notes on his July 10, 2012 Form OWCP-5 indicating that appellant could write notes or type on a computer for up to four hours a day, but that he could not reach above shoulder height with his left arm.

OWCP asked Dr. Pearce if he agreed with Dr. Nemeth's November 12, 2012 report and, on November 27, 2012, he signed a form indicating that he agreed with it.

In a December 5, 2012 letter, OWCP advised appellant that his reasons for not accepting the modified sales and service associate position offered by the employing establishment were

⁴ In a June 29, 2012 report, Dr. Pearce stated that appellant continued to have problems with his right thumb, noting that "[m]ost of it now seems to be along the flexor carpi radialis tendon." He stated, "The patient has multiple musculoskeletal problems with pain in both shoulders, painful right thumb and is on pain management for his back. In light of all these problems, I think [appellant] is permanently disabled." Dr. Pearce's August 22, 2012 statement was produced after this report and would supersede it with respect to his opinion of work restrictions.

⁵ Appellant had participated in vocational nurse services sponsored by OWCP but these services ended after he was not placed in a suitable position *via* the program.

unjustified. It listed the evidence submitted by him, including the October 17, 2012 letter from a veterans advocacy group and indicated that he had not provided a valid reason for refusing to accept the offered position. OWCP advised appellant that his compensation would be terminated if he did not accept the modified sales and service associate position within 15 days of the date of the letter.

Appellant continued to refuse the modified sales and service associate position offered by the employing establishment. OWCP confirmed with the employing establishment that the position remained available. Appellant submitted a December 11, 2012 letter in which Mr. Labbe again discussed his disability rating with the Social Security Administration.

In a January 11, 2013 decision, OWCP terminated appellant's compensation effective January 13, 2013 on the grounds that he refused an offer of suitable work. It indicated that the modified sales and service associate position offered by the employing establishment was vocationally and medically suitable but that he refused to accept the position without good cause.

In a February 11, 2013 letter, appellant, through a representative, requested reconsideration of his claim. He alleged that OWCP did not adequately consider all of his current medical conditions (both physical and mental). In a February 12, 2013 report, Dr. Pearce stated that he had reviewed Dr. Nemeth's November 12, 2012 report and noted that he agreed with the restrictions regarding such matters as reaching above the shoulders, answering telephones, filing, lifting books, writing notes and typing on the computer. He stated, "I know [appellant] has other problems such as post-traumatic stress disorder and issues with his back. I do not treat him for these conditions and, therefore, cannot state as to how these conditions should be factored in to suitable employment."

In a May 2, 2013 decision, OWCP denied modification of its prior decision terminating appellant's compensation effective January 13, 2013 for refusing suitable work.

LEGAL PRECEDENT

It is well settled that, once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.⁶ Section 8106(c)(2) of FECA 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.⁷ Section 8106(c)(2) 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.⁸

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

⁶ See *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

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

⁸ See *Joan F. Burke*, 54 ECAB 406 (2003).

the burden of showing that such refusal or failure to work was reasonable or justified.⁹ 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.¹⁰

To justify termination, OWCP must show that the work offered was suitable and that appellant was informed of the consequences of his or her refusal to accept such employment.¹¹ Determining what constitutes suitable work for a particular disabled employee, it considers the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area and the employee's qualifications to perform such work.¹² OWCP 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.¹³

The Board has long held that entitlement to benefits under statutes administered by other federal agencies does not establish entitlement to benefits under FECA.¹⁴

ANALYSIS

OWCP accepted that on January 9, 2003 appellant sustained localized primary osteoarthritis of both hands, traumatic arthropathy of his right hand and right radial styloid tenosynovitis due to lifting a tub of mail at work. Appellant initially received total disability compensation on the daily rolls and later received it on the periodic rolls. In a January 11, 2013 decision, OWCP terminated his compensation effective January 13, 2013 on the grounds that he refused an offer of suitable work. On May 2, 2013 it affirmed this determination.

The evidence of record shows that appellant was capable of performing the modified sales and service associate position offered by the employing establishment and determined to be suitable by OWCP in October 2012. The position required working for 4 hours a day and 20 hours a week and involved accepting mail from customers for 4 hours a day, applying postage, documents and other labels to mailings for 4 hours a day, lifting packages and other items (not to exceed 15 pounds) for 1 hour a day and performing other retail and financial transactions for 4 hours a day. The physical requirements included standing for two hours a day, sitting for two hours a day and lifting up to 15 pounds for one hour a day.¹⁵ The record does not reveal that the

⁹ 20 C.F.R. § 10.517(a).

¹⁰ *Id.* at § 10.516.

¹¹ See *Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

¹² 20 C.F.R. § 10.500(b).

¹³ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.5a (June 2013); see *E.B.*, Docket No. 13-319 (issued May 14, 2013).

¹⁴ See *Donald Johnson*, 44 ECAB 540, 551 (1993).

¹⁵ The position description indicated that appellant would work at a modified window, could use a stool to sit (alternating with standing) and could take a break every two hours for 15 minutes.

modified sales and service associate position was temporary in nature.¹⁶ Moreover, there is no indication in the record that appellant, a former mail handler, could not vocationally perform the selected position.

In determining that appellant was physically capable of performing the modified sales and service associate position, OWCP properly relied on the opinions of Dr. Nemeth, a Board-certified orthopedic surgeon serving as an OWCP referral physician, and Dr. Pearce, an attending Board-certified orthopedic surgeon. In reports produced in July and November 2012, Dr. Nemeth provided work restrictions that were well within the physical requirements of the offered position. For example, he indicated that appellant could perform such activities as answer a telephone, file papers in a cabinet or reach for a book on a shelf for up to eight hours a day, could write notes or type on a computer for up to four hours a day and lift up to 15 pounds for one hour a day. Moreover, Dr. Pearce reviewed Dr. Nemeth's reports and indicated that he agreed with the work restrictions contained therein.

Before OWCP and on appeal, appellant argued that OWCP did not adequately consider all of his current medical conditions (both physical and mental) in determining that the modified sales and service associate position was suitable. He did not submit any rationalized medical evidence showing that any specific medical condition prevented him from performing the offered position. With particular respect to a mental condition, the record does contain medical evidence showing that appellant has a disabling mental condition. Appellant submitted a letter in which a representative from an veterans advocacy group stated that he had been awarded a "100 percent Social Security Disability due to physical and mental conditions," but this does not constitute probative medical evidence and the Board has long held that entitlement to benefits under statutes administered by other federal agencies does not establish entitlement to benefits under FECA.¹⁷

The Board finds that OWCP has established that the modified sales and service associate position offered by the employing establishment is suitable. As noted above, once it has established that a particular position is suitable, 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. The Board has carefully reviewed the evidence and argument submitted by appellant in support of his refusal of the modified sales and service associate position and notes that it is not sufficient to justify his refusal of the position.

For these reasons, OWCP properly terminated appellant's compensation effective January 13, 2013 on the grounds that he refused an offer of suitable work.¹⁸

¹⁶ If the employing establishment offers a claimant a temporary light-duty assignment and the claimant held a permanent job at the time of injury, the penalty language of section 8106(c) cannot be applied. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.4c(5), (9) (June 2013).

¹⁷ *See supra* note 14.

¹⁸ The Board notes that OWCP complied with its procedural requirements prior to terminating appellant's compensation, including providing him with an opportunity to accept the position offered by the employing establishment after informing him that his reasons for initially refusing the position were not valid; *see generally* *Maggie L. Moore, supra* note 11.

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 properly terminated appellant's compensation effective January 13, 2013 on the grounds that he refused an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the May 2, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 18, 2014
Washington, DC

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

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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