

reinstated with back pay as OWCP failed to issue a 15-day notice allowing her a second chance to accept the employing establishment's July 26, 2013 job offer. She argues that appellant's decision to retire on disability is a valid reason for her refusal to accept the offered job.

FACTUAL HISTORY

OWCP accepted that on December 3, 2007 appellant, then a 56-year-old letter carrier, sustained an aggravation of bilateral lower leg osteoarthritis when she lifted a bucket of mail at work. It authorized total bilateral knee replacement surgery performed on May 20, 2008 by Dr. Louis C. Romeo, a Board-certified orthopedic surgeon. OWCP paid appellant total disability compensation.

In medical reports dated June 5 and July 2, 2013, Dr. Hormozan Aprin, a Board-certified orthopedic surgeon serving as an OWCP referral physician, determined that appellant could work four noncontinuous hours a day with restrictions. He stated that she required a 15-minute rest period three times during her 4-hour work period. Dr. Aprin permanently restricted appellant from standing and walking for an extended period of time, squatting, kneeling, going up and down high steps of a postal truck, pushing, pulling or lifting over 10 pounds, kneeling, climbing and operating a motor vehicle at work.

On July 26, 2013 the employing establishment offered appellant a modified letter carrier position at the employing establishment in Smithtown, New York based on Dr. Aprin's physical restrictions. The position involved intermittent walking, sitting, standing, bending, stooping, reaching above the shoulder and pushing, pulling and lifting up to 10 pounds up to four hours and up to three breaks as needed within four hours.

In a July 31, 2013 letter to the employing establishment, appellant rejected the modified letter carrier job offer. She stated that she decided to take disability retirement. Appellant submitted an election form indicating that she had elected to receive disability retirement benefits effective July 28, 2013 through the Office of Personnel Management.

By letter dated August 5, 2013, OWCP informed appellant that the offered position of modified letter carrier dated July 26, 2013 was suitable work as it complied with her medical limitations. It further informed her that the position remained available to her. OWCP allowed appellant 30 days to accept or provide a written explanation of her reasons for refusal and advised that an employee who refuses an offer of suitable work without reasonable cause is not entitled to compensation under 5 U.S.C. § 8106(c). It stated that, even if she was retired, that was not a valid reason for refusing a suitable offer of employment.³ Appellant was expected to accept the offered position and return to work if medically capable. She did not respond.

In a September 5, 2013 decision, OWCP terminated appellant's wage-loss and schedule award compensation benefits effective that date on the grounds that she refused an offer of suitable work. It noted that authorization for further medical treatment continued.

³ See *Robert P. Mitchell*, 52 ECAB 116 (2000) (where the claimant chose to receive disability retirement benefits rather than accept a position offered by the employing establishment).

LEGAL PRECEDENT

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.⁴ It is OWCP's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.⁵ 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.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 his or her refusal to accept such employment.⁸ In determining what constitutes suitable work for a particular disabled employee, OWCP considers the employee's current physical limitations, whether the work was available within the employee's demonstrated commuting area and the employee's qualifications to perform such work.⁹ 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.¹⁰

Section 10.516 of FECA's implementing regulations provide that OWCP shall advise the employee that it has found the offered work to be suitable and afford the employee 30 days to accept the job or present any reasons to counter OWCP's finding of suitability. If the employee presents such reasons and OWCP determines that the reasons are unacceptable, it will notify the employee of that determination and that he or she has 15 days in which to accept the offered work without penalty. At that point in time, OWCP's notification need not state the reasons for finding that the employee's reasons are not acceptable.¹¹ After providing the 30-day and 15-day

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

⁵ *Joyce M. Doll*, 53 ECAB 790 (2002).

⁶ 20 C.F.R. § 10.517(a).

⁷ *See Joan F. Burke*, 54 ECAB 406 (2003).

⁸ *See Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, *supra* note 2.

⁹ 20 C.F.R. § 10.500(b).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work, Job Offer Refusal*, Chapter 2.814.5a (June 2013); *see E.B.*, Docket No. 13-319 (issued May 14, 2013).

¹¹ 20 C.F.R. § 10.516.

notices, OWCP will terminate the employee's entitlement to further wage-loss compensation and schedule award benefits.¹² However, the employee remains entitled to medical benefits.¹³

ANALYSIS

To justify termination of compensation, OWCP, must show that the work offered was suitable.¹⁴ The Board finds that it properly terminated appellant's compensation on the grounds that she refused suitable work under 5 U.S.C. § 8106(c)(2).

OWCP accepted that appellant had an aggravation of bilateral lower leg osteoarthritis while in the performance of duty on December 3, 2007 and authorized total bilateral knee replacement surgery. It terminated her monetary compensation effective September 5, 2013 based on her failure to accept suitable work.

The Board finds that the offered modified letter carrier position was within appellant's physical limitation as set forth by Dr. Aprin on June 5 and July 2, 2013. Dr. Aprin advised that she could work four noncontinuous hours a day with permanent restrictions, which included no standing and walking for an extended period of time, squatting, kneeling, going up and down high steps of a postal truck, pushing, pulling or lifting over 10 pounds, kneeling, climbing and operating a motor vehicle at work. He also advised that appellant required a 15-minute rest break three times during her 4-hour work period. There is no indication in the job offer as written that any of the described duties exceeded Dr. Aprin's restrictions. There is also no dispute that appellant meets the qualifications of the position. The Board notes that the offered job is located at the same facility as her date-of-injury job in Smithtown, New York.

The Board further finds that OWCP complied with its procedural requirements in advising appellant that the position was found suitable, providing her with the opportunity to accept the position or provide her reasons for refusing the job offer and notifying her of the penalty provision of section 8106(c). The Board notes that she never responded to OWCP's August 5, 2013 suitability determination letter requesting that she submit evidence supporting her refusal of the offered employment during the 30-day period specified by the letter. Appellant did not provide OWCP with any response as to why the position was not suitable. At the time of termination, there was no medical evidence indicating that she could not perform the duties of the offered position. The Board finds that OWCP properly terminated appellant's compensation benefits on the grounds that she refused an offer of suitable work.

On appeal, counsel cited to *Maggie L. Moore*¹⁵ and 20 C.F.R. § 10.516 in support of her contention that OWCP's termination decision should be reversed and appellant's compensation should be reinstated with back pay as OWCP failed to issue a 15-day notice allowing appellant a second chance to accept the employing establishment's July 26, 2013 job offer. As stated,

¹² *Id.* at § 10.517(b).

¹³ *Id.*

¹⁴ *See* cases cited *supra*, note 8.

¹⁵ *See supra* note 2.

appellant did not respond to OWCP's suitability determination letter within the allotted 30-day period. Only if she had responded with reasons for refusing the job offer would the additional 15 days be offered. Thus, OWCP was not required to allow appellant an additional 15 days to accept the employing establishment's job offer. The Board finds that her arguments are without merit and appellant failed to provide an acceptable reason for neglecting to work in the suitable work position.

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's compensation effective September 5, 2013 on the grounds that she refused an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the September 5, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 24, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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