

FACTUAL HISTORY

This case was previously before the Board. On May 2, 2013 the Board issued an order dismissing appeal from a November 8, 2012 OWCP decision denying modification of a September 20, 2012 decision terminating her compensation benefits.³ The Board noted that appellant requested that the appeal be dismissed as OWCP had resolved the issue.

Appellant a 44-year-old sales service/distribution clerk has an accepted occupational disease claim for left shoulder and upper arm sprain; left wrist sprain; left rupture of the rotator cuff; other affections of left shoulder region; and other specified disorder of bursae and tendons in the left shoulder region. She received compensation benefits. Appellant's disability retirement benefits became effective May 9, 2013.

In an April 25, 2013 report, Dr. Andrew K. Lee, an attending Board-certified hand surgeon, found that appellant reached maximum medical improvement and that she could return to work with permanent restrictions for eight hours a day. Appellant was restricted from reaching or lifting more than 15 pounds for eight hours. For four hours a day, she was restricted from reaching above the shoulder with more than 15 pounds or pushing and pulling more than 50 pounds.

On May 3, 2013 the employing establishment provided appellant with a job offer as a modified distribution clerk. The physical requirements of the position included: lifting items less than 15 pounds three to four hours a day; fine manipulation eight hours a day; grasping items four to six hours a day; and reaching above the shoulder one to two hours a day. Appellant was to clear the registry cage in the afternoon for two to three hours a day; write second notices on accountable items three to four hours a day; distribute SPRS to carriers in the afternoon one to two hours per day; and scan SPRS in the afternoon one to two hours a day.

On May 7, 2013 appellant advised that she was approved for disability retirement.

In a letter dated May 15, 2013, OWCP informed appellant that the duties and physical requirements of the modified distribution clerk position were found to be suitable to her capabilities and the medical limitations provided by Dr. Lee. The position remained available to her and she should return to the position or provide an explanation for refusing the position within 30 days. OWCP advised appellant that, if she failed to return to the offered position or failed to demonstrate that the failure was justified, her compensation would be terminated.

On April 10, 2013 appellant provided an undated letter from the employing establishment with a handwritten note stating that she was no longer on the USPS payroll because of her separation on March 18, 2013. She stated that she was separated from the employing establishment on March 18, 2013 and was approved for disability retirement. Appellant advised that she had one more semester to complete her studies and had enrolled for the fall semester once she knew she was separated from the employing establishment. She noted complications with her shoulder since her injury and stated that the job offer did not coincide with the hour she

³ Docket No. 13-351 (issued May 2, 2013).

bid on and would cause stress to her shoulder and wrist. Appellant stated that she wished to start a new career.

OWCP also received March 11 and May 23, 2013 letters from the Office of Personnel Management (OPM) approving her application for disability retirement; and a copy of the modified job offer with appellant's statement dated May 21, 2013 that "On March 18, 2013 I was separated from the USPS and I was approved for retirement disability ... start training for a new career." An SF-50 form listed that appellant was separated from the employing establishment on March 18, 2013.

The record contains a memorandum of a May 4, 2013 telephone conversation between appellant and OWCP. Appellant noted that she was approved for disability and confused by the job offer. She was in college and would be working at an internship the coming summer. Appellant would graduate college in one to two semesters.

On June 5, 2013 appellant requested a change of physicians from Dr. Lee to Dr. James Key. She stated that Dr. Key has offices closer to her home, which was more convenient than Dr. Lee's office. On June 14, 2013 OWCP denied appellant's request to change physicians as she was under the care of a specialist and it appeared that the treatment had been appropriate.

By letter dated June 18, 2013, OWCP informed appellant that she had not provided acceptable reasons for refusing the offered position. It allowed her 15 days to accept the position prior to the termination of benefits.

On June 18, 2013 appellant elected OPM benefits effective May 9, 2013. In a July 8, 2013 letter, she noted that she received disability retirement benefits through OPM. Appellant stated that she was not refusing the job offer, but chose to retire on disability as she was not able to perform the work that was assigned.

In a July 17, 2013 report, Dr. James D. Key, a Board-certified orthopedic surgeon, provided examination findings. He advised that appellant should continue with physical therapy.

On August 13, 2013 the employing establishment confirmed the job offer remained available.

By decision dated August 13, 2013, OWCP terminated appellant's monetary benefits effective August 28, 2013 finding that she refused suitable employment. It noted that the decision did not affect her medical benefits for the accepted conditions.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.⁴ 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

⁴ See *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

secured for the employee is not entitled to compensation.⁵ 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.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

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.⁹ 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.¹⁰ 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.¹¹

ANALYSIS

OWCP accepted appellant's claim for left shoulder and upper arm sprain; left wrist sprain; left rupture of the rotator cuff; other affections of left shoulder region; and other specified disorder of bursae and tendons in the left shoulder region. Appellant stopped working on March 18, 2013 and her disability retirement became effective May 9, 2013.

On May 3, 2013 the employing establishment provided appellant with a job offer as a modified distribution clerk.

The determination 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 the medical evidence.¹² The weight of the medical evidence in this case establishes that appellant was capable of performing the modified distribution clerk position. In an April 25,

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

⁶ *See Joan F. Burke*, 54 ECAB 406 (2003).

⁷ 20 C.F.R. § 10.517(a).

⁸ *Id.* at § 10.516.

⁹ *See Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

¹⁰ 20 C.F.R. § 10.500(b).

¹¹ 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).

¹² *Robert Dickinson*, 46 ECAB 1002 (1995).

2013 report, Dr. Lee opined that appellant reached maximum medical improvement. He found her capable of working full time with permanent restrictions. For eight hours a day, appellant could reach and lift no more than 15 pounds and, for four hours a day, she could reach above the shoulder with no more than 15 pounds and push/pull no more than 50 pounds. The employing establishment job offer is within the restrictions set forth by Dr. Lee. OWCP properly relied upon the opinion of Dr. Lee in determining the offered position of distribution clerk was within appellant's restrictions and, thus, suitable. The position had physical requirements of lifting items less than 15 pounds three to four hours a day and reaching above the shoulder one to two hours a day, which were within Dr. Lee's restrictions.

The Board further notes 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).¹³

OWCP found that appellant refused an offer of suitable work and terminated her entitlement to monetary compensation effective August 28, 2013. It noted that she had elected to receive OPM disability retirement benefits and had separated from the employing establishment on March 18, 2013. Appellant's disability retirement became effective May 9, 2013, which was after the date of the May 3, 2013 job offer. Under OWCP procedures, retirement is not considered an acceptable reason for refusing an offer of suitable work.¹⁴ The evidence reflects that appellant intended to complete college and train for a new career, not to return to work at the employing establishment. She has not established a justifiable basis for refusing the offered position. As the weight of the medical evidence established that appellant could perform the duties of the offered position, she did not offer sufficient justification for refusing the position. The employing establishment confirmed the job was open and available.

On appeal, appellant addressed why she did not return to work. She noted that her physicians did not agree that she could perform work as found by Dr. Lee. The medical evidence established that appellant could perform the duties of a modified distribution clerk. She offered no valid reason for refusing the offered position. There is also no evidence to support appellant's assertion that the offered position was not within her medical restrictions.

OWCP met its burden of proof in this case to terminate appellant's monetary compensation benefits pursuant to 5 U.S.C. § 8106(c).

CONCLUSION

The Board finds that OWCP met its burden to terminate appellant's compensation effective August 28, 2013 on the grounds that she refused an offer of suitable work.

¹³ See *Bruce Sanborn*, 49 ECAB 176 (1997).

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(c) (July 1997). See also *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).

ORDER

IT IS HEREBY ORDERED THAT the August 13, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 23, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board