

down cleaning.” OWCP accepted his claim for right knee strain, effusion right knee and chondromalacia patella. On September 15, 2009 appellant underwent an aspiration right knee, synovial biopsy and synovectomy, meniscectomy, patellar chondroplasty and lateral release. On November 18, 2010 he underwent a right knee arthroscopy, chondroplasty of the medial femoral condyle and open trochlea resurfacing with patellar replacement. Initially, appellant did not work for intermittent periods and then he stopped work entirely commencing September 20, 2010. OWCP paid appellant wage-loss compensation and medical benefits and appellant was placed on the periodic rolls effective December 19, 2010.

Appellant received postsurgery care from Dr. Anthony Schena, a Board-certified orthopedic surgeon. He first saw Dr. Schena on February 4, 2011 for a recheck of right knee pain. A right knee aspiration/injection was completed. Dr. Schena diagnosed effusion of knee joint and chondromalacia of patella.

On March 10, 2011 OWCP referred appellant to Dr. Stanley Hom, a Board-certified orthopedic surgeon, for a second opinion. In an April 7, 2011 report, Dr. Hom diagnosed appellant with right knee patellofemoral degenerative joint disease, status post right knee arthroscopy on September 15, 2009, right knee chondroplasty of the medial femoral condyle, and trochlea resurfacing with patella replacement on November 18, 2010; gouty arthritis; and history of degenerative medial meniscal tear (arthroscopy dated September 15, 2009). He opined that appellant currently suffered from residuals of his underlying preexisting conditions, including degenerative joint disease and gout, and not the aggravation sustained on April 10, 2009 that was temporary with residual effects approximating 6 to 12 weeks. Dr. Hom opined that appellant could only work in a modified capacity as a housekeeping aide, with restrictions with regard to lifting, pushing, pulling, standing, walking and stair climbing. He suggested weight limitations in the order of approximately 15 to 20 pounds. Dr. Hom anticipated that these restrictions would be permanent.

In an August 23, 2011 report, Dr. Schena diagnosed appellant with knee pain, chondromalacia and weakness in muscle. He opined that appellant was going to end up having a permanent disability, but that there was some room for improvement. In a November 8, 2011 report, Dr. Schena noted that appellant continued to have issues with his right lower extremity secondary to his chronic quadriceps weakness, and that he did not expect appellant to gain any further strength in his quadriceps. Therefore, he opined that appellant was permanently limited in his activities and should not climb stairs, ladders, squat, kneel or stand for any length of time secondary to persistent quadriceps weakness. Dr. Schena believed that appellant would put himself in jeopardy of falling and causing further damage with any activity that required repetitive quadriceps function. He noted that appellant could participate in sedentary activity. Dr. Schena indicated that appellant will continue to use his knee brace which will help support his knee and protect him from falling. In an April 17, 2012 report, he indicated that appellant reached maximum medical improvement for his thigh/knee and would continue to use his brace as needed. Dr. Schena indicated that appellant could return to sedentary work, although it may be in his best interest to settle the case with the employing establishment as he does not want to return there for employment.

In order to resolve the conflict between Drs. Hom and Schena regarding the nature of appellant’s work capacity, OWCP referred appellant to Dr. Harvey Taylor, a Board-certified

orthopedic surgeon, for an impartial medical examination. In a May 11, 2012 report, Dr. Taylor listed appellant's diagnosis as right knee patellofemoral degenerative joint disease, right knee status post trochlear resurfacing and patellar replacement; and significant right quadriceps weakness. He opined that appellant's current condition was 50 percent related to his preexisting patellofemoral arthritis and 50 percent related to his significant quadriceps weakness. Dr. Taylor opined that appellant has the ability to return to work in some capacity but has significant restrictions, which include an inability to stand for more than 15 to 20 minutes at a time, an inability to walk more than a quarter of a mile, and an inability to drive more than 15 or 20 minutes. The inability to drive was related to appellant's symptoms of knee pain, a feeling of numbness in his leg which is a result of the surgery and weakness in his quadriceps which occurs after repetitive motion of his knee from the brake to the gas. Dr. Taylor opined that if appellant were able to have a job within 15 minutes of his home and that job would be basically a sedentary, sit down job he could work immediately. He noted that what is preventing appellant from returning to his date-of-injury position is his pain, recurrent swelling and inability to perform the types of activities that are required for a housekeeping job that would include long-standing, squatting and lifting. Dr. Taylor further indicated that appellant's treatment has been proper and effective. He opined that appellant's condition was permanent and that he reached a point of maximum medical improvement. Dr. Taylor concluded that appellant was not permanently and totally disabled and could be gainfully employed in the foreseeable future with restrictions. He completed a work capacity evaluation wherein he noted that appellant could sit 8 hours a day, but was prohibited from walking or standing more than 15 to 20 minutes a day. Appellant was also prohibited from driving a motor vehicle to work more than 15 to 20 minutes. He was prohibited from bending/stooping, squatting, kneeling and climbing and was allowed to lift only one to two pounds.

Dr. Schena continued to provide reports on appellant. In a September 4, 2012 report, he indicated that appellant was doing well but still had quadriceps weakness which limits his activities. He opined that appellant could tolerate a low impact sedentary job. In a March 18, 2013 capacity evaluation, Dr. Schena indicated that appellant could walk 1 to 2 hours and stand 10 to 15 minutes. He opined that appellant could work two to four hours a day and was prohibited from lifting/pushing/pulling over 25 pounds.

The employing establishment conducted video surveillance on appellant from August 25, 2009 through May 10, 2012. The surveillance reports were forwarded to Dr. Taylor, who noted in a September 11, 2012 letter that the surveillance evidence did not change his opinions or the conclusions reached in his earlier report of May 11, 2012. He noted that the video evidence showed appellant consistently limping, using a brace at times and not bending his knees to any significant extent. Dr. Taylor noted that the video did not show appellant doing any heavy lifting. He indicated that, while the video evidence did show that appellant was able to drive, there was no video evidence showing that he was standing for 15 to 20 minutes at a time or was able to do any squatting or heavy lifting. Dr. Taylor indicated that there is no change to the answers given in his May 2012 report.

By letter dated April 1, 2013, the employing establishment offered appellant a position as a housekeeping aide in patient effects. In this position, appellant's duties would be folding linens, folding and hanging patient clothing, receiving patient effects and answering incoming telephone calls. The employing establishment indicated that the position was sedentary and

involved walking for 15 to 20 minutes, standing for 15 to 20 minutes, lifting of 1 to 2 pounds, operating a motor vehicle to and from work for 15 to 20 minutes and no bending, stooping, squatting, kneeling or climbing. The employing establishment indicated that the position was within the restrictions set by Dr. Taylor in his May 8, 2012 report. It noted that appellant's tour of duty would be from 8:00 a.m. until 4:30 p.m., Monday through Friday. The employing establishment indicated that it was prepared to offer appellant a public transit subsidy not to exceed the current maximum amount per month allowance, for round-trip transportation to and from work outside of his current driving restrictions of 15 to 20 minutes.

By letter dated April 5, 2013, OWCP indicated that the position of modified housekeeping aide was within the medical limitations as set by Dr. Taylor on May 8, 2012, that the employing establishment confirmed that the position remained available to him, and that he was expected to accept the position and report to duty within 30 days, and that, if he failed to accept the position, he must provide a written explanation of his reasons within 30 days. It explained that, if appellant failed to report for the position or demonstrate that his failure to report for work was justified, he would not be entitled to any further compensation for wage loss or a schedule award.

On April 22, 2013 appellant indicated that he accepted the job offer, but then stated that he could not do the walking and standing and that he cannot walk the stairs to get to the job.

On May 3, 2013 OWCP indicated that it did not consider appellant's reasons for refusing to accept the position to be valid and gave appellant an additional 15 days to accept the position. It noted that, if appellant had not accepted the position and arranged for a report date within 15 days of the letter, his entitlement to wage loss and schedule award benefits will be terminated.

On May 12, 2013 appellant accepted the offer, but asked that OWCP look at Dr. Taylor's report.

By letter dated May 29, 2013, appellant's counsel contended that appellant had agreed to return to work, but argued that he has a preexisting post-traumatic stress disorder which had not been considered and if any activities by the employer cause an aggravation of this condition, appellant intended to hold the claims examiner responsible for the aggravation. OWCP responded by letter dated June 28, 2013 and noted that it had received no medical information about any preexisting conditions.

By letter received on July 3, 2013, Kristin J. Coyle a lead workers' compensation programs specialist for the employing establishment, indicated that appellant left a voice mail message indicating that he cannot take public transportation per his treating physician and that he has more restrictions than the impartial medical examiner indicated. She indicated that appellant had caused scenes at work while visiting for personal reasons, including swearing and insulting a supervisor; that after getting a job offer he resigned and then had to complete a new application to get back into system; that appellant tried to request new accommodations on issues never mentioned; and that he walked out on the first occupational health appointment requiring another appointment to finish.

On July 3, 2013 OWCP terminated appellant's compensation effective July 28, 2013 for refusal of suitable work.

On July 11, 2013 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative.

In a July 2, 2013 Form CA-110 note, OWCP noted that it received a voice mail from the employing establishment indicating that the claimant did not return to work. A note was made that the physical examination by occupational health was normal.

In a July 2, 2013 note, Dr. Schena indicated that appellant could not tolerate sitting/transfer for two to two and a half hours on public or private transportation due to knee issues. In an accompanying report, he indicated that appellant had mild increased discomfort along the patellofemoral joint and along the distal quadriceps, but that otherwise his quadriceps atrophy and weakness have remained about the same. Dr. Schena noted that appellant was still using his brace to ambulate. He indicated that because of appellant's quadriceps weakness and intra-articular issues, appellant was unable to tolerate sitting with his knee in a flexed position for extended periods of time. Dr. Schena did not believe that he could handle a long commute, whether in public transportation or primary transportation, and therefore extended his restrictions to driving or traveling a long period of time. He stated that appellant should not spend more than half an hour or so in a sitting position secondary to his chronic right knee issues.

By letter dated September 12, 2013, counsel asserted that appellant did try to return to work, was given a physical, and the nurse refused to release him to work. Therefore, he asserts, the job was not available to appellant.

At the hearing held on October 21, 2013, counsel reiterated the argument that appellant's occupational nurse did not allow him to return to work, that therefore the termination of compensation was incorrect. Appellant testified that the nurse would not allow him to return to work because his pain level was too high and that his leg swelled all the time. He noted that he went twice for medical appointments because the first time they could not see him because they were busy. Appellant stated that someone at the employing establishment sent him a letter stating that they withdrew reasonable accommodations and closed his case.

In a November 18, 2013 letter, the employing establishment contended that the evidence on file supports that a suitable job offer was made and that appellant did everything in his power to try to administratively delay his return to work. Ms. Coyle alleged that on April 1, 2013 a job offer was provided for appellant; that on April 5, 2013 he presented himself and stated that he would like to resign; that on April 5, 2013, OWCP found the position suitable; that on April 22, 2013 appellant accepted the job offer under protest; that on April 24, 2013 he withdrew his acceptance of the job offer; and that on May 29, 2013 appellant through his attorney stated that he would accept the job under protest. She indicated that on June 7, 2013 appellant came to campus to get security clearance, background check, fingerprints and an occupational health visit; that after that was finished appellant remained on campus in a nonpatient setting and disturbed various employees with verbal assaults and profanity; and that as a result he was sent a June 14, 2013 letter instructing him that until he was given a return to duty status, he was prohibited from entering any work areas but could get to patient care for treatment. Ms. Coyle

noted inappropriate behavior towards Mr. Collins, one of the compensation experts, and that as a result of the altercation, occupational health could not clear appellant as he wanted to provide additional medical documentation. She indicated that on June 17, 2013 appellant requested a reasonable accommodation; that on June 27, 2013 appellant withdrew his request for a reasonable accommodation; and that on July 2, 2013 appellant called and stated that he got a note from his physician that stated he could not take public transportation. On July 3, 2013 OWCP terminated benefits. Ms. Coyle argued that appellant has tried to administratively delay his return to the workplace. Further, she argued that public transportation is a viable option to offer when there are restrictions on driving.

By decision dated December 16, 2013, OWCP's hearing representative affirmed the termination of compensation benefits.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.² 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.³ OWCP may not terminate compensation without establishing that the disability ceased or that it is no longer related to the employment.⁴ The Board has stated that monetary compensation payable to an employee under section 8107 are payments made from the Employees' Compensation Fund and are, therefore, subject to provision of section 8106(c).⁵

Section 10.517(a) of FECA's implementing regulations provide that an employee who refused to work after suitable work has been offered to or secured for the employee has the burden of showing that such refusal or failure to work was reasonable or justified.⁶ 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.⁷

In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁸

² *Barry Neutuch*, 54 ECAB 313 (2003); *Lawrence D. Price*, 47 ECAB 120 (1995); *see also M.B.*, Docket No. 12-728 (issued September 26, 2012).

³ 5 U.S.C. § 8106(c)(2); *see also Linda D. Guerro*, 54 ECAB 556 (2003).

⁴ *Ronald M. Jones*, 52 ECAB 190 (2000); *Arthur R. Reck*, 47 ECAB 339 (1995).

⁵ *Sandra A. Sutphen*, 49 ECAB 174 (1997); *Stephen R. Lubin*, 43 ECAB 564 (1992).

⁶ 20 C.F.R. § 10.517(a); *see Ronald M. Jones*, *supra* note 4.

⁷ *Id.* at § 10.516; *see Kathy E. Murray*, 55 ECAB 288 (2004).

⁸ *Manuel Gill*, 52 ECAB 282 (2001).

ANALYSIS

OWCP accepted appellant's claim for right knee strain, effusion right knee and chondromalacia patella causally related to his April 10, 2009 employment injury. It paid him compensation benefits but terminated these benefits effective July 28, 2013 as it found that he failed to accept an offer of suitable employment from the employing establishment.

Appellant's treating physician, Dr. Schena, and the second opinion physician, Dr. Hom, disagreed with regard to appellant's work capacity limitations. In order to resolve this conflict, OWCP referred appellant to Dr. Taylor for an impartial medical examination. Dr. Taylor, in a May 11, 2012, report, listed appellant's diagnoses as right knee patellofemoral degenerative joint disease, right knee status post trochlea resurfacing and patellar replacement; and significant right quadriceps weakness. He opined that appellant had an inability to stand for more than 15 to 20 minutes at a time, an inability to walk more than a quarter of a mile, and an inability to drive more than 15 or 20 minutes. Dr. Taylor noted that appellant could not drive more than 15 minutes because of numbness in his leg which is the result of the surgery and weakness in his quadriceps which occurs after repetitive motion of his knee from the brake to the gas. He opined that, if appellant were able to have a job within 15 minutes of his home and the job were sedentary, he could work immediately. Dr. Taylor opined that appellant could be gainfully employed in a sedentary position. After reviewing the video surveillance on appellant, Dr. Taylor declined to change his report. As his report is well rationalized and based on a proper factual background, it must be given special weight.⁹

Based on Dr. Taylor's report, the employing establishment made appellant an offer of employment as a modified housekeeping aide, with duties including folding linens, folding and hanging patient clothing, receiving patient effects and answering incoming telephone calls. The employing establishment described the position as sedentary and noted that appellant would not walk over 15 to 20 minutes, lift over 1 to 2 pounds, operate a motor vehicle more than 15 to 20 minutes and would not bend, stoop, squat, kneel or climb. The employing establishment indicated that it was prepared to offer appellant a public transit subsidy for round-trip transportation to and from work outside of his current driving restrictions of 15 to 20 minutes.

The Board finds that the position of modified housekeeping aide, offered by the employing establishment, was suitable for appellant. The position was designed to accommodate appellant's restrictions, and the position was within his work capacity limitations as set forth by Dr. Taylor. Although there is some evidence that the location of the employing establishment would involve more than a 15- to 20-minute commute, the employing establishment offered to give appellant a subsidy for public transportation and noted that public transportation was available.

The Board notes that in a July 2, 2013 report, Dr. Schena indicated that appellant could not handle a long commute even on public transportation. He stated that appellant could not spend more than a half an hour in a sitting position secondary to his chronic right knee issues. However, in this report, Dr. Schena also indicated that appellant's right knee was essentially

⁹ G.H., Docket Number 14-721 (issued August 4, 2014).

unchanged since his last visit. He failed to adequately explain this increased restriction when any changes in appellant's knee condition were unchanged.

Appellant contends that the employing establishment withdrew his assignment as the nurse indicated that he did not pass the employment physical. However, there is no evidence in the record that this is the case. Appellant failed to provide any documentation indicating that he was rejected by the occupational health nurse for a return to employment, despite his testimony that someone from the employing establishment sent him a letter withdrawing the reasonable accommodations. In fact there is a notation in the record that on July 2, 2013 the employing establishment indicated to OWCP that appellant's physical examination for occupational health was normal.

The Board finds that the position offered was medically and vocationally suitable and OWCP complied with the procedural requirements of section 8106(c) of FECA. OWCP met its burden of proof to terminate appellant's compensation benefits based on his refusal to accept suitable work.¹⁰

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 benefits effective July 28, 2013 pursuant to 5 U.S.C. § 8106(c)(2).

¹⁰ *Roy E. Bankston*, 38 ECAB 380 (1987).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 16, 2013 is affirmed.

Issued: October 20, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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