



## **FACTUAL HISTORY**

On October 24, 2008 appellant, then a 56-year-old city letter carrier, filed a traumatic injury claim alleging that on October 21, 2008 he sustained slipped discs in his neck causally related to factors of his federal employment. He stopped work on October 24, 2008. OWCP accepted appellant's claim for degeneration of a cervical intervertebral disc.<sup>2</sup> It paid him compensation for total disability beginning December 1, 2008. On February 5, 2010 appellant underwent an anterior cervical discectomy at C3-4 and C4-5.

In a progress report dated August 24, 2010, Dr. Michael P. Barker, a Board-certified physiatrist, diagnosed spinal stenosis at C3-4 and C4-5 following anterior discectomies and fusions at C3 through C5. He released appellant to return to work with restrictions on September 7, 2010. In a work restriction evaluation dated August 24, 2010, Dr. Barker found that appellant could work eight hours per day with no overhead reaching. He further determined that appellant could push, pull and lift no more than 15 pounds for eight hours per day.

On August 10, 2011 OWCP referred appellant for vocational rehabilitation.

Appellant had a previously accepted March 2003 occupational disease claim, assigned file number xxxxxx500, for a ganglion cyst of the left wrist, bilateral carpal tunnel syndrome and a bilateral ulnar nerve lesion. In a work restriction evaluation dated March 16, 2012, Dr. Miguel J. Saldana, a Board-certified surgeon, released appellant to resume his usual work without restrictions under file number xxxxxx500.

In a work restriction evaluation dated June 7, 2012, Dr. Barker again found that appellant could work full time with restrictions on lifting, pushing and pulling up to 15 pounds for eight hours per day and avoiding reaching over the shoulder.

By letter dated November 16, 2012, OWCP advised appellant that it proposed to reduce his compensation based on its finding that he had the capacity to work in the selected position of procurement clerk.

On November 20, 2012 the employing establishment provided OWCP with a copy of a November 14, 2012 job offer. The position was available November 19, 2012 and the hours were from 7:30 a.m. to 4:00 p.m.<sup>3</sup> The duties of the position consisted of casing mail two to three hours per day and carrying an assigned route for five to six hours per day. The physical requirements entailed loading level trays weighing no more than 15 pounds, loading, pushing

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<sup>2</sup> By decision dated December 12, 2008, OWCP denied appellant's claim after finding that the medical evidence was insufficient to show that he sustained a medical condition as a result of his work duties. On March 6, 2009 an OWCP hearing representative set aside the December 12, 2008 decision and remanded the case for further development of the medical evidence.

<sup>3</sup> The cover letter with the offered position provided that the employing establishment had been "able to find two hours of work within [appellant's] restrictions." The job offer, however, specifies that the position was full time and provides work hours from 7:30 a.m. to 4:00 p.m. and work duties of eight hours per day. Consequently, the indication in the cover letter that the employing establishment had a position for only two hours per day appears to be a typographical error.

and pulling level hampers weighing no more than 15 pounds and loading a level satchel weighing no more than 15 pounds.

By letter dated November 27, 2012, OWCP advised appellant that it had determined that the November 14, 2012 position of a modified city letter carrier was suitable. It informed him that the position remained available and allowed him 30 days to accept the offer or provide a written explanation of his reason for not accepting the position. OWCP further notified appellant that section 8106(c) provides that an employee who refuses an offer of suitable work without reasonable cause is not entitled to compensation.

On December 5, 2012 appellant responded to OWCP's November 16, 2012 notice of proposed reduction of his compensation. He related that he had persistent wrist and neck pain. Appellant asserted that on November 3, 2011 Dr. Saldana performed a ganglionectomy. He requested that OWCP schedule him for an evaluation of his neck pain.

On December 28, 2012 OWCP notified appellant that his reasons for refusing the offered position were not acceptable and provided him 15 days to accept the offered position or have his compensation terminated. It informed him that it would not consider further reasons for refusal.

On January 7, 2013 appellant refused the November 2012 job offer due to neck and hand pain. On January 16, 2013 the employing establishment confirmed that the offered position remained available.

By decision dated January 17, 2013, OWCP terminated appellant's compensation and entitlement to a schedule award effective that date on the grounds that he refused an offer of suitable work under section 8106(c).

On January 28, 2013 appellant requested a review of the written record. In a letter dated January 26, 2013, he related that he had scheduled appointments with Dr. Barker and his primary care physician for an evaluation of his continued symptoms. Appellant related that he went to the employing establishment on January 7, 2013. He asserted that the position was the same as the job he was performing before his injury with the exception of two hours of work. When appellant told a manager that he could not perform the work with his current injuries, the manager told him to leave. He continued to experience daily neck and bilateral hand and arm pain.

By decision dated April 24, 2013, an OWCP hearing representative affirmed the January 17, 2013 decision. He noted that appellant had been released to return to work with no restrictions under file number xxxxxx500 and released to return to modified work under the current file number. The hearing representative found that the evidence established that appellant could perform the offered position as it was within Dr. Barker's work restrictions.

In a report dated June 17, 2013, Dr. Donald P. Atkins, a Board-certified neurosurgeon, diagnosed cervical disc degeneration and cervical postlaminectomy syndrome.<sup>4</sup>

A magnetic resonance imaging (MRI) scan study of the cervical spine, performed on June 25, 2013, showed status post cervical fusion at C3 to C5, flattening of the spinal cord at C4, a disc bulge at C5-6 without neural encroachment and a broad-based disc herniation at C6-7 with abutment of the cervical spinal cord and compression of both C7 nerve roots.

In a report dated July 30, 2013, Dr. Stephen Dinger, an osteopath, diagnosed brachial neuritis or radiculitis, chronic pain syndrome and cervical postlaminectomy syndrome. He noted that appellant had sustained a neck injury when he fell while delivering mail. Dr. Dinger indicated that he continued to work.

On January 8, 2014 appellant requested an oral hearing on the January 17, 2013 decision. On January 9, 2014 counsel requested reconsideration.

By decision dated February 6, 2014, OWCP denied appellant's request for an oral hearing as he had previously received a review of the written record. It exercised its discretion and considered his request but found that it could be adequately addressed through a reconsideration request and the submission of evidence showing that the offered position was not suitable.

In a decision dated March 3, 2014, OWCP denied modification of its April 24, 2013 decision. It found that appellant had not submitted evidence showing that he was unable to perform the duties of the offered position.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8124(b) of FECA provides that before review under section 8128(a) of this title, a claimant for compensation "not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."<sup>5</sup>

Section 10.615 of the federal regulations implementing this section of FECA provides that the claimant shall be afforded a choice of an oral hearing or a review of the written record.<sup>6</sup> OWCP's regulations provide that the request must be sent within 30 days of the date of the

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<sup>4</sup> On June 18, 2013 appellant requested a change of physicians to Dr. Helo Chen, who specializes in occupational medicine. On June 27, 2013 OWCP authorized a change in physicians from Dr. Barker to Dr. Chen. In a letter dated June 30, 2013, appellant related that he returned to work on May 9, 2013 but that his supervisor told him to return home pending an evaluation by his attending physician. Dr. Chen found that appellant could return to work with restriction on June 18, 2013, but he was told there was no work available.

<sup>5</sup> 5 U.S.C. § 8124(b)(1).

<sup>6</sup> 20 C.F.R. § 10.615.

decision for which a hearing is sought and also that the claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.<sup>7</sup>

The Board has held that OWCP, in its broad discretionary authority in the administration of FECA, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and OWCP must exercise this discretionary authority in deciding whether to grant a hearing.<sup>8</sup> This includes the situation where a claimant requests a second hearing on an issue. There is no provision in FECA for more than one hearing on the same issue.<sup>9</sup> If a request for a second hearing is made, appellant is not entitled to a hearing as a matter of right, but OWCP must exercise its discretion in determining whether to grant a hearing.<sup>10</sup>

### **ANALYSIS -- ISSUE 1**

On January 8, 2014 appellant requested an oral hearing on the January 17, 2013 decision terminating his compensation for refusal of suitable work. He had previously, however, requested and received a review of the written record regarding the January 17, 2013 decision. As appellant previously received a review of the written record, he is not entitled to an oral hearing as a matter of right. There is no provision in FECA for more than one hearing on the same issue.<sup>11</sup>

When a claimant has previously requested reconsideration or requests a second hearing on the same issue, OWCP must exercise its discretionary authority to grant or deny the hearing request. It considered the issue and found that it could be equally well addressed by submitting new and relevant evidence with an application for reconsideration. The Board finds that OWCP properly exercised its discretion and did not abuse its discretion in denying appellant's hearing request.<sup>12</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>13</sup> Section 8106(c)(2) of FECA<sup>14</sup> 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.<sup>15</sup> To justify termination of

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<sup>7</sup> *Id.* at § 10.616(a).

<sup>8</sup> *Marilyn F. Wilson*, 52 ECAB 347 (2001).

<sup>9</sup> *See R.F.*, Docket No. 13-892 (issued July 5, 2013); *John S. Baldwin*, 35 ECAB 1161 (1984).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *See Lawrence C. Parr*, 48 ECAB 445 (1997).

<sup>13</sup> *Linda D. Guerrero*, 54 ECAB 556 (2003).

<sup>14</sup> *Supra* note 1.

<sup>15</sup> *Id.* at § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

compensation, OWCP must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.<sup>16</sup> 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.<sup>17</sup>

Section 10.517(a) of FECA's implementing regulations provides 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.<sup>18</sup> 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.<sup>19</sup>

Before compensation can be terminated, however, OWCP has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work, establishing that a position has been offered within the employee's work restrictions and setting forth the specific job requirements of the position.<sup>20</sup> In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, OWCP has the burden of showing that the work offered to and refused by appellant was suitable.<sup>21</sup>

Once OWCP establishes that the work offered is suitable, the burden shifts to the employee who refuses to work to show that the refusal or failure to work was reasonable or justified.<sup>22</sup> The determination of whether an employee is physically capable of performing a modified assignment is a medical question that must be resolved by medical evidence.<sup>23</sup> OWCP procedures state that acceptable reasons for refusing an offered position include medical evidence of inability to do the work.<sup>24</sup>

## **ANALYSIS -- ISSUE 2**

OWCP accepted that appellant sustained degeneration of a cervical intervertebral disc due to an October 21, 2008 employment injury. On February 5, 2010 appellant underwent an anterior cervical discectomy at C3-4 and C4-5. He also had an accepted 2003 occupational

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<sup>16</sup> *Ronald M. Jones*, 52 ECAB 190 (2000).

<sup>17</sup> *Joan F. Burke*, 54 ECAB 406 (2003).

<sup>18</sup> 20 C.F.R. § 10.517(a); *see supra* note 16.

<sup>19</sup> *Id.* at § 10.516.

<sup>20</sup> *See Linda Hilton*, 52 ECAB 476 (2001).

<sup>21</sup> *Id.*

<sup>22</sup> 20 C.F.R., *supra* note 18.

<sup>23</sup> *Gayle Harris*, 52 ECAB 319 (2001).

<sup>24</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work, Job Offer Refusal*, Chapter 2.814.5a (July 2013).

disease claim for a ganglion cyst of the left wrist, bilateral carpal tunnel syndrome and a bilateral ulnar nerve lesion under file number xxxxxx500.

On November 14, 2012 the employing establishment offered appellant a position as a modified city letter carrier. 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.<sup>25</sup> The weight of the evidence in this case clearly establishes that appellant was capable of performing the modified position. OWCP considered his restrictions in both the current file number and file number xxxxxx500.<sup>26</sup> In a March 16, 2012 work restriction evaluation, Dr. Saldana released appellant to return to work with no restrictions under file number xxxxxx500. In a June 7, 2012 work restriction evaluation relevant to the current file number, Dr. Barker found that appellant could return to work with restrictions on lifting, pushing and pulling of 15 pounds for eight hours per day and no reaching over the shoulder. The employing establishment's job offer, which requires loading level trays, hampers and satchels weighing no more than 15 pounds, is within the restrictions set forth by Dr. Barker. The Board thus finds that the offered position was medically suitable.

The Board further finds that OWCP complied with its procedural requirements in advising appellant that the position was suitable, providing him with the opportunity to accept the position or provide reasons for his refusal and notifying him of the penalty provision of section 8106(c).<sup>27</sup> Appellant informed OWCP that he had continued pain in his wrist and neck. He, however, did not submit any medical evidence supporting that he was unable to perform the duties of the offered position. On December 28, 2012 OWCP advised appellant that his reasons for refusing the position were not valid and provided him an additional 15 days to accept the position. The Board finds that it properly followed its procedures in terminating compensation under section 8106.

Subsequent to OWCP's termination of his compensation, appellant submitted a June 17, 2013 report from Dr. Atkins, who diagnosed cervical disc degeneration and cervical postlaminectomy syndrome. On July 30, 2013 Dr. Dinger diagnosed brachial neuritis or radiculitis, chronic pain syndrome and cervical postlaminectomy syndrome. Neither physician, however, addressed whether appellant was disabled from the duties of the modified position and as such their opinions are of little probative value.

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 and 20 C.F.R. §§ 10.605 through 10.607.

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<sup>25</sup> See *Robert Dickinson*, 46 ECAB 1002 (1995).

<sup>26</sup> When evaluating the suitability of a particular position, OWCP must consider the employment-related condition(s) and any preexisting and subsequently acquired medical conditions. See *Gayle Harris*, 52 ECAB 319 (2001).

<sup>27</sup> See *Bruce Sanborn*, 49 ECAB 176 (1997).

**CONCLUSION**

The Board finds that OWCP properly denied appellant's January 8, 2014 request for an oral hearing under 5 U.S.C. § 8124 as it was made after he received a review of the written record. The Board further finds that it properly terminated his compensation effective January 17, 2013 on the grounds that he refused an offer of suitable work under section 8106(c).

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 3 and February 6, 2014 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 29, 2014  
Washington, DC

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

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

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