

establishment was not suitable based on his current medical restrictions and that therefore he was justified in refusing the job.

FACTUAL HISTORY

On February 22, 2006 appellant, then a 52-year-old maintenance mechanic, filed an occupational disease claim alleging that, due to the repetitive motions of his job duties, including kneeling, bending, squatting, and twisting, he had pain in his right and left knees. On April 7, 2006 OWCP initially denied his claim. In a July 10, 2006 decision, an OWCP hearing representative reversed the April 7, 2006 decision, finding that evidence submitted since the initial decision was sufficient to establish an employment-related injury. Pursuant to his instructions, on August 23, 2006 OWCP accepted appellant's claim for bilateral enthesopathy of the knee and bilateral prepatellar bursitis. Appellant's claim was later accepted for bilateral localized primary osteoarthritis of the lower leg.

In an October 1, 2013 report, Dr. Karen M. Perl, appellant's treating Board-certified physiatrist, listed her impressions as: (1) bilateral knee pain related to occupational duties at the employing establishment; (2) bilateral knee joint effusions, prepatellar bursitis, and thinning of the articular cartilage; (3) status post right knee arthroscopy on May 1, 2007; (4) status post right total knee replacement on April 14, 2010; and (5) status post left knee arthroscopy on June 30, 2007.

In a January 21, 2014 note, Dr. Perl noted that appellant was unchanged since his last visit. In a duty status report of the same date, she indicated that he had work restrictions of lifting/carrying 20 pounds; walking, standing, bending/stooping of zero to one hours a day; twisting one hour a day; pushing/pulling and lifting above shoulder for two hours a day; and sitting, simple grasping, and fine manipulation for four to eight hours a day. All of these restrictions were based on intermittent activity. Dr. Perl prohibited appellant from climbing or kneeling. She advised appellant that he can resume work within those restrictions.

By letter dated February 28, 2014, the employing establishment offered appellant a limited-duty position as a maintenance mechanic. The daily physical requirements of the job were intermittent lifting/carrying of 20 pounds for one to two hours; sitting for four to eight hours; standing, walking/bending/stooping for one hour; and no climbing or kneeling. The position would involve appellant performing bread rack repairs, and the offer noted that he will have to use a bicycle to travel to equipment and a stool at the equipment.

Although OWCP initially indicated on March 6, 2014 that appellant could perform the offered position, in a March 6, 2014 report, Dr. Perl indicated that he was not capable of riding a bicycle and rolling around on a stool due to his knee replacement and weakness. Dr. Perl noted that his sitting restrictions were for sedentary sitting in a chair intermittently and not for physical labor activity while in a stool. She submitted a new duty status report dated March 21, 2014, which was identical to the prior duty status report except that she indicated that appellant was unable to use a bicycle for travel and was unable to use a rolling stool for sitting.

On March 28, 2014 the employing establishment made a new job offer to appellant as a modified maintenance mechanic performing bread rack repairs eight hours a day. The position

would involve intermittent lifting and carrying of 20 pounds; sitting for four to eight hours; standing, walking and bending/stooping for one hour; and no climbing or kneeling. The requirement of riding a bicycle or using a stool was removed. The employing establishment indicated that the assignment would remain within the physical restrictions furnished by appellant's treating physician, and that appellant was advised to not exceed these restrictions. In an accompanying letter, the employing establishment indicated that the job offer was made in strict compliance with his medically defined work limitations.

By letter to OWCP dated March 31, 2014, appellant's counsel contended that the offer of employment was unsuitable because the position did not adequately describe what was involved in performing bread rack repairs.

On April 3, 2014 OWCP notified appellant that the modified maintenance mechanic position was suitable, and gave appellant 30 days to accept the position or provide a written explanation for his refusal.

By letter dated April 7, 2014, appellant indicated that he wished to switch his benefits from OWCP to the Office of Personnel Management (OPM). He attached a January 24, 2012 letter, wherein OPM approved his disability retirement application. By letter dated April 8, 2014, appellant, through counsel, asked that OWCP coordinate with OPM to transition his benefits.

In an April 21, 2014 report, Dr. Perl noted that appellant was in no acute distress, but had chronic issues with his knees. She noted that he had difficulty with heel and toe walking and uses a single point cane for ambulation assistance.

By letter dated May 7, 2014, OWCP gave appellant an additional 15 days to accept the position.

By decision dated May 28, 2014, OWCP found that the job offer was suitable based on appellant's restrictions as provided by Dr. Perl on March 6, 2014. As appellant refused suitable work, OWCP terminated his compensation benefits.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.³ OWCP's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁴ The burden is on OWCP to demonstrate an absence of employment-related disability is the period subsequent to the date when compensation is terminated or modified.⁵ Pursuant to FECA

³ *Mohamed Yunis*, 42 ECAB 325, 334 (1991); *see also J.P.*, Docket No. 13-1049 (issued August 16, 2013).

⁴ *Gewin C. Hawkins*, 52 ECAB 242 (2001).

⁵ *J.S.*, Docket No. 13-1678 (issued April 3, 2014).

procedure manual, before terminating benefits, the claims examiner is responsible for advising the claimant of the proposed termination or reduction, including the reasons for the proposed action, and provide the claimant an opportunity to respond in writing.⁶ The Board has held that OWCP must follow its procedures and provide notice and opportunity to respond prior to the termination of compensation benefits.⁷

Section 8106(c) of FECA provides in pertinent part, “A partially disabled employee who (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation.⁸ It is OWCP’s burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.⁹ The Board has long held that section 8106(c) will be narrowly construed as it is a serious penalty provision that may bar an employee’s entitlement to compensation based on a refusal to accept a suitable offer of employment.¹⁰

When OWCP informs a claimant that it has determined that, a given offered position is suitable and invites him or her to write and give reasons for not accepting, OWCP acknowledges that its determination is not yet final and that a reasonable explanation may support the claimant’s refusal of the position and result in the continuation of his or her compensation for disability. Certain explanations will, of course, justify a claimant’s refusal to accept an offer of employment. OWCP’s procedures list a number of reasons that are considered acceptable.¹¹ If a claimant refuses the employment offered and provides such a reason, OWCP will consider his or her refusal justified and will continue his or her compensation for disability.¹²

If a claimant chooses to respond within 30 days and gives reasons for not accepting the offered position, OWCP must consider these reasons before it can make a final determination on the issue of suitability. Only after it has made a final determination on the issue of suitability can OWCP afford the claimant an opportunity to accept or refuse an offer of suitable work. Only after it has finalized its decision on suitability can OWCP notify the claimant that refusal to accept shall result in the termination of compensation, as the language of 5 U.S.C. § 8106(c) clearly mandates.¹³

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.2(a)-(b) (February 2013).

⁷ *K.S.*, Docket No. 11-2021 (issued August 21, 2012).

⁸ 5 U.S.C. § 8106(c).

⁹ *Joyce M. Doll*, 53 ECAB 790 (2002).

¹⁰ *G.M.*, Docket No. 11-1752 (issued April 24, 2012); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.5(a)-(b) (June 2013).

¹² *Id.*

¹³ *See Maggie L. Moore*, 42 ECAB 484 (1991); *reaff’d on recon.*, 43 ECAB 818 (1992); *see also J.J.*, Docket No. 14-951 (issued September 2, 2014).

OWCP 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.¹⁴ After providing the 30-day and 15-day notices, OWCP will terminate the employee's entitlement to further wage-loss compensation and schedule award benefits.¹⁵ However, the employee remains entitled to medical benefits.¹⁶

ANALYSIS

OWCP accepted appellant's claim for bilateral joint effusion, prepatellar bursitis of the knees, and bilateral localized primary osteoarthritis of the lower leg. Dr. Perl, appellant's treating physician, indicated in a duty status report dated March 21, 2014 that appellant could return to work with restrictions of intermittent lifting/carrying limited to 20 pounds; walking, standing, bending/stooping of zero to one hours a day; twisting for one hour a day; pushing/pulling, lifting above shoulder for two hours a day; and sitting, simple grasping, fine manipulation for four to eight hours a day. She prohibited climbing or kneeling. In addition, Dr. Perl stated that appellant would be unable to use a bicycle for travel and was unable to use a rolling stool. The March 21, 2014 duty status report was identical to her previous duty status report with the exception of the prohibition with regard to the bicycle and stool. The employing establishment offered appellant a limited-duty position within these restrictions.

Appellant maintains that the modified position would require him to exceed his work restrictions as set by Dr. Perl, and that he was, therefore, justified in refusing the position. He is particularly concerned about the amount of sitting required and noted that he cannot ride a bicycle or use a stool. However, there is no medical evidence of record showing that appellant would be required to exceed his restrictions. Although the initial job offer required him to perform his duties using a bicycle and a stool, the employing establishment removed those specific requirements from the position description and reoffered him the new modified job. Appellant argues that OWCP did not take into account all of his medical conditions, yet it is unclear what conditions he contends were excluded. In support of his position appellant cites *E.B.*, Docket No. 13-319 (issued May 14, 2013). However, the facts in the present case can be distinguished from *E.B.* In *E.B.*, only very basic and general work restrictions were listed by OWCP without reference to the extent and duration of the restricted activities. Further, restrictions were left to appellant to "self limit" her work activities. In the case at bar, specific work restrictions were listed accompanied by recommended length and duration of the restricted activities taken from Dr. Perl's report. The position description for the second modified maintenance mechanic job adhered to all of the work limitations as set by appellant's treating

¹⁴ 20 C.F.R. § 10.516.

¹⁵ *Id.* at § 10.517(b).

¹⁶ See *Linda Hilton*, 52 ECAB 476 (2001); *S.B.*, Docket No. 14-1441 (issued June 24, 2014); *Maggie L. Moore*, *supra* note 13.

physician, Dr. Perl. Appellant contends that the job description is not specific, but it clearly indicates that he would work performing bread rack repairs, lists the job restrictions, and notes that he will not be required to exceed his restrictions. As acknowledged by him, retirement is not an acceptable reason for refusing an offer of suitable work.¹⁷

Appellant also questions whether the procedural requirements for terminating his compensation were properly followed. However, the Board finds that he received proper notice prior to termination of his compensation. Appellant was given 30 days to provide reasons for refusal of the position and was given an additional 15 days to accept the position after that. Accordingly, the Board finds that OWCP complied with its procedural requirements in that it advised him that the position was suitable, provided him with an opportunity to accept the position or provide his reasons for refusing the job offer, and giving him notice of the penalty provisions of section 8106(c).¹⁸ Finally, although appellant references OPM's decision with regard to his ability to perform his position with the employing establishment, the Board has long held that findings of other federal agencies are not dispositive with regard to questions arising under FECA.¹⁹

Accordingly, after reviewing the evidence of record, the Board finds that the offered modified maintenance mechanic position 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.²⁰

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 wage-loss compensation under 5 U.S.C. § 8106(c) for refusal of suitable work.

¹⁷ *C.E.*, Docket No. 09-725 (issued November 5, 2009); *Robert P. Mitchell*, 52 ECAB 116 (2000).

¹⁸ *See J.J.*, Docket No. 14-951 (issued September 2, 2014).

¹⁹ *See D.I.*, 59 ECAB 158 (2007); *see also J.B.*, Docket No. 13-876 (issued October 22, 2013).

²⁰ *A.B.*, Docket No. 14-1176 (issued October 27, 2014); *Roy E. Bankston*, 38 ECAB 380 (1987).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 28, 2014 is affirmed.

Issued: June 4, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

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