

On appeal counsel contends that appellant continues to suffer residuals from his October 25, 2008 employment injuries and is unable to perform the duties of the offered position.

FACTUAL HISTORY

OWCP accepted that appellant, a 49-year-old letter carrier, sustained a lumbar sprain and displacement of lumbar intervertebral disc without myelopathy on October 25, 2008 due to twisting his left hip while getting out of a postal vehicle. Appellant stopped work on the date of injury. He was placed on the periodic rolls and received compensation benefits.

On May 17, 2012 OWCP referred appellant for vocational rehabilitation services, but the case was closed because OWCP found that rehabilitation services were not medically feasible for appellant at that time and changes in his medical condition needed clarification.

OWCP referred appellant to Dr. Leon Sultan, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the nature and extent of his employment-related conditions. In an April 16, 2013 report, Dr. Sultan took a detailed medical history, reviewed appellant's medical records and a statement of accepted facts, and performed a physical examination. He found that the lumbar spine motion was restricted with forward flexion accompanied by complaint of pain secondary to lower lumbar disc herniations and opined that appellant had an ongoing lower back disability due to his employment-related conditions. Dr. Sultan concluded that appellant was not fit for duty as a letter carrier, but was capable of light or sedentary duty. In a work capacity evaluation dated April 16, 2013, he advised that appellant had reached maximum medical improvement and was capable of full-time, limited-duty work with the following restrictions: pushing, pulling, and lifting up to 15 to 20 pounds; and no squatting, kneeling, or climbing.

On May 22, 2013 the employing establishment offered appellant a full-time modified position as a letter carrier with the following restrictions: pushing, pulling, and lifting up to 15 to 20 pounds using both hands; and avoid squatting, kneeling, and climbing. The duties included sedentary work writing notices, reports, and logs, delivering Express Mail sedentary mounted pieces, and delivering express and small parcels under 20 pounds. The job offer was available at 10:00 a.m. on May 30, 2013. Appellant accepted the modified letter carrier position on May 30, 2013, but did not report for duty.

By letter dated June 7, 2013, OWCP advised appellant that the modified letter carrier position had been found to be suitable and conformed to the work limitations provided by Dr. Sultan in his April 16, 2013 report. The employing establishment confirmed that the position remained available. OWCP allowed appellant 30 days to accept the position or provide his reasons for refusal and advised that an employee who refuses an offer of suitable work without reasonable cause is not entitled to compensation.

In response, appellant submitted reports dated June 10 through 27, 2013 from Dr. Robert Sica, a Board-certified osteopathic manipulative medicine specialist, who diagnosed lumbar radiculopathy. In a June 13, 2013 work capacity evaluation, Dr. Sica further diagnosed lumbar sprain and displacement of lumbar intervertebral disc without myelopathy. He opined that

appellant could not work due to residuals of his back condition and had not reached maximum medical improvement. Dr. Sica advised that appellant had the following medical restrictions: sitting, walking, standing, reaching, and reaching above the shoulder no more than two hours per day; no operating a motor vehicle at work and no more than one hour of operating a motor vehicle to/from work per day; and no twisting, bending, stooping, pushing, pulling, lifting, squatting, kneeling, or climbing.

Appellant also submitted a July 1, 2013 magnetic resonance imaging (MRI) scan of the lumbar spine which showed an extruded disc herniation at L5-S1 with additional degenerative disc disease with clear asymmetry and mass effect at L4-5 and L3-4 in the setting of congenital spinal stenosis.

In an August 6, 2013 letter, OWCP indicated that appellant had refused to report to the modified letter carrier position on May 30, 2013. It advised him that his reasons for refusing the offered position were determined to be unreasonable and his compensation benefits would be terminated if he did not accept the position within 15 days.

Subsequently, appellant accepted a job offer as a modified letter carrier which he signed on January 24, 2013 with a handwritten contingency indicating that he would accept the offer once he had been medically cleared for duty.

By decision dated September 12, 2013, OWCP terminated appellant's eligibility for wage-loss and schedule award benefits effective September 3, 2013 because he refused suitable employment. It advised that appellant did not respond to the 30-day notice.

On November 24, 2013 appellant, through counsel, requested reconsideration and submitted reports dated July 16 through October 29, 2013 from Dr. Agha Raza, a Board-certified neurologist, who diagnosed multiple lumbar radiculopathies and lumbar spinal stenosis. Dr. Raza indicated that appellant had bilateral lower extremity weakness and opined that the left-sided weakness was related to his lumbar radiculopathy "due to [an] old work injury since 2008." He concluded that appellant was disabled and unable to work.

Appellant submitted a November 6, 2008 MRI scan of the lumbar spine which showed a disc herniation at L3-4, L4-5, and L5-S1 and electromyography and nerve conduction studies (EMG/NCS) dated October 7, 2013 which revealed mild-to-moderate chronic left L4-5 lumbar radiculopathy. He also submitted a May 9, 2014 electroencephalogram (EEG) and MRI scan of the pelvis and left hip dated September 23, 2013 which was read to be within normal limits.

By decision dated May 28, 2014, OWCP denied modification of its prior decision.

LEGAL PRECEDENT

It is well settled that, once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.³ Section 8106(c)(2) of FECA provides that a partially disabled employee who refuses or neglects to work after suitable work is offered

³ See *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

to, procured by or secured for the employee is not entitled to compensation.⁴ Section 8106(c)(2) will be narrowly construed as it serves as a penalty provision.⁵

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.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

To justify termination, OWCP must show that the work offered was suitable and that appellant was informed of the consequences of his 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 is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work and other relevant factors.⁹

The determination of whether an employee is capable of performing modified duty is a medical question that must be resolved by probative medical opinion.¹⁰ OWCP procedures provide that an acceptable reason for refusing a job offer includes medical evidence that the claimant's refusal was based upon the attending physician's advice, and that such advice included medical rationale in support of the opinion.¹¹ If the attending physician states that the claimant cannot perform the duties of the offered position and a second opinion specialist state that the claimant can perform those duties, and both opinions are of equal weight, then a conflict in the medical evidence exists and a referral to an impartial medical specialist for a referee examination is necessary.¹²

ANALYSIS

On appeal counsel contends that appellant continues to suffer residuals from his October 25, 2008 employment injuries and is unable to perform the duties of the offered

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

⁵ *See Joan F. Burke*, 54 ECAB 406 (2003).

⁶ 20 C.F.R. § 10.517(a).

⁷ *Id.* at § 10.516.

⁸ *See Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

⁹ 20 C.F.R. § 10.500(b); *see Ozine J. Hagan*, 55 ECAB 681 (2004).

¹⁰ *See Gloria J. Godfrey*, 52 ECAB 486 (2001); *Robert Dickerson*, 46 ECAB 1002 (1995).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.5a(4) (June 2013); *see B.H.*, Docket No. 11-379 (issued October 17, 2011).

¹² *Id.* at Chapter 2.814.5a(4)(d).

position. The Board finds that OWCP failed to meet its burden of proof to terminate appellant's entitlement to wage-loss and schedule award compensation.

OWCP accepted that appellant sustained a lumbar sprain and displacement of lumbar intervertebral disc without myelopathy on October 25, 2008 due to twisting his left hip while getting out of a postal vehicle. On May 22, 2013 the employing establishment offered appellant a full-time modified position as a letter carrier with the following restrictions: pushing, pulling, and lifting up to 15 to 20 pounds using both hands; and avoid squatting, kneeling, and climbing. Appellant accepted the modified letter carrier position on May 30, 2013, but did not report for duty. By letter dated June 7, 2013, OWCP advised appellant that the modified letter carrier position had been found to be suitable and afforded him 30 days to accept the position or provide his reasons for refusal.

In response, appellant submitted reports dated June 10 through 27, 2013 from Dr. Sica who diagnosed lumbar radiculopathy. In a June 13, 2013 work capacity evaluation, Dr. Sica further diagnosed lumbar sprain and displacement of lumbar intervertebral disc without myelopathy and opined that appellant could not work due to residuals of his back condition. He concluded that appellant had not reached maximum medical improvement and provided the following medical restrictions: sitting, walking, standing, reaching, and reaching above the shoulder no more than two hours per day; no operating a motor vehicle at work and no more than one hour of operating a motor vehicle to/from work per day; and no twisting, bending, stooping, pushing, pulling, lifting, squatting, kneeling, or climbing.

Once OWCP accepts a claim, it has the burden of proving that the employee's disability has ceased or lessened before it may terminate or modify compensation benefits.¹³ Following its suitability determination of the modified letter carrier position, appellant was properly afforded 30 days to either accept the offer of suitable work or provide reasons for rejecting the offered position. In response, he submitted medical records dated June 10 through 27, 2013 from Dr. Sica, including a June 13, 2013 functional capacity examination. Within these records, he opines that appellant could not perform the offered position, had continuing residuals of his back condition, and was not at maximum medical improvement. Herein, OWCP failed to sufficiently discuss or analyze the new reports from Dr. Sica appellant had submitted within the 30 days he was afforded. In fact, the September 12, 2013 decision erroneously finds that appellant did not respond to OWCP's 30-day notice. Because appellant submitted additional evidence within the 30-day period afforded by OWCP for responding to the suitability determination, he was entitled to have this evidence evaluated to determine whether or not he provided acceptable reasons for refusing the offer of suitable work.

The Board finds that OWCP failed to properly consider the evidence submitted by appellant within the 30 days to contest the termination and improperly terminated his entitlement to wage-loss and schedule award compensation effective September 3, 2013 because he refused suitable work under 5 U.S.C. § 8106(c)(2).

Consequently, OWCP's May 28, 2014 decision shall be reversed.

¹³ *Karen L. Majewski*, 45 ECAB 219 (1993); *Bettye F. Wade*, 37 ECAB 556 (1986).

CONCLUSION

The Board finds that OWCP improperly terminated appellant's entitlement to wage-loss and schedule award compensation effective September 3, 2013 on the grounds that he refused suitable work under 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the May 28, 2014 decision of the Office of Workers' Compensation Programs is reversed.¹⁴

Issued: June 13, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

¹⁴ James A. Haynes, Alternate Judge, participated in the original decision but was no longer a member of the Board effective November 16, 2015.