



## **FACTUAL HISTORY**

On April 15, 2006 appellant, then a 42-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that on April 5, 2006 he injured his upper right arm and shoulder while trying to free a hamper full of mail from a crack in the floor. OWCP accepted the claim for right shoulder and upper arm sprain, which was expanded to include right shoulder adhesive capsulitis, right rotator cuff sprain, right shoulder joint derangement, and right shoulder reflex sympathetic dystrophy. It authorized right arthroscopic and rotator cuff repair surgery, which was performed on April 6, 2007 and right arthroscopic surgery, which was performed on May 15, 2014. Appellant stopped work on April 6, 2006 and was paid compensation benefits until he was placed on the periodic rolls for temporary total disability, effective May 9, 2008.

On December 16, 2008 OWCP referred appellant to Dr. Michael J. Katz, a Board-certified orthopedic surgeon, to resolve a conflict in the medical opinion evidence between Dr. James M. Kipnis, a treating Board-certified orthopedic surgeon, and Dr. Frank Hudak, a second opinion orthopedic surgeon, regarding the need for further medical treatment and whether there continued to be any residuals or disability due to the accepted conditions. In a January 9, 2009 report, Dr. Katz opined that appellant was capable of working with restrictions and recommended further testing.

The record shows that Dr. Marc Parnes, a treating Board-certified family medicine practitioner, began treating appellant in December 2009. Dr. Parnes opined that appellant was totally disabled from his date-of-injury job in reports dated December 2, 2009 and December 20, 2010 and attending physician reports (Form CA-20) dated December 20, 2010 and December 29, 2011.

On March 9, 2012 OWCP referred appellant for a second opinion evaluation with Dr. Leon Sultan, a Board-certified orthopedic surgeon, to obtain updated information regarding the nature and extent of appellant's disability due to the accepted April 5, 2006 employment injury.

In a March 22, 2012 report, Dr. Sultan, based upon a review of the medical evidence, statement of accepted facts, and physical examination, diagnosed status post right shoulder internal derangement with residual low grade right shoulder adhesive capsulitis. A physical examination revealed no right deltoid atrophy, no complaints on palpation over the acromioclavicular (AC) joint articulation biceps long head, and negative right shoulder impingement, Hawkins, and drop arm tests. Right shoulder range of motion was 140 degrees forward elevation and abduction, 45 degrees external rotation, complete internal rotation, 45 degrees adduction, and 40 degrees posterior extension. Dr. Sultan opined that appellant was capable of working with restrictions. The restrictions included no lifting more than 15 pounds at a time and limitations in using his right arm above the horizontal lifting.

On January 15, 2013 the employing establishment offered appellant a modified distribution window clerk position at the employing establishment. The duties of the position were listed as up to eight hours of window clerk within medical restrictions. Physical requirements of the position included up to eight hours of sitting, walking, and standing and up

to eight hours of lifting up to 15 pounds with no overhead lifting. The work hours were 1:00 p.m. to 5:00 p.m. with Sundays and Thursdays as the scheduled days off.

On January 23, 2013 appellant refused the offered position as he claimed that his physician found him totally disabled.

In a letter dated January 25, 2013, OWCP advised appellant of its determination that the distribution window clerk position offered by the employing establishment on January 15, 2013 was suitable. It indicated that their determination was based upon the opinion of Dr. Sultan who opined that appellant was capable of working eight hours per day with restrictions. The employing establishment confirmed that the position remained available to appellant. OWCP instructed appellant that he had 30 days to either accept the position or provide a written explanation as to why he was not accepting the position or he could lose his right to compensation under 5 U.S.C. § 8106(c) of FECA.

On March 1, 2013 OWCP received an undated letter from appellant responding to the January 25, 2013 letter. Appellant contended that he was disabled from performing the offered position based on the reports of his treating physicians and psychologist and submitted their reports in support.

In the August 25, 2008 report, Dr. John T. McCann, Ph.D., a treating clinical psychologist, diagnosed major depression, anxiety, numerous injuries, and severe psychosocial stressors. He opined that appellant was permanently and totally disabled due to his psychiatric condition.

In a January 21, 2013 report, Dr. Parnes noted employment and medical histories. A physical examination revealed AC joint and biceps tendon tenderness. Range of motion for the right shoulder included 90 degrees anterior flexion, internal and external rotation mild rotator cuff defects, and 35 degrees posterior extension. Dr. Parnes diagnosed traumatic right shoulder internal derangement.

In a February 13, 2013 report, Dr. Barry M. Katzman, a treating Board-certified orthopedic surgeon, reviewed a magnetic resonance imaging (MRI) scan and performed a physical examination. Physical examination findings revealed positive Neer and Hawkins impingement signs, negative apprehension sign, no glenohumeral crepitus, no tenderness on palpation over the biceps, rotator cuff, or AC joint, and 90 degrees forward flexion. A review of the MRI scan revealed no significant findings despite appellant's extreme difficulty in lifting the right shoulder more than 90 degrees passively and 45 degrees actively.

In an April 18, 2013 letter, OWCP found that the reasons given by appellant for refusing the offered position were insufficient. It gave him 15 additional days to accept the position. OWCP noted that, if appellant did not accept the position within 15 days of the date of the letter, his right to compensation for wage loss or future eligibility for a schedule award would be terminated pursuant to section 8106 of FECA. It would not consider any further reasons for refusal of the offered position. OWCP found the opinion of Dr. Parnes was insufficient to outweigh the second opinion physician.

On May 10, 2013 OWCP received a February 6, 2013 MRI scan report reflecting AC joint changes and an intact rotator cuff tendon.

On May 22, 2013 OWCP terminated appellant's wage-loss compensation benefits effective May 23, 2013 as he had refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c). This decision found that although Dr. McCann had diagnosed "major depressive episode" and anxiety, he had provided no explanation as to the causal relationship between these conditions and the accepted employment injury of April 5, 2006. In this decision, OWCP concluded that appellant's physicians had not explained how appellant's disability was related to his accepted work injury, therefore appellant had not established that he was justified in refusing the work offer.

OWCP continued to receive medical evidence. An October 7, 2013 MRI scan revealed supraspinatus and infraspinatus tendinosis with a stable interstitial linear tear of the infraspinatus tendon anterior fibers, mild AC joint osteoarthritis, and no labral tear.

In an October 23, 2013 report, Dr. Katzman noted that appellant had extreme difficulty lifting his arm up to 90 degrees and provided physical examination findings found in his prior report. He stated that he would request authorization for right shoulder surgery and noted appellant was currently retired.

In a January 8, 2014 report, Dr. Katzman diagnosed labral tear, impingement syndrome, and possible frozen shoulder. He opined that some of appellant's pain was originating in the neck and that appellant basically has a nonfunctional right shoulder.

In letters dated February 10 and April 7, 2014, appellant's then counsel requested reconsideration and submitted medical reports in support of the request. The reports provided by counsel, which were not previously submitted, are set forth below.

In a February 3, 2013 report, Dr. Katzman noted appellant's employment and medical history and that appellant continued to have right shoulder pain. A physical examination revealed 70 degrees forward flexion, bilateral internal and external rotation were equal on both shoulders, no tenderness on palpation over the AC joint, rotator cuff or biceps, positive Neer and Hawkins impingement signs, and negative apprehension and cross body adduction sign. Based on the findings and history, Dr. Katzman opined that appellant might have a frozen shoulder and referred appellant for a right shoulder MRI scan.

Dr. Katzman, in a July 26, 2013 report, noted that appellant continued to have right shoulder pain complaints. He reviewed a nerve study test showing C5-6 radiculopathy, which he opined "could explain some of [appellant's] pain."

In a September 18, 2013 report, Dr. Katzman noted that appellant complained that he can barely lift his right arm and has a terrible right shoulder. He reviewed the job offer from the employing establishment. Dr. Katzman found that appellant was capable of standing for up to four hours without a break, but opined that there was no way appellant could lift any packages with his right arm or place a package on a scale with his right arm. In support of this conclusion, he noted that appellant was barely able to lift his right arm without holding a package.

In a December 19, 2013 report, Dr. Parnes noted appellant's employment injury, his medical history, and that Dr. Katzman recommended right shoulder surgery. A physical examination revealed AC joint and biceps tendon tenderness. Range of motion for the right shoulder included 90 degrees anterior flexion, internal and external rotation mild rotator cuff defects, and 35 degrees posterior extension. Dr. Parnes diagnosed traumatic right shoulder internal derangement rotator cuff tear, which he opined required surgery.

By decision dated June 18, 2014, OWCP denied modification.

In a letter dated January 31, 2015, appellant's representative requested reconsideration. In support of this request, he submitted medical reports from Dr. Katzman and a definition of a frozen shoulder by the Mayo Clinic.

In a January 21, 2015 report, Dr. Katzman concurred with Dr. Sultan regarding the diagnosis of adhesive capsulitis as being causally related to the accepted employment injury.

By decision dated April 7, 2015, OWCP denied modification.

### **LEGAL PRECEDENT**

Section 8106(c)(2) of FECA states that a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by, or secured for him or her is not entitled to compensation.<sup>2</sup> Once OWCP accepts a claim, it has the burden to justify termination or modification of compensation benefits under section 8106(c) for refusing to accept or neglecting to perform suitable work.<sup>3</sup> The Board has recognized that section 8106(c) serves as a penalty provision as it may bar an employee's entitlement to future compensation and, for this reason, will be narrowly construed.<sup>4</sup> 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.<sup>5</sup> According to its procedure, a job offer must be in writing and contain a description of the duties to be performed and the specific physical requirements of the position.<sup>6</sup> Section 10.516 of Title 20 of the Code of Federal Regulations<sup>7</sup> provides that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of showing that such refusal or failure to work was reasonable or justified, and shall be provided with the opportunity to make such

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<sup>2</sup> 5 U.S.C. § 8106(c)(2).

<sup>3</sup> *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

<sup>4</sup> *H. Adrian Osborne*, 48 ECAB 556 (1997).

<sup>5</sup> *T.S.*, 59 ECAB 490 (2008); *Ronald M. Jones*, 52 ECAB 190 (2000).

<sup>6</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.4(a) (June 2013).

<sup>7</sup> 20 C.F.R. § 10.516.

showing before a determination is made with respect to termination of entitlement to compensation.<sup>8</sup>

### ANALYSIS

OWCP accepted the claim for right shoulder and upper arm sprain, which was expanded to include right shoulder adhesive capsulitis, right rotator cuff sprain, right shoulder joint derangement, and right shoulder reflex sympathetic dystrophy. On January 15, 2013 the employing establishment offered appellant a job as a modified clerk. By letters dated January 25 and April 18, 2013, OWCP informed him that the position was suitable. Appellant refused the position and OWCP terminated his compensation effective May 23, 2013 due to this refusal.

The Board finds that OWCP did not meet its burden of proof to establish that the modified distribution clerk position offered by the employing establishment was suitable. Therefore, OWCP's termination of appellant's compensation for refusing such employment was improper.

OWCP did not adequately consider whether all of appellant's diagnosed medical conditions negatively affected his ability to work in the position offered by the employing establishment. The Board has held that all impairments, whether work related or not, must be considered in assessing the suitability of an offered position.<sup>9</sup> In this case, OWCP had not adequately considered whether appellant's diagnosed psychological condition affected his ability to perform the modified clerk position. Appellant submitted medical evidence regarding his psychiatric condition from Dr. McCann, an attending clinical psychologist, opining that appellant had disabling depression and anxiety. While these psychiatric conditions have not been accepted by OWCP as work related, they should be considered in determining the suitability of the modified distribution clerk position. However, OWCP did not provide any discussion in its decisions regarding whether he could perform the position in spite of his psychiatric conditions. Rather, it discounted appellant's diagnosed psychiatric conditions because they had not been established to be causally related to the accepted April 5, 2006 employment injury. As such, OWCP failed to establish that the offered position was suitable due to appellant's psychiatric disorder. As a penalty provision, section 8106(c)(2) must be narrowly construed.<sup>10</sup> The medical evidence does not clearly establish that the modified distribution clerk position was within appellant's capabilities. Consequently, OWCP did not discharge its burden of proof to justify the termination of his compensation pursuant to section 8106(c)(2) of FECA.

For the above reason, OWCP did not meet its burden of proof to show that the modified clerk position was suitable when it was offered on January 15, 2013. Because the modified distribution clerk position was not shown to be suitable, appellant's refusal of the offered position would not constitute a refusal of an offer of suitable work. Therefore, OWCP had no basis to terminate appellant's compensation effective May 23, 2013.

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<sup>8</sup> See *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

<sup>9</sup> See *Mary E. Woodward*, 57 ECAB 211 (2005).

<sup>10</sup> See *Stephen A. Pasquale*, 57 ECAB 396 (2006); *Richard P. Cortes*, 56 ECAB 200 (2004).

**CONCLUSION**

The Board finds that OWCP did not meet its burden of proof to establish that appellant refused an offer of suitable work.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated April 7, 2015 is reversed.

Issued: March 11, 2016  
Washington, DC

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

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board