

On February 9, 1994 appellant, then a 42-year-old boiler operator, filed an occupational disease claim (Form CA-2) alleging that he sustained bilateral carpal tunnel syndrome causally related to factors of his federal employment. OWCP accepted the claim for bilateral carpal tunnel syndrome and paid compensation for disability beginning August 31, 1995. Appellant underwent a right carpal tunnel release in January 1996 and a left carpal tunnel release in February 1997.

In decisions dated September 12, 2001 and May 7, 2002, OWCP reduced appellant's compensation benefits based on its finding that he could work in the selected position of telecommunicator. By decision dated January 29, 2003, the Board reversed OWCP's loss of wage-earning capacity determination after finding that the record contained a conflict in opinion regarding his work capacity.²

In a report dated July 2, 2012, Dr. Luis F. Pagani, an attending Board-certified neurologist, diagnosed carpal tunnel syndrome and status post laminectomy and discectomy. He found that appellant was totally disabled from employment.

On January 9, 2013 OWCP referred appellant to Dr. Edward Gregory Fisher, a Board-certified orthopedic surgeon, for a second opinion examination. It noted that appellant had a history of a cervical fusion at C5-6 and C6-7 in January 1995 and lumbar surgery at L5-S1 in September 1998 and November 2001.

In a report dated January 24, 2013, Dr. Fisher noted that appellant had not received treatment for carpal tunnel syndrome since his carpal tunnel releases in 1996 and 1997 and received only pain management treatment of his back from Dr. Pagani.³ He listed findings on examination of full strength and sensation of the upper and lower extremities and a mildly positive Tinel's sign and Phalen's test of both wrists. Dr. Fisher found that appellant was not able to work as a boiler plant worker, but could work "eight hours a day in a limited[-]duty capacity. His restrictions would be having a weight limitation of carrying/lifting/pushing/pulling of 10 pounds frequently and 20 pounds occasionally with both hands."

On March 25, 2013 the employing establishment offered appellant a position as a facilities management clerk working eight hours per day Monday through Thursday from 6:30 a.m. until 3:00 p.m. The position required occasional carrying of no more than 10 pounds, sitting not more than 7 hours, walking up to 1 hour, and standing, kneeling, and bending up to ½ hour. It provided that the work was sedentary and that appellant could either sit or stand.

On March 30, 2013 appellant refused the offered position.

In a letter dated April 2, 2013, the employing establishment advised OWCP that appellant had refused a light-duty job offer for a position that was "full time, 10 hours per day, Monday through Thursday...."

² Docket No. 02-1754 (issued January 29, 2003).

³ In a progress report dated March 4, 2013, Dr. Pagani diagnosed carpal tunnel syndrome and a herniated lumbar disc and provided pain medication.

On April 4, 2013 OWCP notified appellant that the offered position was suitable and provided him 30 days to accept the position or provide reasons for his refusal.⁴ It informed him that an employee who refused an offer of suitable work without cause was not entitled to compensation and that disability retirement is not an acceptable reason to refuse an offer of suitable work.

On May 6, 2013 OWCP verified that the offered position remained available.⁵ By letter dated May 8, 2013, it advised appellant that any reasons offered for refusing the position were not valid and afforded him 15 days to accept the position and resume work or have his compensation benefits terminated. Appellant did not respond.

By decision dated June 4, 2013, OWCP terminated appellant's compensation benefits and eligibility for a schedule award effective that date as he refused an offer of suitable employment under section 8106(c)(2). It found that the opinion of Dr. Fisher represented the weight of the evidence and established that the offered position was suitable.

On June 15, 2013 appellant requested an oral hearing before an OWCP hearing representative. In an August 5, 2013 progress report, Dr. Pagani found that appellant could lift and carry no more than 10 pounds frequently or 20 pounds occasionally, walk no more than 20 to 30 minutes, and could not stand or bend. He further advised that appellant could not use his left upper extremity.

At the telephone hearing, held on September 13, 2013, appellant argued that OWCP did not consider his back limitations in finding the position suitable.

In a November 4, 2013 progress report, Dr. Pagani reviewed the offered position of facility management clerk. He noted that appellant had a loss of sensation in his fingers from carpal tunnel syndrome and back pain from a herniated disc. Dr. Pagani related, "The position offer[ed] is seemingly free to sit and stand as he wishes and there is no lifting involved. It is a position that is sedentary. I do not think he will make it with that but I do [not] see any objection to give it to him on a trial basis."

By decision dated November 26, 2013, the OWCP hearing representative affirmed the June 4, 2013 decision. She determined that the position was within the work restrictions set forth by Dr. Fisher and Dr. Pagani.

On December 16, 2013 appellant requested a review of the written record.⁶

⁴ On April 9, 2013 OWCP referred appellant to vocational rehabilitation. In a report dated May 10, 2013, the rehabilitation counselor noted that appellant was not interested in participating and was pursuing disability retirement.

⁵ In a progress report dated May 2, 2013, Dr. Pagani found that appellant was totally disabled due to his hand pain and herniated lumbar disc.

⁶ In a report dated January 7, 2014, Dr. Stephen Umansky, a Board-certified orthopedic surgeon, found that appellant had no work restrictions but "may not be capable to doing everything his job requires." Appellant also submitted progress reports from Dr. Pagani dated May through December 2014.

In a decision dated April 23, 2014, OWCP denied appellant's request for a review of the written record as appellant had already received a telephone hearing. It exercised its discretion and found that the matter could be equally well addressed by submitting evidence that he was unable to perform the offered position and requesting reconsideration.

In correspondence received October 31, 2014, appellant's senator inquired into the status of his reconsideration request. On December 16, 2014 another senator inquired into his reconsideration request.

In a decision dated January 14, 2015, OWCP denied the December 16, 2013 reconsideration request as untimely and insufficient to show clear evidence of error. On January 23, 2015 appellant again requested reconsideration.⁷ By decision dated February 9, 2015, OWCP denied his reconsideration request after determining that it was not timely and did not demonstrate clear evidence of error.

On February 18, 2015 appellant appealed to the Board. By decision dated August 20, 2015, the Board set aside OWCP's January 14 and February 9, 2015 decisions.⁸ It found that appellant had timely requested reconsideration of the November 26, 2013 decision in correspondence received October 31, 2014. The Board remanded the case for OWCP to apply the standard applicable to timely reconsideration requests.

By decision dated September 30, 2015, OWCP denied modification of its November 26, 2013 decision.⁹ It found that both Dr. Fisher and Dr. Pagani determined that appellant was capable of performing the offered position of facilities management clerk.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.¹⁰ 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.¹¹ To justify termination of compensation, OWCP must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.¹² Section 8106(c) will be narrowly

⁷ Appellant submitted a January 21, 2015 progress report from Dr. Pagani, a May 18, 2004 finding by the Social Security Administration that he was totally disabled, and a finding by the Department of Veterans Affairs that he had 70 percent impairment due to a cervical fracture with a fusion, bilateral carpal tunnel syndrome, tinea corpus, and hypertension.

⁸ Docket No. 15-0811 (issued August 20, 2015).

⁹ In progress reports dated February 24 to August 20, 2015, Dr. Pagani described his treatment of appellant for low back and leg pain and listed examination findings.

¹⁰ *Linda D. Guerrero*, 54 ECAB 556 (2003).

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

¹² *Ronald M. Jones*, 52 ECAB 190 (2000).

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.¹³

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 to or secured by him, has the burden of showing that such refusal or failure to work was reasonable or justified.¹⁴ 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.¹⁵

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 for the specific job requirements of the position.¹⁶ 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.¹⁷

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.¹⁸ 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.¹⁹ OWCP procedures state that acceptable reasons for refusing an offered position include medical evidence of inability to do the work.²⁰

ANALYSIS

OWCP accepted that appellant sustained employment-related bilateral carpal tunnel syndrome and paid him compensation for total disability. It terminated his compensation benefits effective June 2, 2013 after it found that he refused a March 25, 2013 offer of suitable work by the employing establishment. OWCP found that the January 24, 2013 opinion of Dr. Fisher, an OWCP referral physician, established that the position offered was within appellant's work restrictions.

¹³ *Joan F. Burke*, 54 ECAB 406 (2003).

¹⁴ 20 C.F.R. § 10.517(a); *see supra* note 12.

¹⁵ *Id.* at § 10.516.

¹⁶ *See Linda Hilton*, 52 ECAB 476 (2001).

¹⁷ *Id.*

¹⁸ 20 C.F.R. § 10.517(a).

¹⁹ *Gayle Harris*, 52 ECAB 319 (2001).

²⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(3) (June 2013).

The Board finds that OWCP failed to meet its burden of proof to establish that appellant refused an offer of suitable employment. The determination of whether an employee has the physical ability to perform a position offered by the employing establishment is a medical question that must be resolved by the medical evidence.²¹

In the report dated January 24, 2013, Dr. Fisher, a second opinion physician, found that appellant could work eight hours a day with restrictions on lifting, carrying, pushing, and pulling up to 20 pounds occasionally and 10 pounds frequently. On March 25, 2013 the employing establishment offered him a job as a facilities management clerk working eight hours a day Monday through Thursday. The position required sitting no more than seven hours a day, walking and standing no more than one hour a day, and occasional carrying of no more than 10 pounds. On April 2, 2013, however, the employing establishment advised that the position was for 10 hours a day Monday through Thursday rather than eight hours a day. Dr. Fisher determined that appellant could work only eight hours a day, and thus the offered position is not within his work restrictions.

On August 5, 2013 Dr. Pagani, an attending physician, found that appellant could carry up to 10 pounds frequently or 20 pounds occasionally and walk no more than 20 to 30 minutes. In November 2013, he indicated that he had reviewed the offered position of facilities management clerk and advised that he could attempt the job as it was sedentary and required no lifting. As noted, however, the offered position indicated that it was for eight hours a day Monday through Thursday rather than 10 hours a day Monday through Thursday, as later clarified by the employing establishment. There is no medical evidence clearly supporting that appellant can perform the offered position of facilities management clerk for 10 hours a day 4 days a week. As a penalty provision, section 8106(c)(2) must be narrowly construed.²² As the medical evidence does not clearly establish that the offered position was within appellant's capabilities, OWCP did not discharge its burden of proof to support the termination of his monetary compensation under section 8106(c)(2).

CONCLUSION

The Board finds that OWCP improperly terminated appellant's compensation effective June 2, 2013 as he refused an offer of suitable work under 5 U.S.C. § 8107(c)(2).

²¹ See *A.L.*, Docket No. 12-1839 (issued August 29, 2013); *Robert Dickinson*, 46 ECAB 1002 (1995).

²² See *E.B.*, Docket No. 13-319 (issued May 14, 2013); *A.M.*, Docket No. 12-1301 (issued March 14, 2013).

ORDER

IT IS HEREBY ORDERED THAT the September 30, 2015 decision of the Office of Workers' Compensation Programs is reversed.

Issued: March 11, 2016
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board