



## **FACTUAL HISTORY**

On December 12, 2011 appellant, then a 50-year-old meat inspector, filed a traumatic injury claim (Form CA-1) alleging that on December 5, 2011 he sustained a left ankle injury when he slipped on a drain cover. OWCP accepted that appellant sustained a stress fracture of his left tibia/fibula, left ankle sprain, and left peroneal nerve injury.<sup>2</sup> Appellant stopped work on December 8, 2011 and received disability compensation on the daily roll beginning January 23, 2012. He returned to modified duty on a part-time basis in July 2012.

On July 1, 2013 Dr. Steven Howell, a Board-certified orthopedic surgeon, performed OWCP-authorized decompression surgery on the common and deep peroneal nerves of appellant's left knee and foot. Appellant stopped work after undergoing this surgery.

In a December 31, 2013 report, Dr. Howell indicated that appellant could work eight hours per day with restrictions including sitting for eight hours per day, walking/standing for three hours, reaching for eight hours, reaching above the shoulders for eight hours, twisting for eight hours, bending/stooping for three hours, operating a motor vehicle at work and to/from work for eight hours, engaging in repetitive movements of the wrists and elbows for eight hours, pushing/pulling for three hours, lifting 12 pounds for three hours, squatting/kneeling for three hours, and climbing for three hours.<sup>3</sup>

On February 20, 2014 appellant filed a claim for a schedule award (Form CA-7) due to his December 5, 2011 employment injury.

In a March 3, 2014 report, Dr. Alan Snodgrass, an attending Board-certified family practitioner, reported findings on physical examination including limitation of left ankle motion. He indicated that appellant had subjective complaints of experiencing pain upon any degree of standing, walking, or climbing. Dr. Snodgrass noted that appellant was unable to maintain his balance upon slick surfaces and could not walk without slipping. He opined that instability and limited motion of appellant's left ankle placed him at risk for additional injury.<sup>4</sup>

On June 26, 2014 the employing establishment offered appellant a modified position as a food inspector. The duties involved inspecting slaughtered poultry to make sure that it was fit for human consumption.<sup>5</sup> The physical requirements of the permanent job offer included optional sitting/standing for a combined total of up to 8 hours per day, walking less than 30 minutes, lifting up to 5 pounds, no squatting, no crawling, no crouching, no kneeling, very occasional bending/stooping, occasional balancing/climbing stairs for less than 3 minutes at a

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<sup>2</sup> The findings of December 8, 2011 x-ray testing of appellant's left foot showed no acute osseous abnormality, minimal degenerative changes, moderate-sized plantar calcaneal spur, and probable forefoot soft tissue swelling.

<sup>3</sup> In another December 31, 2013 report, Dr. Howell indicated that appellant had 10 percent permanent impairment of his left lower extremity.

<sup>4</sup> In a March 3, 2014 note, Dr. Snodgrass indicated that appellant could not return to work due to left ankle instability.

<sup>5</sup> The record contains descriptions of the food inspector position from earlier in 2014, but it does not appear that the position was formally offered to appellant at that time.

time, and frequent fine manipulation, simple grasping, and firm hand grasping. Appellant did not accept the food inspector position offered by the employing establishment.

In an August 28, 2014 letter, OWCP advised appellant of its determination that the food inspector position offered by the employing establishment was suitable. It noted that the medical opinion of Dr. Howell showed that appellant was physically able to perform the position. OWCP informed appellant that his compensation would be terminated if he did not accept the position or provide good cause for not doing so within 30 days of the date of the letter. Appellant did not respond to OWCP's August 28, 2014 letter within the allotted period.

In an October 6, 2014 decision, OWCP terminated appellant's wage-loss and schedule award compensation, effective October 8, 2014 because he refused an offer of suitable work. It found that the food inspector position was vocationally and physically suitable and that he did not provide good cause for refusing the position.

By decision dated December 5, 2014, OWCP granted appellant a schedule award for 10 percent permanent impairment of his left lower extremity. The award ran for 21.86 weeks from May 8 to October 7, 2014. OWCP indicated, "On October 6, 2014 this office notified [appellant] by letter that your entitlement to compensation for wage loss and schedule award has been terminated effective October 8, 2014 for refusal of suitable work, in accordance with 5 U.S.C. § 8106(c)(2). Therefore, payment of your award ends on October 7, 2014."

Appellant, through counsel, requested a telephone hearing before an OWCP hearing representative. During the June 26, 2015 hearing, counsel argued that the opinion of Dr. Snodgrass showed that appellant could not work as a food inspector. Counsel noted that the percentage of impairment awarded was not in dispute.

By decision dated September 15, 2015, the hearing representative affirmed OWCP's termination of appellant's wage-loss and schedule award compensation, effective October 8, 2014. He indicated that the opinion of Dr. Snodgrass did not show that appellant was physically unable to perform the duties of the food inspector position offered by the employing establishment. The hearing representative further found that the proper termination action under section 8106(c)(2) of FECA dictated that both appellant's wage-loss and schedule award compensation were terminated, effective October 8, 2014.<sup>6</sup>

### **LEGAL PRECEDENT**

It is well settled that once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>7</sup> Section 8106(c)(2) of FECA provides that a partially disabled employee who refuses or neglects to work after suitable work is offered

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<sup>6</sup> The hearing representative indicated that he was affirming OWCP's December 5, 2014 decision, which found that appellant was not entitled to schedule award compensation after October 7, 2014. He did not make any determination regarding the percentage of impairment awarded on December 5, 2014 and this matter is not currently before the Board.

<sup>7</sup> See *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

to, procured by, or secured for the employee is not entitled to compensation.<sup>8</sup> Section 8106(c)(2) 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>9</sup> The Board has held that section 8106(c)(2) of FECA serves as a bar to receipt of further compensation for a period of disability arising from the accepted employment injury. This includes cases where a claimant who has had compensation terminated under 5 U.S.C. § 8106(c)(2) claims later periods of disability for conditions that were accepted prior to the termination.<sup>10</sup> The Board has also held that termination under section 8106(c)(2) of FECA serves as a bar to receipt of compensation in the form of schedule award compensation.<sup>11</sup>

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.<sup>12</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>13</sup>

To justify termination, OWCP must show that the work offered was suitable and that appellant was informed of the consequences of his or her refusal to accept such employment.<sup>14</sup> Determining what constitutes suitable work for a particular disabled employee, it considers the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, and the employee's qualifications to perform such work.<sup>15</sup> OWPC procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.<sup>16</sup>

### ANALYSIS

OWCP accepted that on December 5, 2011 appellant sustained a stress fracture of his left tibia/fibula, left ankle sprain, and left peroneal nerve injury. On July 1, 2013 Dr. Howell, a Board-certified orthopedic surgeon, performed OWCP-authorized decompression surgery on the common and deep peroneal nerves of appellant's left knee and foot. Appellant stopped work

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<sup>8</sup> 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

<sup>9</sup> *See Joan F. Burke*, 54 ECAB 406 (2003).

<sup>10</sup> *See Ronald M. Jones*, 52 ECAB 190 (2000).

<sup>11</sup> *See Pete F. Dorso*, 52 ECAB 424 (2001).

<sup>12</sup> 20 C.F.R. § 10.517(a).

<sup>13</sup> *Id.* at § 10.516.

<sup>14</sup> *See Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

<sup>15</sup> 20 C.F.R. § 10.500(b).

<sup>16</sup> *See Federal (FECA) Procedure Manual, Part 2 -- Claims, Job Offers and Return to Work, Chapter 2.814.5a* (June 2013); *see E.B.*, Docket No. 13-319 (issued May 14, 2013).

after this surgery. By decision dated December 5, 2014, OWCP granted appellant a schedule award for 10 percent permanent impairment of his left lower extremity. The award ran for 21.86 weeks from May 8 to October 7, 2014.

The Board finds that OWCP properly terminated appellant's wage-loss and schedule award compensation, effective October 8, 2014, because he refused an offer of suitable work.

On June 26, 2014 the employing establishment offered appellant a modified position as a food inspector. The position involved inspecting slaughtered poultry to make sure that it was fit for human consumption.<sup>17</sup>

The evidence of record shows that appellant is capable of performing the food inspector position offered by the employing establishment and determined to be suitable by OWCP in August 2014. In determining that appellant was physically capable of performing the food inspector position, OWCP properly relied on the opinion of Dr. Howell, an attending Board-certified orthopedic surgeon. On December 31, 2013 Dr. Howell indicated that appellant could work eight hours per day with restrictions, including sitting for eight hours per day, walking/standing for three hours, and reaching for eight hours.<sup>18</sup> The Board finds that these work restrictions would fit into the work restrictions of Dr. Howell and allow appellant to perform the physical duties of the food inspector position offered by the employing establishment.

Appellant submitted a March 3, 2014 report in which Dr. Snodgrass, an attending Board-certified family practitioner, indicated that he had subjective complaints of experiencing pain upon any degree of standing, walking, or climbing. Dr. Snodgrass noted that appellant was unable to maintain his balance upon slick surfaces and could not walk without slipping.<sup>19</sup> However, his opinion does not contain medical rationale in support of his conclusions regarding appellant's ability to work. The Board has held that a medical report is of limited probative value on a medical matter if it contains a conclusion regarding that medical matter which is unsupported by medical rationale.<sup>20</sup> Dr. Snodgrass generally indicated that instability and limited motion of appellant's left ankle placed him at risk for additional injury. He did not provide any opinion explaining how specific findings on physical examination and diagnostic testing supported limitations which would prevent appellant from working in the food inspector position offered

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<sup>17</sup> The physical requirements of the permanent job offer included optional sitting/standing for a combined total of up to 8 hours per day, walking less than 30 minutes, lifting up to five pounds, no squatting, no crawling, no crouching, no kneeling, very occasional bending/stooping, occasional balancing/climbing stairs for less than 3 minutes at a time, and frequent fine manipulation, simple grasping, and firm hand grasping.

<sup>18</sup> Dr. Howell also recommended restrictions of reaching above the shoulders for eight hours per day, twisting for eight hours, bending/stooping for three hours, operating a motor vehicle at work and to/from work for eight hours, engaging in repetitive movements of the wrists and elbows for eight hours, pushing/pulling for three hours, lifting 12 pounds for three hours, squatting/kneeling for three hours, and climbing for three hours.

<sup>19</sup> In a March 3, 2014 note, Dr. Snodgrass indicated that appellant could not return to work due to left ankle instability.

<sup>20</sup> *C.M.*, Docket No. 14-88 (issued April 18, 2014).

by the employing establishment. Dr. Snodgrass only noted that appellant's complaints were subjective in nature and he did not provide an objective basis for their existence.<sup>21</sup>

The record does not reveal that the food inspector position offered by the employing establishment was temporary in nature.<sup>22</sup> Appellant has not alleged that he was not vocationally capable of performing the food inspector position and the record reveals that he was in fact vocationally capable of performing the food inspector position as he was working as a meat inspector for the employing establishment at the time of his December 5, 2011 employment injury.

The Board finds, therefore, that OWCP has established that the food inspector position offered by the employing establishment is suitable. As noted above, once OWCP has established that a particular position is suitable, the employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.<sup>23</sup> Appellant did not respond to OWCP's August 28, 2014 preliminary suitability determination and the evidence of record does not justify his refusal of the food inspector position.

The Board notes that OWCP properly terminated both appellant's wage-loss and schedule award compensation effective October 8, 2014. As noted above, section 8106(c)(2) of FECA serves as a bar to receipt of further compensation for a period of disability arising from the accepted employment injury as well as a bar to receipt of schedule award compensation arising from the accepted employment injury.<sup>24</sup>

For these reasons, OWCP properly terminated appellant's wage-loss and schedule award compensation effective October 8, 2014 because he refused an offer of suitable work.

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 entitlement to wage-loss and schedule award compensation, effective October 8, 2014, because he refused an offer of suitable work.

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<sup>21</sup> Moreover, there is no indication in the record that the food inspector position required walking on slippery floors.

<sup>22</sup> If the employing establishment offers a claimant a temporary light-duty assignment and the claimant held a permanent job at the time of injury, the penalty language of section 8106(c)(2) cannot be applied. *See* Federal (FECA) Procedure Manual, *supra* note 16 at Chapter 2.814.4c(5), 9 (June 2013).

<sup>23</sup> *See supra* note 12.

<sup>24</sup> *See supra* notes 10 and 11.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 15, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 25, 2016  
Washington, DC

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

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

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