

**United States Department of Labor  
Employees' Compensation Appeals Board**

L.S., Appellant	)	
	)	
and	)	<b>Docket No. 15-1246</b>
	)	<b>Issued: September 8, 2016</b>
U.S. POSTAL SERVICE, POST OFFICE,	)	
Plant City, FL, Employer	)	
	)	

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On May 13, 2015 appellant filed a timely appeal from a May 1, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether OWCP properly terminated appellant's compensation effective May 3, 2015 as he refused an offer of suitable work.

**FACTUAL HISTORY**

On October 21, 2013 appellant, then a 58-year-old city letter carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained a ventral hernia in the performance of duty. He stopped work on September 11, 2012. OWCP accepted the claim for ventral hernia without

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

obstruction or gangrene. Appellant began receiving wage-loss compensation benefits beginning October 1, 2012.

On September 17, 2012 appellant underwent emergency surgery for repair of an incarcerated ventral hernia performed by Dr. Michael Perez, a general surgeon. In a September 16, 2013 treatment note, Dr. Steven Rakita, a Board-certified surgeon, noted seeing appellant for a chronic nonhealing wound in the upper portion of the incision of a prior ventral hernia repair. He debrided the wound on October 23, 2013 and believed that the wound would heal.

OWCP subsequently referred the matter to an OWCP field nurse for medical management. The nurse began meeting with appellant on February 10, 2014 and advised that he experienced many complications following his initial surgery, including a blood clot in his lungs and a nonhealing wound. She advised that he could potentially return to a light-duty nonlifting position or that he could be granted disability retirement for which he had applied.<sup>2</sup>

In a March 20, 2014 report, Dr. Rakita advised that normally patients with appellant's condition were able to return to work with restrictions that avoid excessive labor and allow the wound to be kept clean. However, appellant informed Dr. Rakita that there was no light duty available to him and that his full-duty position required heavy lifting, which caused him to perspire profusely. Dr. Rakita stated that appellant could not work in such a capacity.

By letter dated May, 28, 2014, OWCP requested that Dr. Rakita advise of appellant's ability to work.

In a June 26, 2014 work capacity evaluation form, Dr. Rakita advised that appellant was able to perform his usual job with permanent restrictions on pushing, pulling, or lifting more than 50 pounds for eight hours per day.

On July 1, 2014 the employing establishment provided appellant a job offer as a modified city carrier job offer with a 70-pound lifting and carrying requirement. On July 9, 2014 appellant rejected the job offer noting that he had other medical issues that prevented him from performing the physical requirements of the job.

In a September 2, 2014 letter, the Office of Personnel Management related that its records showed that appellant was disabled due to respiratory failure, massive pulmonary embolism, high blood pressure, and blood clotting.

On January 20, 2015 the employing establishment advised that the 70-pound lifting restriction was an error. It resent the job offer for a modified city carrier position, but modified it to reflect a 45-pound lifting restriction for eight hours per day. The offer stated that it was in compliance with appellant's medical restrictions of no pulling, pushing, or lifting of more than 50 pounds.

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<sup>2</sup> The Social Security Administration advised appellant that he became eligible for its disability benefits beginning March 2013. The employing establishment advised that he was separated on September 12, 2014.

On January 27, 2015 appellant declined the modified job offer based upon the advice of his physician.<sup>3</sup>

By letter dated February 20, 2015, OWCP advised appellant that the modified city carrier position offered to him on January 20, 2015 by the employing establishment had been found to be suitable to his capabilities and was currently available. It found the work restrictions set by Dr. Rakita to be consistent with the offered position. Appellant was advised that he should accept the position or provide an explanation for refusing the position within 30 days. OWCP informed him that, if he failed to accept the offered position and failed to demonstrate that the failure was justified, his compensation would be terminated.

A February 3, 2015 functional capacity evaluation (FCE) requested by Dr. Shanthala Narasimha, Board-certified in internal medicine, and prepared by an occupational therapist was submitted. The FCE advised that appellant could only lift and carry 20 pounds and push and pull 22 pounds.

In a February 24, 2015 report, Dr. Narasimha stated that she had treated appellant for seven years. She advised that he was admitted for an emergent ventral hernia repair on September 17, 2012. On postoperative day 11 September 27, 2012, appellant developed a massive pulmonary embolism, which could have been triggered by a deep vein thrombus that was detected on a venous Doppler of the lower extremities. Dr. Narasimha stated that, an intravenous caval filter was inserted, he was put on blood thinner for life, and he received monitoring every three to four weeks. Due to this condition, appellant had chronic shortness of breath that would be an issue if he walked long periods or climbed hills in his job. Dr. Narasimha further noted that he had chronic pain syndrome from degenerative joint disease of the spine, knees, and shoulder, which would also hinder his performance of job duties. She stated that appellant continued to suffer from a ventral hernia as the mesh had been removed. Dr. Narasimha opined that, due to his chronic issues, he would be unable to perform his past duties.

By decision dated May 1, 2015, OWCP terminated appellant's compensation benefits, effective May 3, 2015, as he had refused an offer of suitable work. It determined that the position offered on January 20, 2015 was suitable and in accordance with the restrictions of the attending physician, Dr. Rakita, who had released appellant to work eight hours per day with a 50-pound lifting restriction. OWCP advised that in response to the notice dated February 20, 2015 it received a February 3, 2015 FCE ordered by Dr. Narasimha. It advised that no recent medical evidence was provided to support that appellant could not perform the offered modified city carrier job.

### **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>4</sup> Section 8106(c)(2) of FECA provides

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<sup>3</sup> On January 31, 2015 appellant elected to receive Civil Service retirement benefits, in lieu of FECA benefits, effective February 9, 2015, but on March 5, 2015 he elected FECA benefits.

<sup>4</sup> See *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

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.<sup>5</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>6</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>7</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>8</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>9</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>10</sup> OWCP 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>11</sup>

### ANALYSIS

OWCP accepted appellant's claim for ventral hernia without obstruction or gangrene. On February 20, 2015 it notified him that the modified city carrier position, offered by the employing establishment on January 20, 2015, was suitable. OWCP informed appellant that he had 30 days to either accept the offer or provide reasons for refusing the offer. A February 24, 2015 report from Dr. Narasimha as well as a February 3, 2015 FCE ordered by her was submitted. On May 1, 2015 OWCP terminated appellant's wage-loss compensation effective May 3, 2015 finding that he refused an offer of suitable work.<sup>12</sup>

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

<sup>6</sup> *See Joan F. Burke*, 54 ECAB 406 (2003).

<sup>7</sup> 20 C.F.R. § 10.517(a).

<sup>8</sup> *Id.* at § 10.516.

<sup>9</sup> *See Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

<sup>10</sup> 20 C.F.R. § 10.500(b).

<sup>11</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).

<sup>12</sup> OWCP also indicated that appellant had not submitted recent medical evidence supporting that he was unable to perform the offered position. However, Dr. Narasimha's February 24, 2015 report clearly addressed his medical conditions that limited his ability to work. *See William A. Couch*, 41 ECAB 548 (1990) (when adjudicating a claim, OWCP is obligated to consider all evidence properly submitted by a claimant and received by OWCP before the final decision is issued).

The Board, having duly considered the matter, finds that OWCP failed to meet its burden of proof in terminating appellant's compensation benefits, as it did not comply with its own procedural and regulatory requirements. Appellant submitted evidence in response to OWCP's February 20, 2015 letter that included Dr. Narasimha's February 24, 2015 report and February 3, 2015 FCE. OWCP regulations, procedures, and Board case law provide that, if the claimant's refusal of the offered job is not deemed justified in such a situation, OWCP must advise the claimant and allow 15 additional days for him to accept the job.<sup>13</sup> In issuing the May 1, 2015 decision, it implicitly determined that the evidence submitted by appellant in support of his refusal to accept the offered position was unacceptable and in doing so, finalized its preliminary decision on suitability under section 8106(c), thereby denying him an opportunity to accept the position.<sup>14</sup> The Board finds that OWCP failed to comply with its own notice requirements prior to termination. Thus, under the facts of this case, OWCP committed error in its invocation of section 8106(c) and improperly terminated appellant's compensation effective May 3, 2015 for refusing suitable work.<sup>15</sup>

### **CONCLUSION**

The Board finds that OWCP improperly terminated appellant's compensation benefits under 5 U.S.C. § 8106(c) because he refused an offer of suitable work.

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<sup>13</sup> *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1972). *See Maxine Riggs*, Docket No. 96-228 (issued November 10, 1997); 20 C.F.R. § 10.516. *See supra* note 11 at Chapter 2.814(5)(e)(3) (June 2013).

<sup>14</sup> *See R.M.*, Docket No. 14-1378 (issued February 5, 2015).

<sup>15</sup> *Id.* *See Tammy L. Flickinger*, 54 ECAB 516 (2003); *Maxine E. Riggs*, Docket No. 96-228 (issued November 10, 1997).

**ORDER**

**IT IS HEREBY ORDERED THAT** May 1, 2015 decision of the Office of Workers' Compensation Programs is reversed.<sup>16</sup>

Issued: September 8, 2016  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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