

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

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**W.L., Appellant**

**and**

**DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL  
CENTER, Altoona, PA, Employer**

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**Docket No. 17-0338  
Issued: July 25, 2017**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

Before:

COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On December 5, 2016 appellant, through counsel, filed a timely appeal from a September 30, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that appellant submitted new evidence following the September 30, 2016 decision. However, since the Board's jurisdiction is limited to evidence that was before OWCP at the time it issued its final decision the Board may not consider this evidence for the first time on appeal. See 20 C.F.R. § 501.2(c)(1); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

## **ISSUE**

The issue is whether OWCP properly terminated appellant's wage-loss compensation benefits effective November 2, 2015 pursuant to 5 U.S.C. § 8106(c)(2) as he abandoned suitable work.

## **FACTUAL HISTORY**

On May 2, 2013 appellant, then a 33-year-old police officer, filed a traumatic injury claim (Form CA-1) alleging that on April 15, 2013 his left leg became swollen as a result of defensive tactics training in the performance of duty. He did not stop work. OWCP accepted appellant's claim for osteochondritis dissecans of the left lateral femoral condyle.

On July 13, 2013 appellant resigned from federal employment.

In October 2013 appellant moved to North Carolina and began to attend college.

On October 9, 2013 appellant underwent authorized left knee surgery. He stopped work and filed claims for wage-loss compensation (Forms CA-7) for the period October 9 to November 1, 2013. OWCP paid disability compensation beginning October 9, 2013 and placed appellant on the periodic rolls. Appellant continued to receive medical treatment.

OWCP expanded acceptance of appellant's claim on March 6, 2014 to include post-surgery deep vein thrombosis of the left leg and left knee lateral meniscus tear.

On October 16, 2014 appellant was examined by Dr. Craig Mauro, a Board-certified orthopedic surgeon, who related in a work capacity evaluation form (OWCP-5C) that appellant's condition was accepted for osteochondritis dissecans. He checked a box marked "no" that appellant was not capable of performing his usual job. Dr. Mauro related that appellant could work full time with restrictions of standing and walking limited to two hours, reaching above the shoulder and operating a motor vehicle limited to one hour, pushing, pulling, and lifting limited to less than 10 pounds for less than one hour, and no squatting, kneeling, bending, or climbing. He also recommended 15-minute breaks "as needed."

By letter dated November 12, 2014, OWCP requested that the employing establishment provide appellant with a job, if possible, within the restrictions as outlined in Dr. Mauro's October 16, 2014 OWCP-5c form. It informed the employing establishment that the job offer must be in writing and include a description of the duties to be performed, the specific physical requirements of the position, the geographic location, the date on which the job will be available, and the rate of pay for the position.

On November 13, 2014 OWCP referred appellant for vocational rehabilitation services.

In a December 30, 2014 office visit note, Dr. Mauro related appellant's complaints of persistent pain and continued inability to run. Examination of appellant's left knee revealed primary tenderness anterolaterally over his trochlea, but no tenderness over his joint lines. Dr. Mauro indicated that a left knee magnetic resonance imaging (MRI) scan showed some chondrosis at the level of the donor sites, but no significant effusion or other abnormality. He

opined that appellant was one year status post left knee surgery with patellofemoral pain and chondrosis.

Appellant underwent a left lower extremity MRI scan on December 30, 2014 with Dr. Amitesh Prasad, a Board-certified diagnostic radiologist, who noted appellant's history of knee pain. He reported that appellant was post procedure at the posterior aspect of the lateral femoral condyle with overlying cartilage intact. Dr. Prasad also noted some chondrosis near the margin of the surgical site in the central aspect of the lateral femoral condyle, some minor blunting of the medial meniscus, edema and cystic changes at the margin of the lateral aspect of lateral trochlea with subchondral cystic changes, and slight lateral tilt of the patella with some capsular edema anterolaterally.

In a letter dated March 13, 2015, the employing establishment offered appellant a permanent position as a security clerk for the employing establishment in Pennsylvania. It informed him that it attempted to find a suitable position within the commuting radius of his proposed new address in Tennessee, but was informed on March 5, 2015 that he had relocated to Ohio. The employing establishment noted that a suitable vacancy was available in Pennsylvania and advised appellant that moving expenses would be provided. The job offer described the physical requirements of the position as: "The work is sedentary in nature and normally performed sitting." The employing establishment noted that appellant's physician provided him with physical limitations of sedentary duty, 10 pounds lifting restriction, no climbing, crawling, squatting, or kneeling, and may get up and move around as needed. It indicated that this position appeared to be a suitable assignment and within his medical restrictions since he performed these duties from May 24 to July 14, 2013. The employing establishment afforded appellant until March 27, 2015 to review and accept the position or provide a valid reason explaining why the position was not suitable. It advised him that according to 5 U.S.C. § 8106(c)(2), a claimant who refused an offer of suitable employment was not entitled to continuing compensation benefits. The employing establishment instructed appellant to report for duty on April 6, 2015.

On March 24, 2015 appellant declined the job offer and noted that the job had an undesirable location and pay plan/grade.

In a letter dated March 30, 2015, appellant informed OWCP that he was relocating to Ohio starting April 1, 2015 and provided his new address.

Dr. Mauro provided an April 10, 2015 work status report where he noted a diagnosis of status post left knee surgery. He indicated that appellant was able to work limited duty with restrictions of lifting, pushing, and pulling up to 10 pounds, limited standing, walking, and driving, sitting as tolerated, and no climbing, crawling, squatting, and kneeling. Dr. Mauro continued to treat appellant and provided work status reports dated June 17 to July 2, 2015.

By letter dated May 4, 2015, OWCP informed appellant that the security clerk position as offered in the March 13, 2015 letter was found suitable and within the medical restrictions as provided by Dr. Mauro. The employing establishment confirmed that this position continued to be open and available to appellant. OWCP instructed appellant that he had 30 days to accept the position or provide a valid reason in writing for his refusal. It further informed him that, if he

failed to work when suitable work was provided for him, he would not be entitled to further compensation for wage loss or a schedule award pursuant to 5 U.S.C. § 8106(c)(2).

On June 15, 2015 appellant accepted the suitable work offer and returned to limited duty.

Appellant was examined on June 25, 2015 by Dr. Matthew C. Schaffer, Board-certified in family medicine. He reported that on physical examination appellant's left knee was tender but there was no evidence of an active infection. Dr. Schaffer indicated that appellant received an injection into his left knee and would follow-up in one week for another injection.

In a letter dated August 8, 2015, appellant informed the employing establishment that his last day working in the position of security clerk for the employing establishment would be August 19, 2015.

Dr. Mauro continued to treat appellant and in an August 19, 2015 work status report indicated that appellant could continue to perform limited duty with the same work restrictions.

On August 20, 2015 the employing establishment informed OWCP *via* Form CA-110 that appellant had resigned effective August 19, 2015.

In a letter dated August 26, 2015, OWCP advised appellant that the security clerk position, which he worked from June 17 to August 19, 2015, was found suitable and within the medical restrictions as provided by Dr. Mauro. The employing establishment confirmed that this position continued to be open and available to appellant. OWCP instructed appellant that he had 30 days to accept the position or provide a valid reason in writing for his refusal. It also informed appellant that if he believed he had sustained a recurrence of disability he must provide factual and medical evidence to establish that he was unable to work due to a spontaneous worsening of his accepted injury or withdrawal of a light-duty assignment made specifically to accommodate his work-related injury. OWCP advised appellant that the current evidence of record was insufficient to establish a recurrence of disability. Appellant was afforded 30 days to submit additional information. OWCP advised appellant that if at the end of the 30-day period he failed to establish a recurrence of disability, failed to return to the offered position, and his reasons for refusing were not deemed justified, his right to compensation and schedule award benefits would be terminated in accordance with 5 U.S.C. § 8106(c)(2).

OWCP received an August 19, 2015 treatment report from Dr. Mauro who related that appellant continued to complain of symptoms over the trochlear and patellofemoral joint. Dr. Mauro reported tenderness over appellant's iliotibial (IT) band, lateral compartment, and trochlea and patellofemoral joint. He indicated that appellant was capable of working limited duty, but would be undergoing surgery.

In a letter dated September 18, 2015, appellant provided OWCP with his new address in Columbus, OH.

In a decision dated November 2, 2015, OWCP terminated appellant's entitlement to wage-loss compensation and schedule award benefits effective November 2, 2015 because he refused suitable work without justification in accordance with 5 U.S.C. § 8106(c)(2). It determined that the security clerk position was suitable and within the medical restrictions of

Dr. Mauro, appellant's treating physician. OWCP noted that appellant did not respond to its August 26, 2015 letter, and thus, failed to provide any explanation as to why he could no longer work the limited-duty position.

On November 20, 2015 appellant, through counsel, requested a hearing before an OWCP hearing representative. Appellant resubmitted various medical reports dated January 3, 2014 to November 5, 2015 regarding treatment for his work-related left leg injury.

On November 23, 2015 appellant underwent authorized left knee surgery.

Dr. Mauro continued to examine appellant. In a work status note dated December 1, 2015, Dr. Mauro noted a diagnosis of status post left knee surgery. He indicated that appellant was unable to work effective November 23, 2015. A January 8, 2016 work status note, related that appellant could work limited duty with restrictions of lifting, pushing, and pulling up to 10 pounds and no crawling, squatting, climbing, or kneeling.

In office notes dated March 16 and May 18, 2016, Dr. Mauro related that appellant remained symptomatic and was still unable to get back to running. Upon physical examination of appellant's left knee, he observed tenderness over the IT band and minimal tenderness over the lateral facet of appellant's patella. Dr. Mauro reported that appellant was status post arthroscopy with persistent lateral knee pain. He recommended IT band injections and continuation with a stretching program.

On July 15, 2016 a telephone hearing was held. Appellant was represented by counsel. Counsel pointed out that appellant began working on June 15, 2015 and resigned on August 19, 2015, 65 days later. He alleged that appellant was only required to work in the offered position for 60 days in order to maintain his benefits. Counsel asserted that appellant was under no obligation to continue to work and could leave his employment at his own will. He explained that appellant stopped work to return to school. Counsel confirmed that appellant had no medical reason or disability, which prevented him from working.

By decision dated September 30, 2016, an OWCP hearing representative affirmed the November 2, 2015 decision. She found that OWCP properly terminated appellant's benefits because he did not provide evidence of a recurrence of disability, work withdrawal, or disability for work due to the employment injury. The hearing representative noted that appellant's return to school was not considered an acceptable reason to refuse appellant's light-duty position after it was found suitable. She determined that OWCP properly reviewed the evidence of record and found that the job offer was suitable. As appellant refused or neglected to work after suitable work was offered to him, OWCP properly terminated his benefits under 5 U.S.C. § 8106(c).

#### **LEGAL PRECEDENT**

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of an employee's compensation benefits.<sup>4</sup> Section 8106(c)(2) of FECA provides that a partially disabled employee who refuses or neglects to work after suitable

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<sup>4</sup> *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

work is offered to, procured by or secured for the employee is not entitled to compensation.<sup>5</sup> To justify termination of compensation, OWCP must show that the work offered was suitable, that the employee was informed of the consequences of refusal to accept such employment, and that he was allowed a reasonable period to accept or reject the position or submit evidence to provide reasons why the position is not suitable.<sup>6</sup> Section 8106(c) 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>7</sup>

To establish that a claimant has abandoned suitable work, OWCP must make a finding of suitability.<sup>8</sup> In determining what constitutes suitable work, 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.<sup>9</sup> The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by medical evidence. The weight of medical evidence must establish that the employee is physically capable of carrying out any physical requirements of the job.<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>

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, 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>

## ANALYSIS

OWCP accepted that appellant sustained a left knee injury in the performance of duty on April 15, 2013. On October 9, 2013 appellant underwent authorized left knee surgery and stopped work. OWCP placed appellant on the periodic rolls. On March 13, 2015 the employing establishment offered appellant a modified-duty position as a security clerk based on the

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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 Ronald M. Jones*, 52 ECAB 190 (2000). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.4(a) (June 2013).

<sup>7</sup> *Joan F. Burke*, 54 ECAB 406 (2003); *see Robert Dickerson*, 46 ECAB 1002 (1995).

<sup>8</sup> Federal (FECA) Procedure Manual, *supra* note 6 at Chapter 2.814.8 (June 2013).

<sup>9</sup> *Supra* note 2 at § 8123(a); *see Y.A.*, 59 ECAB 701 (2008).

<sup>10</sup> 20 C.F.R. § 10.321.

<sup>11</sup> Federal (FECA) Procedure Manual, *supra* note 6 at Chapter 2.814.5(a) (June 2013).

<sup>12</sup> *Supra* note 10 at § 10.517(a); *see Ronald M. Jones*, *supra* note 6.

<sup>13</sup> *Id.* at § 10.516.

October 16, 2014 medical restrictions of Dr. Mauro, appellant's treating physician. On June 15, 2015 appellant began modified duty in the security clerk position. He resigned from federal service on August 19, 2015. In a decision dated November 2, 2015, OWCP terminated appellant's entitlement to wage-loss compensation and schedule award benefits effective November 2, 2015 in accordance with 5 U.S.C. § 8106(c)(2).

The Board finds that OWCP has met its burden of proof to justify termination of appellant's entitlement to wage-loss compensation or schedule award benefits pursuant to 5 U.S.C. § 8106(c) because he abandoned suitable work.

The Board finds that the security clerk position as offered in OWCP's March 13, 2015 letter was within appellant's work restrictions and was properly found to be medically suitable. In an October 16, 2014 work capacity evaluation form, Dr. Mauro indicated that appellant could work full time with restrictions of standing and walking with breaks for two hours, reaching, reaching above the shoulder, and operating a motor vehicle for one hour, pushing, pulling, and lifting less than 10 pounds for less than one hour, and no squatting, kneeling, bending or climbing. He also recommended 15-minute breaks "as needed." Dr. Mauro continued to note in August 19 and December 1, 2015 reports that appellant was capable of working limited duty with the same restrictions. A March 13, 2015 job offer from the employing establishment outlined that the physical requirements of the security clerk position were "sedentary in nature" with physical limitations of lifting up to 10 pounds, no climbing, crawling, squatting, or kneeling, and getting up and moving around as needed. The Board finds that the physical requirements of the security clerk position were in accord with appellant's existing medical restrictions provided by his treating physician. There is no medical evidence of the record relating that appellant was unable to perform the duties of the security clerk position. The Board finds, therefore, that appellant was physically able to perform the modified-duty security position as described in the employing establishment's March 13, 2015 job offer.<sup>14</sup>

Because OWCP has established that the security position abandoned by appellant was suitable, he has the burden to show that his refusal or failure to work was reasonable or justified.<sup>15</sup> On June 15, 2015 appellant returned to limited duty as a security clerk. He stopped work on August 19, 2015. In the July 15, 2016 telephone hearing, counsel confirmed that appellant had no medical reason or disability to prevent him from working, but that he stopped work to return to school. The Board has found, however, that this reason does not constitute an acceptable reason for abandoning suitable work.<sup>16</sup> Accordingly, appellant has failed to establish that his failure to return to work was justified.

The Board further notes that OWCP followed its proper procedures in this case. After appellant resigned from the suitable work position, OWCP notified appellant by letter dated August 26, 2015 that the security clerk position was found to be suitable, discussed the

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<sup>14</sup> See D.S., Docket No. 16-1593 (issued December 21, 2016).

<sup>15</sup> Supra note 12.

<sup>16</sup> See Donald Reynolds, Docket No. 00-2682 (issued August 17, 2001). See also Federal (FECA) Procedure Manual, *supra* note 6 at Chapter 2.814.8(b)3iii (June 2013). Insufficient reasons for abandonment of suitable work include a return to college.

provisions of 5 U.S.C. § 8106(c)(2), and provided 30 days to respond.<sup>17</sup> The August 26, 2015 letter advised appellant that if he failed to establish a recurrence of disability, failed to return to the security clerk position, and failed to provide a valid reason for not returning to the position, his right to compensation and schedule award benefits would be terminated in accordance with 5 U.S.C. § 8106(c)(2).

The Board finds that, based on the evidence of record, OWCP properly terminated appellant's compensation, effective November 2, 2015, pursuant to 5 U.S.C. § 8106(c)(2). The position that appellant performed from June 15 to August 19, 2015 was suitable work, and he did not provide valid reasons for the work stoppage.<sup>18</sup>

Counsel argued that a suitable work termination was improper as appellant had worked in the position for 60 days. He provided no legal basis for his argument. The Board notes that OWCP may determine a claimant's loss of wage-earning capacity after 60 days of work. However, in case of abandonment of suitable work this procedure does not preclude OWCP from a suitable work termination.<sup>19</sup>

On appeal, counsel alleges that OWCP's decision was contrary to fact and law. For the reasons discussed above, however, the Board finds that OWCP properly terminated compensation in this case.

### **CONCLUSION**

The Board finds that OWCP properly terminated appellant's wage-loss compensation benefits effective November 2, 2015 pursuant to 5 U.S.C. § 8106(c) as he abandoned suitable work.

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<sup>17</sup> Federal (FECA) Procedure Manual, *supra* note 6 at Chapter 2.814.8(b) (June 2013).

<sup>18</sup> *Id.*

<sup>19</sup> Federal (FECA) Procedure Manual, *supra* note 6 at Chapter 2.814.4(b) (June 2013).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 30, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 25, 2017  
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