

treating appellant for bilateral chondromalacia of the patella since January 2006. He explained that chondromalacia was caused “by abnormal tracking of the patella over the femur,” causing a “softening of the cartilage underside, resulting in chronic inflammation, erosion, degeneration, and eventual osteoarthritis of the patella-femoral complex.” Dr. Wein opined that a July 26, 2006 work injury where appellant fell while descending steps, and “extensive walking and climbing steps” while carrying a loaded satchel, permanently accelerated and aggravated her degenerative condition. He limited appellant to sitting and walking one hour a day, and standing four hours a day. On June 12, 2013 Dr. Wein increased appellant’s standing tolerance to five hours a day, decreased standing tolerance to four hours a day on August 12, 2013.²

On September 16, 2013 appellant accepted a position as a modified carrier, with standing and reaching limited to two hours a day, lifting one hour a day, and driving a vehicle for one hour a day.³ She worked for four hours a day. OWCP paid appellant compensation for the remaining four hours. Appellant underwent a series of cortisone injections to the right knee. She worked part-time light duty through December 2013 and continuing.

On April 4, 2014 OWCP obtained a second opinion evaluation regarding appellant’s work capacity from Dr. Emmanuel Obianwu, a Board-certified orthopedic surgeon. Dr. Obianwu found active chondromalacia in both knees, greater on the left. He opined that appellant could walk, stand, kneel, squat, and climb up to six hours a day.

Dr. Wein opined on May 12, 2014 that appellant could stand, reach, push, pull, and perform fine manipulation for four hours a day, bend and grasp for three hours a day, and sit, walk, and twist for one hour a day, with no climbing or kneeling.⁴ He reiterated these restrictions through August 3, 2015, noting continued crepitus and edema in both knees.

On September 30, 2015 OWCP obtained a second opinion from Dr. Allen L. Babcock, a Board-certified orthopedic surgeon. Dr. Babcock reviewed the medical record and a statement of accepted facts. On examination, he found no warmth, tenderness, effusion, instability, or crepitus in either knee. Dr. Babcock diagnosed bilateral chondromalacia of the patellofemoral joint, appearing “mostly in the trochlea and it is some grade 3 and some grade 4.” He opined that work factors permanently aggravated appellant’s chondromalacia, and that the condition would worsen over time. Dr. Babcock noted that appellant could continue to work four hours a day light duty, with no stair climbing, commenting that she “probably could work a couple more hours a day within this capacity.” In an accompanying work capacity evaluation (Form OWCP-5c), he found appellant able to sit up to eight hours, walk or stand for four hours, and lift up to 25

² OWCP paid wage-loss compensation for intermittent work absences from July 27 to September 6, 2013.

³ October 24, 2013 knee x-rays showed narrowing around the patellofemoral joint bilaterally. October 28, 2013 magnetic resonance imaging (MRI) scans of both knees showed degenerative joint disease with “[m]arked articular cartilage degeneration of patellofemoral joint compartment and articular bony erosions of the patella,” and “[m]ild articular cartilage degeneration lateral femoral condyle.”

⁴ In a December 10, 2014 report, Dr. Wein related a workplace incident a few days prior when appellant caught her foot in a plastic band on a palette, causing her to fall forward, striking both knees. Appellant reported increased bilateral knee symptoms to the fall, exacerbated by the new incident.

pounds. Dr. Babcock opined that appellant could increase her work schedule from four to six hours a day, and could “hopefully” progress to an eight-hour workday.

On October 20, 2015 the employing establishment offered appellant a full-time modified position as a customer care agent processing inbound customer contacts and responding to customer inquiries. Appellant accepted the position on October 23, 2015, “pending doctor’s approval.” Dr. Wein reviewed the employing establishment’s job offer on October 29, 2015. He found appellant unable to perform the position as she could work only four hours a day.⁵

On November 6, 2015 the employing establishment offered appellant a modified position as a customer care agent, working eight hours a day, five days a week. The assigned duties involved processing inbound customer contacts, and responding to customer inquiries. The physical requirements included sitting with occasional standing up to eight hours a day, with intermittent keyboarding, fine manipulation, and use of a computer mouse. On November 12, 2015 she accepted the position “under protest and duress” as the “work schedule would exceed [her] treating physician’s restrictions.”

Dr. Babcock provided a supplemental report on November 30, 2015, noting that appellant could perform her light-duty position for eight hours a day, but could not deliver mail. In a December 22, 2015 supplemental report, he affirmed that appellant could perform the “full-time position of a [c]ustomer [c]are [a]gent.”

On March 28, 2016 the employing establishment offered appellant a rehabilitation job assignment as a customer care agent for eight hours a day, five days a week, with sitting up to eight hours a day, walking, standing, and reaching up to six hours a day, and operating a motor vehicle for up to eight hours a day. The position would become effective on April 30, 2016.

In an April 6, 2016 letter, Dr. Wein noted that appellant planned to retire on medical disability as “her knee pain ha[d] worsened. [Appellant] has had increased episodic diarrhea and vomiting from increased stress at work and having stress-related IBS [irritable bowel syndrome] exacerbations.” He found appellant disabled from work.

On April 8, 2016 appellant accepted the March 28, 2016 job offer “under protest and duress,” contending that the physical requirements of the position exceeded Dr. Wein’s restrictions. In an attached letter, she advised that she was no longer able to work due to increased knee pain. Appellant explained that prolonged sitting, standing, and walking aggravated her knee pain, and that she had applied for OPM disability retirement and social security disability benefits.

In a May 3, 2016 letter, OWCP advised appellant that the offered customer care agent position was found to be suitable work in accordance with the medical limitations prescribed by Dr. Babcock in his December 22, 2015 report. The position remained open and available to appellant. OWCP contended that Dr. Wein was “not qualified to offer a professional opinion on gastrointestinal and psychiatric factors” because he was a doctor of osteopathy. It advised her of

⁵ The Board notes that there are multiple copies of the October 29, 2015 report of record. The copy received by OWCP on November 17, 2015 bears Dr. Wein’s signature with his name printed beneath it.

the penalty provisions under FECA for refusing an offer of suitable work, and afforded her 30 days to either accept the position or provide good cause for her refusal.

Appellant responded by May 27, 2016 letter, contending that the offered position exceeded Dr. Wein's work restrictions. She noted being hospitalized from November 27 to 30, 2014 for a bowel abscess.

Appellant retired from the employing establishment effective May 31, 2016. She elected to receive OPM retirement benefits in lieu of FECA benefits effective May 29, 2016.

In a June 3, 2016 letter, OWCP advised appellant that her reasons for refusing the offered position were invalid, and that she had 15 days to accept and report to the position or her entitlement to wage-loss and schedule award benefits would be terminated. It noted that the offered position remained open and available to her.

By decision dated June 21, 2016, OWCP terminated appellant's wage-loss compensation and schedule award eligibility, effective that date, under 5 U.S.C. § 8106(c)(2), finding that she refused an offer of suitable work. It found that Dr. Babcock's December 22, 2015 addendum established that the March 28, 2016 job offer was for suitable work. OWCP found that the April 6, 2016 letter from "Mark B. Wein, D.C." was insufficient to establish that the offered position was not medically suitable, as an osteopathic physician was "not qualified to offer an opinion on gastrointestinal and psychiatric factors."

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proof in justifying termination or modification of compensation benefits. It has authority under section 8106(c)(2) of FECA to terminate compensation for any partially disabled employee who refuses or neglects to work after suitable work is offered. To justify termination, OWCP must show that the work offered was suitable, that appellant was informed of the consequences of her refusal to accept such employment and that he or she was allowed a reasonable period to accept or reject the position or submit evidence or provide reasons why the position is not suitable.⁶ In this case, it terminated appellant's compensation under section 8106(c)(2) of FECA, which 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."⁷

OWCP regulations provide factors to be considered in determining what constitutes "suitable work" for a particular disabled employee, including the employee's current physical

⁶ See *Ronald M. Jones*, 52 ECAB 190, 191 (2000); see also *Maggie L. Moore*, 42 ECAB 484, 488 (1991), *reaff'd on recon.*, 43 ECAB 818, 824(1992). See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4 (June 2013) (The claims examiner must make a finding of suitability, advise the claimant that the job is suitable and that refusal of it may result in application of the penalty provision of 5 U.S.C. § 8106(c)(2) and allow the claimant 30 days to submit his or her reasons for abandoning the job. If the claimant submits evidence and/or reasons for abandoning the job, the claims examiner must carefully evaluate the claimant's response and determine whether the claimant's reasons for doing so are valid).

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

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.⁸ 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. All impairments, whether work related or not, must be considered in assessing the suitability of an offered position.⁹

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.¹⁰ 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.¹¹ 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.¹²

ANALYSIS

OWCP accepted that appellant sustained an aggravation of bilateral chondromalacia of the patella. Appellant performed part-time modified-duty work beginning in September 2013. Dr. Wein, an attending osteopath Board-certified in family practice, permanently limited appellant to working four hours a day.

Dr. Babcock, a Board-certified orthopedic surgeon and second opinion physician, opined on December 22, 2015 that appellant was medically able to work full time as a customer care agent, requiring sitting with occasional standing for eight hours a day. The employing establishment offered appellant the position on March 28, 2016. Dr. Wein opined on April 6, 2016 that appellant was disabled from work due to bilateral chondromalacia and irritable bowel syndrome.

On May 3, 2016 OWCP advised appellant that the offered position was suitable work and of FECA's penalty provision for refusing it without good cause. Appellant contended in a May 27, 2016 letter that Dr. Wein limited her to working four hours a day, and found her disabled from work due to chondromalacia and gastrointestinal issues. OWCP advised appellant on June 3, 2016 that her reason for refusal was invalid, and afforded her 15 days to report for work. Appellant retired from the employing establishment.

⁸ *Rebecca L. Eckert*, 54 ECAB 183 (2002).

⁹ *Edward J. Stabell*, 49 ECAB 566 (1998).

¹⁰ *Joan F. Burke*, 54 ECAB 406 (2003); see *Robert Dickerson*, 46 ECAB 1002 (1995).

¹¹ 20 C.F.R. § 10.517(a); *Ronald M. Jones*, 52 ECAB 190 (2000).

¹² *Id.* at § 10.516.

By decision dated June 21, 2016, OWCP terminated appellant's wage-loss compensation, effective that date, affording the weight of the medical evidence to Dr. Babcock. The decision referred to Dr. Wein, an osteopath Board-certified in family practice, as "Mark B. Wein, D.C." The Board notes that OWCP misidentified Dr. Wein as a chiropractor as "D.C." is the abbreviation for "Doctor of Chiropractic." The decision went on to find that osteopathic physicians are "not qualified to offer an opinion on gastrointestinal and psychiatric factors," thereby confusing or equating osteopaths with chiropractors. The Board finds that Dr. Wein, as an osteopath, was fully qualified to offer his medical opinion that appellant was disabled from work as of April 6, 2016 due to chondromalacia and irritable bowel syndrome.¹³ As OWCP disregarded Dr. Wein's medical opinion, it did not properly consider the evidence submitted to support appellant's refusal of the offered customer care agent position. Therefore, OWCP's June 21, 2016 decision terminating appellant's wage-loss compensation and schedule award entitlement must be reversed.

On appeal appellant contends that the offered position exceeded medical restrictions provided by Dr. Babcock. As set forth above, OWCP did not meet its burden of proof in terminating her compensation.

CONCLUSION

The Board finds that OWCP improperly terminated appellant's compensation benefits effective June 21, 2016 pursuant to 5 U.S.C. § 8106(c)(2).

¹³ 5 U.S.C. § 8102(2); *E.K.*, Docket No. 09-1827 (issued April 21, 2010); *A.C.*, Docket No. 15-1892 (issued February 1, 2016).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 21, 2016 is reversed.

Issued: June 20, 2017
Washington, DC

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

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

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