

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

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**G.G., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Bainbridge, GA, Employer**

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**Docket No. 16-1081  
Issued: May 9, 2017**

*Appearances:*  
*Tim Griffin, for the appellant*<sup>1</sup>  
*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  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On April 26, 2016 appellant, through her representative, filed a timely appeal from an October 29, 2015 merit decision and a February 23, 2016 nonmerit 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 the case.

**ISSUES**

The issues are: (1) whether OWCP properly terminated appellant's compensation benefits effective November 6, 2013 pursuant to 5 U.S.C. § 8106(c); and (2) whether OWCP

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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.*

properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

On appeal appellant, through her representative, contends that, Dr. Nicodemo Macri, a physiatrist, advised that, as she could not lift, due to a urological condition that was not employment related, she was unable to perform the duties of the offered position. The representative related that appellant saw a urologist on September 27, 2013, who also indicated that she could not lift from September 27 to 29, 2013, but could return to full duty on September 30, 2013. He continued that she reported for work at 7:55 a.m. on Saturday, September 28, 2013 and was told to leave.

### **FACTUAL HISTORY**

This case has previously been before the Board. In an October 19, 2009 decision, the Board found that OWCP had not met its burden of proof to terminate appellant's compensation benefits effective March 15, 2008 pursuant to 5 U.S.C. § 8106(c) because the offered position was not suitable. The Board observed that the opinion of a referee physician did not clearly demonstrate that appellant could perform the duties of the offered position and that OWCP had not considered her diagnosed emotional condition when terminating her compensation.<sup>3</sup> The facts of the prior appeal are incorporated herein by reference.

Subsequent to the Board's October 19, 2009 decision, appellant received retroactive compensation beginning March 16, 2008 and was returned to the periodic compensation rolls.

In August 2010 OWCP referred appellant to Dr. Robert S. Pilcher, a Board-certified orthopedic surgeon, for a second opinion evaluation.<sup>4</sup> In an August 27, 2010 report, Dr. Pilcher noted the history of injury, appellant's medical and surgical history, her complaints of left shoulder girdle pain with numbness of the little and ring fingers, and his review of the medical records. He found appellant diffusely tender about the left shoulder with excellent grip and rotator cuff strength and some giveaway weakness. Tinel's, Phalen's, and Finkelstein's tests were negative. Dr. Pilcher diagnosed left shoulder girdle pain, cervical strain with left radiculopathy, ulnar nerve neuropathy, and left acromioclavicular joint arthritis. He advised that appellant's employment-related left shoulder condition had not resolved, noting limited motion and pain on elevation of the arm. Dr. Pilcher reviewed a job description and advised that, from a work point of view, she could return to regular duty with permanent restrictions, including lifting no more than 20 pounds with the left arm and no reaching above the shoulder.

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<sup>3</sup> Docket No. 09-384 (issued October 19, 2009). On April 28, 2000 appellant, a city carrier, tripped and fell exiting her postal vehicle. OWCP accepted the claim for left shoulder strain/contusion and left shoulder impingement, and appellant underwent arthroscopic left shoulder repair on December 7, 2007. Adhesive capsulitis of the left shoulder was also accepted. Appellant worked limited duty until 2005 when she rejected a limited-duty job offer and did not return to work. She was placed on the periodic compensation rolls effective March 3, 2005.

<sup>4</sup> For many years appellant was seen by Dr. Wilton B. Reynolds, Jr., a general practitioner. Appellant was also seen by Gary W. Smith, Ph.D., a psychologist, beginning in February 2006. Dr. Smith diagnosed major depression and anxiety disorder due to her work. An April 15, 2008 report from Dr. Reynolds is the last medical evidence of record, before the referral to Dr. Pilcher in June 2010.

The employing establishment subsequently offered appellant modified positions that she refused.

Beginning in April 2011, Dr. Macri provided treatment notes describing examination findings. He diagnosed left chronic, persistent acromioclavicular joint separation pain and tenderness, left upper extremity lymphedema, and post-traumatic stress depression and sleep disorder secondary to the above, all of which was caused by the work injury. On May 14, 2012 Dr. Macri advised that appellant could not return to work and was most likely permanently disabled.

In November 2012 OWCP referred appellant to Dr. Raymond Derry Crosby, a Board-certified osteopath specializing in orthopedic surgery, for a second opinion evaluation. In a December 4, 2012 report, Dr. Crosby described the history of injury and appellant's medical and surgical history. He described complaints of a burning sensation over the anterior medial aspect of the left shoulder radiating to the left elbow and pain with left shoulder range of motion. Physical examination demonstrated painful left shoulder range of motion, and tenderness on examination over the acromioclavicular joint. Left shoulder x-ray demonstrated no appreciable abnormalities. Dr. Crosby reviewed the functional capacity evaluation (FCE) and advised that, although appellant's complaints were subjective, they were consistent with irritation to the anterior capsular area of the left shoulder, noting that her previous surgery had not been completely successful in alleviating her discomfort. He concluded that appellant had residuals of the employment injury. While she could not return to regular city carrier duties, appellant could perform light-duty work. Dr. Crosby advised that appellant could work eight hours daily with permanent restrictions of two hours of reaching above the shoulder and operating a motor vehicle, with pushing, pulling, and lifting below chest height limited to 20 pounds.

OWCP forwarded Dr. Crosby's report to Dr. Macri for review. Dr. Macri continued to submit bimonthly reports describing appellant's condition. On February 8, 2013 Dr. Macri advised that he agreed with all of Dr. Crosby's recommendations except that he would limit appellant's lifting to 15 pounds and lifting should only be allowed between the waist and axillary regions.

In a February 15, 2013 internal memorandum, OWCP found the weight of the medical evidence rested with Dr. Crosby as Dr. Macri had not provided rationale for his opinion.

In brief correspondence dated February 2013, Dr. Smith diagnosed severe depression and severe anxiety. He opined that she was totally disabled and that he did not expect that she could return to work.

On March 13, 2013 OWCP forwarded a modified carrier job offer to appellant. Appellant refused the position on April 3, 2013, referring to Dr. Macri's February 8, 2013 report.

In May 2013 OWCP referred appellant to Dr. Karuna Reddy, a Board-certified psychiatrist, for a second opinion evaluation. In a June 14, 2013 report, Dr. Reddy described the employment injury, and appellant's medical history and appellant's pain symptoms plus sleep impairment, low energy, poor concentration, and some anxiety. She performed a mental status examination and diagnosed major depressive disorder, recurrent, of moderate severity, and moderately severe stresses relating to her physical and emotional problems. Dr. Reddy

completed a psychiatric/psychological work capacity evaluation (OWCP Form 5a). She advised that appellant could work eight hours a day in a job that was less physically demanding than regular mail carrier duties such as sorting stamp mail and doing any mail corrections or anything else in the office.

On June 27, 2013 OWCP accepted major depressive disorder, recurrent. Dr. Macri continued to submit treatment notes.

On July 13, 2013 the employing establishment offered appellant a modified city carrier position for four hours a day, 8:00 a.m. to 10:00 a.m., and 4:00 p.m. to 6:00 p.m., effective July 27, 2013. The job duties were: distribute, box, and case mail less than 20 pounds for no more than two hours per day; prepare evening dispatches -- includes emptying collection boxes, sorting mail by type into tubs, trays, hampers, and other general purpose containers, pushing, pulling, and lifting were limited to 20 pounds for no more than two hours per day, and no reaching with left arm greater than two hours per day, not greater than 20 pounds below the area of the upper chest surrounding the axilla, lateral to the pectoral region. She was to grasp mail less than 20 pounds at a time and place the mail in cases, post office boxes and other mail transportation equipment. Reaching with the left arm was restricted to 20 pounds, two hours per day. The offer indicated that the position was in compliance with appellant's medical restrictions which were no lifting greater than 20 pounds for more than two hours per day below the area of the upper chest surrounding the axilla, lateral to the pectoral region, no pushing or pulling with the left arm greater than 20 pounds for more than two hours per day, no reaching with the left arm for more than two hours per day below the chest, no reaching above the left shoulder for more than two hours per day with a 20-pound weight limit, and no climbing.

Appellant refused the position on July 19, 2013, stating that the requirements exceeded her medical limitations, based on her doctor's recommendations. On July 30, 2013 the employing establishment informed OWCP that a search had been made within a 50-mile radius for a full-time position within appellant's restrictions and none were found.

By letter dated August 6, 2013, OWCP advised appellant that the position offered was suitable. She was notified that if she failed to report to work or failed to demonstrate that the failure was justified, pursuant to section 8106(c)(2) of FECA, her right to compensation for wage loss or a schedule award would be terminated. She was given 30 days to respond.

In an undated response, appellant stated that the offered position was outside her restrictions and that, as she would have to work alone on Saturday, she could not perform the duties of the offered position. Appellant provided an August 22, 2013 report from Dr. Macri who noted that she was right-hand dominant and described her complaint of severe, radiating left shoulder pain. Following physical examination, the physician advised that, regarding her left shoulder, she should avoid wear and tear, overuse or lifting, and was to stay within her limitations of 15 to 18 pounds, and that she was restricted to not lifting above the axilla area. Also submitted was a June 20, 2013 treatment note in which Dr. Macri described appellant's condition that day and indicated that she should avoid left shoulder wear and tear.

On September 12, 2013 OWCP ascertained that the offered position was still available. In a September 12, 2013 letter, it advised appellant that her reasons for refusing the offered position were not valid. Appellant was given an additional 15 days to accept and report to the

position, and advised that if she did not report to the job within 15 days of the date of the letter, her entitlement to wage-loss and schedule award benefits would be terminated.

In September 16, 2013 correspondence, an employing establishment health resource management specialist forwarded photographs representing the type of work and areas where appellant would work. The letter indicated that appellant could utilize a rest bar as needed, and she could seek assistance of fellow employees and management if any package appeared to be in excess of 20 pounds.

Appellant telephoned OWCP on September 26, 2013 requesting an extension of time to submit additional medical evidence. OWCP returned the call on September 27, 2013 and left her a voicemail message stating that the September 12, 2013 letter did not provide an opportunity to submit further medical evidence, just to report to work. On September 27, 2013 the employing establishment notified OWCP that appellant had submitted medical evidence the previous day indicating that she was totally disabled due to a urological condition. On September 30, 2013 the employing establishment contacted OWCP, stating that appellant had reported to work on Saturday, September 28, 2013 but when assigned tasks described on the job offer, stated that she could not perform the tasks and left.

On October 2, 2013 Dr. Macri forwarded a September 26, 2013 duty status report (Form CA-17) which advised that appellant could not work, stating, "please see dictated office visit note of today." On October 7, 2013 he forwarded a revised version of the September 26, 2013 duty status report, as of September 30, 2013. This report indicated that appellant had a lifting limit of 12 to 15 pounds, that she could occasionally lift for less than four hours daily from the waist to axilla area but not over her head. On October 23, 2013 Dr. Macri forwarded a September 26, 2013 treatment note in which he again described appellant's left shoulder pain. The report also stated that a review of systems was negative for urinary frequency, urinary incontinence, and urinary retention. Dr. Macri diagnosed rotator cuff syndrome of the right shoulder, stating that despite right shoulder surgery her symptoms persisted and rendered her unable to do any over the shoulder activity or lift, carry, or grasp anything greater than 15 pounds. He further advised that at the present time appellant was not able to lift any weight due to urologic problems that might necessitate bladder surgery and was to see an urologist the following day. Dr. Macri opined that she should apply for permanent disability, maintaining that functionally and physically she could not return to the type of work she previously performed.

On November 6, 2013 the employing establishment advised that appellant had not returned to work.

In a November 6, 2013 decision, OWCP terminated appellant's wage-loss and schedule award benefits because she refused an offer of suitable work. It found that the weight of medical evidence rested with the opinions of Dr. Crosby and Dr. Reddy.

Appellant timely requested a hearing before a representative of OWCP's Branch of Hearings and Review. On December 20, 2013 the employing establishment again offered appellant a part-time modified position. This included similar duties as those of the July 13, 2013 job offer except that the weight restriction was changed to 15 pounds. Appellant returned to this position on December 20, 2013 for four hours per day.

Appellant thereafter submitted claims for compensation (CA-7 forms) for four hours daily beginning December 20, 2013. OWCP informed her that the claims could not be processed until hearings and review rendered its decision.

In correspondence dated January 9, 2014, appellant's representative asserted that she had not refused the job offer, maintaining that she reported for work and was willing to work within her medical limitations, but the postmaster refused to modify the job based on a nonwork-related condition.<sup>5</sup> E-mail correspondence was attached in which the representative reiterated that since appellant's supervisor would not accommodate temporary restrictions he had technically withdrawn the limited-duty offer at that time. Dr. Macri also submitted bimonthly treatment notes.

At the hearing, held on June 11, 2014, appellant and her representative maintained that she accepted the offered job on September 28, 2013 but the postmaster sent her home because no work was available within Dr. Macri's lifting restrictions. Appellant testified that she saw a urologist on September 27, 2013, had a procedure, and went to work on September 28, 2013. The hearing representative advised that she could submit evidence from the urologist.

Appellant thereafter submitted evidence previously of record, including the duty status report revised by Dr. Macri on September 30, 2013. A June 27, 2014 disability slip indicated that appellant had been seen by Dr. Joseph C. Clements, a Board-certified urologist, on September 27, 2013 and had a cystoscopy. In a September 27, 2013 letter, faxed to the postmaster, appellant noted that she tried to telephone him that day, indicating that she would accept the job offer under protest and would report to work on Saturday, September 28.

On June 26, 2014 an employing establishment health management specialist with the employing establishment maintained that when appellant reported to work she presented restrictions for a nonwork-related medical condition which indicated that she was unable to lift anything.<sup>6</sup>

By decision dated August 28, 2014, OWCP's hearing representative affirmed the November 6, 2013 decision. She noted that the evidence submitted by Dr. Clements merely indicated that appellant was seen for a cystoscopic procedure of September 27, 2013 and contained no diagnosis and did not provide work restrictions.

On February 2, 2015 appellant's representative requested reconsideration. He asserted that on September 27, 2013 appellant faxed a duty status report, stating that she had accepted the offered position and that she had reported for work on September 28, 2013, but that she was sent home. He further asserted that there was a difference in the weight restriction between appellant's physician (15 pounds) and OWCP's referral physician (20 pounds) that required an impartial medical examination for resolution. He forwarded a "work excuse" note dated September 27, 2013 stating that appellant had a work restriction from September 27 to 29, 2013

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<sup>5</sup> At that time appellant was represented by Jeff Siciunas of the National Association of Letter Carriers.

<sup>6</sup> Although the June 26, 2014 correspondence indicated that appellant reported for work on Friday, September 27, 2013, the 15<sup>th</sup> day following OWCP's 15-day letter, she did not report to work until Saturday, September 28, 2013, when she indicated she was restricted to no lifting.

of no lifting and that she could return to full duty on September 30, 2013. Also submitted was an employing establishment time card noting that on September 28, 2013 appellant clocked in at 7:55 a.m. and left at 7:58 a.m.

Dr. Macri continued to treat appellant. On December 3, 2014 he advised that, to the best of his knowledge, she had never denied any type of suitable job offered her and that, after having a urologic procedure on Friday, she returned to work on Saturday, but could not lift anything until the following Monday, when her supervisor sent her home. On January 28, 2015 he diagnosed pain in joint involving shoulder region; osteoarthritis, unspecified; neuralgia, neuritis, and radiculitis; myofascial pain; muscle spasticity; insomnia, disorder unknown; depression; and obesity.

In a merit decision dated April 9, 2015, OWCP denied modification of the prior decisions. It explained that on September 12, 2013 appellant was given 15 days to accept the modified position and did not do so.

On June 10, 2015 appellant's representative requested reconsideration. He asserted that appellant was unable to report for the offered position on September 27, 2013 because she had a scheduled urological procedure that day, which Dr. Macri addressed in his September 26, 2013 treatment note. The representative maintained that, on September 26, 2013, appellant provided a duty status report to the employing establishment which was within the 15-day time limitation to accept the offered position, but that when she reported for work on September 28, 2013, she was sent home because she had a two-day restriction on lifting and not because she refused the offered position. He continued that on September 28, 2013 appellant inquired whether she should report for work on September 30, 2013 and was told not to do so and to await further instructions. The representative also reiterated that a conflict remained regarding the medical restrictions and this required an impartial medical examination.

Appellant forwarded a brief form report dated September 27, 2013 from Dr. Clements, stating that appellant could return to work on September 28, 2013 with no lifting for two days following cystoscopy.

In August 4, 2015 correspondence, the employing establishment noted that appellant initially refused the offered position on July 19, 2013. OWCP found the position suitable and issued a 30-day letter on August 6, 2013 and a 15-day letter on September 12, 2013. The employing establishment maintained that appellant failed to report to work on September 27, 2013 and failed to provide any explanation as to why she did not report. It described the duties of the offered position and maintained that these were not outside appellant's restrictions.

On August 12, 2015 appellant's representative disagreed with the employing establishment's August 4, 2015 letter, arguing that under OWCP procedures, if the medical evidence documents a condition that disables an employee, the job will be considered unsuitable. Dr. Macri continued to submit reports. On July 14, 2015 he advised that appellant was not refusing work and would return to work within her limitations.

In a merit decision dated October 29, 2015, OWCP denied modification of its prior decisions. It reviewed the newly submitted evidence and found that the medical evidence

supported that the offered position was medically suitable at the time offered, and that appellant's monetary benefits were properly terminated.

Appellant's representative requested reconsideration on January 29, 2016. He reiterated his argument that appellant had timely accepted the offered position, alleging that by letter dated September 27, 2013 she had accepted the offered position, and that the record contained numerous documents supporting her position. In support of reconsideration she resubmitted her letter dated September 27, 2013, and the June 27, 2014 disability slip from Dr. Clements. In a November 5, 2015 treatment note, Dr. Macri noted that appellant had been unable to return to work for two years because the employing establishment did not have a position that accommodated her restrictions.

In a nonmerit decision dated February 23, 2016, OWCP denied review of the merits of appellant's claim. It noted that the evidence and argument submitted were duplicative or repetitious and insufficient to warrant merit review.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8106(c) of FECA provides in pertinent part, "A partially disabled employee who (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation."<sup>7</sup> It is OWCP's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.<sup>8</sup> The implementing regulations provide that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of showing that such refusal or failure to work was reasonable or justified and shall be provided with the opportunity to make such a showing before entitlement to compensation is terminated.<sup>9</sup> To justify termination, OWCP must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.<sup>10</sup> In determining what constitutes "suitable work" for a particular disabled employee, 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>11</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.<sup>12</sup>

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<sup>7</sup> 5 U.S.C. § 8106(c).

<sup>8</sup> *Joyce M. Doll*, 53 ECAB 790 (2002).

<sup>9</sup> 20 C.F.R. § 10.517(a).

<sup>10</sup> *Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

<sup>11</sup> 20 C.F.R. § 10.500(b); *see Ozine J. Hagan*, 55 ECAB 681 (2004).

<sup>12</sup> *Gayle Harris*, 52 ECAB 319 (2001).

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>13</sup>

### ANALYSIS -- ISSUE 1

The Board finds that OWCP met its burden of proof to terminate appellant's compensation benefits on November 6, 2013 pursuant to section 8106(c) of FECA. OWCP accepted left shoulder strain/contusion, left shoulder impingement, and left shoulder adhesive capsulitis.<sup>14</sup> The claim was later expanded to include major depressive disorder, recurrent.

On July 13, 2013 the employing establishment offered appellant a modified job. The described job duties were: distributing, boxing and casing mail less than 20 pounds for no more than two hours per day; preparing evening dispatches -- includes emptying collection boxes; and sorting mail by type into tubs, trays, hampers and other general purpose containers. Pushing, pulling, and lifting were limited to 20 pounds for no more than two hours per day and there was to be no reaching with left arm greater than two hours per day, not greater than 20 pounds below the area of the upper chest surrounding the axilla, lateral to the pectoral region. Appellant was to grasp mail less than 20 pounds at a time and place the mail in cases, post office boxes, and other mail transportation equipment. The job offer indicated that appellant was to begin work at 8:00 a.m. The Board finds the weight of the evidence establishes that appellant could perform the offered job.

In brief correspondence dated February 2013, Dr. Smith, an attending psychologist, diagnosed severe depression and severe anxiety. He opined that appellant was totally disabled and that he did not expect that she could return to work. Dr. Smith, however, provided no rationale or explanation to support his conclusion. His report is, therefore of diminished probative value.<sup>15</sup>

Dr. Reddy, an OWCP referral psychiatrist, performed a mental status examination on June 14, 2013 and reported her findings and conclusions. While the physician diagnosed a major depressive disorder, she advised that appellant could work eight hours a day in a job that was less stressful and less physically demanding than a letter carrier position.

As to her left shoulder condition, appellant, who is right-hand dominant, had left upper extremity restrictions provided by both her attending physician Dr. Macri and Dr. Crosby, the OWCP referral physician. In a comprehensive report dated December 4, 2012, Dr. Crosby described appellant's complaints, his review of the medical record, and physical examination findings. He advised that, while appellant could not return to regular duties, she could perform light-duty work for eight hours daily. Dr. Crosby placed restrictions on two hours of reaching above the shoulder and operating a motor vehicle, with pushing, pulling, and lifting below chest height limited to 20 pounds. On February 8, 2013 Dr. Macri agreed with Dr. Crosby's

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<sup>13</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity, Refusal of Job Offer*, Chapter 2.814.5 (June 2013); see *Lorraine C. Hall*, 51 ECAB 477 (2000).

<sup>14</sup> *Supra* note 3.

<sup>15</sup> See *Charles W. Downey*, 54 ECAB 421 (2003).

recommendations with the exception that he would limit appellant's lifting between the waist and axillary region to 15 pounds. He later advised that appellant could lift 15 to 18 pounds. The July 13, 2013 job offer comports with the 20-pound restriction provided by Dr. Crosby. Dr. Macri did not explain why he disagreed with the 20-pound lifting limitation. The Board therefore concludes that the weight of the evidence establishes that appellant could perform the physical duties of the modified position at the time it was offered.

Appellant refused the position on July 19, 2013, stating that the requirements exceeded her medical limitations. By letter dated August 6, 2013, OWCP advised her that the position offered was suitable and notified her of the penalty provisions of section 8106(c)(2) of FECA. She was afforded 30 days to respond. In an undated response, appellant maintained that the offered position was outside her restrictions and attached August 22, 2013 reports from Dr. Macri who advised that, for her left shoulder, she should stay within her limitations of 15 to 18 pounds, and lifting nothing above the axilla area. In a September 12, 2013 letter, OWCP advised appellant that her reasons for refusing the offered position were not valid. It allowed her an additional 15 days to accept and report to the position, and advised that if she did not do so within 15 days of the date of the letter, her entitlement to benefits would be terminated.

The 15<sup>th</sup> day following the September 12, 2013 letter in which OWCP informed her that she had 15 days to accept the offered position was September 27, 2013. Appellant telephoned OWCP on September 26, 2013 for a time extension. OWCP returned the call on September 27, 2013 and left her a voicemail message telling her that the September 12, 2013 letter did not provide an opportunity to submit further evidence, just to report to work. On September 27, 2013 the employing establishment notified OWCP that appellant had submitted medical evidence the previous day indicating that she was totally disabled due to a urological condition. On September 30, 2013 the employing establishment contacted OWCP, stating that appellant had reported to work on Saturday, September 28, 2013, but when assigned tasks described on the job offer, stated that she could not perform the tasks and left.

In October 2013 Dr. Macri forwarded various reports dated September 26, 2013. A September 26, 2013 duty status report advised that appellant could not work. On a treatment note dated September 26, 2013 the physician indicated that a review of systems was negative for urinary frequency, urinary incontinence, and urinary retention. Dr. Macri advised that appellant could not lift any weight due to urologic problems that might necessitate a bladder surgery. He forwarded another copy of the September 26, 2013 duty status report, noting that it was revised on September 30, 2013. This report indicated that appellant had a lifting limit of 12 to 15 pounds and could occasionally lift, for less than four hours daily, from the waist to axilla area and not over her head.

The Board has long held that OWCP must consider preexisting and subsequently-acquired conditions in evaluation of suitability of an offered position.<sup>16</sup> While Dr. Macri indicated that appellant could not lift any weight on September 26, 2013 due to a urological condition, his treatment note that day advised that a review of systems was negative for urinary frequency, urinary incontinence, and urinary retention. Medical opinions which are speculative

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<sup>16</sup> *Supra* note 11.

or equivocal in character have little probative value.<sup>17</sup> Likewise, a medical opinion not fortified by medical rationale is of little probative value.<sup>18</sup> As Dr. Macri's September 26, 2013 reports are contradictory and contain a conclusory explanation, they are insufficient to establish that appellant could not perform the duties of the offered position on September 27, 2013 and provide a sufficient reason to support that she could not report for work that day. Although appellant reported for work on September 28, 2013, this was after the 15-day period and she immediately left, indicating that she could not perform the duties.

The Board thus finds that OWCP properly terminated appellant's wage-loss compensation and schedule award benefits on November 6, 2013 because she refused an offer of suitable work. At that time there was nothing in the record documenting that she had a urological condition other than Dr. Macri's contradictory report described above.

As the offered position was suitable at that time, where OWCP shows that an offered limited-duty position was suitable based on the claimant's work restrictions at that time, the burden shifted to appellant to show that her refusal to work in that position was justified.<sup>19</sup>

Evidence subsequently submitted included a work excuse dated September 27, 2013 stating that appellant was seen by Dr. Clements that day and had a work restriction from September 27 to 29, 2013 of no lifting and that she could return to full duty on September 30, 2013. A second brief form report from Dr. Clements, dated September 27, 2013, noted that appellant could return to work on September 28, 2013 with no lifting for two days following cystoscopy. Also submitted was an employing establishment time card noting that on September 28, 2013 appellant clocked in at 7:55 a.m. and left at 7:58 a.m. A June 27, 2014 disability slip indicated that appellant was seen in Dr. Clements' office on September 27, 2013 and had a cystoscopy. Dr. Macri also continued to submit reports describing appellant's treatment. On December 3, 2014 the physician advised that, to the best of his knowledge, appellant had never refused any type of suitable job offered her and that, after having a urologic procedure on Friday, she returned to work on Saturday but could not lift anything until the following Monday, when her supervisor sent her home.

The Board finds that none of this evidence is of sufficient rationale to establish that appellant could not perform the duties of the offered position. There is no treatment note or any report from Dr. Clements regarding the necessity for the cystoscopic procedure. The brief disability slips contain no medical diagnosis or explanation as to why appellant could not lift. The Board concludes that this evidence is of insufficient rationale to establish that appellant could not perform the duties of the offered position on September 27, 2013.

Therefore, the Board finds that appellant's reasons for refusing the offered position were not acceptable, and OWCP properly terminated her wage-loss compensation based on her refusal

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<sup>17</sup> *Frank Luis Rembisz*, 52 ECAB 147 (2000).

<sup>18</sup> *Charles W. Downey*, *supra* note 15.

<sup>19</sup> *Gloria J. Godfrey*, 52 ECAB 421 (2003).

to accept a suitable work position.<sup>20</sup> Also, as noted above, OWCP complied with its procedural requirements in advising appellant that the position was suitable.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.<sup>21</sup> Section 10.608(a) of OWCP's regulations provides that a timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence and/or argument that meet at least one of the standards enumerated in section 10.606(b)(3).<sup>22</sup> This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>23</sup> Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.<sup>24</sup>

### **ANALYSIS -- ISSUE 2**

Appellant's representative requested reconsideration on January 29, 2016. He reiterated his contentions that appellant had, by letter dated September 27, 2013, accepted the offered position and that the record contained numerous documents supporting her position. As the representative did not assert that OWCP erroneously applied or interpreted the law or advance a relevant legal argument not previously considered by OWCP, appellant was not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(3).<sup>25</sup>

With respect to the third above-noted requirement under section 10.606(b)(3), appellant submitted copies of a September 27, 2013 letter and a June 27, 2014 disability slip. This evidence, however, was initially submitted to OWCP on July 1, 2014 and had previously been reviewed by OWCP's hearing representative in the decision dated August 28, 2014.

Appellant also submitted a November 5, 2015 treatment note from Dr. Macri. He indicated that appellant had been unable to return to work for two years because the employing

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<sup>20</sup> See *Sandra R. Shepherd*, 53 ECAB 735 (2002).

<sup>21</sup> 5 U.S.C. § 8128(a).

<sup>22</sup> 20 C.F.R. § 10.608(a).

<sup>23</sup> *Id.* at § 10.608(b)(3).

<sup>24</sup> *Id.* at § 10.608(b).

<sup>25</sup> *Id.* at § 10.606(b)(3); see *R.M.*, 59 ECAB 690 (2008).

establishment did not have a position that accommodated her restrictions. Dr. Macri, however, had rendered this opinion in previous reports that had been reviewed by OWCP.

Evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.<sup>26</sup>

As appellant did not show that OWCP erred in applying a point of law, advance a relevant legal argument not previously considered, or submit relevant and pertinent new evidence not previously considered by it, OWCP properly denied her reconsideration request.

### **CONCLUSION**

The Board finds that OWCP properly terminated appellant's compensation benefits effective November 6, 2013 pursuant to 5 U.S.C. § 8106(c), and that it properly denied her request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

### **ORDER**

**IT IS HEREBY ORDERED THAT** the February 23, 2016 and October 29, 2015 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 9, 2017  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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<sup>26</sup> *J.P.*, 58 ECAB 289 (2007).