

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

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**S.Y., Appellant**

**and**

**DEPARTMENT OF JUSTICE, FEDERAL  
BUREAU OF INVESTIGATION, New York, NY,  
Employer**

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**Docket No. 17-1032  
Issued: November 21, 2017**

*Appearances:*  
*Thomas S. Harkins, Esq., for the appellant*<sup>1</sup>  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On April 10, 2017 appellant, through counsel, filed a timely appeal from a January 25, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>2</sup> Pursuant to the Federal Employees' Compensation Act<sup>3</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

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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> Following the January 25, 2017 decision, OWCP received additional evidence. However, the Board may only review evidence that was in the record at the time OWCP issued its final decision. See 20 C.F.R. § 501.2(c)(1); *M.B.*, Docket No. 09-176 (issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

## **ISSUE**

The issue is whether OWCP properly terminated appellant's wage-loss compensation and schedule award benefits effective February 7, 2016 because he refused suitable work under 5 U.S.C. § 8106(c)(2).

## **FACTUAL HISTORY**

On May 5, 2006 appellant, then a 37-year-old special agent, filed a traumatic injury claim (Form CA-1) alleging that he injured his lower back and left leg during tactical shooting maneuvers on April 25, 2006. He stopped work on May 4, 2006 and has not returned. OWCP accepted the claim for closed lumbar vertebra dislocation and lumbar intervertebral disc disorder with myelopathy. Appellant received wage-loss compensation and medical benefits on the periodic rolls commencing August 6, 2006.

OWCP received reports from Dr. Mathew Lefkowitz, a treating Board-certified anesthesiologist and pain medicine physician, from 2006 to 2016 providing results on examination and diagnosed lower back pain, lumbar radiculopathy, lumbago, sciatica, and lumbosacral lesion secondary to disc disease. In a May 25, 2006 report, Dr. Lefkowitz noted a past medical history of primary sclerosing cholangitis. He continued to opine over the course of 15 years that appellant was totally disabled from work. In a May 25, 2016 report, Dr. Lefkowitz reiterated a past medical history of primary sclerosing cholangitis.

On February 6, 2015 OWCP prepared a statement of accepted facts (SOAF). The SOAF noted the accepted conditions, but failed to identify any preexisting or subsequently acquired conditions.

By letter dated March 4, 2015, OWCP referred appellant for a second opinion evaluation with Dr. Christopher B. Geary, a Board-certified orthopedic surgeon, for an opinion on whether appellant continued to have residuals or disability due to his accepted work conditions.

In a report dated March 16, 2015, Dr. Geary, based upon a review of the medical evidence, and the SOAF, the results on physical examination noted that appellant had been diagnosed with lumbar intervertebral disc disorder with left leg myelopathy. A physical examination revealed mild antalgic gait, normal cervical and thoracic spine and bilateral extremity examination, L4-5 midline tenderness on palpation and paraspinal muscle spasm, decreased low back range of motion due to pain, full right leg range of motion, negative right straight leg raising, some obvious left leg muscular atrophy, markedly decreased left leg raise, and L4-S1 decreased sensation or subjective numbness, negative left Babinski testing, and absent left Achilles and patellar reflexes. Dr. Geary opined that appellant continued to have residuals of his accepted work-related injury but was capable of working full time with restrictions. The restrictions included up to one hour of walking and standing, up to one hour of operating a motor vehicle at work, up to one hour of driving to and from work, no pushing, pulling, lifting, squatting or kneeling, up to one hour of climbing, and a 10-minute break every hour. Dr. Geary also noted that there were no preexisting conditions.

In an attached work capacity evaluation form (OWCP-5c), he indicated that appellant had permanent work restrictions, but was capable of working a sedentary position with significant restrictions.

On August 3, 2015 the employing establishment offered appellant a job as an operational management specialist, which was based on the work restrictions assigned by Dr. Geary. The duties of the position required appellant to work in an office environment and perform management of operational/administrative programs. The physical requirements for the position were listed as no walking or standing more than one hour per day, no bending, stooping, or twisting, and no operating a motor vehicle to and from work or at work for more than one hour per day. Appellant refused the offered position on August 14, 2015.

In a letter dated September 3, 2015, OWCP advised appellant that it found the offered operational management specialist position dated August 3, 2015 to be suitable as it was in accordance with his medical restrictions as provided by Dr. Geary, an OWCP referral physician. It noted that the offered position was still available and allowed him 30 days to accept the offered position or provide his reasons for refusal. OWCP further advised appellant that if he refused a suitable work position he would forfeit any further compensation for wage loss or entitlement to a schedule award. Appellant did not respond.

By letter dated October 8, 2015, OWCP advised appellant that he had 15 days to accept the position or his compensation would be terminated.

In an October 19, 2015 report, Dr. Lefkowitz diagnosed sciatica, lumbosacral radiculopathy, and low back pain due to left paracentral disc herniation. He provided work restrictions which included standing, walking, and operating a motor vehicle as tolerated and no bending, lifting, pulling, squatting, kneeling, climbing, stooping, or pushing. Dr. Lefkowitz opined that no offered position could accommodate appellant's work restrictions.

In an October 20, 2015 letter, appellant argued that the medical evidence and record established that he was totally disabled and that his restrictions were permanent and lifelong.

By decision dated January 20, 2016, OWCP found that appellant had refused suitable work. It determined his compensation for wage loss was terminated effective February 7, 2016 pursuant to 5 U.S.C. § 8106(c)(2).

In a letter dated November 29, 2016, appellant, through counsel, requested reconsideration. Counsel argued that the offered position was not suitable and failed to consider all of his medical conditions. In support of his request, he submitted a July 1, 2016 report by Dr. Lefkowitz.

Dr. Lefkowitz, in the July 1, 2016 report, provided a history of appellant's work injury, treatment provided before and after the accepted April 25, 2006 work injury, and examination findings. He noted that prior to appellant's work injury he had suffered for 17 years with primary sclerosing cholangitis, abdominal pain due to the sclerosing cholangitis, and that he had undergone various surgeries. Appellant's past medical history included surgeries for choledoco jejunostomy, biliary liver resection, intestinal resection from Crohn's disease complications, and severe percutaneous transhepatic cholangiogram, dilations, and stent placements. Dr. Lefkowitz

opined that appellant's pain was unmanageable despite various conservative therapies and interventional procedures. He provided work restrictions which included standing, walking, and operating a motor vehicle as tolerated and no bending, lifting, pulling, squatting, kneeling, climbing, stooping, or pushing. Dr. Lefkowitz concluded that appellant's congenital hepatic and intestinal conditions, his low back pain, and his high narcotic dosage rendered him disabled from performing the offered position.

By decision dated January 25, 2017, OWCP denied modification of the decision terminating appellant's compensation benefits pursuant to section 8106(c). It found Dr. Lefkowitz failed to provide a rationalized opinion explaining why appellant was disabled due to his preexisting and nonwork-related conditions.

### **LEGAL PRECEDENT**

Section 8106(c)(2) of FECA provides that a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by, or secured for him is not entitled to compensation.<sup>4</sup> Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits under section 8106(c) for refusing to accept or neglecting to perform suitable work.<sup>5</sup> The Board has recognized that section 8106(c) serves as a penalty provision as it may bar an employee's entitlement to future compensation and, for this reason, will be narrowly construed.<sup>6</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>7</sup> According to OWCP's procedure, a job offer must be in writing and contain a description of the duties to be performed and the specific physical requirements of the position.<sup>8</sup> Section 10.516 of the Code of Federal Regulations<sup>9</sup> provides 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 showing before a determination is made with respect to termination of entitlement to compensation.<sup>10</sup>

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<sup>4</sup> 5 U.S.C. § 8106(c)(2).

<sup>5</sup> *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

<sup>6</sup> *H. Adrian Osborne*, 48 ECAB 556 (1997).

<sup>7</sup> *T.S.*, 59 ECAB 490 (2008); *Ronald M. Jones*, 52 ECAB 190 (2000).

<sup>8</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.4(a) (June 2013).

<sup>9</sup> 20 C.F.R. § 10.516.

<sup>10</sup> See *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

The determination of whether an employee is capable of performing modified duty is a medical question that must be resolved by probative medical opinion evidence.<sup>11</sup> All medical conditions, whether work related or not, must be considered in assessing the suitability of an offered position.<sup>12</sup>

### ANALYSIS

The Board finds that OWCP failed to meet its burden of proof to establish that the modified operational management specialist offered by the employing establishment was suitable and therefore its termination of appellant's compensation for refusing such employment was improper.

The Board finds that OWCP failed to establish that appellant was capable of performing the position of operational management specialist given all of his preexisting medical conditions.

OWCP failed to adequately consider whether appellant's preexisting diagnosed medical conditions impacted his ability to work in the position offered by the employing establishment. As previously noted, the Board has held that all conditions, whether work related or not, must be considered in assessing the suitability of an offered position.<sup>13</sup> In this case, OWCP did not adequately consider whether appellant's diagnosed primary sclerosing cholangitis, Crohn's disease, and medication taken for pain management affected his ability to perform the operational management specialist position. Appellant submitted medical evidence from Dr. Lefkowitz, a treating Board-certified anesthesiologist and pain medicine physician, opining that he was disabled from performing the offered position due to the prescribed narcotic pain medication, congenital hepatic and intestinal conditions, as well as his low back pain. While hepatic and intestinal conditions have not been accepted by OWCP as work related, they must be considered when determining the suitability of the operational management specialist position.<sup>14</sup>

On February 6, 2015 OWCP prepared a SOAF which listed appellant's accepted conditions, but it failed to note appellant's concurrent conditions. Its procedures, however, provide that the SOAF should include a complete record of all pertinent facts related to the injury or medical condition. The omission of a critical fact diminishes the validity of a medical opinion or decision as much as an incorrect statement.<sup>15</sup> Concurrent medical conditions, as potentially relevant to the claim, must be included in the SOAF as necessary.<sup>16</sup>

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<sup>11</sup> See *Gloria J. Godfrey*, 52 ECAB 486 (2001); *Robert Dickerson*, 46 ECAB 1002 (1995).

<sup>12</sup> See *Mary E. Woodward*, 57 ECAB 211 (2005).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statement of Accepted Facts*, Chapter 2.809.4(a) (September 2009).

<sup>16</sup> *Id.* at Chapter 2.809.6(a)(4).

OWCP had referred appellant for a second opinion evaluation with Dr. Geary, who examined appellant and noted that appellant had no preexisting medical conditions. It is well established that it must consider preexisting and subsequently acquired conditions in evaluating the suitability of an offered position.<sup>17</sup> Based on his examination Dr. Geary found that appellant could return to work with restrictions. The employing establishment offered appellant an operational management specialist consistent with Dr. Geary's March 16, 2015 report, which OWCP deemed suitable on September 3, 2015. Dr. Smith based his restrictions on the conditions of lumbar intervertebral disc disorder with left leg myelopathy.

Dr. Geary's report did not consider appellant's preexisting condition of primary sclerosing cholangitis in assigning appellant's work restrictions. OWCP accorded determinative weight to Dr. Geary's March 16, 2015 report, which failed to consider whether appellant had any work restrictions due to his preexisting condition; rather he specifically found no history of a preexisting condition.

The Board has held that for OWCP to meet its burden of proof in a suitable work termination, the medical evidence should be clear and unequivocal that the claimant could perform the offered position.<sup>18</sup> As a penalty provision, section 8106(c)(2) must be narrowly construed.<sup>19</sup> In this case the medical evidence was not clear on the issue. OWCP did not secure a medical report that reviewed the job offer and provided a reasoned opinion as to its suitability for appellant, considering all existing and relevant conditions.<sup>20</sup>

Under the circumstances of this case, OWCP failed to establish that appellant refused suitable work. The Board will reverse the January 25, 2017 decision.

### **CONCLUSION**

The Board finds that OWCP did not meet its burden of proof to establish that appellant refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c).

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<sup>17</sup> *E.G.*, Docket No. 12-1011 (issued November 28, 2012).

<sup>18</sup> *Annette Quimby*, 49 ECAB 304 (1998).

<sup>19</sup> *See Stephen A. Pasquale*, 57 ECAB 396 (2006).

<sup>20</sup> *Cf. B.P.*, Docket No. 15-1096 (issued January 20, 2016) (second opinion physician reviewed the offered position and provided a reasoned opinion that the position was suitable).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated January 25, 2017 is reversed.

Issued: November 21, 2017  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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