



resonance imaging scan demonstrated fracture of the neck and head of the talus, calcaneal bone bruise, nondisplaced fractures of the navicular, and cuboid, as well as anterior talofibular ligament sprain. On February 21, 2006 OWCP accepted appellant's claim for closed fracture of tarsal and metatarsal. It later expanded acceptance of her claim to include left ankle tendinitis. Appellant received intermittent wage-loss benefits on the supplemental rolls commencing February 4, 2006.

On April 24, 2009 Dr. Brett Limkuhler, a clinical neuropsychologist, examined appellant due to chronic pain and depression. He noted her history of injury and foot pain. Dr. Limkuhler reported appellant's history of major depression with suicidal ideation, generalized anxiety disorder, and chronic dysthymic disorder. He found that her judgement was impaired and that she did not foresee the consequences of her actions. Dr. Limkuhler opined that appellant's mental health was further compromised by the stress of chronic pain, work demands, and her work environment. He found that she was totally disabled. Dr. Limkuhler opined that appellant was able to work full time until her 2003 employment injury, but that this injury had a significant deleterious impact on her mental health.

On January 22, 2010 appellant filed a notice of recurrence of disability (Form CA-2a) alleging that on January 22, 2010 she stopped work due to disability caused by her October 2, 2003 employment injury. By decision dated April 12, 2010, OWCP accepted that she sustained a recurrence of disability on January 22, 2010 due to her accepted left foot conditions. Appellant received wage-loss compensation on the periodic rolls as of April 11, 2010.

On May 21, 2010 Dr. Linda Thornton, a podiatrist, performed left foot surgery for evacuation of exostosis, evacuation of sinus tarsi, and peroneal tendon repair.

Appellant returned to light-duty work four hours a day on March 5, 2011. By decision dated November 16, 2011, OWCP reduced her wage-loss compensation based on her actual earnings as a modified clerk for 20 hours a week.

In a report dated January 11, 2012, Dr. Frank Graf, a Board-certified orthopedic surgeon, provided a history of injury and examined appellant due to her left foot condition. He noted that following her 2010 foot surgery she had numbness and tingling in the lateral border of her foot. Dr. Graf also noted appellant's left-sided low back pain as well as chronic stress and anxiety. He diagnosed chronic left foot pain, cutaneous nerve damage in her incision, abnormal gait pattern with a limp, and inability to heel or toe walk, chronic inflammation of the left sacroiliac joint with chronic sacroiliac joint pain, and chronic lumbosacral pain secondary to gait disturbance. Dr. Graf opined that appellant could not work due to her left foot and back conditions as well as her chronic anxiety. He found that she was totally disabled.

On February 3, 2012 appellant filed a notice of a recurrence of total disability (Form CA-2a) alleging that on January 4, 2012 she sustained a recurrence of her October 2, 2003 employment injury such that she could no longer work four hours a day. By decision dated December 31, 2012, OWCP determined that she had experienced a recurrence of disability commencing January 4, 2012. As of March 19, 2013 it again paid appellant on the periodic rolls for temporary total disability.

Dr. Thornton completed a work restriction evaluation (Form OWCP-5c) and opined that appellant could not return to work in her date-of-injury position, but could work in a seated job. She diagnosed chronic tendinitis neuritis and opined that appellant was unable to walk or stand.

On October 16, 2013 OWCP referred appellant, a statement of accepted facts (SOAF), and a list of questions for a second opinion evaluation with Dr. Gilbert Shapiro, a Board-certified orthopedic surgeon. It requested that he assess her current condition and work capacity and provide any work restrictions due to her work-related conditions as well as any preexisting conditions.

In a report dated November 12, 2013, Dr. Shapiro reviewed the SOAF and performed a physical examination. He found that appellant had an antalgic gait favoring the left leg. Dr. Shapiro found no atrophy of her left lower extremity, pulses in her foot, and a visible incision over the sinus tarsi which was exquisitely tender, but no swelling. He reported that appellant's left ankle had full range of motion and excellent strength. Dr. Shapiro diagnosed nondisplaced fracture of the talus, navicular fracture, cuboid fracture, and talofibular ligament sprain, as well as sinus tarsi strain. He noted that appellant reported back complaints, but found that her back examination was within normal limits with no neurologic abnormalities. Dr. Shapiro found that her back condition was not disabling. He noted that appellant had been prescribed mood elevators including klonopin. Dr. Shapiro did not discuss the impact of her emotional condition on her employment. He opined that appellant would have difficulty with work requiring walking and standing, but could perform full-time sedentary seated work.

On November 12, 2013 Dr. Shapiro completed a work capacity evaluation (Form OWCP-5c) and opined that appellant was disabled from her date-of-injury position, but could work eight hours a day. He indicated that she could not squat or kneel and found that she could stand and walk for one to two hours each.

On January 14, 2014 Dr. Graf continued to find diminished sensibility at the lateral aspect of appellant's left ankle as well as segmental sensitivity on manipulation at the base of the lumbosacral spine at L5-S1. He reported tenderness in the left sciatic notch and tenderness to palpation and manipulation of the left sacroiliac joint.

On July 29, 2014 the employing establishment offered appellant a limited-duty position as a modified mail processing clerk. The physical requirements of this position included: lifting up to 30 pounds; standing and walking for one to two hours each; sitting for six hours intermittently; twisting for one hour intermittently; reaching for eight hours intermittently, and reaching above the shoulder for two hours intermittently; grasping for eight hours; as well as pushing and pulling for two hours; and operating machinery for two hours.

On October 23, 2014 the employing establishment advised OWCP that the offered position was still available and permanent.

In a letter dated November 7, 2014, OWCP informed appellant that the modified mail processing clerk position was suitable and afforded her 30 days to accept the position or offer her reasons for refusal. Appellant did not respond.

By decision dated December 11, 2014, OWCP terminated her wage-loss compensation and entitlement to schedule award compensation benefits effective January 11, 2015 in accordance with 5 U.S.C. § 8106(c)(2).

On December 11, 2015 appellant, through her then counsel, requested reconsideration of the December 11, 2014 decision. In support of this request, she provided additional medical evidence from Dr. Graf including a report dated February 4, 2015 opining that she could not return to her date-of-injury position. On November 11, 2015 Dr. Graf again opined that appellant had likely developed a secondary lumbosacral condition by reason of gait change.

By decision dated January 20, 2016, OWCP denied modification of the December 11, 2014 termination decision.

On May 16, 2017 appellant filed a schedule award claim (Form CA-7). She submitted a report dated March 2, 2016 from Dr. Graf. Dr. Graf noted that following her surgery in April 2010 she experienced numbness in the lateral ankle and within three months of the surgery she developed low back pain. He further noted appellant's treatment for anxiety and depression. Dr. Graf found that she had permanent impairments including L5 radiculopathy with motor and sensory deficits in the left lower extremity resulting in 13 percent permanent impairment of the left lower extremity, lateral cutaneous nerve deficits result in 5 percent permanent impairment of the left lower extremity, 5 percent permanent impairment of the left lower extremity due to her accepted fractures, and 5 percent permanent impairment of the left lower extremity due to chronic peroneal tendinitis. He combined these impairments to reach 25 percent permanent impairment of the left lower extremity. Dr. Graf opined that appellant was totally disabled.

By decision dated May 30, 2017, OWCP informed appellant that her schedule award claim was not payable due to the January 11, 2015 termination as set forth in the December 11, 2014 decision.

On August 11, 2017 appellant requested reconsideration of the May 30, 2017 schedule award decision and submitted medical records from Dr. Graf. In a form report dated January 11, 2012, Dr. Graf indicated that she could lift up to 20 pounds occasionally and carry up to 10 pounds occasionally. He attributed these restrictions to appellant's chronic left foot pain, low back, and sacroiliac joint pain. Dr. Graf indicated that she could sit for four hours a day, and stand and walk for one hour a day each. He noted that appellant walked with a cane and found that she could never climb ladders or crawl. In a form report dated November 11, 2015, Dr. Graf indicated that she was totally disabled. On February 17, 2016 he found in two separate reports that appellant could not work as a mail processing clerk or postal clerk due to her foot condition as she could not ambulate sufficiently to walk or run. Dr. Graf completed a report on April 5, 2016 and diagnosed chronic peroneal tendinitis, as well as chronic anxiety and depression. In a form report dated May 2, 2016, he indicated that appellant had work restrictions due to chronic foot and low back pain.

Appellant also submitted documents regarding her 2015 removal from the employing establishment. On April 25, 2015 the employing establishment issued a letter of removal finding that she refused suitable work and misrepresented her physical limitations. In a note dated February 12, 2016, the employing establishment rescinded the notice of removal effective immediately. In a letter dated August 4, 2017, a union official noted that appellant's removal was

rescinded on February 12, 2016, finding that she had not refused suitable work or misrepresented her physical limitations.

By decision dated November 15, 2017, OWCP reviewed the merits of appellant's claim and found that the December 11, 2014 termination decision should not be modified.

### **LEGAL PRECEDENT**

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.<sup>2</sup> After it has determined that an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>3</sup> Section 8106(c) of FECA<sup>4</sup> 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. Section 10.517 of the applicable regulations<sup>5</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 proof to show 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. To justify termination of compensation, OWCP must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.<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>

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> Its regulations provide factors to be considered in determining what constitutes suitable work for a particular disabled employee, including 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. All impairments, whether work related or not, must be considered in assessing the suitability of an offered position.<sup>10</sup> Section

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<sup>2</sup> *L.L.*, Docket No. 17-1247 (issued April 12, 2018); *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

<sup>3</sup> *G.R.*, Docket No. 16-0455 (issued December 13, 2016).

<sup>4</sup> 5 U.S.C. § 8106(c)(2).

<sup>5</sup> 20 C.F.R. § 10.517(a).

<sup>6</sup> *L.L.*, *supra* note 2; *Arthur C. Reck*, 47 ECAB 339, 341-42 (1995).

<sup>7</sup> *L.L.*, *id.*

<sup>8</sup> *L.L.*, *id.*; *T.S.*, 59 ECAB 490 (2008); *Ronald M. Jones*, 52 ECAB 190 (2000).

<sup>9</sup> *L.L.*, *id.*; *J.J.*, Docket No. 17-0410 (issued June 20, 2017); *Rebecca L. Eckert*, 54 ECAB 183 (2002).

<sup>10</sup> *Id.*

10.517(a) of FECA's implementing regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured by the employee has the burden of proof to show that such refusal or failure to work was reasonable or justified.<sup>11</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>12</sup>

After termination or modification of benefits clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant.<sup>13</sup>

### ANALYSIS

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award compensation benefits, effective January 11, 2015, as she refused an offer of suitable work under 5 U.S.C. § 8106(c)(2).

OWCP accepted appellant's October 2, 2003 traumatic injury claim for closed fracture of tarsal and metatarsal as well as left ankle tendinitis. Appellant stopped work on January 4, 2012 and OWCP placed appellant on the periodic rolls. On July 29, 2014 the employing establishment offered her a limited-duty position as a modified mail processing clerk, which she refused. By decision dated December 11, 2014, OWCP terminated appellant's wage-loss compensation and entitlement to schedule award compensation benefits effective January 11, 2015 as she refused an offer of suitable work.

The Board finds that OWCP failed to establish that appellant was capable of performing the position of modified mail processing clerk, given her other medical conditions including major depression with suicidal ideation, generalized anxiety disorder, and chronic dysthymic disorder.<sup>14</sup>

OWCP relied on the second opinion report of Dr. Shapiro, who provided work restrictions based on appellant's accepted left lower extremity conditions. Dr. Shapiro found that her low back condition was not disabling and mentioned that she was receiving medication for her emotional conditions, but did not address whether these emotional conditions and treatments would impact her return to work. The issue of whether a claimant is able to perform the duties of the offered employment position is a medical one and must be resolved by probative medical evidence.<sup>15</sup> While OWCP found that Dr. Shapiro's opinion contained sufficient medical rationale to support that appellant could perform the physical duties later contained in the offered position,<sup>16</sup> the Board finds his opinion lacks sufficient rationale to meet OWCP's burden of proof. It did not secure a medical report that reviewed the job offer and provide a reasoned opinion as to its suitability for

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<sup>11</sup> *L.L.*, *supra* note 2; *Catherine G. Hammond*, 41 ECAB 375, 385 (1990); 20 C.F.R. § 10.517(a).

<sup>12</sup> *Id.* at § 10.516.

<sup>13</sup> *L.L.*, *supra* note 2; *K.J.*, Docket No. 16-0846 (issued August 18, 2016); *Talmadge Miller* 47 ECAB 673, 679 (1996); *see also George Servetas*, 43 ECAB 424 (1992).

<sup>14</sup> *See S.Y.*, Docket No. 17-1032 (issued November 21, 2017); *D.H.*, Docket No. 17-1014 (issued October 3, 2017).

<sup>15</sup> *F.B.*, Docket No. 17-0216 (issued February 13, 2018); *Gayle Harris*, 52 ECAB 319 (2001).

<sup>16</sup> *F.B.*, *id.*; *Maurissa Mack*, 50 ECAB 498 (1999).

her, considering all existing and relevant conditions.<sup>17</sup> The medical evidence of record, therefore, fails to establish that the offered position was suitable.

As a penalty provision, section 8106(c)(2) of FECA must be narrowly construed.<sup>18</sup> Based on the evidence of record, the Board finds that OWCP improperly determined that the modified position offered to appellant constituted suitable work within her physical limitations and capabilities. Consequently, OWCP did not meet its burden of proof to justify the termination of her compensation benefits. Therefore, appellant's claim for a schedule award is no longer precluded due to the effect of the termination decision.

### **CONCLUSION**

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award compensation benefits, effective January 11, 2015, as she refused an offer of suitable work under 5 U.S.C. § 8106(c)(2).

### **ORDER**

**IT IS HEREBY ORDERED THAT** the November 15, 2017 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 17, 2018  
Washington, DC

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

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

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

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<sup>17</sup> *S.Y.*, *supra* note 14.

<sup>18</sup> *D.H.*, *supra* note 14.