



## ISSUE

The issue is whether OWCP properly terminated appellant's entitlement to wage-loss and schedule award compensation, effective October 18, 2017, pursuant to 5 U.S.C. § 8106(c)(2), due to his refusal of an offer of suitable work.

## FACTUAL HISTORY

On April 4, 2009 appellant, then a 44-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that, commencing March 1, 2009, he experienced increasing bilateral elbow and forearm pain while performing repetitive lifting tasks. He stopped work on April 4, 2009 and returned to work on April 22, 2009.

On May 12, 2009 OWCP accepted the claim for bilateral/lateral epicondylitis. It later expanded acceptance of the claim to include a left elbow lateral collateral ligament (LCL) sprain. On February 15, 2010 appellant underwent an authorized right elbow fasciotomy, with partial osteotomy and tendon debridement and repair. He did not return to work.

OWCP accepted that appellant sustained a recurrence of disability, commencing February 15, 2010. After initially paying appellant compensation on the daily rolls, it placed appellant on the periodic rolls, effective March 14, 2010.

On May 18, 2010 appellant underwent an authorized fasciotomy of the left elbow with partial otectomy and extensor tendon debridement and repair. On February 18, 2011 he underwent an authorized LCL repair of the left elbow to address a left lateral elbow extensor tendon rupture. On May 29, 2012 appellant underwent a left elbow lateral epicondylectomy with extensor tendon debridement and repair, LCL reconstruction, and posterior interosseous nerve decompression. He remained under medical treatment. On April 9, 2014 OWCP obtained a second opinion report from Dr. Robert M. Ungerer, a Board-certified orthopedic surgeon, who opined that appellant had not yet attained maximum medical improvement and required additional treatment. Dr. Ungerer noted that appellant could perform full-time limited-duty work with little to no use of the left upper extremity.

In a report dated August 22, 2016, Dr. Robert Milch, an attending Board-certified anesthesiologist, related appellant's account of chronic bilateral elbow pain, greater on the left. Appellant self-limited the "usage of his arm at or above shoulder level and does not lift anything greater than five pounds." Dr. Milch prescribed opioid medication for chronic left elbow pain and myalgia. He found appellant totally disabled from work due to the accepted bilateral upper extremity conditions.

In a report dated August 24, 2016, the employing establishment's Office of Inspector General (OIG) summarized surveillance videos obtained from March 8 through April 28, 2016, which allegedly showed appellant driving and performing repetitive lifting tasks with both upper extremities. Pursuant to the investigation, appellant had acknowledged in a June 3, 2016 interview that he had lifted a 35-pound sack of dog food and a pack of water bottles while grocery shopping. He also participated in a bowling league for two consecutive seasons.

In a report dated October 6, 2016, Dr. James M. Hitt, an attending Board-certified anesthesiologist and associate of Dr. Milch, acknowledged the employing establishment's August 24, 2016 report and its description of appellant's activities. He noted that appellant was independent in performing activities of daily living, but avoided strenuous tasks that would exacerbate his condition. Dr. Hitt opined that he was physically capable of performing the activities described in the surveillance report on occasion. He requested that OWCP authorize a functional capacity evaluation (FCE) to determine appellant's current limitations. Dr. Hitt reiterated his request for an FCE in a report dated December 1, 2016.

On December 28, 2016 appellant underwent an authorized FCE which demonstrated his capacity to perform full-time work at the light physical demand level.

On January 6, 2017 OWCP obtained a second opinion report from Dr. Kevin Scott, a Board-certified orthopedic surgeon. Dr. Scott reviewed the medical record, a statement of accepted facts, and the surveillance video obtained by the OIG. On examination, he noted restricted flexion of the left elbow and no positive findings in the right elbow. Dr. Scott opined that appellant did not require further medical treatment related to the accepted upper extremity conditions. He found that based on the December 28, 2016 FCE appellant could perform full-time, light-duty work with lifting limited to 10 pounds, pushing and pulling limited to 15 pounds, 15-minute breaks each hour, and no twisting, squatting, kneeling, or climbing.

In a report dated January 16, 2017, Dr. Hitt noted moderate discomfort in the left elbow. He found that appellant was "75 percent disabled," and totally disabled from work. Dr. Hitt prescribed opioid analgesic medication.<sup>3</sup>

In a report dated February 16, 2017, Dr. Hitt reviewed Dr. Scott's January 6, 2017 report. He opined that appellant remained totally disabled from work due to moderate left elbow discomfort. Dr. Hitt noted in a report dated April 27, 2017 that appellant's left elbow pain caused "difficulty with repetitive pushing, pulling and lifting. [Appellant] avoids lifting anything over five pounds since this increases his pain." Dr. Hitt reiterated these findings in a report dated June 22, 2017.

On July 18, 2017 the employing establishment offered appellant a full-time modified position as a mail handler. The duties were categorized as sedentary, with all tasks performed while seated. The position involved sorting "flats" for up to eight hours and removing mail from flat tubs and placing them into a cart. Appellant would work in the damaged mail unit if the flats unit was closed, placing damaged mail from a tray or tub onto a table, then taping or bagging the damaged items. He would be given a 15-minute break each hour. Appellant did not respond to the job offer.

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<sup>3</sup> On February 10, 2017 the employing establishment offered appellant a full-time position as a modified mail handler. Appellant declined the position on February 24, 2017, contending that the assigned duties exceeded his medical restrictions. In a letter dated July 13, 2017, OWCP notified the employing establishment that the February 10, 2017 job offer was incomplete as it did not include an accurate work schedule, required breaks, and required physical activities in excess of appellant's restrictions.

In a letter dated August 10, 2017, OWCP advised appellant of its determination that the position of modified mail handler offered by the employing establishment was suitable. It discussed the medical evidence of record, noting that Dr. Scott's report showed that appellant could work as a modified mail handler. OWCP informed appellant that his entitlement to wage-loss and schedule award compensation would be terminated if he did not accept the position or provide good cause for not doing so within 30 days of the date of the letter.

On August 22, 2017 OWCP telephoned appellant, who contended that he had not yet received the July 18, 2017 job offer. Appellant asserted that he was unable to work as he took prescribed narcotic medication four times a day. He alleged that Dr. Scott did not perform a thorough examination.

In a letter dated September 25, 2017, OWCP advised appellant that his reasons for not accepting the position of modified mail handler offered by the employing establishment were unjustified.<sup>4</sup> It advised him that his entitlement to wage-loss and schedule award compensation would be terminated if he did not accept the position within 15 days of the date of the letter.

In response, appellant submitted an August 24, 2017 report from Dr. Hitt, noting that the "job recommendations from the [employing establishment] will be analyzed after a[n] FCE will be initiated and ordered at today's office visit." Dr. Hitt reiterated his finding of pain with left elbow range of motion. He found that appellant was "75 percent disabled," and totally disabled from work.

Appellant also provided a September 21, 2017 CA-20 form report from Elizabeth Hyla, a nurse practitioner indicating that appellant was being referred for a functional capacity examination.

On September 29, 2017 appellant telephoned OWCP and asserted that he had not refused the offered position. He contended that he was waiting for an updated FCE so that Dr. Hitt could render an opinion on his work capacity.

In a letter dated October 3, 2017, appellant stated that he would not accept or refuse the offered position until the updated FCE and medical evaluation were completed.

On October 11, 2017 the employing establishment again confirmed that the earlier offered modified mail handler position remained open and available to appellant.

By decision dated October 18, 2017, OWCP terminated appellant's entitlement to wage-loss and schedule award compensation, effective October 18, 2017, because he had refused an offer of suitable work. It found that the evidence of record showed that he was medically and vocationally capable of performing the position of modified mail handler and that he had not shown good cause for refusing the position. OWCP found that the weight of the medical opinion evidence regarding appellant's ability to work as a modified mail handler rested with the well-

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<sup>4</sup> On September 25, 2017 the employing establishment notified OWCP that the offered modified mail handler position remained open and available.

rationalized opinion of Dr. Scott, OWCP's referral physician, and determined that he did not submit rationalized medical evidence showing that he could not perform the position.

On November 1, 2017 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

In support of his request, appellant submitted an October 19, 2017 report from Dr. Hitt, who opined that appellant remained totally disabled from work, "most recently documented on November 1, 2016." Dr. Hitt noted that there were no changes in appellant's presentation. He again requested that OWCP authorize an updated FCE "to determine guidelines for [appellant] to return to work safely." Dr. Hitt repeated these findings and opinions in a report dated December 8, 2017.

Appellant also provided an October 24, 2017 report from Ms. Hyla, a nurse practitioner. He also submitted urine drug testing forms dated March 14, 2017 and January 23, 2018.

By decision dated February 15, 2018, OWCP's hearing representative affirmed the October 18, 2017 decision which terminated appellant's entitlement to wage-loss and schedule award compensation, effective October 18, 2017, due to his refusal of suitable work. He found that appellant was medically and vocationally capable of performing the position of modified mail handler offered by the employing establishment. The hearing representative determined that the weight of the medical opinion evidence regarding appellant's ability to work as a modified mail handler continued to rest with the opinion of Dr. Scott, and noted that the reports of appellant's attending physicians were not sufficiently well-rationalized to establish that he could not work as a modified mail handler.

### **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>5</sup> Section 8106(c)(2) of FECA 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.<sup>6</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 or she was allowed a reasonable period to accept or reject the position or submit evidence to provide reasons why the position is not suitable.<sup>7</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>8</sup>

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<sup>5</sup> *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

<sup>6</sup> 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

<sup>7</sup> *See Ronald M. Jones*, 52 ECAB 190 (2000).

<sup>8</sup> *Joan F. Burke*, 54 ECAB 406 (2003); *see Robert Dickerson*, 46 ECAB 1002 (1995).

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 proof to establish that such refusal or failure to work was reasonable or justified.<sup>9</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>10</sup>

Before compensation can be terminated, however, OWCP has the burden of proof to demonstrate that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work, and establishing that a position has been offered within the employee's work restrictions and setting forth the specific job requirements of the position.<sup>11</sup> The determination of whether an employee is physically capable of performing a modified assignment is a medical question that must be resolved by medical evidence.<sup>12</sup> OWCP procedures provide 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>

In a suitable work determination, OWCP must consider preexisting and subsequently acquired medical conditions in evaluating an employee's work capacity.<sup>14</sup>

### ANALYSIS

The Board finds that OWCP properly terminated appellant's entitlement to wage-loss and schedule award compensation, effective October 18, 2017, pursuant to 5 U.S.C. § 8106(c)(2), due to his refusal of an offer of suitable work.

The Board finds that the evidence of record establishes that appellant was capable of performing the position of modified mail handler offered by the employing establishment on July 18, 2017 and determined to be suitable by OWCP on August 10, 2017. The position involved sorting flats, removing flats from tubs and placing them into a cart, placing damaged mail from a tray or tub onto a table, and taping or bagging the damaged mail. Appellant would be given a 15-minute break each hour. The physical requirements of the position included sitting in an office chair. The evidence of record does not reveal that the position of modified mail handler was temporary in nature.<sup>15</sup>

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<sup>9</sup> 20 C.F.R. § 10.517(a).

<sup>10</sup> *Id.* at § 10.516.

<sup>11</sup> *See Linda Hilton*, 52 ECAB 476 (2001).

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

<sup>13</sup> *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.5a (June 2013); *E.B.*, Docket No. 13-0319 (issued May 14, 2013).

<sup>14</sup> *See G.R.*, Docket No. 16-0455 (issued December 13, 2016); *Richard P. Cortes*, 56 ECAB 200 (2004).

<sup>15</sup> If the employing establishment offers a claimant a temporary light-duty assignment and the claimant held a permanent job at the time of injury, the penalty language of section 8106(c) cannot be applied. *See* Federal (FECA) Procedure Manual, *supra* note 13 at Chapter 2.814.4c(5), 9 (June 2013).

The Board finds that, with respect to appellant's physical ability to work, OWCP properly relied on the opinion of Dr. Scott when it made its determination that the modified position of mail handler offered by the employing establishment was suitable. The weight of the medical evidence regarding his ability to work is represented by the thorough, well-rationalized opinion of Dr. Scott. Dr. Scott's January 6, 2017 report shows that appellant is capable of working in the position of modified mail handler.

In his report dated January 6, 2017, Dr. Scott detailed the findings of the physical examination he conducted on November 11, 2016, noting that appellant had restricted motion of the left elbow and no positive findings in the right elbow. He explained that, based on a December 28, 2016 FCE, appellant could perform full-time, light-duty work with lifting up to 10 pounds and a 15-minute break each hour.

The Board finds that the opinion of Dr. Scott has reliability, probative value, and convincing quality with respect to its conclusions. Dr. Scott provided a thorough factual and medical history and accurately summarized the relevant medical evidence.<sup>16</sup> He provided medical rationale for his opinion by explaining that, although appellant's medical condition prevented him from performing his regular work as a mail handler, the objective findings of record showed that he could perform a full-time limited-duty position such as the position of modified mail handler offered by the employing establishment.<sup>17</sup>

The Board therefore finds that OWCP has established that the position of modified mail handler offered by the employing establishment is suitable. As noted above, once OWCP has established that a particular position is suitable, an employee who refuses or neglects to work after suitable work has been offered has the burden of proof to establish that such refusal to work was justified.<sup>18</sup>

The Board has reviewed the evidence and argument submitted by appellant in support of his refusal of the position of modified mail handler and finds that it is insufficient to justify his refusal of the position.

In support of his claim, appellant submitted reports dated from October 6, 2016 onward from Dr. Hitt. Dr. Hitt prescribed opioid analgesic medication for moderate discomfort in the left elbow. He explained that the discomfort caused difficulty with repetitive upper extremity activities or lifting more than five pounds, rendering appellant "75 percent disabled," and totally disabled from work. Although appellant underwent an FCE on December 28, 2016, Dr. Hitt opined in his reports from August 24 to December 8, 2017 that an updated FCE was necessary to determine if appellant could perform the offered modified mail handler position. He noted, however, that there had been no change in appellant's condition.

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<sup>16</sup> *M.H.*, Docket No. 17-0210 (issued July 3, 2018); see *Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

<sup>17</sup> The Board notes that the specific work restrictions recommended by Dr. Scott would allow appellant to work in the modified mail handler position.

<sup>18</sup> 20 C.F.R. § 10.517(a).

The Board finds that the submission of this evidence does not show that appellant was unable to work as a modified mail handler because Dr. Hitt's opinion about his inability to work is of limited probative value due to its lack of medical rationale. Dr. Hitt did not provide an explanation of why he found appellant totally disabled from work based solely on left elbow discomfort. Also, he did not explain why the December 28, 2016 FCE was insufficient to document appellant's ability to perform full-time light duty, or why an updated FCE was necessary although appellant's condition had remained unchanged. The Board has held that a medical report is of limited probative value on a given medical issue if it contains a medical opinion which is unsupported by medical rationale.<sup>19</sup>

Appellant also provided reports from Ms. Hyla, a nurse practitioner. These opinions are not competent medical evidence as nurse practitioners are not considered physicians under FECA.<sup>20</sup>

Appellant contended that he was disabled from work due to prescription narcotic medication. He submitted drug screen testing forms dated March 14, 2017 and January 23, 2018. As these forms do not contain medical rationale regarding appellant's ability to perform the offered modified mail handler position, they lack relevance to the claim.<sup>21</sup>

The Board finds that OWCP complied with its procedural requirements prior to terminating appellant's compensation, including providing him with an opportunity to accept the position of modified mail handler offered by the employing establishment after informing him that his reasons for initially refusing the position were not valid.<sup>22</sup>

For these reasons, the Board finds that OWCP properly terminated appellant's entitlement to wage-loss and schedule award compensation, effective October 18, 2017, because he refused the August 10, 2017 offer of suitable work.<sup>23</sup>

On appeal counsel contends that OWCP's February 15, 2018 decision is contrary to fact and law. As stated above, the medical and factual evidence of record established that the offered modified mail handler position was suitable work and that appellant presented no valid reason for refusing the job.

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<sup>19</sup> *C.M.*, Docket No. 14-0088 (issued April 18, 2014).

<sup>20</sup> See *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law). *S.J.*, Docket No. 17-0783, n.2 (issued April 9, 2018) (nurse practitioners are not considered physicians under FECA).

<sup>21</sup> *M.H.*, *supra* note 16; *Gayle Harris*, *supra* note 12.

<sup>22</sup> See generally *Maggie L. Moore*, 42 ECAB 484 (1991); *reaff'd on recon.*, 43 ECAB 818 (1992).

<sup>23</sup> *M.H.*, *supra* note 16.

**CONCLUSION**

The Board finds that OWCP properly terminated appellant's entitlement to wage-loss and schedule award compensation, effective October 2, 2015, pursuant to 5 U.S.C. § 8106(c)(2), due to his refusal of an offer of suitable work.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated February 15, 2018 is affirmed.

Issued: December 3, 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