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

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| **A.P., Appellant** | ) | |
| **and** | ) | **Docket No. 17-1135** |
| | ) | **Issued: February 12, 2018** |
| **DEPARTMENT OF ARMY,** | ) | |
| **FORT BELVOIR, VA, Employer** | ) | |

*Appearances:*
*Alan J. Shapiro, Esq.*, for the appellant[1]
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

### ***JURISDICTION***

On May 2, 2017 appellant, through counsel, filed a timely appeal from a January 30, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

### ***ISSUE***

The issue is whether OWCP properly terminated appellant's wage-loss compensation effective March 4, 2016 pursuant to 5 U.S.C. § 8106(c)(2) for refusing an offer of suitable work.

[1] 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.

[2] 5 U.S.C. § 8101 *et seq.*

## ***FACTUAL HISTORY***

On July 12, 2011 appellant, then a 54-year-old criminal investigator, filed an occupational disease claim (Form CA-2) alleging that on June 20, 2011 he suffered a myocardial infarction due to factors of his federal employment. In a supporting statement, he explained that he suffered a massive myocardial infarction while stationed in Kabul, Afghanistan. Appellant noted that he was initially treated by U.S. Embassy staff, and then transported to the French NATO Hospital at Kabul International Airport. He was stabilized at the U.S. Army Hospital at Bagram Airfield, and returned to the United States for further treatment on June 30, 2011. Appellant alleged that his cardiac event was the result of dramatic physiological stress caused by profound sleep deprivation and other environmental factors including diet, air quality, living conditions, and operational stress. He alleged that these conditions started on January 15, 2011 when he arrived in Kabul as a special agent and continued through June 20, 2011. On May 2, 2012 OWCP accepted appellant's claim for myocardial infarction. It paid him wage-loss compensation on the supplemental rolls commencing July 21, 2011 and on the periodic rolls as of April 6, 2014.

On January 27, 2015 appellant's treating Board-certified cardiologist, Dr. Richard A. Katz, noted that appellant sustained cardiac arrest while deployed in Kabul, Afghanistan, and that he was found to have a 50 to 70 percent stenosis of his proximal left anterior descending coronary artery (LAD) associated with the origin of the first diagonal branch. Dr. Katz opined that appellant was incapable of working eight hours a day as isometric physical labor was not to his medical advantage for all the obvious reasons associated with physical stress. He noted that appellant may be able to work four to six hours a week on a part-time basis. Dr. Katz opined that returning to work in a position responsible for security issues would confer emotional stress for which appellant was ill-suited. He opined that any kind of position involved in security protection, police work, *etc.*, imposed an environment of emotional stress which would not inure to appellant's good health and which could precipitate symptoms of angina. With regard to rehabilitation, Dr. Katz noted that appellant and his family were vested in the San Diego community, and if he was obligated to move, that would involve emotional stress which could place appellant in jeopardy. He noted that, at this point in his life, he doubted that appellant would be interested in moving his family to another location. Dr. Katz stated that, if appellant lost the financial support provided, this would also impose a hardship on him, and he would have to make adjustments that would reverberate through his entire family. In a March 11, 2015 echocardiographic report, he found borderline left atrial enlargement, but otherwise normal. Dr. Katz interpreted a normal carotid duplex study on July 20, 2015.

On March 18, 2015 OWCP referred appellant to Dr. Mohammad Pashmforoush, a physician Board-certified in clinical cardiac electrophysiology and internal medicine, for a second opinion. In an April 6, 2015 report, Dr. Pashmforoush concluded that appellant had a myocardial infarction in July 2011, that this was aborted with thrombolytic therapy, and that he had not suffered any neurological sequelae. He further noted that appellant's echocardiograms have consistently shown normal left ventricular size and function and there was no evidence of wall motion abnormality or cardiac dysfunction based on echocardiography. Dr. Pashmforoush noted that appellant remained fairly active and denied any symptomatology related to his myocardial infarction. He opined that, based on appellant's current echocardiogram, nuclear perfusion studies, exercise capacity, and symptomatology, he should be able to work eight hours a day. Dr. Pashmforoush noted that, despite appellant's active cardiac disease, he remained with

minimal symptoms. He noted a caveat that appellant did apparently have a 50 to 70 percent lesion inside the LAD that was noted in 2011, but that he had not seen documentation for this, and that, if appellant did have angina or left ventricular dysfunction, he may be disabled as a result of low cardiac function. However, Dr. Pashmforoush noted that appellant had no evidence of cardiac dysfunction and had recovered from his myocardial infarction. He noted that appellant did remain at risk for having subsequent cardiovascular events in the future, but at present he was close to normal. Dr. Pashmforoush opined that appellant was not suitable for any high level physical activity or combat-related jobs. He noted that appellant should be able to work as a supervisor or mostly office-related jobs without difficulty.

By letter dated to Dr. Katz dated May 13, 2015, OWCP asked for comments regarding Dr. Pashmforoush's report.

In an August 20, 2015 e-mail, a representative of the employing establishment indicated that she had not been able to find any appropriate positions in Irvine, but found a few in Fort Irwin, but adjustments to these positions would need to be made. She noted that the employing establishment was prepared to pay moving costs associated with relocation. Per a September 11, 2015 OWCP telephone memorandum, the employing establishment indicated that they had an available position and that it would be either in Sacramento or San Diego. A September 15, 2015 note indicated that the employing establishment was in the process of formulating a job offer for the claimant to return to work in the San Diego area.

By letter dated December 1, 2015, the employing establishment offered appellant a position in Irvine, California. The offered position was full time and permanent, and would begin on November 23, 2015. The duty hours would be from 8:00 a.m. to 4:00 p.m. The incumbent would administratively support the staff of the criminal investigation command major procurement fraud field office performing a variety of administrative, technical, automation support duties. The position would have no special physical demands. It would include some standing and bending, but would be mostly sedentary. The position was designated critical-sensitive and would require the incumbent to be able to obtain and maintain a top secret security clearance. On December 16, 2015 appellant refused the employment offer.

In a December 16, 2015 note to file, the claims examiner indicated the need for documentation from the employing establishment that it performed a search for jobs within 25 miles of the claimant's residential area and that Irvine, California was the closest field position available. A December 28, 2015 note related that the employing establishment indicated that they could not find a job for appellant in San Diego, California, but found a criminal investigator position that was more sedentary in nature in Irvine, California and that the employing establishment had agreed to pay relocation fees.

By letter to appellant dated January 12, 2016, OWCP stated that appellant was offered a position by the employing establishment, that he failed to report to the position, that the weight of the medical evidence rested with Dr. Pashmforoush, and that appellant could work in the position of criminal investigator. It provided appellant the opportunity to accept the job within 30 days with no penalty, and indicated that, if appellant failed to accept the position, he must provide a written explanation of the reasons during the allotted period. OWCP informed appellant that pursuant to FECA, when a suitable job is offered by the employing establishment and he refused the position, he was not entitled to further compensation for wage loss or a

schedule award. Appellant was also informed that preference to reside in a specific geographic area was not a valid reason for refusing a suitable offer of employment as the employing establishment had confirmed that there is no suitable work in his current commuting area.

In a response dated January 19, 2016, appellant asked that OWCP reconsider the suitability of the job offer. He noted that the offer would only encompass the remaining six months of his contract, that he would have to relocate over 100 miles from his home, that the position and location were not consistent with the recommendation of his treating physician, that Dr. Pashmforoush's opinion was defective, that his assignment at the time of injury included special pay incentives for working in a foreign war zone and that the position in Irvine, California should therefore pay the same amount, and that the position offer was vague and incomplete. Appellant contended that accepting the position was not in his best interest from a medical or financial point of view.

In a January 22, 2016 letter, counsel argued that, although appellant worked in both Afghanistan and Washington, District of Columbia, his domicile was in Alpine, California, which is part of the metropolitan San Diego, California locality. He noted that appellant was basically a reemployed annuitant with war waivers. Counsel indicated that the job appellant was now being offered was one that he had never previously performed, and it appeared to require a security clearance, which he did not have at this time. He argued that, although the job was listed as permanent, appellant was told by the employing establishment that it was only temporary. Counsel contended that appellant would need to move, that the employing establishment would need to pay moving expenses, and that the government should pay for a house in Irvine. He also suggested that appellant could telecommute. Counsel argued that the job offer was specifically tailored to appellant and was "'a make work' job," and was therefore not suitable.

In a letter dated May 19, 2015, Dr. Katz indicated that his medical opinion was unchanged from his prior January 27, 2015 opinion.

By decision dated February 18, 2016, OWCP determined that the reasons for appellant's job refusal were not justified. It provided appellant an additional 15 days to accept and report to the position.

By letter to OWCP dated February 22, 2016, appellant argued that OWCP did not sufficiently address his concerns, that he wished to exercise his option to voluntarily discontinue the receipt of FECA compensation benefits. He also related that he had applied for retirement benefits with OPM.

By decision dated March 4, 2016, OWCP terminated appellant's entitlement to wage-loss and schedule award compensation benefits, effective that date.

By letter dated March 14, 2016, appellant, through counsel, requested an oral hearing before an OWCP hearing representative. During the hearing held on November 17, 2016, appellant related that in 2011 he was stationed in Kabul where he tracked diverted funds from reconstruction money and worked on counter insurgency issues having to do with the relocation and diversion of money. He indicated that he had a top security level clearance and described the extensive physical duties of his job. Appellant testified that, despite being in excellent health

before his assignment, while in Afghanistan, he had a heart attack. He noted that he lived in Alpine, California which was about 20 miles east of San Diego, California. Appellant indicated that he would have to relocate to accept the job offer. He contended that, from an intellectual and training point, he could perform the duties of the proposed position of criminal investigator, but he indicated that he could not physically perform the work as his treating physician made it very clear that he should work part-time only. Appellant also contended that he would need to carry a weapon for the proposed assignment which involves risks.

By letter dated December 15, 2016, the employing establishment commented on the hearing transcript. Initially, its injury compensation specialist indicated that there was some confusion with regard to the position offered. The employing establishment had offered a position as a criminal investigation policy renew specialist and this position did not require working long hours. Appellant would have a standard 8-hour tour of duty with a 30-minute lunch break. The injury compensation specialist noted that the position was sedentary, and that appellant would be providing technical, administrative, and automation support. The position did not include interviewing suspects, victims or witnesses in criminal investigations. The position did not include carrying a firearm. Finally, the injury compensation specialist noted that the employing establishment had done everything possible to assist in returning the employee to work in a position as close as possible to appellant's current address. She noted that the position provided all physical requirements as described by the physician's report. The injury compensation specialist indicated that while the position was still a bit far from home, the employing establishment was willing to make accommodations by paying all moving expenses to ensure appellant's continued successful employment.

By decision dated January 30, 2017, the hearing representative affirmed the March 4, 2016 decision. She found that appellant's preference for work in the area in which he resides, and personal dislike of the offered position were not acceptable reasons for refusing an offer of suitable work.

## ***LEGAL PRECEDENT***

Once OWCP accepts a claim it has the burden of proof in justifying termination or modification of compensation benefits, it has authority under section 8106(c)(2) of FECA to terminate compensation for any partially disabled employee who refuses or neglects to work after suitable work is offered. To justify termination, OWCP must show that the work offered was suitable, that appellant was informed of the consequence of his refusal to accept such employment, and that he or she was allowed a reasonable period to accept or reject the position or submit evidence or provide reasons why the position is not suitable.[3] Section 8106(c)(2) of

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

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.[4]

OWCP regulations provide factors 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.[5] 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.[6]

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.[7] Section 10.517(a) of FECA's implementing regulations provide that an employee who refuses or neglects to work after suitable work has been offered or secured by the employee, has the burden of showing that such refusal or failure to work was reasonable or justified.[8] 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.[9]

If possible, the employing establishment should offer suitable reemployment in the location where the employee currently resides. If this is not practical, it may offer suitable reemployment at the employee's former duty station or other location. Where the distance between the location of the offered job and the location were the employee currently resides is at least 50 miles, OWCP may pay such relocation expenses as are considered reasonable and necessary if he employee has been terminated from the employing establishment's rolls and would incur relocation expenses by accepting the offered employment.[10]

## ***ANALYSIS***

OWCP accepted that on June 20, 2011 appellant suffered a myocardial infarction in the course of his employment. It began paying wage-loss compensation beginning July 21, 2011, and placed appellant on the periodic rolls, effective April 6, 2014.

[4] 5 U.S.C. § 8106(c)(2); *see Geraldine Foster*, 54 ECAB 435 (2003).

[5] *Rebecca L. Eckert*, 54 ECAB 183 (2002).

[6] *Edward J. Stabell*, 49 ECAB 566 (1998).

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

[8] 20 C.F.R. § 10.517(a); *Ronald M. Jones, supra* note 3.

[9] *Id.* at § 10.516.

[10] 20 C.F.R. § 2.814.6(d)(2); *see also W.B.*, Docket No. 13-0947 (issued August 16, 2013).

The employing establishment indicated that there were no suitable positions available within 25 miles of appellant's home near San Diego, California, so it offered appellant a position in Irvine, California. The incumbent would administratively support the staff of the criminal investigation command major procurement fraud field office performing a variety of administrative, technical, automation support duties. Appellant refused the job offer, and OWCP terminated his benefits effective March 4, 2016.

The Board finds that the offered position was suitable.

Dr. Pashmforoush, the second opinion physician, opined that, based on appellant's echocardiogram, nuclear perfusion studies, exercise capacity, and symptomatology, he was capable of working eight hours a day. Although he noted that appellant should not perform any high level physical activity or combat-related jobs, he indicated that appellant should be able to work as a supervisor or in office-related jobs without difficulty. He based this conclusion on the fact that appellant's echocardiograms had consistently shown normal left ventricular size and function and there was no evidence of wall motion abnormality or cardiac dysfunction based on echocardiography. Dr. Pashmforoush noted that appellant remained fairly active and denied any symptomatology related to his myocardial infarction. The Board has held that 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.[11] In this case, OWCP properly determined that the physical demands of the offered position of criminal investigator were within the restrictions set forth by Dr. Pashmforoush and that his second opinion report constituted the weight of the medical opinion evidence.[12]

Appellant's physician, Dr. Katz, held a contrary opinion. Dr. Katz indicated that appellant was not capable of working eight hours a day as isometric physical labor was not to his medical advantage for all he reasons associated with physical stress with a background of cardiac issue. He noted that appellant may have been capable of working four to six hours a week on a part-time basis. Dr. Katz did not want appellant in a position responsible for security issues such as police work as it would place him in an environment of emotional stress which would not inure to his good health and could precipitate symptoms of angina. He also contended that appellant and his family were vested in the San Diego, California community, and if he was obligated to move, that would place stress on appellant. Dr. Katz's opinion is not well rationalized. He did not list present symptoms which could prohibit appellant from performing eight hours of work a day. Instead, he indicated that physical stress could cause angina or other symptoms. The Board has held that fear of future injury is not compensable under FECA.[13] Furthermore, appellant's desire to not move is not relevant to his medical condition. Accordingly, this report is insufficient to overcome the weight of the medical evidence accorded to the well-rationalized opinion of the second opinion physician, Dr. Pashmforoush.

The Board further finds that the December 1, 2015 job offer process was procedurally correct, as it was made in writing, provided a detailed description of the assigned duties and

[11] *T.M.*, Docket No. 16-0065 (issued April 4, 2016); *Kathy E. Murray*, 55 ECAB 288 (2001).

[12] *See D.C.*, Docket No. 16-1665 (issued April 13, 2017).

[13] *See Mary Geary*, 43 ECAB 300, 309 (1991); *Pat Lazarra*, 31 ECAB 1169, 1174 (1980).

physical requirements, and instructed appellant when to report for work.[14] There is no dispute that appellant meets the intellectual and training qualifications for this position.

FECA regulations provide that the employing establishment should offer suitable employment where the employee currently resides, if possible.[15] If the job offer is outside of appellant's residential area, the employing establishment must document that it first searched the suitable employment in the claimant's current geographic area.[16] The evidence of record indicates that the offer of employment was in Irvine, California and would have required relocation from appellant's home in San Diego, California. December 28, 2015 documentation of record relates that the employing establishment could not find a suitable position in San Diego, California, but located a sedentary suitable position in Irvine, California. In a letter dated December 15, 2016, the employing establishment also related that it had done everything possible to assist appellant in returning to work in a physically appropriate position, as close as possible to appellant' current address. It explained that as the closest suitable position was in Irvine, California, appellant had been offered relocation expenses.

OWCP's regulation at 20 C.F.R. § 10.508 provides that OWCP may pay relocation expenses if it is not practical for the employing establishment to offer suitable reemployment in the location where the employee currently resides, but the employing establishment can offer suitable reemployment at another location at least 50 miles from the employee's current residence. If these and other conditions are met, the regulations allow OWCP to remove a possible impediment to returning the injured federal employee to suitable reemployment. In the present case, OWCP properly established that it was not practical to offer appellant suitable employment in Alpine, California and therefore offered relocation expenses for appellant to relocate to Irvine, California for suitable work.

The Board finds that the offered position was medically and vocationally suitable and OWCP complied with the procedural requirements of section 8106(c) of FECA. OWCP therefore met its burden of proof to terminate appellant's compensation benefits.[17]

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

## ***CONCLUSION***

The Board finds that OWCP properly terminated appellant's wage-loss compensation benefits effective March 4, 2016 pursuant to 5 U.S.C. § 8106(c)(2) for refusing an offer of suitable work.

[14] *R.W.*, Docket No. 13-0428 (issued January 8, 2014).

[15] 20 C.F.R. § 10.508; *see also W.D.*, Docket No. 15-1297 (issued August 23, 2016).

[16] Federal (FECA) Procedure Manual, Part 2 -- Claim, *Job Offer and Return to Work*, Chapter 2.814.4(a)(2) (June 2013).

[17] *See W.B.*, Docket No. 11-0239 (issued January 27, 2012).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated January 30, 2017 is affirmed.

Issued: February 12, 2018
Washington, DC

Patricia H. Fitzgerald, Deputy 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