

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

S.B., Appellant)	
)	
and)	Docket No. 18-0039
)	Issued: October 15, 2018
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Atlanta, GA, Employer)	
)	

Appearances:
Wayne Johnson, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On October 5, 2017 appellant, through counsel, filed a timely appeal from a June 16, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant to the

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 Appellant timely requested oral argument. By order dated March 14, 2018, the Board exercised its discretion and denied his request as his arguments could be adequately addressed in a decision based on a review of the case record. *Order Denying Request for Oral Argument*, Docket No. 18-0039 (issued March 14, 2018).

Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.⁴

ISSUE

The issue is whether OWCP properly terminated appellant's compensation benefits pursuant to 5 U.S.C. § 8106(c)(2) for abandonment of suitable work, effective March 21, 2016.

FACTUAL HISTORY

On July 27, 2013 appellant, then a 59-year-old tractor trailer operator, filed a traumatic injury claim (Form CA-1) alleging that he felt pain in his right shoulder after he lifted a dock plate while in the performance of duty. He stopped work that day. OWCP accepted the claim for sprain of his right shoulder and upper arm, other specified sites and displacement of cervical intervertebral disc without myelopathy. Appellant returned to work on August 24, 2013 in a full-time modified position. He worked in the modified position until March 1, 2014, when he stopped work. By decision dated September 25, 2014, OWCP accepted appellant's claim of recurrence (Form CA-2a) for total disability commencing March 1, 2014. It paid him retroactive wage-loss compensation benefits on the periodic rolls as of August 24, 2014.

In a May 9, 2015 report, Dr. Raju Vanapalli, a Board-certified orthopedic surgeon and OWCP second opinion physician, reviewed the statement of accepted facts (SOAF) and the medical record and provided appellant's March 13, 2015 examination findings. He indicated that appellant continued to suffer residuals of the accepted injury as he had cervical radiculopathy, C5-6 with diminished C-spine range of movements and right shoulder rotator cuff tendinopathy with adhesive capsulitis. Dr. Vanapalli also indicated that there was permanent exacerbation of preexisting degenerative spondylosis superimposed on congenitally narrow spinal canal and cervical radiculopathy. He found that appellant could not resume his usual employment, but could work a sedentary job eight hours daily with permanent restrictions. In the March 13, 2015 work capacity evaluation (Form OWCP-5c), Dr. Vanapalli opined that appellant could perform sedentary work with no more than 2 hours reaching, no more than 3 hours of pushing, pulling, and lifting up to 10 pounds and 20-minute breaks every 2 hours.

On April 20, 2015 Dr. Zouheir A. Shama, a general surgeon, signed off on appellant's March 28, 2015 functional capacity evaluation (FCE), which revealed that appellant had positive orthopedic, neurologic, and diagnostic testing in his cervical spine, right shoulder, and right arm. Appellant could not run/jog, carry, push/pull, or work. He had severe difficulty with lifting, climbing stairs, driving, dressing, and household chores. Appellant had moderate difficulty with walking, bending, standing, sleeping, reading, and watching TV. He also had mild-to-moderate difficulty with sitting. The FCE related that appellant should never reach overhead, never be in

³ 5 U.S.C. § 8101 *et seq.*

⁴ The record provided to the Board includes evidence received after OWCP issued its June 16, 2017 decision. The Board's jurisdiction is limited to the evidence that was before OWCP at the time of its final decision. Therefore, the Board is precluded from considering this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

postures which involved neck flexion and neck extension, and that he was only able to sit infrequently.

By letter dated May 18, 2015, OWCP advised the employing establishment that the weight of the medical evidence rested with Dr. Vanapalli's opinion regarding appellant's permanent work tolerances and limitations and it requested that the employing establishment offer appellant a job within those restrictions. On May 21, 2018 it referred appellant to vocational rehabilitation as no permanent light-duty work was available within appellant's medical restrictions.

In a May 26, 2015 report, Dr. Shama noted the history of the July 27, 2013 work injury. He noted that the October 28, 2014 magnetic resonance imaging (MRI) scan of the right shoulder indicated moderate-to-severe cuff tendinosis, severe degeneration of the superior and posterosuperior labrum, and anterior cruciate joint degenerative change. The August 25, 2014 MRI scan of the cervical spine revealed advanced cervical spondylosis at C3-4 with resultant severe central spinal stenosis and myelomalacia; spondylosis at C4-5 with moderate-to-severe bilateral foraminal stenosis; and spondylosis at C6-7 with moderate-to-severe left and right foraminal narrowing and mild-to-moderate foraminal narrowing on the left at C5-6. Dr. Shama indicated that special attention was paid to the FCE of the cervical spine and right shoulder. In a May 26, 2015 duty status report (Form CA-17), he indicated that appellant was totally disabled from work.

In a June 8, 2015 letter, appellant disagreed that the weight of the medical evidence rested with Dr. Vanapalli.

In June 29 and July 30, 2015 reports, Dr. Shama noted that disc fusion surgery had been recommended, but it could not be performed until appellant's diabetes was under control. In a June 29, 2015 Form CA-17, he opined that appellant was totally disabled.

On July 22, 2015 a vocational rehabilitation specialist conducted an initial interview with appellant. She noted that Dr. Shama related that the recommended disc fusion surgery could not be performed until appellant's diabetes was controlled. The rehabilitation specialist also noted that appellant attended physical therapy, occupational therapy, and aquatic therapy three times a week and that he took several medications for which he reported side effects.

On August 6, 2015 the employing establishment offered appellant a modified position as a Sales and Solution Team Member. The position involved contacting customers by telephone and answering incoming telephone calls, intermittently six to eight hours, and light data input intermittently four hours. The physical requirements of the position involved sitting in an office chair intermittently eight hours, simple grasping and pushing/pulling using computer mouse intermittently four to eight hours, fine manipulation of keyboard and lifting no more than five pounds intermittently four to eight hours, and speaking on telephone intermittently six to eight hours.

In an August 13, 2015 letter, counsel indicated that the employing establishment agreed that appellant would not be under a timed performance standard.

On August 17, 2015 appellant returned to modified work as a Sales and Solution Team Member. He refused to sign the job offer and took two days off work to attend medical appointments.

In an August 18, 2015 CA-17 form, Dr. Melanie Cooper, a Board-certified family practitioner, found appellant totally disabled from work.

In an August 19, 2015 letter, Dr. Kathy Edwards, a Board-certified internist, noted that appellant was a right-handed type II diabetic with right shoulder pain, neck pain, and cervical degenerative disc disease with neuropathy on the right, who had been in rehabilitation and physical therapy three days a week since October 2014. She noted that the October 27, 2014 MRI scan of C-spine confirmed advanced cervical spondylosis at C3-4 with severe central spinal stenosis. Dr. Edwards opined that appellant was medically disabled as his pain and numbness persisted and his diabetes was not controlled.

On August 20, 2015 appellant signed the job offer. He worked in the modified position until August 25, 2015, when he became ill at work and was taken to the emergency room. An August 25, 2015 work excuse note from Grady Hospital Emergency Department noted that appellant was unable to return to work for a minimum of 24 hours.

In an August 26, 2015 report, Dr. Cooper noted the history of injury and that appellant was off work from March 1, 2014 until August 17, 2015, when he attempted to work. She also noted that appellant could not tolerate the activity of working which required stooping, bending, sitting, standing, and walking, grasping and pincher movements. Dr. Cooper provided an assessment of right shoulder sprain with prolonged tendonesis; spondylosis at C3 to C4 and C4 to C5 and C6 to C7; and cervical spine stenosis at C3 and C4.

In a September 4, 2015 statement, appellant stated that he had accepted the modified job offer against his doctor's recommendations. He alleged that he would have been terminated by the employing establishment had he not accepted the modified job offer. Appellant stated that when he reported to work on August 17, 2015 no work was available within his restrictions, so he sat in the office until it was time to go to physical therapy. He indicated that he had prescheduled doctor appointments for Tuesday and Wednesday and had took off Thursday and Friday because of pain. The following week, appellant reported to work. On August 25, 2015 he collapsed at work and was taken to the emergency department. Appellant saw Dr. Cooper the next day and was excused from work until September 28, 2015.

A September 4, 2015 emergency room record indicated that appellant was seen and diagnosed with neck pain. He was provided discharge instructions for near syncope.

In a September 9, 2015 report, Dr. Cooper reported that appellant was given medical leave from August 26 to September 30, 2015 due to severe neck pain. She noted that on August 17, 2015 appellant had received a letter to report to work, which he did, as he did not want to lose his job. Dr. Cooper noted that when appellant returned to work, there were no job duties available for him so he was advised to do data entry, answer telephone calls, and perform basic office duties. Appellant was also told that he must make 60 calls per day. Dr. Cooper noted that appellant did not work, but sat for 30 minutes to an hour, in between time walking around due to being

aggravated by pain. Appellant left the job site at 12:30 p.m. and did not return because he had therapy scheduled that day. The next day he reported to work and could not perform again. Appellant did not report to work until August 24, 2015 due to neck pain. On August 25, 2015 he collapsed to the floor secondary to severe pain. Paramedics were called and appellant went to the emergency room at Grady Hospital. Dr. Cooper noted the results of the objective testing and the March 28, 2015 FCE.⁵ She opined that appellant was permanently disabled and had a material worsening of his incapacitation due to events demanding return to work. Dr. Cooper further opined that appellant was incapacitated and could not work until he received a second opinion or pursued surgery.

On October 2, 2015 appellant filed Form CA-7s claiming compensation for recurrent disability commencing August 25, 2015.

In an October 7, 2015 letter, OWCP advised appellant that additional evidence was needed to establish disability for work from August 25, 2015. It informed him that pain was not a diagnosis and that he needed to provide medical evidence to support why he did not work the light-duty assignment which was available within his medical restrictions with the employing establishment during the period claimed. OWCP afforded appellant 30 days to submit the requested information.⁶

OWCP received an October 28, 2015 statement from appellant and emergency room discharge notes dated September 4 and October 27, 2015, where he was diagnosed with neck pain and cervical stenosis, respectively.

In an August 26, 2015 Form CA-17, Dr. Cooper diagnosed neck stiffness and right shoulder pain due to work injury. She opined that appellant was totally disabled and could not lift, twist, bend, turn, walk long distances, or grasp. Dr. Cooper excused appellant from work from August 26 to September 30, 2015 as he required further testing and specialist consultations.

In a September 28, 2015 report, Dr. Hassan Monfared, a physiatrist, noted the history of the work injury. He provided an assessment of cervical myelopathy and right shoulder impingement syndrome possibly secondary to subacromial bursitis versus rotator cuff tendinitis. Dr. Monfared scheduled appellant for an evaluation with a spine surgeon, but indicated that he was probably not a good surgical candidate at this point. He also ordered a new MRI scan.

In an October 22, 2015 report, Dr. Keith W. Michael, a Board-certified orthopedic surgeon, noted the history of the work injury and diagnosed cervical spondylosis with myelopathy. He advised that appellant had cord compression with T2 signal on his MRI scan and clinical symptoms of myelopathy with significant right arm weakness. Dr. Michael also suspected a right shoulder problem. He advised that, while appellant was a candidate for cervical surgery, he needed

⁵ Dr. Cooper decreased appellant's aquatic physical therapy to twice a week.

⁶ On October 8 and 23, 2015 appellant requested a change of physicians from Drs. Shama and Cooper to Dr. Jay B. Bender, a physiatrist. On November 4, 2015 OWCP approved appellant's change of physician to Dr. Bender.

to improve his sugar level and quit smoking. Dr. Michael opined that given appellant's significant right upper extremity weakness, he would not be able to function at his prior work capacity.

In a November 16, 2015 report, Dr. Bender noted the history of the July 27, 2013 work injury. He opined that appellant was totally incapacitated. In a November 18, 2015 report, Dr. Bender noted the history of the July 27, 2013 work injury and reviewed MRI scan reports. He diagnosed cervical herniated nucleus and spinal stenosis and right shoulder pain, which he opined were due to the work injury. Dr. Bender also opined that appellant was incapacitated. In a November 18, 2015 Form CA-17, he opined that appellant was unable to return to work.

On December 18, 2015 the employing establishment confirmed that the August 6, 2015 position remained available.

In a December 21, 2015 letter, OWCP noted that appellant had returned to work as a Sales and Solution Team Member on August 17, 2015, but stopped work and claimed compensation for recurrent disability, effective September 21, 2015.⁷ It advised him that the job offer of August 6, 2015 as a Sales and Solution Team Member was currently available and medically suitable within the limitations provided by Dr. Vanapalli in his March 13, 2014 report. OWCP advised appellant that the evidence was insufficient to establish a recurrence of disability as there was no rationalized medical evidence as to why he was unable to perform the sedentary duties listed in the August 6, 2015 job offer. It further advised appellant that, if he failed to establish a recurrence of disability, failed to return to the August 6, 2015 position, and failed to demonstrate that his refusal of suitable work was justified, his compensation benefits would be terminated pursuant to 5 U.S.C. § 8106(c)(2). OWCP afforded appellant 30 days to provide the requested information.

In a December 9, 2015 report, Dr. Vidyadhar Chitale, a Board-certified neurosurgeon, noted the history of the July 27, 2013 work injury. He provided an impression of lumbar spinal stenosis, differential diagnoses for cervical spine include nerve root and/or cord compression C5 through C6, brachial plexus injury, and neuropathy. Dr. Chitale also provided copies of the December 9, 2015 MRI scan of the lumbar spine and December 9, 2015 nerve conduction studies.

In a December 9, 2015 report, Dr. Alan Maloon, a Board-certified neurologist, noted the history of the July 27, 2013 work injury and diagnosed post work-related right shoulder arthropathy with possible rotator cuff tear, chronic neck pain predominantly left-sided with occipital radiation, and chronic right knee pain. A copy of the December 9, 2016 MRI scan of the right shoulder was provided.

In medical reports dated November 18, 2015 through January 27, 2016, Dr. Bender continued to opine that appellant was totally incapacitated from the July 27, 2013 work injury.

Physical therapy reports were also received along with Form CA-7 claims for compensation, and a January 20, 2016 letter from counsel. Also received was a January 4, 2016 letter from the Social Security Administration which indicated that appellant was entitled to monthly disability benefits beginning August 2014, and a PS Form 50 from the employing

⁷ Appellant claimed recurrent disability effective August 25, 2015 and continuing.

establishment, which noted that appellant's FEGLI insurance status was terminated effective September 19, 2015.

On January 19, 2016 OWCP received the August 25, 2015 emergency medical service report. Appellant reported feeling dizzy while walking into work. He also complained of chronic neck pain and right shoulder pain.

On February 12, 2016 the employing establishment indicated that the job offer was still available.

By letter dated February 18, 2016, OWCP advised appellant that he had not returned to work and had not provided any valid reasons for his refusal to return to the position of Sales and Solution Team Member. It also found that the evidence of record failed to establish a recurrence of disability. OWCP notified appellant that the position was still available and allowed him 15 days to accept and report to the position or his entitlement to compensation benefits would be terminated pursuant to 5 U.S.C. § 8106(c)(2).

Appellant continued to submit CA-7 forms, claiming wage-loss compensation. In a March 4, 2016 letter, counsel stated that he had not been provided a copy of OWCP's February 18, 2016 letter. He argued that no physician had concluded that the offered position was medically suitable to appellant. In the alternative, counsel argued that a medical conflict of opinion existed between Dr. Vanapalli and the opinions of Dr. Bender, Dr. Shama and Dr. Cooper on appellant's ability to work.

Dr. Bender continued to submit progress reports which diagnosed cervical herniated nucleus and right shoulder pain. He also continued to opine that appellant was incapacitated.

In an August 19, 2015 report, Dr. Edwards diagnosed neck pain, diabetes, cervical disc disease, sprains and strains of shoulder and upper arm, and neuropathy. She agreed with appellant's plan to retire. Dr. Edwards also instructed him not to return to work or to lift anything greater than five pounds. She indicated that appellant would need a discectomy and/or fusion due to right arm neuropathy and several cervical disc displaced and compression.

By decision dated March 21, 2016, OWCP terminated his entitlement to wage-loss and schedule award compensation as of March 21, 2016. It found that the August 6, 2015 job offer was suitable work based on the work restrictions provided by Dr. Vanapalli on March 13, 2015 and that he had abandoned the suitable work without a valid reason. OWCP found that no medical conflict of opinion existed as the treating physicians had not provided any evidence to support disability. It also found that appellant had not established a recurrence of disability as the medical evidence of record lacked rationale as to why he was totally disabled from performing any duties due to his July 27, 2013 work-related injury.

Appellant continued to submit Form CA-7 claims for compensation. He also continued to submit medical reports regarding his medical status after March 7, 2016, which related to his continuing disability.

On March 20, 2017 appellant, through counsel, requested reconsideration. Counsel argued that appellant had suffered a material deterioration/worsening of his accepted conditions which

made the job offer no longer valid. Also the August 25, 2015 event resulted in a worsening of appellant's condition. Counsel argued that the job was outside of Dr. Vanapalli's restrictions and presented an affidavit from appellant attesting to the duties of the job. He also noted that appellant was not allowed 20-minute breaks every 2 hours and that Dr. Vanapalli never approved the job. Counsel argued that OWCP used the wrong standard in determining whether a recurrence occurred to negate the suitability determination.

In support of his reconsideration request, counsel submitted appellant's March 20, 2017 affidavit attesting to his disabilities. Appellant continued to submit medical evidence regarding his current medical status.

In a June 14, 2017 letter, counsel argued that appellant was unable to vocationally perform the duties of the offered position and was further ineligible for the position.

By decision dated June 16, 2017, OWCP denied modification of its prior decision. It noted that there were discrepancies regarding why appellant had refused to continue working and that there was a preexisting disabling diabetes condition. OWCP found that the medical evidence lacked objective findings provided by contemporaneous medical reports of sufficient weight to overturn the evidence of record at the time of the ruling.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁸ 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.⁹ Section 8106(c) of FECA¹⁰ 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 regulations¹¹ 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 establish that a claimant has abandoned suitable work, OWCP must make a finding of suitability. To establish that a claimant has abandoned suitable work, OWCP must make a finding of suitability. 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.¹² Section 8106(c) will be narrowly

⁸ *L.L.*, Docket No. 17-1247 (issued April 12, 2018); *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

⁹ *G.R.*, Docket No. 16-0455 (issued December 13, 2016).

¹⁰ 5 U.S.C. § 8106(c)(2).

¹¹ 20 C.F.R. § 10.517(a).

¹² *L.L.*, *supra* note 8; *Arthur C. Reck*, 47 ECAB 339, 341-42 (1995).

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.¹³

According to OWCP's procedures, 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.¹⁴ 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.¹⁵ 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.¹⁶ Section 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.¹⁷ 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.¹⁸

After termination or modification of benefits clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant.¹⁹

ANALYSIS

The Board finds that OWCP failed to meet its burden of proof to establish that appellant abandoned suitable work pursuant to 5 U.S.C. § 8106(c)(2). OWCP failed to establish that he was capable of performing the Sales and Solution Team Member position given his accepted as well as preexisting and subsequently-acquired medical conditions.

The employing establishment offered appellant a position as a Sales and Solution Team Member on August 6, 2015. Appellant worked in that position from August 17 to 25, 2015, when he was taken to the hospital for dizziness from hypoglycemia and neck pain. OWCP subsequently found that he abandoned suitable work in violation of 5 U.S.C. § 8106(c)(2). The initial question presented under 5 U.S.C. § 8106(c)(2) is whether the job was medically suitable.

¹³ *L.L., id.*

¹⁴ *T.S.*, 59 ECAB 490 (2008); *Ronald M. Jones*, 52 ECAB 190 (2000).

¹⁵ *J.J.*, Docket No. 17-0410 (issued June 20, 2017); *Rebecca L. Eckert*, 54 ECAB 183 (2002).

¹⁶ *Id.*

¹⁷ *Catherine G. Hammond*, 41 ECAB 375, 385 (1990); 20 C.F.R. § 10.517(a).

¹⁸ *Id.* at § 10.516.

¹⁹ *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).

OWCP relied on Dr. Vanapalli's March 13, 2015 medical limitations, which were set forth in a May 9, 2015 report, to find that the August 6, 2015 job offer was medically suitable. The physical requirements of the position involved sitting in an office chair intermittently eight hours, simple grasping and pushing/pulling using computer mouse intermittently four to eight hours, fine manipulation of keyboard, lifting no more than five pounds intermittently four to eight hours, and speaking on telephone intermittently six to eight hours.

On April 20, 2015 Dr. Shama, however, signed off on appellant's March 28, 2015 FCE, which revealed that appellant had positive orthopedic, neurologic, and diagnostic testing in his cervical spine, right shoulder, and right arm. The FCE specifically found that appellant should never reach overhead, should not perform work in postures which involved neck flexion and neck extension, and should only sit infrequently. Dr. Shama attested to appellant's cervical and right upper extremity conditions by interpreting the diagnostic testing performed in 2014, and he indicated in June 29 and July 30, 2015 reports that cervical disc fusion surgery had been recommended, but could not be performed until appellant's diabetes was under control. He also opined that appellant was totally disabled.

OWCP did not attempt to clarify the FCE results with Dr. Vanapalli or discuss the physical requirements of the August 6, 2015 job offer as to the FCE recommendations of no overhead reaching, no work in postures which involved neck flexion and neck extension, and infrequent sitting. It also did not discuss appellant's need for cervical surgery or his diabetic condition.

Nevertheless, on December 21, 2015, OWCP advised appellant that the position of Sales and Solution Team Member, as set forth in the August 6, 2015 job offer, was within his medical restrictions as provided by Dr. Vanapalli in his March 13, 2014 report. The record thereafter reflects that appellant developed additional medical conditions involving his right shoulder. Also, his sugar levels were still uncontrolled such that he could not undergo the recommended cervical and shoulder surgeries. OWCP again did not attempt to clarify the FCE with either Dr. Vanapalli or against the position requirements, but rather terminated appellant's wage-loss compensation and entitlement to schedule award benefits, effective March 21, 2016 for abandoning suitable work. OWCP bears the burden of proof to terminate compensation due to abandonment of suitable work, and the Board finds that OWCP did not meet its burden of proof in this case.

As previously noted, OWCP must consider all of appellant's conditions, preexisting, work related, and subsequently-acquired medical conditions in determining whether a position is suitable for appellant. The record does not substantiate that OWCP considered the medical limitations set forth in the May 28, 2015 FCE, which Dr. Shama signed off on April 20, 2015, his uncontrolled diabetic condition, his cervical spondylosis with myelopathy and cord compression, and right shoulder conditions, before terminating his compensation, effective March 21, 2016. Rather the termination decision dated March 21, 2016, and OWCP's June 16, 2017 decision denying modification, based the finding of abandonment of suitable work only on the accepted work-related conditions and the treating physician's opinions regarding total disability, which it found were insufficiently rationalized. In this regard, the Board notes that the work restrictions from appellant's treating physicians as well as knowledge of appellant's preexisting diabetic

condition and need for cervical surgery were provided prior to appellant's attempt to return to work in August 2016. Therefore, OWCP failed to meet its burden of proof in this case.²⁰

As a penalty provision, section 8106(c)(2) must be narrowly construed.²¹ Based on the evidence of record, the Board finds that OWCP improperly determined that the modified position offered to appellant constituted suitable work within his physical limitations and capabilities. Consequently, OWCP did not meet its burden of proof to justify the termination of his compensation benefits pursuant to section 8106(c)(2).

CONCLUSION

The Board finds that OWCP improperly terminated appellant's compensation benefits pursuant to 5 U.S.C. § 8106(c)(2), for abandonment of suitable work effective March 21, 2016.

ORDER

IT IS HEREBY ORDERED THAT the June 16, 2017 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 15, 2018
Washington, DC

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

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

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

²⁰ See *H.L.*, Docket No. 16-1810 (issued March 16, 2017).

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