



all-purpose containers (APC's), hampers, carts, cans, and trailers weighing approximately 70 to 470 pounds. On September 2, 1997 OWCP accepted the claim for lumbosacral sprain. It subsequently expanded acceptance of the claim to include displacement of lumbar intervertebral disc without myelopathy and pyogenic arthritis of left lower leg.

On May 4, 1999 appellant underwent surgery for radical discectomy L4-5, posterior lumbar interbody fusion L4-5, bilateral internal fixation with ray threaded fusion cage L4-5, and autogenous local bone graft mixed with dynagraft. He stopped work intermittently and received appropriate wage-loss and medical compensation on the supplemental rolls from OWCP. Beginning July 31, 2011, OWCP paid appellant wage-loss compensation on the periodic rolls.

Appellant sought treatment with Dr. James Cable, Board-certified in family medicine. In a November 19, 2012 duty status report (Form CA-17), Dr. Cable provided work restrictions including restrictions of pushing/pulling no more than 14 pounds continuously and 70 pounds intermittently for four hours per day.

In an April 18, 2016 work capacity evaluation (OWCP-5c form), Dr. Cable reported that appellant had reached maximum medical improvement and could return to work with permanent restrictions. He reported that appellant was capable of medium-duty work and provided restrictions of lifting 10 to 50 pounds for four hours a day, pushing and pulling no greater than 20 pounds for four hours per day, reaching and repetitive wrist and elbow movements four hours per day, sitting, standing, walking, and operating a motor vehicle eight hours per day, and twisting, bending, stooping, and kneeling one hour per day.

In a February 27, 2017 medical report, Dr. Cable reported that appellant was continuing work and complained of low back pain and spasms. He diagnosed low back pain status post lumbar fusion due to his compensable August 20, 1996 injury.

On March 10, 2017 the employing establishment offered appellant a limited-duty position as a modified mail handler. Duties of the assignment included unloading and loading containers of mail on to or off trucks for one to eight hours per day. Physical requirements included intermittent lifting 10 pounds to hold hand held scanner intermittently for one to four hours per day, lifting up to 50 pounds to move sacks, buckets, and trays for one to four hours per day, and reaching for one to four hours per day. Physical requirements also included one hour of kneeling, squatting, climbing, bending, stooping, and twisting, and one to four hours of repetitive wrist and elbow movements, and pushing/pulling containers with assistance if necessary.

On March 15, 2017 appellant refused the offer of modified assignment (limited duty) of a mail handler. He explained that he had scheduled an appointment with his physician for April 6, 2017 because his condition and restrictions had changed. Appellant requested the offer of modified assignment be revisited following his doctor's appointment.

By letter dated April 13, 2017, the employing establishment requested that OWCP review appellant's modified job offer which was created based on Dr. Cable's permanent restrictions outlined in his April 18, 2016 OWCP-5c form. It noted that appellant had not provided new information from his physician as indicated in his refusal of the offer and requested that OWCP

review new medical evidence submitted by appellant to determine whether there were any material changes in his condition since his permanent restrictions were established.

In an April 6, 2017 medical report, Dr. Cable reported that appellant complained of increased back and bilateral leg pain. He reported that appellant had been contacted by the employing establishment to return to work, but that he needed updated restrictions. Dr. Cable reported that as appellant was having increased symptoms and had not had a recent opportunity to pursue rehabilitation, he would recommend a short course of physical therapy to reassess his program and new restrictions. He noted that appellant should remain off work until his progress could be assessed by reevaluation in four to six weeks. Dr. Cable diagnosed lumbar intervertebral disc without myelopathy, degenerative lumbar or lumbosacral disc, low back pain, and lumbosacral neuritis or radiculitis.

By letter dated April 18, 2017, OWCP advised appellant that it had confirmed with the employing establishment that the offered position remained available. It explained that the modified mail handler was suitable and in accordance with the medical restrictions set forth in Dr. Cable's March 13, 2017 report.<sup>2</sup> OWCP noted that there was no medical evidence of record to support appellant's contention that his condition had changed. It indicated that the case would be held open for 30 days for evaluation of the evidence. OWCP further advised appellant that, if he failed to accept the position or provide adequate reasons for refusing the job offer, his right to compensation would be terminated, pursuant to 5 U.S.C. § 8106(c)(2).

By letter dated June 23, 2017, OWCP advised appellant that he failed to provide a reason for refusing to accept the offered position. It noted that the employing establishment confirmed that the job remained available to him. OWCP provided appellant an additional 15 days to accept and report to the position, and advised that, if he did not report to the job within 15 days of the date of the letter, his entitlement to wage-loss and schedule award benefits would be terminated.

In a June 26, 2017 medical report, Dr. Cable reported that appellant's status was unchanged while he was awaiting approval for physical therapy and still needed restrictions.

By decision dated July 11, 2017, OWCP terminated appellant's wage-loss compensation benefits and schedule award entitlement, effective July 23, 2017, pursuant to 5 U.S.C. § 8106(c)(2), as he had refused an offer of suitable work.<sup>3</sup> It found that the offered position was within the restrictions set forth by Dr. Cable's March 13, 2017 report.<sup>4</sup>

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<sup>2</sup> The Board notes that OWCP incorrectly identified March 13, 2017 as the date of Dr. Cable's April 18, 2016 physical limitations contained in the OWCP-5c form.

<sup>3</sup> OWCP noted that the physical requirements of a modified mail handler position included: eight hours of sitting; eight hours of walking; eight hours of standing; four hours of reaching above shoulder; one hour of twisting; one hour of bending/stooping; eight hours operating motor vehicle at work; four hours of repetitive movements (elbow and wrist); one hour of kneeling, no climbing; four hours of pushing/pulling/lifting; pushing up to 70 pounds; lifting up to 70 pounds and lifting and squatting 10 to 50 pounds. It determined that this position was suitable because the duties could be performed within the medical limitations provided by Dr. Cable's March 13, 2017 report.

<sup>4</sup> See *supra* note 2.

On July 30, 2017 appellant requested review of the written record before an OWCP hearing representative. In support of his claim, he submitted an accompanying narrative statement detailing a timeline of events pertaining to the refusal of his job offer with contemporaneous medical reports in support of his claim.

In a July 19, 2017 duty status report (Form CA-17), Dr. Cable reported that appellant could not resume his regular work duties as a result of his lumbar fusion. He provided restrictions of intermittent sitting, standing, and walking for eight hours per day, intermittent bending, stooping, kneeling, and twisting for one hour per day, intermittent reaching above shoulder for four hours per day, and intermittent pushing and pulling no greater than 50 pounds for four hours per day. He reported that appellant could perform continuous simple grasping and fine manipulation for eight hours per day.

In a July 27, 2017 medical report, Dr. Cable reported that he had restricted appellant from work in April 2017 until he underwent a course of physical therapy yet OWCP threatened to terminate his position if he did not return to work. As such, he provided work restrictions a few weeks later which were ignored by OWCP.

In a September 18, 2017 medical report, Dr. Cable reported that OWCP notified appellant that he was released to return to work based on his March 13, 2017 medical report,<sup>5</sup> however, a March 13, 2017 report did not exist as appellant was not treated on that date. He explained that OWCP provided appellant a job offer which was beyond his restrictions, requiring him to load and unload containers of mail onto and off of trucks for one to eight hours per day. Dr. Cable stated that his April 18, 2016 OWCP-5c form and July 19, 2017 Form CA-17 limited appellant to medium level work which was not consistent with the job offer noted for unloading and loading trucks as he was limited to 50 pounds lifting, occasionally. He reported that his April 6, 2017 report requested that appellant be off work until he completed his course of physical therapy, at which time his work restrictions could be evaluated.

By decision dated October 26, 2017, an OWCP hearing representative affirmed the July 11, 2017 decision.

### **LEGAL PRECEDENT**

Once OWCP has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.<sup>6</sup> It has authority under 5 U.S.C. § 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 consequences of his refusal to accept such employment, and that he or she was allowed a reasonable period to accept or reject the position or

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<sup>5</sup> *Id.*

<sup>6</sup> *Bernadine P. Taylor*, 54 ECAB 342 (2003).

submit evidence or provide reasons why the position is not suitable.<sup>7</sup> In determining what constitutes suitable work for a particular disabled employee, it considers the employee's current physical limitations, whether the work was available within the employee's demonstrated commuting area, and the employee's qualifications to perform such work.<sup>8</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>9</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>10</sup> 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 showing 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 failed to meet its burden of proof to terminate appellant's compensation, effective July 23, 2017, for refusal of an offer of suitable work under 5 U.S.C. § 8106(c).<sup>14</sup>

Initially, the Board notes that Dr. Cable's report which OWCP referred to as a March 13, 2017 report was mislabeled in OWCP's Integrated Federal Employees' Compensation System (iFECS) as authored on March 13, 2017. The actual date of this report was April 18, 2016. The

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<sup>7</sup> 5 U.S.C. § 8106(c)(2); *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 that 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 reasons for abandoning the job. If the claimant submits evidence and/or reasons for abandoning the job, the claims examiner must carefully evaluate the claimant's response and determine whether the claimant's reasons for doing so are valid); *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).

<sup>8</sup> 20 C.F.R. § 10.500(b).

<sup>9</sup> FECA Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work, Job Offer Refusal*, Chapter 2.814.5a (June 2013); *see E.B.*, Docket No. 13-0319 (issued May 14, 2013).

<sup>10</sup> *Joan F. Burke*, 54 ECAB 406 (2003); *see Robert Dickerson*, 46 ECAB 1002 (1995).

<sup>11</sup> 20 C.F.R. § 10.517(a); *Ronald M. Jones*, *supra* note 7.

<sup>12</sup> *Id.* at § 10.516.

<sup>13</sup> *Talmadge Miller*, 47 ECAB 673, 679 (1996); *see also* *George Servetas*, 43 ECAB 424 (1992).

<sup>14</sup> *M.W.*, Docket No. 17-1205 (issued April 26, 2018).

Board finds that OWCP improperly relied on Dr. Cable's April 18, 2016 report in determining that the position offered by the employing establishment constituted suitable employment.<sup>15</sup>

Dr. Cable's April 18, 2016 work capacity evaluation was stale with regard to the modified job offer extended to appellant on March 10, 2017. The Board has recognized the importance of medical evidence being contemporaneous with a job offer in order to ensure that a claimant is medically capable of returning to work.<sup>16</sup> OWCP's July 11, 2017 termination decision referenced the date of Dr. Cable's report as March 13, 2017, which it relied upon to determine that appellant's refusal of suitable work was not justified. The Board notes that the actual report was created on April 18, 2016, approximately 16 months prior to the termination decision. OWCP improperly relied on this report as a basis to terminate appellant's benefits for refusal of suitable work as the report was not current from a March 13, 2017 examination, but rather created more than one year prior. While Dr. Cable provided more recent reports on April 6 and June 26, 2017, he indicated that appellant required a short course of physical therapy to reassess his performance. As such, he placed appellant off work until his new work restrictions could be determined. The Board has recognized the importance of medical evidence being contemporaneous with a job offer to ensure that a claimant is medically capable of returning to work.<sup>17</sup> As the medical evaluation relied upon by OWCP to find the position suitable was not reasonably current, OWCP has not met its burden of proof to terminate appellant's compensation for refusing suitable work.<sup>18</sup>

The record does not contain a medical report contemporaneous with OWCP's July 11, 2017 termination of appellant's compensation which supports that the offered position was in fact suitable. The Board therefore finds that OWCP did not meet its burden of proof to terminate his compensation as a sanction for failure to accept an offer of suitable work.<sup>19</sup>

### CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's compensation, effective July 23, 2017, for refusal of an offer of suitable work under 5 U.S.C. § 8106(c)(2).

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<sup>15</sup> *Id.*

<sup>16</sup> In *M.W.*, Docket No. 17-1205 (issued April 26, 2018), the Board emphasized the importance of medical evidence being contemporaneous with a job offer in order to ensure that a claimant is medically capable of returning to work. The Board found that a medical report based upon a medical evaluation some 15 months prior to the job offer and over 18 months prior to the termination was not reasonably current; *see also P.M.*, Docket No. 07-0132 (issued April 6, 2007) (finding that a report nearly two years old at the time OWCP determined suitability was not reasonably current). *See also Keith Hanselman*, 42 ECAB 680 (1991); *Ellen G. Trimmer*, 32 ECAB 1878 (1981) (reports almost two years old deemed invalid basis for disability determination and loss of wage-earning capacity determination).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Supra* note 12.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 26 and July 11, 2017 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: September 14, 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