

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

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<b>J.R., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 19-0206</b>
	)	<b>Issued: August 14, 2019</b>
<b>U.S. POSTAL SERVICE, POST OFFICE,</b>	)	
<b>Kearny, NJ, Employer</b>	)	
_____	)	

*Appearances:*  
*Alan J. Shapiro, Esq., for the appellant*<sup>1</sup>  
*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 November 5, 2018 appellant, through counsel, filed a timely appeal from an October 12, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## ISSUE

The issue is whether OWCP properly terminated appellant's wage-loss compensation and entitlement to a schedule award effective September 28, 2017 because he refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

## FACTUAL HISTORY

On December 29, 2004 appellant, then a 45-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that he sustained a neck injury when engaging in repetitive lifting while in the performance of duty. He indicated that he first became aware of his claimed injury on July 1, 2004 and first realized that it was related to his federal employment on that same date. Appellant began working in a light-duty position. OWCP accepted that he sustained cervical spondylosis without myelopathy and displacement of cervical intervertebral disc myelopathy.<sup>3</sup>

On November 10, 2015 appellant underwent OWCP-approved cervical surgery, including discectomies and foraminotomies at C3-4 and C4-5. Due to disability caused by this surgery, OWCP paid him wage-loss compensation on the daily rolls commencing November 10, 2015 and on the periodic rolls commencing November 15, 2015.

On November 8, 2016 OWCP referred appellant for a second opinion examination to Dr. John Klein, a Board-certified orthopedic surgeon. It requested that Dr. Klein provide an opinion regarding a treatment plan review, the extent of appellant's disability, and, suitability for vocational rehabilitation. In a December 20, 2016 report, he discussed appellant's factual and medical history and reported the findings of the physical examination he conducted on that date. Dr. Klein indicated that appellant exhibited neck pain upon range of motion of his neck. He posited that appellant had cervical stenosis, documented by diagnostic testing, which was aggravated by his work. In response to a question regarding appellant's physical limitations resulting from his work-related disability, Dr. Klein noted, "The only restrictions that I would put on the patient are that he is not allowed to do any pushing, pulling, lifting, squatting, kneeling, climbing, or twisting at work."<sup>4</sup> He attached a December 20, 2016 work capacity evaluation (Form OWCP-5c) in which he indicated that appellant was unable to perform his usual job. Dr. Klein indicated that, due to

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<sup>3</sup> OWCP paid appellant partial wage-loss compensation on the daily and periodic rolls for intermittent periods of disability commencing April 14, 2005. Appellant stopped working for the employing establishment in late-2008 and elected to receive Office of Personnel Management benefits in early January 2009. He had private employment as a school crossing guard between 2009 and 2015 and elected to receive FECA benefits again in late-2015. Appellant has a prior claim, filed under a separate claim number, for a 1998 injury that was accepted for right carpal tunnel syndrome.

<sup>4</sup> Dr. Klein indicated that, through vocational rehabilitation, appellant might be able to find a job that is sedentary in nature where he does not have to frequently lift, carry, push, or pull objects. He noted that a sedentary job would involve sitting most of the time and indicated, "A sedentary job, I think, he would be able to do."

his neck pain, appellant was limited to performing sedentary work for eight hours per day.<sup>5</sup> He provided further clarification regarding appellant's ability to work by identifying limitations on specific activities. Dr. Klein indicated that appellant could not perform any of the following activities: lifting, pushing, pulling, twisting, bending, stooping, squatting, kneeling, and climbing. He further indicated that appellant could perform the following activities for eight hours per day: sitting, walking, standing, reaching above the shoulder level, and repetitive wrist/elbow motion.

On December 29, 2016 OWCP sent Dr. Klein a new work capacity evaluation form (Form OWCP-5c), which contained a definition of sedentary work, and requested that he complete and return the form in order to clarify the fact that he had indicated appellant could perform sedentary work, but also completely restricted him from lifting, pushing, and pulling. The cover letter which was attached to the new work capacity evaluation form discussed the definition of sedentary work contained in the form. There is no indication in the case record that Dr. Klein responded to OWCP's request.

On January 13, 2017 the employing establishment offered appellant a job as a modified mail handler on a full-time basis. The position included such duties as: walking up and down aisles to visually check mail and replace mail trays weighing ½ pound (2 to 3 hours per day), walking the work floor to count mail types and mark tallies (1 to 3 hours), checking delivery confirmations and printing data (½ to 1½ hours), and occasionally answering the telephone. The physical requirements of the position included: intermittent standing/walking for brief periods; intermittent simple grasping, intermittent driving; intermittent writing, keyboarding up to 15 minutes at a time; and lifting/carrying up to ½ pound for 2 to 3 hours per day.

In a January 15, 2017 letter received by OWCP on January 20, 2017, appellant asserted that he had several conditions, including obsessive compulsive disorder (OCD), post-traumatic stress disorder (PTSD), and depression, which prevented him from working as a modified mail handler. He submitted a January 19, 2017 report from Dr. Fred Wiggins, a clinical psychologist, who indicated that appellant was a former patient who had been seen on October 20, 2015 and February 10, 2016. Dr. Wiggins indicated that appellant had been diagnosed with unspecified depressive disorder and other specified anxiety disorder with panic and OCD features. He advised that these were "long standing conditions that have adversely affected his functional capacity in occupational and social settings." In a February 2, 2017 report, Dr. Robert Chalemian, a Board-certified psychiatrist, indicated that he treated appellant for depressive and anxiety disorder in the 1990s.

In a February 2, 2017 letter, OWCP advised appellant of its determination that the modified mail handler position offered by the employing establishment was suitable. It informed him that the weight of the medical opinion evidence with respect to his ability to work rested with the

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<sup>5</sup> On the first page of the work capacity evaluation form, Dr. Klein also checked a box indicating that appellant could work at the "Sedentary" strength level. The record contains a blank four-page copy of a work capacity evaluation (Form OWCP-5c) which has a definition of the "Sedentary" strength level on its second page. In part, sedentary work was defined as exerting up to 10 pounds of force occasionally or a negligible amount of force frequently to lift, carry, push, pull, or otherwise move objects, including the human body.

December 20, 2016 report of Dr. Klein.<sup>6</sup> OWCP advised appellant that his wage-loss compensation and entitlement to a schedule award would be terminated if he did not accept the modified mail handler position or provide good cause for not doing so within 30 days of the date of the letter.

In response, appellant subsequently submitted a January 26, 2017 note from Dr. Sheldon Weiser, a Board-certified psychiatrist, who indicated that appellant had been his patient in the 1990s for anxiety and depression. In a February 26, 2017 report, Dr. Linda Russek, a clinical psychologist, indicated that she evaluated appellant on an unspecified date. She noted that she agreed with other providers' diagnoses of PTSD and OCD and she questioned whether the risk was worth the potential benefits in trying to get appellant back to work.

In a March 1, 2017 letter, appellant advised OWCP that he was refusing the modified mail handler position because he had severe anxiety, major depressive disorder, OCD, and PTSD.

In a March 9, 2017 letter, OWCP informed appellant that his wage-loss compensation and entitlement to a schedule award 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. Appellant submitted records from a psychiatric hospitalization in 1985 and treatment notes from Dr. Jennifer Treusch, a Board-certified psychiatrist, which discussed her treatment of his psychiatric condition in 2015.

In a June 22, 2017 letter, OWCP advised appellant that his reasons for refusing to accept the modified mail handler position offered by the employing establishment were unjustified. It discussed the evidence submitted by appellant, but found that this evidence did not provide a valid reason for refusing to accept the position. OWCP advised appellant that his wage-loss compensation and entitlement to a schedule award would be terminated if he did not accept the position within 15 days of the date of the letter. Appellant did not accept the modified mail handler position within the allotted period.

Appellant submitted additional reports from attending Board-certified psychiatrists, including reports from 2014 of a Dr. Maria Reckart and reports from 2016 of a Dr. Stephen Streitfeld.

On September 22, 2017 the employing establishment advised OWCP that the modified mail handler position remained available to appellant.

By decision dated September 28, 2017, OWCP terminated appellant's wage-loss compensation and entitlement to a schedule award effective September 28, 2017 because he refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2). It determined that the weight of medical evidence with respect to his ability to work rested with the December 20, 2016 report of Dr. Klein. OWCP found that appellant did not submit a rationalized medical report showing that a psychiatric condition prevented him from working in the modified mail handler position which had been identified as suitable.

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<sup>6</sup> OWCP indicated that appellant had not submitted medical evidence sufficient to support his assertion that OCD, PTSD, and depression prevented him from working as a modified mail handler.

On October 12, 2017 appellant, through counsel, requested a telephonic hearing with a representative of OWCP's Branch of Hearings and Review. Appellant subsequently submitted an undated report from Dr. George Goldman, a clinical psychologist, who discussed his evaluation of appellant on October 19 and December 14, 2017. He posited that appellant's OCD made it impossible for him to work. During the hearing held on March 15, 2018, counsel reiterated that appellant's psychological conditions prevented him from performing any work.

By decision dated May 30, 2018, OWCP's hearing representative affirmed OWCP's September 28, 2017 decision. She noted that the weight of the medical opinion evidence with respect to appellant's ability to work continued to rest with the December 20, 2016 report of Dr. Klein.

On July 16, 2018 appellant, through counsel, requested reconsideration of the May 30, 2018 decision. Appellant submitted a June 10, 2018 note from Dr. Goldman who diagnosed bipolar disorder, major depressive disorder, and OCD, and he indicated that appellant's emotional vulnerability and fragility made him a hazard to himself and others in a work environment.

By decision dated October 12, 2018, OWCP denied modification of the May 30, 2018 decision.

### **LEGAL PRECEDENT**

Once OWCP accepts a claim and pays compensation, it has the burden of justifying termination or modification of an employee's compensation benefits.<sup>7</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>8</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>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

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<sup>7</sup> See *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

<sup>8</sup> 5 U.S.C. § 8106(c)(2); see also *Geraldine Foster*, 54 ECAB 435 (2003).

<sup>9</sup> See *R.A.*, Docket No. 19-0065 (issued May 14, 2019); *Ronald M. Jones*, 52 ECAB 190 (2000).

<sup>10</sup> *S.D.*, Docket No. 18-1641 (issued April 12, 2019); *Joan F. Burke*, 54 ECAB 406 (2003).

<sup>11</sup> 20 C.F.R. § 10.517(a).

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>

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>13</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>14</sup> In a suitable work determination, OWCP must consider preexisting and subsequently-acquired medical conditions in evaluating an employee's work capacity.<sup>15</sup>

### ANALYSIS

The Board finds that OWCP improperly terminated appellant's wage-loss compensation and entitlement to a schedule award effective September 28, 2017 because he refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

The employing establishment offered appellant a modified mail handler position in January 2017 and OWCP determined it to be suitable in February 2017. The physical requirements of the position included lifting/carrying up to ½ pound for 2 to 3 hours per day. The record does not reveal that the position was temporary in nature.<sup>16</sup>

The Board notes, however, that the evidence of record does not show that appellant is physically capable of performing the modified mail handler position offered by the employing establishment and determined to be suitable by OWCP. In determining that appellant was physically capable of performing the modified mail handler position, OWCP relied on the December 20, 2016 opinion of Dr. Klein, the OWCP referral physician. The Board notes that Dr. Klein did not provide a clear opinion that appellant could perform the lifting duties of the modified mail handler position.

In his December 20, 2016 report, Dr. Klein noted, "The only restrictions that I would put on the patient are that he is not allowed to do any pushing, pulling, lifting, squatting, kneeling, climbing, or twisting at work." He attached a December 20, 2016 work capacity evaluation form (Form OWCP-5c) in which he indicated that appellant was not able to perform his usual job. Dr. Klein advised that, due to his neck pain, appellant was limited to performing sedentary work

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<sup>12</sup> *Id.* at § 10.516.

<sup>13</sup> *M.A.*, Docket No. 18-1671 (issued June 13, 2019); *Gayle Harris*, 52 ECAB 319 (2001).

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

<sup>15</sup> See *G.R.*, Docket No. 16-0455 (issued December 13, 2016); *Richard P. Cortes*, 56 ECAB 200 (2004).

<sup>16</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, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.4c(5), 9 (June 2013).

for eight hours per day.<sup>17</sup> He indicated that appellant could not perform any of the following activities: lifting, pushing, pulling, twisting, bending, stooping, squatting, kneeling, and climbing.

In a December 29, 2016 e-mail, an OWCP official acknowledged that Dr. Klein's December 20, 2016 report was contradictory with respect to work restrictions. On December 29, 2016 OWCP sent Dr. Klein a new work capacity evaluation form, which contained a definition of sedentary work, and requested that he complete and return the form in order to clarify the fact that he had indicated that appellant could perform sedentary work, but also completely restricted him from lifting, pushing, and pulling.

There is no indication in the case record that Dr. Klein responded to OWCP's request for a supplemental report and Dr. Klein's opinion regarding appellant's ability to perform the lifting duties of the modified mail handler position offered by the employing establishment remain unclear.

For these reasons, the Board finds that OWCP has not established that the modified mail handler position offered by the employing establishment was suitable. Therefore, OWCP improperly terminated appellant's wage-loss compensation and entitlement to a schedule award effective September 28, 2017 because he refused an offer of suitable work.<sup>18</sup>

### **CONCLUSION**

The Board finds that OWCP improperly terminated appellant's wage-loss compensation and entitlement to schedule award compensation effective September 28, 2017 because he refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

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<sup>17</sup> On the first page of the work capacity evaluation form, Dr. Klein also checked a box indicating that appellant could work at the "Sedentary" strength level. As noted above, the record contains a blank four-page copy of a work capacity evaluation form which has a definition of the "Sedentary" strength level on its second page. In part, sedentary work was defined as exerting up to 10 pounds of force occasionally or a negligible amount of force frequently to lift, carry, push, pull, or otherwise move objects, including the human body. It is unclear whether Dr. Klein referenced the second page of a work capacity evaluation form when he checked the box indicating that appellant could work at the "Sedentary" strength level.

<sup>18</sup> See *supra* note 11.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 12, 2018 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 14, 2019  
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