



## **ISSUES**

The issues are: (1) whether OWCP properly terminated appellant's wage-loss compensation and entitlement to schedule award compensation, effective December 16, 2016, because she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2); and (2) whether OWCP properly denied her request for a review of the written record in response to the denial of her request for surgery, as it was untimely filed.

## **FACTUAL HISTORY**

On August 26, 2011 appellant, then a 41-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that she sustained a bilateral upper extremity condition due to the repetitive handling of mail required by her job. OWCP accepted appellant's claim for adhesive capsulitis of the left shoulder, bilateral carpal tunnel syndrome, bilateral disorder of bursae and tendons of the shoulder region, other bilateral affections of the shoulder region, other bilateral synovitis and tenosynovitis, bilateral elbow and forearm sprains, bilateral mononeuritis multiplex, and late effects of complications of medical/surgical care.<sup>4</sup>

Appellant stopped work on January 8, 2014 and, on the same date, she underwent OWCP-authorized revision of carpal tunnel release surgery.<sup>5</sup> She periodically returned to light-duty work and OWCP paid her appropriate wage-loss compensation for periods of work stoppage. Appellant stopped work on July 22, 2014.

Appellant participated in a functional capacity evaluation (FCE) on November 17, 2014. A report of the FCE indicated that the results suggested that appellant gave a self-limited effort and that she demonstrated patterns of movement and physiological responses that were inconsistent with maximal effort.<sup>6</sup>

OWCP referred appellant to Dr. Eric S. Furie, a Board-certified orthopedic surgeon, for a second opinion examination and requested that he provide an opinion detailing appellant's ability to work.

In a July 28, 2015 report, Dr. Furie discussed appellant's factual and medical history and detailed the findings of his physical examination. He advised that appellant's active diagnoses were left trapezial strain, frozen left shoulder, and mild right lateral epicondylitis. Dr. Furie noted that it appeared that appellant's bilateral carpal tunnel syndrome had resolved and indicated that she had good range of motions of her wrists and adequate strength. Appellant did not appear to

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<sup>4</sup> The case record contains an authorization for examination and/or treatment form (Form CA-16) which was signed by an authorizing official on September 2, 2011.

<sup>5</sup> OWCP authorized several other surgeries, including January 31, 2014 right shoulder subacromial decompression, labral debridement, and synovectomy, March 20, 2014 left shoulder subacromial decompression and repair of superior labrum anterior and posterior tear, April 30, 2014 revision of left carpal tunnel release surgery, and April 21, 2016 left shoulder revision subacromial decompression, biceps tenodesis, lysis of adhesions, and labral debridement.

<sup>6</sup> The report indicated that, during the FCE, appellant demonstrated the ability to frequently carry five pounds, but it was noted this was a self-limited representation of her abilities and that her actual abilities were most likely greater than those demonstrated.

have any sensory loss in her fingers and her elbows had excellent range of motion. Dr. Furie advised that appellant exhibited tenderness at the lateral epicondyle of her right elbow which was mild-to-moderate in nature. He reported that she had a good outcome from her right shoulder surgery with good strength and excellent range of motion. Appellant had some decreased range of motion of her left shoulder and some tenderness at the trapezius and anterior aspect. Dr. Furie noted that her “subjective complaints outweigh her objective findings” and he that, other than the lack of motivation evidenced by her FCE results, she should be able to participate in vocational rehabilitation efforts. He maintained that the only difficulties appellant would have with performing her date-of-injury job as a mail handler would be lifting over her shoulder level or lifting 70 pounds with her left arm.<sup>7</sup>

In an August 25, 2015 work capacity evaluation form (OWCP-5c), Dr. Furie indicated that appellant could work eight hours per day with restrictions of lifting, pushing, and pulling no more than 30 pounds for up to eight hours per day. Appellant could not reach about her shoulder level with her left arm.

In an October 13, 2015 report, Dr. Obinwanne Ugwonali, a Board-certified orthopedic surgeon, indicated that he had reviewed the work restrictions from Dr. Furie’s July 28, 2015 report and noted that “[a]ccording to the restrictions she was allowed up to 70 pounds.” He noted that, based on his history with appellant, she was not able to lift more than 30 pounds continuously without a significant amount of pain. Dr. Ugwonali noted, “I therefore would disregard that advice.”

In early November 2015 appellant began participating in an OWCP-sponsored vocational rehabilitation program designed to return her to work.

On November 12, 2015 the employing establishment offered appellant a full-time position as a modified mail handler. The position involved culling and prepping mail for up to eight hours per day.<sup>8</sup> The physical requirements included standing for up to eight hours per day and lifting flat mail bundles weighing up to 30 pounds for up to eight hours per day. In a December 8, 2015 letter, the employing establishment advised OWCP that appellant had not accepted the offered position.

Appellant’s vocational rehabilitation counselor determined that appellant was vocationally and educationally capable of working in the modified mail handler position offered by the employing establishment.

In a December 31, 2015 letter, OWCP advised appellant of its determination that the modified mail handler position offered by the employing establishment was suitable based on the evaluation of Dr. Furie. It informed her that her compensation would be terminated if she did not accept the position or provide good cause for not doing so within 30 days of the date of the letter.

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<sup>7</sup> Dr. Furie discussed appellant’s ability to perform the requirements of her date-of-injury job as a mail handler, such as standing for six hours per day and walking for six hours per day. He did not provide any indication that his comments regarding these requirements represented the limits of appellant’s physical abilities.

<sup>8</sup> These processes included cutting straps, removing rubber bands, and placing mail in containers.

In response, appellant submitted a January 5, 2016 report in which Dr. Ugwonali advised that appellant had been capable of returning to work since October 31, 2015 and was capable of lifting up to 30 pounds on a continuous basis. In a January 29, 2016 document, counsel indicated that an attempt was being made to obtain additional new medical evidence from Dr. Ugwonali.

In a February 8, 2016 letter, OWCP advised appellant that her reasons for not accepting the modified position offered by the employing establishment were unjustified. It advised her that her compensation would be terminated if she did not accept the position within 15 days of the date of the letter. Appellant did not accept the mail handler position within the allotted period.<sup>9</sup>

By decision dated December 15, 2016, OWCP terminated appellant's compensation and entitlement to schedule award compensation effective December 16, 2016 because she refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

On December 6, 2017 appellant, through counsel requested reconsideration of the December 15, 2016 decision. Counsel continued to argue that the opinion of Dr. Ugwonali showed that appellant could not work as a modified mail handler. By decision dated December 13, 2017, OWCP denied modification of the December 15, 2016 decision.

In June 2018 Dr. Ugwonali submitted a request, on appellant's behalf, for authorization of a proposed revised ulnar nerve surgery at the right elbow. Appellant submitted June 11 and July 9, 2018 reports from Dr. Ugwonali who described appellant's right elbow symptoms and opined that they were employment related.

Appellant also submitted a July 19, 2018 report from Dr. Ugwonali who indicated that it was his opinion that appellant was not capable of performing the modified mail handler position at the time it was offered in late-2015. He noted that appellant was able to lift 30 pounds at that time, but that she was not capable of engaging in repetitive arm motion.

By decision dated August 10, 2018, OWCP denied appellant's request for authorization of surgery because she did not submit sufficient medical evidence to establish that the proposed right elbow surgery was necessitated by an employment-related condition.

In a document dated September 10, 2018 and received by OWCP on September 11, 2018, appellant requested a review of the written record with a representative of OWCP's Branch of Hearings and Review with respect to the August 10, 2018 decision. By decision dated October 19, 2018, OWCP denied appellant's request for a hearing in the form of a review of the written record. It found that her request was untimely as it was not filed within 30 days of the issuance of the August 10, 2018 merit decision. OWCP indicated that, in its discretion, it had carefully considered appellant's request and had determined that the issue of the case could equally well be addressed by requesting reconsideration and submitting additional medical evidence.

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<sup>9</sup> Appellant later submitted additional reports, dated February 23 and November 1, 2016 in which Dr. Ugwonali advised that appellant was capable of lifting up to 30 pounds. On April 21, 2016 she underwent left shoulder revision subacromial decompression, biceps tenodesis, lysis of adhesions, and labral debridement. During the several-month recovery period after this surgery, Dr. Ugwonali recommended more restrictive lifting restrictions ranging from no lifting with the right arm to no lifting more than 20 pounds.

By decision dated December 19, 2018, OWCP denied modification of its December 13, 2017 decision.

### **LEGAL PRECEDENT -- ISSUE 1**

Once OWCP accepts a claim and pays compensation, it has the burden of justifying termination or modification of an employee's compensation benefits.<sup>10</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>11</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>12</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>13</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>14</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>15</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>16</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>17</sup> In a suitable work determination, OWCP must consider preexisting and subsequently acquired medical conditions in evaluating an employee's work capacity.<sup>18</sup>

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<sup>10</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>11</sup> 5 U.S.C. § 8106(c)(2).

<sup>12</sup> See *R.A.*, Docket No. 19-0065 (issued May 14, 2019); *Ronald M. Jones*, 52 ECAB 190 (2000).

<sup>13</sup> *S.D.*, Docket No. 18-1641 (issued April 12, 2019); *Joan F. Burke*, 54 ECAB 406 (2003).

<sup>14</sup> 20 C.F.R. § 10.517(a).

<sup>15</sup> *Id.* at § 10.516.

<sup>16</sup> *M.A.*, Docket No. 18-1671 (issued June 13, 2019); *Gayle Harris*, 52 ECAB 319 (2001).

<sup>17</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>18</sup> See *G.R.*, Docket No. 16-0455 (issued December 13, 2016); *Richard P. Cortes*, 56 ECAB 200 (2004).

## **ANALYSIS -- ISSUE 1**

The Board finds that OWCP properly terminated appellant's wage-loss compensation and entitlement to schedule award compensation, effective December 16, 2016, because she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

The evidence of record demonstrates that appellant is capable of performing the modified mail handler position offered by the employing establishment and determined to be suitable by OWCP in December 2015. The position involved culling and prepping mail for up to eight hours per day. The physical requirements included standing for up to eight hours per day and lifting flat mail bundles weighing up to 30 pounds for up to eight hours per day. The record does not reveal that the mail handler position was temporary in nature.<sup>19</sup>

Appellant's vocational rehabilitation counselor determined that appellant was vocationally and educationally capable of working in the modified mail handler position offered by the employing establishment and OWCP properly relied on the opinion of appellant's counselor in finding that she was vocationally and educationally capable of performing the offered position.<sup>20</sup>

In determining that appellant was physically capable of performing the modified mail handler position, OWCP properly relied on the opinion of Dr. Furie, OWCP's referral physician. In his June 28 and August 25, 2015 reports, Dr. Furie comprehensively discussed appellant's medical condition and provided an opinion that appellant could work eight hours per day with restrictions of lifting, pushing, and pulling no more than 30 pounds for up to eight hours per day. The Board notes that these work restrictions would allow appellant to work in the modified mail handler position offered by the employing establishment in late-2015. Dr. Furie noted that appellant could not reach about her shoulder level with her left arm, but there is no indication that the modified mail handler position required such activity.

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

The Board has reviewed the evidence and argument submitted by appellant in support of her refusal of the modified mail handler position and notes that it is insufficient to justify her refusal of the position. On appeal counsel argues that the results of the November 17, 2014 FCE and an October 13, 2015 report of Dr. Ugwonalu established that appellant could not perform the duties of the modified mail handler position offered by the employing establishment. However, the Board notes that, in his October 13, 2015 report, Dr. Ugwonalu actually indicated that appellant could frequently lift up to 30 pounds and this assessment of appellant's lifting ability is in accordance with the requirements of the modified mail handler position offered by the employing establishment. Moreover, the Board notes that the report of the November 17, 2014 FCE

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<sup>19</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).

<sup>20</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.4 (June 2013).

specifically provided that appellant's activities during the FCE were self-limited and that her actual abilities were likely far greater.<sup>21</sup>

The Board finds that OWCP complied with its procedural requirements prior to terminating appellant's wage-loss compensation and entitlement to schedule award compensation, including providing appellant with an opportunity to accept the position offered by the employing establishment after informing her that her reasons for initially refusing the position were not valid.<sup>22</sup>

For these reasons, OWCP properly terminated appellant's wage-loss compensation and entitlement to schedule award compensation, effective December 16, 2016, because she refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).<sup>23</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8124(b)(1) of FECA, concerning a claimant's entitlement to a hearing before an Office representative, provides in pertinent part: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."<sup>24</sup> As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.<sup>25</sup> The date of filing is fixed by postmark or other carrier's date marking.<sup>26</sup>

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<sup>21</sup> In addition, the report of the November 17, 2014 FCE was prepared by a physical therapist and does not constitute probative medical evidence as a physical therapist is not considered to be a physician within the meaning of FECA. See *M.M.*, Docket No. 17-1641 (issued February 15, 2018). Appellant also submitted a July 19, 2018 report from Dr. Ugwonalu who indicated that it was his opinion that appellant was not capable of performing the modified mail handler position at the time it was offered in late-2015. The Board notes, however, that this report was submitted well after OWCP issued its February 8, 2016 letter advising appellant that her reasons for not accepting the offered position were unjustified and that her compensation would be terminated if she did not accept the position within 15 days of the date of the letter. Similarly, the fact that appellant had lifting limitations due to April 2016 right shoulder surgery would not invalidate OWCP's termination action.

<sup>22</sup> See generally *C.V.*, Docket No. 14-1572 (issued June 19, 2015); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

<sup>23</sup> The case record contains a Form CA-16 which was signed by an authorizing official on September 2, 2011. A properly completed CA-16 form authorization may constitute a contract for payment of medical expenses to a medical facility or physician, when properly executed. The form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. The period for which treatment is authorized by a Form CA-16 is limited to 60 days from the date of issuance, unless terminated earlier by OWCP. 20 C.F.R. § 10.300(c); *P.R.*, Docket No. 18-0737 (issued November 2, 2018); *N.M.*, Docket No. 17-1655 (issued January 24, 2018); *Tracy P. Spillane*, 54 ECAB 608 (2003).

<sup>24</sup> 5 U.S.C. § 8124(b)(1).

<sup>25</sup> *C.K.*, Docket No. 18-0607 (issued October 18, 2018); *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

<sup>26</sup> See 20 C.F.R. § 10.616(a).

The Board has held that OWCP, in its broad discretionary authority in the administration of FECA, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that OWCP must exercise this discretionary authority in deciding whether to grant a hearing.<sup>27</sup> Specifically, the Board has held that OWCP has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to FECA which provided the right to a hearing,<sup>28</sup> when the request is made after the 30-day period for requesting a hearing,<sup>29</sup> when the request is for a second hearing on the same issue,<sup>30</sup> and when the request is made after a reconsideration request was previously submitted.<sup>31</sup> In these instances, OWCP will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.<sup>32</sup>

### ANALYSIS -- ISSUE 2

The Board finds that OWCP properly improperly denied her request for a review of the written record, in response to the denial of her request for surgery, as it was untimely filed.

In this case, appellant's letter requesting a hearing from OWCP's August 10, 2018 decision denying authorization for surgery was dated September 10, 2018. The record does not contain the envelope in which the letter was sent, which would include the postmark. OWCP's Branch of Hearings and Review is required to retain an envelope in which a request for a hearing is made so as to determine the timeliness of the request for a hearing.<sup>33</sup> Because appellant submitted a request for a hearing which was dated September 10, 2018 and the record contains no envelope with a postmark, her request is deemed to have been made on September 10, 2018.<sup>34</sup> The Board has held that, in computing a time period, the date of the event from which the designated period of time begins to run shall not be included while the last day of the period so computed shall be included unless it is a Saturday, a Sunday, or a federal holiday.<sup>35</sup> The 30-day time period for determining the timeliness of appellant's hearing request began on August 10, 2018 and ended on September 9, 2018, a Sunday. The first regular business day after September 9, 2018 was Monday,

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<sup>27</sup> *D.T.*, Docket No. 18-0871 (issued February 11, 2019); *Henry Moreno*, 39 ECAB 475, 482 (1988).

<sup>28</sup> *T.R.*, Docket No. 18-1272 (issued February 15, 2019); *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

<sup>29</sup> *See C.K.*, *supra* note 25; *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

<sup>30</sup> *See T.R.*, *supra* note 28; *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

<sup>31</sup> *R.H.*, Docket No. 07-1658 (issued December 17, 2007); *S.J.*, Docket No. 07-1037 (issued September 12, 2007). Section 10.616(a) of OWCP's regulations provides that the claimant seeking a hearing must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision. 20 C.F.R. § 10.616(a).

<sup>32</sup> *See C.K.*, *supra* note 25.

<sup>33</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.3a (October 2011). OWCP procedures further provide that the request is timely if it was mailed (as determined by the postmark or other carrier's date marking) within 30 days of the date of the district office's decision. If the postmark is not legible, the request will be deemed timely unless OWCP has kept evidence of date of delivery on the record reflecting that the request is untimely. *Id.* at Chapter 2.1601.4a.

<sup>34</sup> *See id.*

<sup>35</sup> *B.W.*, Docket No. 16-1860, *Order Remanding Case* (issued May 4, 2017).

September 10, 2018. As appellant's request for a review of the written record was made on September 10, 2018, her request was timely.<sup>36</sup> Consequently, the case must be remanded for OWCP to provide appellant an appropriate hearing under section 8124 of FECA. Upon return of the case record, OWCP should schedule an appropriate hearing with a representative of OWCP's Branch of Hearings and Review. After such further development it deems necessary, OWCP shall issue a *de novo* decision regarding appellant's request for authorization of surgery.

### **CONCLUSION**

The Board finds that OWCP properly terminated appellant's wage-loss compensation and entitlement to schedule award compensation, effective December 16, 2016, because she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2). The Board further finds that OWCP improperly denied her request for a review of the written record, in response to the denial of her request for surgery, as it was untimely filed.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the December 19, 2018 decision of the Office of Workers' Compensation Programs is affirmed. The October 19, 2018 decision of OWCP is reversed, and the case is remanded for further development consistent with this decision of the Board.

Issued: November 13, 2019  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

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

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<sup>36</sup> See *id.*