

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

C.S., Appellant	)	
	)	
and	)	<b>Docket No. 20-1475</b>
	)	<b>Issued: October 4, 2021</b>
<b>DEPARTMENT OF HOMELAND SECURITY,</b>	)	
<b>U.S. SECRET SERVICE, Washington, DC,</b>	)	
<b>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:  
JANICE B. ASKIN, Judge  
PATRICIA H. FITZGERALD, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On August 3, 2020 appellant, through counsel, filed a timely appeal from a March 18, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the

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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 a 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.

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.<sup>3</sup>

### **ISSUE**

The issue is whether OWCP has met its burden of proof to terminate appellant's entitlement to wage-loss compensation and schedule award benefits, effective October 3, 2019, because he refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

### **FACTUAL HISTORY**

On October 13, 2014 appellant, then a 39-year-old police officer, filed a traumatic injury claim (Form CA-1) alleging that on that day he sustained a neck injury when participating in control tactics training while in the performance of duty. OWCP initially accepted the claim for neck strain. Appellant stopped work on October 27, 2014 and returned to limited-duty work on December 10, 2014. On July 8, 2015 OWCP expanded acceptance of the claim to include C5-6 disc herniation. On August 13, 2015 appellant stopped work and underwent authorized C5-6 anterior cervical discectomy and fusion surgery and prosthetic device implant. OWCP paid appellant on the supplemental rolls effective August 13, 2015 and on the periodic rolls effective December 13, 2015.

In a report dated November 17, 2014, Dr. Rupinder Singh, a physician Board-certified in internal medicine, related that appellant had been under his care since February 2007. He noted the history of appellant's October 13, 2014 employment injury, and related diagnoses of cervical/neck strain, cervical radiculopathy/ radiculitis. Dr. Singh also explained that the blunt force of the trauma caused significant muscle strain and injury to tissue in appellant's neck, upper back, and left shoulder, which caused irritation to the nerves innervating appellant's shoulder.

Appellant came under the care of Dr. Joel Belzberg, a Board-certified neurosurgeon. In a May 1, 2015 report, Dr. Belzberg noted that appellant was seen for neck and left shoulder pain, following the October 13, 2014 employment injury. He noted that appellant had undergone physical therapy and that his neck pain improved, but not his left shoulder pain. Dr. Belzberg diagnosed cervical disc disease, and cervical radiculopathy radiating into the left shoulder. He noted that appellant had a past history of a heart murmur. Dr. Belzberg advised on September 16, 2015 that appellant was status post cervical discectomy and fusion at C5-6 on August 13, 2015. He related that, prior to the surgery, appellant had severe pain in his left shoulder, however, since the surgery his left arm pain had resolved. Dr. Belzberg related that after confirmation of C5-6 fusion by x-ray that appellant would be released to full duty. In a December 16, 2015 work/school excuse letter, he requested that appellant be excused from work until February 1, 2016.

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

<sup>3</sup> The Board notes that a appellant submitted additional evidence following the March 18, 2020 decision. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

In a report dated June 4, 2015, Dr. Akhil Chhatre, a Board-certified physiatrist, noted diagnoses of cervical disc disease and left rotator cuff sprain and strain.

Appellant also came under the care of Dr. Levan Atanelov, a Board-certified physiatrist. In a report dated June 27, 2015, Dr. Atanelov related diagnoses of left rotator cuff injury, impingement, cervicalgia, chronic neck pain, and cervical neck pain, following the employment injury.

On February 26, 2016 Dr. Chhatre diagnosed cervical disc disease and C5-6 cervical axial pain anteroposterior cervical fusion and advised that appellant was unable to work. Subsequent reports from Dr. Chhatre advised that appellant could not return to work.<sup>4</sup> Dr. Chhatre, in an undated note, recommended work-hardening physical therapy to ensure appellant's capacity to return to work. In reports dated November 16 and December 2, 2016, and January 3, February 28, and May 23, 2017, he related that appellant was seen for follow up of neck pain, with intermittent radiation to the shoulder blades and to the left hand. Dr. Chhatre noted a diagnosis of cervicalgia.

On March 9, 2017 OWCP referred appellant for a second opinion evaluation with Dr. Stuart J. Gordon, a Board-certified orthopedic surgeon,<sup>5</sup> to determine whether appellant continued to suffer from residuals of his accepted work injury. A March 8, 2017 statement of accepted facts (SOAF) reported the accepted conditions as neck strain and C5-6 disc herniation and that on August 13, 2015 appellant underwent an anterior cervical discectomy and fusion. It also noted that under OWCP File No. xxxxxx193, date of injury February 12, 2003, a lumbar strain had been accepted; under OWCP File No. xxxxxx614, date of injury April 22, 2009, thoracic back region sprain had been accepted, and under OWCP File No. xxxxxx530, date of injury December 9, 2010, rib contusion had been accepted.<sup>6</sup> No other medical conditions, preexisting, concurrent or nonwork related, were mentioned.

In a report dated April 4, 2017, Dr. Gordon reviewed the March 8, 2017 SOAF and the medical record. He noted that he had previously examined appellant on June 25, 2015 and that he was currently in pain management. Dr. Gordon diagnosed left C5-6 disc herniation and status post anterior cervical discectomy and fusion with residual significant complaints. He opined that appellant could perform sedentary work for eight hours per day. Work restrictions included no reaching, above the shoulder, climbing, or operating a motor vehicle at work and up to eight hours of pushing, pulling, lifting, or pulling more than 10 pounds.

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<sup>4</sup> On June 27, 2016 appellant underwent right/left cervical medial branch blocks for diagnosis of cervical C3-5 zygapophyseal joint pain and third occipital nerve block.

<sup>5</sup> OWCP, on May 20 and June 2, 2015, referred appellant for a second opinion evaluation with Dr. Gordon to clarify the cause and extent of his injury-related impairment. In a June 25, 2015 report, Dr. Gordon agreed that the requested surgery was necessary and opined that appellant was capable of working a sedentary job for four hours per day with restrictions of no climbing and no lifting, pulling, or pushing more than 10 pounds for four hours a day.

<sup>6</sup> The Board notes that these claims have not been administratively combined with the current claim, OWCP File No. xxxxxx781.

On October 3, 2017 appellant underwent a health and behavior assessment by Katherine Streeter Wright, Ph.D. for an evaluation to assist appellant with pain management and identify barriers to treatment response and subsequent rehabilitation.

In a letter dated February 7, 2018, OWCP informed the employing establishment that appellant was capable of working with restrictions based on the report of OWCP's referral physician, Dr. Gordon, which it found constituted the weight of the evidence. It requested that the establishment offer a written job offer to appellant with the restrictions noted by Dr. Gordon if possible.

Appellant came under the care of Dr. Nishant Nannapeni, a Board-certified psychiatrist, who noted in a report dated June 21, 2018 that appellant was seen for neck pain. Dr. Nannapeni observed that ablation had helped with appellant's migraines, and noted that appellant was currently off work. He related that appellant was currently being treated for neck pain and cervical disease with cervical axial pain at C519-6 status post cervical fusion. Dr. Nannapeni advised that appellant should continue off work and explained that appellant's significant neck pain and limited neck range of motion significantly impacted his functional limitation with regard to possible work activities.

On October 2, 2018 the employing establishment offered appellant a position as a security specialist (access control) in the Office of Protective Operations (OPO), Presidential Protection Division (PPD) within the Department of Homeland Security. The position was noted to be sedentary, but physical restrictions of the position required lifting moderately heavy equipment. However, based on his work restrictions, the employing establishment would work with appellant to accommodate the pushing/pulling/limiting restrictions applicable to the job's lifting requirement. On October 10, 2018 appellant refused the offered job indicating that he believed the position was outside of his current medical restrictions.

In a letter dated November 9, 2018, OWCP informed the employing establishment that the offered position was not suitable as it did not include appellant's work hours or the specific physical requirements of the position.

On April 19, 2019 the employing establishment again offered appellant the position of security specialist (access control) in the OPO, PPD. It advised that his shift would be one of the following shifts: 6:00 a.m. to 2:00 p.m., or 9:00 a.m. to 5:00 p.m., or 2:00 p.m. to 10:00 p.m. The employing establishment noted that the hours of the position would be subjected to revision, but would be eight hours per day, five days per week. The position description noted that the employing establishment would abide by appellant's specific lifting, pushing, pulling restrictions for work no more than eight hours per day. Appellant refused the position on April 24, 2019.

On May 21, 2019 OWCP referred appellant for a second opinion evaluation with Dr. Rafael A. Lopez Steuart, a Board-certified orthopedic surgeon, to determine whether appellant continued to suffer from residuals of his accepted work injury. An updated May 21, 2019 SOAF included the information from the prior SOAF and added that appellant had bilateral radiofrequency ablation performed on March 20, 2017 and had been seen by a licensed clinical psychologist on October 3, 2017.

In a June 19, 2019 report, Dr. Steuart reviewed the SOAF and the medical record and provided examination findings. He noted the accepted conditions were neck sprain and C5-6 disc herniation. Dr. Steuart reported that appellant had migraines and chronic pain syndrome, and treatment should continue for the chronic pain. He advised that the diagnosis of chronic pain and any work restrictions due to these conditions, was outside his field of expertise. With respect to his work capacity, Dr. Steuart opined that appellant was capable of full-duty work with no restrictions from a musculoskeletal system and orthopedic standpoint. He reviewed the April 17, 2019 offered position and found it reasonable. In an attached work capacity evaluation form (Form OWCP-5c), Dr. Steuart indicated that appellant had reached maximum medical improvement and could return to the date-of-injury position with no restrictions.

On July 31, 2019 the employing establishment advised OWCP that the offered position remained available.

In a letter dated August 1, 2019, OWCP advised appellant that the position offered was suitable in accordance with the medical limitations provided by Dr. Steuart on June 2, 2019. It notified him that, if he failed to report to work or failed to demonstrate that the failure was justified, pursuant to 5 U.S.C. § 8106(c)(2), his right to compensation for wage loss or a schedule award would be terminated. OWCP afforded appellant 30 days to respond.

In a letter dated August 15, 2019, Dr. Ayesha Khan, a physiatrist, noted that appellant was being treated for neck pain by Dr. Akhil Chhatre, a Board-certified physiatrist. She advised that appellant was unable to sit for more than 30 minutes without a severe aggravation of his symptoms and that he required frequent rest breaks every 30 minutes. Dr. Khan reported that appellant was scheduled to have a repeat cervical radiofrequency ablation to treat his pain.

On August 15, 2019 appellant elected to receive retirement benefits from the Office of Personnel Management in lieu of FECA benefits effective August 19, 2019.

OWCP ascertained that the position was still available and, by letter dated September 16, 2019, advised appellant that his reasons for refusing the offered position were not valid. It advised him that his wage-loss compensation and entitlement to a schedule award would be terminated if he did not accept the position and report to the position within 15 days of the date of the letter. No further response was received by OWCP.

OWCP, on October 4, 2019, again ascertained that the offered position remained available.

By decision dated October 4, 2019, OWCP terminated appellant's wage-loss compensation and entitlement to schedule award benefits pursuant to 5 U.S.C. § 8106(c)(2), effective October 10, 2019 noting that this was the date he elected to receive retirement benefits from OPM in lieu of FECA benefits. It accorded the weight of the medical evidence to Dr. Steuart's June 19, 2019 opinion that appellant was capable of performing the duties of the offered position.

On October 16, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on February 4, 2020.

By decision dated March 18, 2020, OWCP's hearing representative affirmed the October 4, 2019 termination 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)(2) of FECA 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>

In determining what constitutes suitable work for a particular disabled employee, OWCP considers the employee's current physical limitations, whether the work was available within the employee's demonstrated commuting area, the employee's qualifications to perform such work, and other relevant factors.<sup>11</sup>

The determination of whether an employee is capable of performing modified-duty employment is a medical question that must be resolved by probative medical opinion evidence.<sup>12</sup> All medical conditions, whether work related or not, must be considered in assessing the suitability of an offered position.<sup>13</sup>

## ANALYSIS

The Board finds that OWCP has not met its burden of proof to terminate appellant's entitlement to wage-loss compensation and schedule award benefits, effective August 10, 2019, for refusal of an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

OWCP accepted that appellant sustained a neck strain as a result of the October 13, 2014 employment injury. It subsequently expanded acceptance of the claim to include a C5-6 disc

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<sup>7</sup> See *S.W.*, Docket No. 20-0240 (issued January 26, 2021); *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> *Supra* note 2 at § 8106(c)(2).

<sup>9</sup> *T.M.*, Docket No. 20-0401 (issued February 26, 2021); *R.A.*, Docket No. 19-0065 (issued May 14, 2019); *Ronald M. Jones*, 52 ECAB 190 (2000); see also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.4 (June 2013).

<sup>10</sup> *S.W.*, *supra* note 7; *S.D.*, Docket No. 18-1641 (issued April 12, 2019); *Joan F. Burke*, 54 ECAB 406 (2003).

<sup>11</sup> *Supra* note 9 at Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.4(c) (June 2013).

<sup>12</sup> *P.C.*, Docket No. 20-0935 (issued February 19, 2021); *C.M.*, Docket No. 19-1160 (issued January 10, 2020); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

<sup>13</sup> *Id.*

herniation and authorized C5-6 anterior cervical discectomy and fusion surgery and prosthetic device implant, which occurred on August 13, 2015.

On April 19, 2019 the employing establishment offered appellant a revised security specialist (access control) position, in the PPD within the Department of Homeland Security. On May 21, 2019 OWCP requested that Dr. Steuart provide an opinion on appellant's work capacity and whether appellant was capable of performing the offered position. It found that Dr. Steuart's report represented the weight of the medical evidence and established that the modified-duty position was suitable.

OWCP's procedures dictate that, when an OWCP medical adviser, second opinion specialist, or impartial medical examiner renders a medical opinion based on a SOAF, which is incomplete or inaccurate, or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.<sup>14</sup>

The Board finds that OWCP provided Dr. Steuart a deficient SOAF, which did not identify the entirety of appellant's diagnosed conditions.<sup>15</sup>

As previously noted, all conditions, whether work related or not, must be considered in assessing the suitability of an offered position.<sup>16</sup> OWCP did not update the May 21, 2019 SOAF to include other preexisting or concurrent medical conditions that were not identified in the SOAF. Appellant was initially treated by Dr. Singh who diagnosed cervical strain, contusion, cervical radiculopathy, and C5-6 nerve impingement. Dr. Singh also related that the blunt force of the trauma caused significant muscle strain and injury to tissue in appellant's neck, upper back, and left shoulder, which caused irritation to the nerves innervating appellant's shoulder.

Subsequently, appellant received treatment from Dr. Belzberg who diagnosed cervical disc disease, cervical radiculopathy radiating into the left shoulder, left shoulder rotator cuff sprain and strain, and shoulder pain a past history of a heart murmur. The record also contains reports from Drs. Atanelov, Chhatre, Khan, and Nannapeni who noted various diagnoses including diagnoses of rotator cuff injury, neck pain, migraines, left shoulder impingement, and cervicalgia.

Based on the evidence of record, the Board finds that OWCP improperly determined that the April 19, 2019 security specialist (access control) position offered to appellant constituted suitable work within his limitations and capabilities. The record does not substantiate that OWCP prepared a proper SOAF and properly considered the entirety of appellant's medical conditions before terminating his entitlement to wage-loss compensation and schedule award benefits.<sup>17</sup>

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<sup>14</sup> *Supra* note 9 at Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990); *see S.C.*, Docket No. 18-1011 (issued March 23, 2020).

<sup>15</sup> *See P.C.*, *supra* note 12; *see also N.W.*, Docket No. 16-1890 (issued June 5, 2017).

<sup>16</sup> *Supra* note 13.

<sup>17</sup> *S.M.*, *supra* note 14.

Consequently, OWCP did not meet its burden of proof to justify the termination of appellant's compensation benefits pursuant to 5 U.S.C. § 8106(c)(2).

**CONCLUSION**

The Board finds that OWCP has not met its burden of proof to terminate appellant's entitlement to wage-loss compensation and schedule award benefits, effective August 10, 2019, as it improperly determined that he refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 18, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 4, 2021  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

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