



## ISSUE

The issue is whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective May 6, 2021, as she refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

## FACTUAL HISTORY

On April 29, 2019 appellant, then a 41-year-old city carrier assistant, filed a traumatic injury claim (Form CA-1) alleging that on April 25, 2019 she sustained injury to her back when lifting a tray of mail to reload her truck while in the performance of duty. She stopped work on April 26, 2019. By decision dated November 14, 2019, OWCP accepted appellant's claim for sprain of ligaments of the lumbar spine, and on March 10, 2020 expanded the acceptance of her claim to include an annular tear at L4-L5. It paid her wage-loss compensation on the supplemental rolls for disability from work commencing June 10, 2019 and commencing December 8, 2019 on the periodic rolls.

In an electromyogram/nerve conduction velocity study (EMG/NCV) dated March 4, 2020, Dr. Paul H. Lento, a Board-certified physiatrist, found that appellant's study was normal. He noted that there was no electrophysiological evidence of a peripheral neuropathy or left lumbar radiculopathy based upon his examination.

In a functional capacity evaluation (FCE) dated June 16, 2020, Eric Pecoraro, a physical therapist, tested appellant's physical capacities and compared them to her occupation as a mail carrier. He concluded that appellant was unable to return to work at the defined strength capacity, as her maximum lifting capacity was 18 pounds.

On June 23, 2020 OWCP referred appellant to Dr. William Dinenberg, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine appellant's work capacity.

In a report dated July 1, 2020, Dr. Ashot Kotcharian, a Board-certified physiatrist, examined appellant and reviewed her FCE. On physical examination, he observed that appellant used a walker to ambulate, limped, and had visible pain on movement. Appellant's lumbar range of motion was limited and painful and appellant was unable to stay in one position for a long period of time due to pain. Dr. Kotcharian diagnosed left lumbar intervertebral disc disorder with radiculopathy and low back pain. He noted that her work restrictions should be as per the FCE.

In a second opinion report dated July 21, 2020, Dr. Dinenberg reviewed the medical record and a statement of accepted facts (SOAF). On physical examination he observed appellant ambulated with a walker, she had tenderness to palpation of the lumbar spine, diminished sensation in a stocking deformity of the left lower extremity, give way strength in all muscle groups tested on the left, lumbar flexion to 30 degrees, and inability to perform lumbar extension. Dr. Dinenberg opined that appellant's sprain of the lumbar spine had resolved, but that her annular tear had not resolved, and it was not anticipated that it would resolve. He stated that there were no objective findings on examination to explain the degree of appellant's symptomology, as she had minimal degenerative findings on magnetic resonance imaging (MRI) studies and computerized tomography (CT) scan studies with no neural impingement. Dr. Dinenberg noted that her

EMG/NCV study was negative. He opined that given the absence of objective findings, no orthopedic restrictions would be given to prevent appellant from returning to full duty. Dr. Dinenberg stated that given appellant's subjective complaints, it may be difficult for her to return to work even with restrictions, but that from an orthopedic standpoint, he could not find objective evidence that would give an etiology to the severity of appellant's subjective complaints. He opined that appellant was able to participate in vocational rehabilitation.

On September 18, 2020 OWCP referred appellant to Dr. Bradford A. Slutsky, a Board-certified orthopedic surgeon serving as an impartial medical examiner (IME) to resolve the conflict of medical opinion relative to her work restrictions between Dr. Kotcharian, appellant's treating physician, and Dr. Dinenberg, the second opinion physician.

In an attending physician's report (Form CA-20) dated September 21, 2020, Dr. Kotcharian diagnosed a lumbar herniated disc. In an accompanying duty status report (Form CA-17), he recommended that appellant resume work on August 10, 2020, but that she was unable to perform regular work and that her work restrictions would be "as per [the] FCE."

In a report dated November 4, 2020, Dr. Slutsky, the IME, reviewed a SOAF and the medical record. He reviewed her history of present illness and conducted a physical examination. Appellant presented using a walker with wheels and a slow gait. On physical examination of the lumbar spine, Dr. Slutsky observed no tenderness over the cervical or thoracic spine, diffuse tenderness to the upper lumbar spine on light touch, pain with any attempted range of motion of the lumbar spine, flexion to 25 degrees, extension to 15 degrees limited to severe pain, and rotation of about 15 degrees in either direction. A straight leg raise test produced severe lower back pain. Appellant had decreased sensation of the entire left leg and a glove and stocking distribution to pin prick. She had 3+/5 weakness of every muscle group in her left leg compared to her right leg. Dr. Slutsky opined that he could not explain her weakness and sensory deficit in the left lower extremity based on the diagnostic reports. He further noted that he would strongly encourage appellant to have a full neurological work-up for other etiologies of her symptoms unrelated to her accepted diagnoses. Based upon appellant's accepted conditions of lumbosacral strain and tearing of the L4 annulus, Dr. Slutsky recommended work restrictions of lifting no more than 25 pounds and no prolonged bending or stooping. He further noted that appellant's restrictions could not all be attributed to the accepted diagnoses, and again he related that he would recommend a full neurologic work-up. In an attached work capacity evaluation (Form OWCP-5c), Dr. Slutsky recommended that appellant was able to work an eight-hour day with restrictions. He recommended light-duty work with restrictions of a 15-minute break every 4 hours from bending/stooping, a 15-minute break every 2 hours from squatting and lifting no more than 25 pounds.

On December 17, 2020 the employing establishment offered appellant a modified-duty position as a city carrier assistant 2. The position involved casing and pulling down mail for two hours per day, delivering city routes for six hours per day; delivering parcels within restrictions from six to eight hours per day, and other carrier tasks as assigned within restrictions for six to eight hours per day. The physical requirements of the modified assignment included no lifting over 25 pounds and no prolonged bending or stooping.

On December 22, 2020 appellant refused the modified assignment offer. She noted that she could not physically perform the duties of a carrier position.

By notice dated January 28, 2021, OWCP advised appellant that it had determined that she refused or failed to report to the offered position as a city carrier assistant. It informed her that it had reviewed the offered position and found it was suitable and in accordance with the medical restrictions provided by the IME, Dr. Slutsky, in his November 4, 2020 report. OWCP noted that appellant would get a 15-minute break twice a day along with a 30-minute lunch break. Pursuant to 5 U.S.C. § 8106(c)(2), OWCP afforded appellant 30 days to either accept the position or to provide adequate reasons for refusal. It informed her that an employee who refuses an offer of suitable work without cause is not entitled to wage-loss or schedule award compensation.

In reports dated February 10 and March 8, 2021, Dr. Kotcharian diagnosed lumbar intervertebral disc disorder with radiculopathy and low back pain. He recommended that appellant have her four-wheeled rolling walker to prevent falls and to reduce further injury, along with work restrictions per the FCE.

In an April 19, 2021 letter, OWCP advised appellant that her reasons for not accepting the position offered by the employing establishment were not valid. 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 respond.

By decision dated May 10, 2021, OWCP terminated appellant's compensation and entitlement to a schedule award effective May 6, 2021, as she refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

### **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>3</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>4</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>5</sup> Section 8106(c)(2) will be narrowly construed

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<sup>3</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>4</sup> 5 U.S.C. § 8106(c)(2); see also *B.H.*, Docket No. 21-0366 (issued October 26, 2021); *Geraldine Foster*, 54 ECAB 435 (2003).

<sup>5</sup> See *R.A.*, Docket No. 19-0065 (issued May 14, 2019); *Ronald M. Jones*, 52 ECAB 190 (2000).

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>6</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>7</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>8</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>9</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>10</sup> In a suitable work determination, OWCP must consider preexisting and subsequently-acquired medical conditions in evaluating an employee's work capacity.<sup>11</sup>

Section 8123(a) of FECA provides that if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or IME) who shall make an examination.<sup>12</sup> This is called an IME and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.<sup>13</sup> When there exists opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>14</sup>

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<sup>6</sup> *S.D.*, Docket No. 18-1641 (issued April 12, 2019); *Joan F. Burke*, 54 ECAB 406 (2003).

<sup>7</sup> 20 C.F.R. § 10.517(a).

<sup>8</sup> *Id.* at § 10.516.

<sup>9</sup> *M.A.*, Docket No. 18-1671 (issued June 13, 2019); *Gayle Harris*, 52 ECAB 319 (2001).

<sup>10</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>11</sup> See *G.R.*, Docket No. 16-0455 (issued December 13, 2016); *Richard P. Cortes*, 56 ECAB 200 (2004).

<sup>12</sup> 5 U.S.C. § 8123(a); *R.R.*, Docket No. 19-0086 (issued February 10, 2021); see *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

<sup>13</sup> 20 C.F.R. § 10.321; *R.R.*, *id.*; *P.B.*, Docket No. 20-0984 (issued November 25, 2020); *R.C.*, 58 ECAB 238 (2006).

<sup>14</sup> *Y.I.*, Docket No. 20-0263 (issued November 30, 2020); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

## ANALYSIS

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective May 6, 2021, because she refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

In determining that appellant was physically capable of performing the modified city carrier assistant 2 position, OWCP relied upon the opinion of Dr. Slutsky, the IME.

In a November 4, 2020 report, Dr. Slutsky, serving as the IME, reviewed a SOAF and the medical record. He reviewed her history of present illness and conducted a physical examination. Appellant presented using a walker with wheels and a slow gait. On physical examination of the lumbar spine, the Dr. Slutsky observed no tenderness over the cervical or thoracic spine, diffuse tenderness to the upper lumbar spine on light touch, pain with any attempted range of motion of the lumbar spine, flexion to 25 degrees, extension to 15 degrees limited to severe pain, and rotation of about 15 degrees in either direction. A straight leg raise test produced severe lower back pain. Appellant had decreased sensation of the entire left leg and a glove and stocking distribution to pin prick. She had 3+/5 weakness of every muscle group in her left leg compared to her right leg. Dr. Slutsky opined that he could not explain her weakness and sensory deficit in the left lower extremity. Based upon appellant's accepted conditions of lumbosacral strain and tearing of the L4 annulus, Dr. Slutsky recommended that appellant work an eight-hour day with restrictions. He recommended light-duty work with restrictions of a 15-minute break every 4 hours from bending/stooping, a 15-minute break every 2 hours from squatting and lifting no more than 25 pounds. While Dr. Slutsky based appellant's work restrictions on her accepted conditions, all medical conditions, whether work related or not, must be considered in assessing the suitability of an offered position.<sup>15</sup>

Consequently, the Board finds that there remains an unresolved conflict in the medical opinion evidence with respect to the termination. Because OWCP relied on the opinion of Dr. Slutsky to terminate appellant's wage-loss compensation medical benefits and entitlement to a schedule award, effective May 6, 2021, without having resolved the existing conflict in the medical opinion evidence, OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation benefits and entitlement to a schedule award pursuant to 5 U.S.C. § 8106(c)(2).

The Board finds that OWCP improperly terminated appellant's entitlement to wage-loss and schedule award compensation effective May 6, 2021 because she refused an offer of suitable work.<sup>16</sup>

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<sup>15</sup> *C.M.*, Docket No. 19-1160 (issued January 10, 2020).

<sup>16</sup> *See generally Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

**CONCLUSION**

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective May 6, 2021, as she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 10, 2021 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 3, 2022  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge  
Employees' Compensation Appeals Board