

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

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**J.J., Appellant**

**and**

**U.S. POSTAL SERVICE, FORT GEORGE  
STATION, New York, NY, Employer**

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**Docket No. 16-0047  
Issued: March 16, 2016**

*Appearances:*  
*Paul Kalker, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge  
COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On October 13, 2015 appellant, through counsel, filed a timely appeal from an August 20, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

**ISSUE**

The issue is whether OWCP properly terminated appellant's wage-loss compensation benefits effective April 8, 2014 as he refused an offer of suitable employment under 5 U.S.C. § 8106(c).

**FACTUAL HISTORY**

On January 14, 2002 appellant, then a 38-year-old carrier, filed a traumatic injury claim (Form CA-1) alleging that on January 7, 2002 he experienced low back pain extending into his

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

right leg in the performance of duty. He stopped work on January 7, 2002. OWCP accepted the claim for lumbar strain, left thumb tendinitis, and an aggravation of underlying arthropathy of the thumb. Appellant returned to limited-duty employment on May 6, 2002 but stopped work on May 21, 2002 and did not return. OWCP paid him compensation for total disability.

On January 23, 2012 OWCP referred appellant to Dr. Carl E. Wilson, a Board-certified orthopedic surgeon, for a second opinion examination.<sup>2</sup>

In a report dated February 7 and March 27, 2012, Dr. Wilson reviewed the history of injury, the medical evidence of record, and listed findings on examination. He found that a February 13, 2012 MRI scan showed objective findings of disc desiccation at L4 to S1, a central posterior disc protrusion at L4-5, and a left posterior disc protrusion at L5-S1. On examination Dr. Wilson found a positive straight leg raise on the right. He opined that appellant had permanent disability due to his January 7, 2002 work injury and could not return to his usual employment. Dr. Wilson determined that appellant could work eight hours per day with restrictions of sitting and walking for six hours, standing for three hours, reaching for five hours, pushing and pulling up to 10 pounds, lifting up to 5 pounds, and no bending or stooping. He advised that appellant could not drive at work but could drive to and from work. Dr. Wilson also found that appellant should take a 10-minute break every 2 hours.

On October 3, 2012 OWCP referred appellant for vocational rehabilitation.<sup>3</sup>

In a report dated October 22, 2012, Dr. Sathish Modugu, a Board-certified physiatrist, evaluated appellant for symptoms of low back pain radiating into his legs following a January 7, 2002 work injury. He noted that appellant had not worked since January 2002 and indicated that he was currently receiving disability compensation. Dr. Modugu diagnosed lumbago. He submitted progress reports describing his treatment of appellant for low back pain during 2013.

On May 13, 2013 a social worker indicated that she was treating appellant for major depressive disorder and a generalized anxiety disorder.

On September 5, 2013 the employing establishment offered appellant a position in Edison, New Jersey, lifting up to 10 pounds. By letter dated September 23, 2013, OWCP informed the employing establishment that the offered position was not suitable as it did not adequately describe the duties of the position, was outside appellant's geographical area, and required lifting up to 10 pounds in violation of the work restrictions set forth by Dr. Wilson.

On September 30, 2013 the employing establishment offered appellant a full-time position as a customer care agent in Edison, New Jersey. The position required sitting no more than 6 hours per day, standing no more than 3 hours per day or as needed, no lifting, bending, or

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<sup>2</sup> In a February 1, 2012 progress report, Dr. Alfredo Davila, an attending Board-certified physiatrist, evaluated appellant for chronic low back pain and referred him for a magnetic resonance imaging (MRI) scan study. A February 13, 2012 lumbar spine MRI scan revealed a disc herniation at L5-S1 that had decreased in size since 2008, increased disc degeneration at L1-2, and a small central and right disc protrusion at L4-5. A March 23, 2012 electrodiagnostic study showed right lumbar radiculopathy and mild peripheral neuropathy.

<sup>3</sup> The record contains progress reports from Dr. Davila describing his treatment of appellant for back pain.

stooping, and pushing and pulling no more than 10 pounds with a 10-minute break every 2 hours. The job offer indicated that work would be performed 8 hours a day for 5 days a week or 10 hours a day for 4 days per week.

By letter dated September 30, 2013, the employing establishment advised OWCP that it had identified a position for four hours per day within appellant's local commuting area.

On December 23, 2013 OWCP requested that Dr. Modugu address appellant's current condition and advise whether he could resume his date-of-injury position or perform any work. It enclosed a work capacity evaluation for his completion.

In a progress report dated January 14, 2014, Dr. Modugu indicated that he was treating appellant for low back pain with radiculopathy subsequent to a work injury. He noted that he was currently receiving disability or workers' compensation benefits. Dr. Modugu diagnosed lumbago.

By letter dated February 19, 2014, OWCP notified appellant that the offered position was suitable and provided him 30 days to accept the position or provide reasons for his refusal. It informed him that an employee who refused an offer of suitable work without cause was not entitled to compensation.

On March 12, 2014 appellant refused the offered position due to his medical condition.<sup>4</sup> He submitted a report dated February 26, 2014 from Dr. Herold Abellard, a Board-certified psychiatrist. Dr. Abellard indicated that appellant experienced multiple symptoms including depression, insomnia, and loss of concentration due to his "physical disabilities and pain...." He advised that appellant was verbally threatening and explosive. Dr. Abellard stated, "At this time it is my suggestion that [appellant] not return to work because of the severity of his depression, anxiety, and explosive occurrences."

In a February 28, 2014 report, Dr. Klaudia Nowakiwskyj, a Board-certified internist, indicated that appellant had "recurrent lower extremity deep venous thrombosis and a serious episode of pulmonary embolism, since then he has been on life-long anticoagulant treatment with warfarin. Appellant has to take precautions to avoid injuries and has to avoid prolonged immobility." Dr. Nowakiwskyj found that appellant could drive his car for only short distances and could not walk, sit, or stand for "an eight[-]hour period on a daily basis." She also advised that he experienced periodic panic attacks and dizziness with syncope and took sedating medication for his low back pain with right radiculopathy.

On March 20, 2014 OWCP advised appellant that his reasons for refusing the position were not valid and provided him 15 days to accept the position and resume work or have his compensation benefits terminated. It also confirmed that the position remained available.

By decision dated April 8, 2014, OWCP terminated appellant's compensation and entitlement to a schedule award effective that date as he refused an offer of suitable employment

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<sup>4</sup> In a progress report dated February 26, 2014, Dr. Modugu diagnosed chronic low back pain after a January 2002 work injury and noted that he had not worked since the injury.

under section 8106(c). It found that the opinion of Dr. Wilson represented the weight of the evidence and established that the offered position was suitable. OWCP determined that the opinion of Dr. Nowakiwskyj was not rationalized or based on a complete history and that the opinion of Dr. Abellard was not reasoned or supported by objective findings.

In a report dated September 19, 2014, Dr. Abellard described appellant's work injury and history of medical treatment.<sup>5</sup> He diagnosed major depressive disorder and generalized anxiety disorder and opined that the work injury "caused constant pain resulting in the depression, anxiety, and anger that he is currently experiencing." Dr. Abellard found that appellant was unable to work due to his anxiety and depression.

On May 23, 2015 Dr. Nowakiwskyj found that appellant could not sit or drive a vehicle for more than 30 minutes. She opined that he could not offer customer service to others and that the offered position was more than he was "mentally and physically able to perform."

On March 16, 2015 appellant, through counsel, requested reconsideration. Counsel contended that OWCP erred in accepting only lumbar strain as the accepted back condition. He maintained that appellant sustained depression and anxiety due to his work injury. Counsel argued that the employing establishment did not adequately document why it offered him a position outside his commuting area, noting that the amount of driving required to commute would exceed his daily sitting limitation. He also asserted that OWCP erred in referring appellant to a second opinion physician and that the opinion of Dr. Wilson was stale.

In a decision dated August 20, 2015, OWCP denied modification of its April 8, 2014 decision.

On appeal appellant's counsel argues that the medical evidence establishes that he was not able to perform the offered position. He further contends that the opinion of the second opinion physician was equivocal and not rationalized. Counsel maintains that OWCP acted in an adversarial manner and held the attending physicians to a different standard than that of the second opinion physician.

### **LEGAL PRECEDENT**

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>6</sup> Section 8106(c)(2) of FECA<sup>7</sup> 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 and must inform appellant

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<sup>5</sup> Appellant submitted progress reports dated April 13, 2014 to March 24, 2015 from Dr. Modugu. The physician did not address disability in his progress reports.

<sup>6</sup> *Linda D. Guerrero*, 54 ECAB 556 (2003).

<sup>7</sup> 5 U.S.C. § 8101 *et seq.*

<sup>8</sup> *Id.* at 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

of the consequences of refusal to accept such employment.<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 provides that an employee who refuses or neglects to work after suitable work has been offered to or secured by him, 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>

Before compensation can be terminated, however, OWCP has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work, establishing that a position has been offered within the employee's work restrictions and setting for the specific job requirements of the position.<sup>13</sup> In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, OWCP has the burden of showing that the work offered to and refused by appellant was suitable.<sup>14</sup>

Once OWCP establishes that the work offered is suitable, the burden shifts to the employee who refuses to work to show that the refusal or failure to work was reasonable or justified.<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 state that acceptable reasons for refusing an offered position include medical evidence of inability to do the work.<sup>17</sup>

### ANALYSIS

OWCP accepted that appellant sustained lumbar strain, left thumb tendinitis, and an aggravation of underlying arthropathy of the thumb due to a January 7, 2002 employment injury. He stopped work on May 21, 2002 and received compensation for total disability. On September 30, 2013 the employing establishment offered appellant a position as a customer care

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<sup>9</sup> *Ronald M. Jones*, 52 ECAB 190 (2000).

<sup>10</sup> *Joan F. Burke*, 54 ECAB 406 (2003).

<sup>11</sup> 20 C.F.R. § 10.517(a); *see supra* note 9.

<sup>12</sup> *Id.* at § 10.516.

<sup>13</sup> *See Linda Hilton*, 52 ECAB 476 (2001).

<sup>14</sup> *Id.*

<sup>15</sup> 20 C.F.R. § 10.517(a).

<sup>16</sup> *Gayle Harris*, 52 ECAB 319 (2001).

<sup>17</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(3) (June 2013).

agent. OWCP terminated his compensation effective April 8, 2014 after finding that he had refused an offer of suitable employment. It found that the February 7 and March 27, 2012 opinion of Dr. Wilson, who provided a second opinion examination, constituted the weight of the evidence and established that appellant had the capacity to perform the duties of the offered position.

The Board finds that OWCP improperly relied upon Dr. Wilson's report as it was not a reasonably current medical opinion and, therefore, did not form a valid basis for determining that the offered position was suitable. OWCP must consider an employee's current physical limitations when determining the suitability of a position. Dr. Wilson examined appellant on February 7 and March 27, 2012, more than two years prior to OWCP's April 8, 2014 termination of his wage-loss compensation.<sup>18</sup> 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>19</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>20</sup>

The record does not contain a medical report contemporaneous with OWCP's April 8, 2014 termination of appellant's compensation supporting that the offered position was 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.

### **CONCLUSION**

The Board finds that OWCP improperly terminated appellant's wage-loss compensation benefits, effective April 8, 2014, as he refused an offer of suitable work under 5 U.S.C. § 8106(c).

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<sup>18</sup> See *S.H.*, Docket No. 10-1531 (issued April 13, 2011) (finding that a report more than two years old at the time of OWCP's suitability determination and almost three years old at the time it terminated a claimant's compensation for refusing suitable work was stale and thus insufficient to meet OWCP's burden of proof); *P.M.*, Docket No. 07-132 (issued April 6, 2007) (finding that a report nearly two years old at the time OWCP determined suitability was not reasonably current).

<sup>19</sup> See *Ruth Churchwell*, Docket No. 02-0792 (issued October 17, 2002).

<sup>20</sup> See *A.G.*, Docket No. 08-2265 (issued September 28, 2009) (finding that the report from the impartial medical examiner was stale as she examined the claimant 23 months prior to the job offer).

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 20, 2015 decision of the Office of Workers' Compensation Programs is reversed.

Issued: March 16, 2016  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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