

FACTUAL HISTORY

On October 23, 1998 appellant, then a 33-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that while in the performance of her job duties she was struck by an automobile and suffered injuries to her head, shoulder, and thoracic spine. The employing establishment provided an authorization for examination (Form CA-16) on October 23, 1998. Dr. Ross G. Moorman, a Board-certified internist, diagnosed cervical and thoracic sprain and provided work restrictions. Appellant returned to light-duty work at the employing establishment on November 13, 1998. Appellant's attending physician released her to return to regular full-duty work on January 29, 1999. Appellant returned to limited-duty work on March 2, 1999 and returned to full-duty work by May 14, 1999.

Dr. Steven A. Reid, a Board-certified neurosurgeon, examined appellant on December 2, 2008 and found that her November 5, 2008 magnetic resonance imaging (MRI) scan demonstrated a disc herniation at L4-5. He opined that this condition was due to her employment injury and recommended spine surgery for appellant's herniated disc. OWCP forwarded Dr. Reid's report for review by an OWCP medical adviser. On February 9, 2009 the medical adviser recommended that the surgery not be approved.

On December 15, 1998 OWCP expanded the accepted conditions to include cervical and thoracic strains. It accepted that appellant sustained a displacement of her lumbar intervertebral disc without myelopathy at L4-5 on December 16, 2008.

OWCP referred appellant for a second opinion evaluation with Dr. David Lotman, a Board-certified orthopedic surgeon, to determine the extent and degree of any remaining injury-related disability and the need for lumbar disc surgery. In a report dated April 28, 2009, Dr. Lotman found that appellant had ongoing medical residuals due to her accepted employment injuries. He found that her MRI scan supported a disc herniation at L4, but that her complaints and physical findings were not entirely consistent with this finding. Due to the inconsistencies, Dr. Lotman recommended further testing before consideration of surgery. He completed a work restriction evaluation report and found that appellant could not perform her date-of-injury position. Dr. Lotman indicated that she could work eight hours a day with restrictions on walking, standing, reaching above the shoulder, twisting, bending, and stooping. He indicated that appellant should not push or pull more than 40 pounds and that she should not lift more than 25 pounds.

By decision dated June 18, 2009, OWCP denied authorization for the spine surgery recommended by Dr. Reid on December 2, 2008.

Appellant underwent right medial nerve neuroplasty at the right wrist on August 18, 2009. Dr. Oscar B. DePaz, Board-certified in physiatrist, prescribed massage therapy on March 30, 2009 from that date through July 30, 2009 and OWCP authorized the requested massage therapy.

On September 23, 2009 OWCP later denied authorization for continued massage therapy.

Dr. DePaz performed an electromyogram (EMG) of appellant's lower extremities on November 6, 2009 which was normal with no electrophysiological evidence of acute or chronic radiculopathy or plexopathy affecting the lower extremities.

On January 12, 2010 appellant requested a review of the written record from OWCP's Branch of Hearings and Review regarding the June 18, 2009 denial of authorization for spine surgery. By decision dated January 26, 2010, OWCP's Branch of Hearings and Review denied this request as untimely as it was not made within 30 days from the June 18, 2009 decision denying authorization for surgery.

Dr. DePaz examined appellant on March 20, 2013 due to progression of neck pain. He reviewed a June 8, 2012 MRI scan which demonstrated progression of articular arthropathy at the C4-5 level. Dr. DePaz diagnosed acute neck pain with right C5-6 radiculitis. He opined that appellant was currently totally disabled. Appellant stopped work. The employing establishment informed OWCP that it could not accommodate appellant's restrictions.

Appellant filed CA-7 forms for leave without pay on February 13 to 16, 2013. OWCP paid for 16 hours for medical appointments. She submitted additional claims for compensation (Form CA-17) starting March 13, 2013 and was paid wage-loss compensation for March 13, 2013 supplemental wage-loss payments from March 20 to June 1, 2013, and on the periodic rolls effective June 2, 2013. OWCP authorized wage-loss benefits.

On June 3, 2013 Dr. DePaz performed electrodiagnostic studies due to persistent cervical pain with radiation to the upper extremities. He found appellant's EMG demonstrated mild irritation at the bilateral C5-6 roots, no evidence of overt denervation, and mild irritability at the right C7 distribution. Dr. DePaz reviewed appellant's June 8, 2012 magnetic resonance imaging (MRI) scan and determined that there had been some progression of appellant's articular arthropathy extending from C3 through C6 resulting in probable impingement of the left C4, bilateral C5, and right C6 nerves. He found that appellant was disabled and recommended a neurosurgical consultation.

Dr. Steven M. Bailey, a Board-certified neurosurgeon, examined appellant on July 2, 2013 and noted her history of injury. He recommended light-duty work. Dr. Bailey provided work restrictions of lifting up to 25 pounds, no reaching above the shoulder, and no driving a vehicle at work, but he indicated that appellant could drive her personal vehicle for up to three hours a day. The employing establishment indicated on July 22, 2013 that it continued to have no work within these restrictions. Dr. Bailey repeated his work restrictions on January 28, February 27, and April 30, 2014.

OWCP referred appellant for a second opinion evaluation with Dr. Richard C. Smith, a Board-certified orthopedic surgeon, on March 12, 2014. The statement of accepted facts provided to him noted that appellant had an active case before OWCP for bilateral carpal tunnel syndrome. It further noted that appellant underwent surgery on October 2, 2012 for left carpal tunnel syndrome and received a schedule award for five percent permanent impairment of her left upper extremity.

In a form report dated March 28, 2014, Dr. Smith noted that he had obtained an additional cervical MRI scan and had referred appellant for a functional capacity evaluation (FCE). He described appellant's history of injury and her medical treatment. Dr. Smith diagnosed cervicalgia, lumbago and intervertebral disc disorder of the lumbar region with myelopathy, cervical spondylosis without myopathy, and carpal tunnel syndrome. He opined that appellant could not return to her date-of-injury position and provided work restrictions which were effective until the FCE was completed including no repetitive bending and no lifting over 25 pounds.

In a narrative report dated March 31, 2014, Dr. Smith noted that appellant had neck and radicular pain as well as back pain and some residual symptoms from her bilateral carpal tunnel syndrome. He found that diagnostic studies supported these symptoms including appellant's cervical and lumbar MRI scans and her EMG and nerve conduction studies of the upper extremities. Dr. Smith provided additional work restrictions opining that appellant was unable to lift more than 25 pounds, reach overhead, or use her upper extremities on a repetitive basis.

Dr. Smith referred appellant for an FCE on May 22, 2014. This testing was conducted by physical therapist, Elizabeth Panatages and S. Rob Oyer, a vocational and functional capacity evaluator. These practitioners determined that appellant could perform light work with carrying and lifting 25 pounds from the floor to the waist, occasionally, which was defined as up to two hours a day or 100 repetitions, lift 18 pounds from the waist to the shoulder occasionally, and lift 15 pounds from her waist overhead occasionally, push and pull 25 pounds occasionally and 15 pounds frequently, which was defined as three to five hours a day or 100 to 500 repetitions, sitting constantly, and stand, walk, reach forward, reach overhead, handle, grasp, and manipulate both hands and fingers on her right hand frequently. The FCE demonstrated that appellant could stoop, bend, crawl, stair climb, balance, and finger with her left hand occasionally. Appellant was also noted to have exhibited some symptom magnification behaviors.

Dr. Smith completed a work capacity evaluation (Form OWCP-5c) on June 8, 2014 based on the May 22, 2014 FCE. On this form he indicated that appellant could not return to her date-of-injury position, but that she could work eight hours a day. Dr. Smith provided restrictions that appellant could push, pull, and lift up to 25 pounds for four hours a day.

OWCP requested a supplemental report from Dr. Smith on June 12, 2014 addressing appellant's specific diagnoses, and whether her work-related conditions had resolved. It also requested that Dr. Smith identify the diagnoses causing appellant's current physical limitations.

Dr. DePaz examined appellant on July 29, 2014 and diagnosed cervical disc degeneration C5-6, cervicalgia, and chronic pain syndrome.

On September 19, 2014 the employing establishment informed OWCP that it had offered appellant a limited-duty position as a regular rural carrier, which she had rejected. It provided a position description dated September 11, 2014 which required appellant to case mail for three hours, with a platform and wing provided, and deliver mail for one hour. The physical requirements were no lifting over 25 pounds and driving a personal vehicle for up to three hours. The employing establishment officials met with appellant on September 11, 2014 and indicated that this position would include a platform so that she would not have to reach above her

shoulder, and if that was insufficient, then a wing would be provided and her shelves adjusted so that she would not have to reach above her shoulders. Appellant was to leave any packages over 24 pounds in the office and she was to drive one hour of her route in her vehicle.

In a statement dated September 11, 2014, appellant refused the offered position and noted that she would request a more complete “ruling of suitability” from her physician.

Dr. Smith submitted a November 10, 2014 supplemental report. He diagnosed cervical radiculopathy, cervical spondylosis, and cervical stenosis based on her MRI scan. Dr. Smith opined that the accepted conditions of cervical, thoracic, and lumbar sprains had resolved. He found that she continued to exhibit residuals of her L4-5 disc herniation which had progressed. Dr. Smith opined that appellant’s cervical condition was more serious than a sprain. He found that appellant’s diagnosed conditions resulted in her limited physical capacity.

On March 10, 2015 the employing establishment provided OWCP with a limited-duty position offer based on her FCE. This position, dated February 27, 2015, required appellant to work 8.20 hours a day with scheduled days off of Saturday and Sunday, and was available March 21, 2015. The duties were to deliver mail for six hours and case mail for two hours. The physical requirements were pushing, pulling, and carrying no more than 25 pounds, lifting no more than 25 pounds from the floor to her waist, lifting no more than 18 pounds from the waist to the shoulder, and lifting no more than 15 pounds from her waist to over her head. The average time for each of these tasks was four hours a day. Appellant refused this position on March 6, 2015 alleging that she could not perform repetitive work as this increased her neck pain.

Dr. DePaz completed a report on March 10, 2015 diagnosing cervical disc degeneration, cervicgia, and chronic pain syndrome. He opined that appellant’s work restrictions remained the same and that she could not perform repetitive motions. Dr. DePaz repeated these findings and restrictions on April 28, 2015.

OWCP referred appellant for vocational rehabilitation on March 12, 2015. In a letter dated March 17, 2015, appellant addressed the limited-duty position provided by the employing establishment. She asserted that she was unable to perform repetitive motions as it worsened her condition. Appellant alleged that she would like to return to work within her restrictions. On June 22, 2015 she again noted that the repetitive nature of the offered position would adversely affect her neck conditions.

The employing establishment offered appellant a limited-duty position as a rural carrier on June 10, 2015. The position was available on August 10, 2015. The duties entailed collection of the mail from the employing establishment for 5 minutes, casing mail, pulling down mail, loading her vehicle, and office duties for 2 hours 10 minutes, delivering her route for 6 hours, and returning to the employing establishment for 5 minutes. The physical restrictions included: pushing, pulling, and carrying no more than 25 pounds for four hours; lifting no more than 25 pounds from the floor to her waist for four hours; lifting no more than 18 pounds from her waist to her shoulder for four hours; and lifting no more than 15 pounds from her waist to overhead for four hours. The employing establishment noted that appellant would report to work and retrieve her mail, including a hamper with parcels, trays of mail, letters, and flats. Appellant was then to transport the mail in the hamper to her case which required pushing, pulling, carrying, and lifting

within her restrictions. She was required to case or sort the mail for street delivery which entailed lifting and carrying. After the mail was cased, appellant was required to pull down her case of mail, load her hamper, and load her vehicle. Her next task was to drive her route and deliver the mail which involved driving for several hours, placing letters in mailboxes, and occasionally dismounting her vehicle to deliver a parcel or accountable letter. After completing her deliveries, appellant was to return to the employing establishment and leave empty trays, bins, or outgoing mail which involved pushing and carrying. She refused this position on June 22, 2015 alleging that she could not perform the repetitive duties required.

On July 9, 2015 OWCP advised appellant that the rural carrier position dated June 10, 2015 was suitable work in accordance with her medical restrictions as provided by Dr. Smith. It informed her that the weight of the medical evidence rested with Dr. Smith and his review of her FCE. OWCP noted that the offered position was still available and allowed her 30 days to accept the offered position or provide her reasons for refusal. It further advised appellant that if she refused a suitable work position she would forfeit any further compensation for wage loss or a schedule award.

Dr. Bailey examined appellant on July 21, 2015 and diagnosed cervical disc degeneration C5-6, cervicalgia, chronic pain syndrome, and other spondylosis with radiculopathy cervical region. He found that Spurling's test was positive for numbness and tingling. Dr. Bailey also found neck pain and bilateral arm radiculopathy and recommended an additional cervical MRI scan.

Dr. DePaz completed a report on July 28, 2015 and opined that the offered position did not meet appellant's current work restrictions due to her chronic neck pain as well as tingling and pain in her arms. He noted that Dr. Bailey had referred appellant for an additional cervical MRI scan. Dr. DePaz referred to an attached duty status report (Form CA-17). This report provided restrictions including alternating standing and sitting every one and a half hours, walking with frequent rest, single flight of stairs only, no kneeling, bending, stooping, or twisting. Appellant was to pull and push up to 25 pounds only, perform limited simple grasping and fine manipulation for 15 minutes each, reach above the shoulder less than one or two times a month, and only drive her personal vehicle for up to three noncontinuous hours a day. Dr. DePaz added, "Repetitive neck/arm/shoulder motion caused patient extended periods of pain flare ups usually lasting [one to two] days beyond baseline pain level."

Appellant underwent a cervical MRI scan on August 3, 2015 which demonstrated multilevel degenerative changes of the cervical spine with foraminal stenosis most notable at C3-4, C4-5, and C5-6.

In a letter dated August 13, 2015, appellant noted that she disagreed that the offered position represented suitable work. She noted discrepancies between Dr. Smith's narrative report, his duty status report, the FCE, and the offered position.

In a letter dated August 25, 2015, OWCP reviewed the reasons for appellant's refusal of the offered position and found that the offered reasons were not valid. It allowed appellant an additional 15 days to accept the position and report to the employing establishment. OWCP

noted, “If you do not accept and report to the position during the allotted period, your entitlement to wage loss and schedule award benefits will be terminated.”²

Dr. Bailey completed a report on August 21, 2015 and indicated that appellant could not perform repetitive movements or push or pull over 25 pounds. He provided a lifting restriction of 10 pounds. Dr. Bailey noted that appellant “cannot do repetitive motion,” was “very limited overall,” and “cannot perform duties of rural mail carrier.”

By decision dated September 10, 2015, OWCP terminated appellant’s compensation for wage-loss and schedule award effective September 11, 2015 based on a finding that she refused suitable work, pursuant to 5 U.S.C. § 8106(c)(2). It found that the weight of the medical evidence rested with Dr. Smith and that the offered position was within the work restrictions he provided on June 8, 2014. OWCP further found that appellant had failed to submit any well-reasoned medical evidence establishing that she was incapable of performing the offered position.

On September 17, 2015 OWCP received an August 21, 2015 report from Dr. Bailey who recommended that appellant undergo a posterior C4-6 fusion with lateral mass instrumentation and bilateral foraminotomies at C4-5 and C5-6. OWCP referred Dr. Bailey’s request for surgery to an OWCP medical adviser.

On September 21, 2015 appellant disagreed with the suitable work termination decision of September 10, 2015 and alleged that all doctors opined that she could not perform repetitive motion. She requested additional medical development of her claim by OWCP.

On September 23, 2015 OWCP’s medical adviser noted that appellant’s claim had been accepted for cervical sprain and found that there was no evidence of cervical radiculopathy. He noted that appellant required minimal pain medication and indicated that appellant could continue work as a rural mail carrier. The medical adviser recommended denial of the requested surgery.

In a letter dated October 15, 2015, OWCP requested additional evidence in support of appellant’s claim for cervical spine surgery. Dr. Bailey completed a work capacity evaluation dated October 22, 2015 and indicated that appellant was totally disabled due to her need for surgery.

In a letter dated November 5, 2015, appellant’s representative requested reconsideration of the September 10, 2015 decision terminating appellant’s wage-loss and schedule award compensation benefits for refusal of a suitable work position. He argued that Dr. Smith supported that appellant was unable to lift more than 25 pounds, reach overhead, or use her upper extremities on a repetitive basis. The representative further alleged that appellant had residuals

² The employing establishment provided an investigative report for the period June 10 to August 13, 2015. The record also contains brief digital video clips documenting appellant’s activities on July 27, and 29, 2015 as well as August 26, 2015.

of bilateral carpal tunnel syndrome, which had previously been accepted by OWCP,³ and that this condition and its residuals should be considered in formulating the suitable work position.

By decision dated February 12, 2016, OWCP denied modification of the September 10, 2015 decision finding that appellant had not established that her current cervical condition was related to her employment and that her reasons were insufficient to overturn the suitable work determination.

LEGAL PRECEDENT

It is well settled that once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.⁴ As OWCP in this case terminated appellant's compensation under 5 U.S.C. § 8106(c), OWCP must establish that appellant refused an offer of suitable work. Section 8106(c) of FECA⁵ 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. Section 10.517 of the applicable regulations⁶ provided that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee, has the burden of showing that such refusal or failure to work was reasonable or justified, and shall be provided with the opportunity to make such showing before a determination is made with respect to termination of entitlement to compensation. To justify termination of compensation, OWCP must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.⁷ 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.⁸

OWCP's regulations provide that OWCP shall advise the employee that it has found the offered work to be suitable and afford the employee 30 days to accept the job or present any reasons to counter the finding of suitability. If the employee presents such reasons and OWCP determines that the reasons are unacceptable, it will notify the employee of that determination and that he or she has 15 days in which to accept the offered work without penalty.⁹

It is well established that OWCP must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.¹⁰

³ This separate claim is not currently before the Board.

⁴ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

⁵ 5 U.S.C. § 8106(c)(2).

⁶ 20 C.F.R. § 10.517(a).

⁷ *Arthur C. Reck*, 47 ECAB 339, 341-342 (1995).

⁸ *See Joan F. Burke*, 54 ECAB 406 (2003).

⁹ 20 C.F.R. § 10.516.

¹⁰ *Richard P. Cortes*, 56 ECAB 200 (2004).

ANALYSIS

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and schedule award compensation benefits effective September 11, 2015, under section 8106(c)(2) of FECA for refusal of an offer of suitable work.

OWCP accepted appellant's claim for cervical and thoracic strain as well as herniated disc at L4-5. In a separate claim, it also accepted bilateral carpal tunnel syndrome as employment related. Appellant's attending physicians Dr. DePaz and Bailey also diagnosed chronic neck pain syndrome, cervical disc degeneration, and cervicgia.

OWCP referred appellant for a second opinion evaluation with Dr. Smith, who examined appellant and requested an FCE. Based on this examination Dr. Smith found that appellant could return to work with restrictions of no lifting over 25 pounds. The employing establishment offered appellant a rural carrier position consistent with Dr. Smith's November 10, 2014 report and June 8, 2014 restrictions, which OWCP deemed suitable on July 9, 2015. Dr. Smith based his restrictions on the conditions of bilateral carpal tunnel syndrome, cervical spondylosis, cervical radiculopathy, cervical stenosis, and L4-5 disc herniation.

On July 21, 2015 Dr. Bailey imposed restrictions inconsistent with the offered rural carrier position based upon diagnosis of cervical disc degeneration C5-6, cervicgia, chronic pain syndrome and other spondylosis with radiculopathy cervical region. He also found neck pain and bilateral arm radiculopathy. Dr. DePaz opined on July 28, 2015 that the offered position was not within appellant's work restrictions due to her chronic neck pain as well as tingling and pain in her arms.

Appellant has submitted a series of reports from her physicians noting increasing restrictions due to her subsequently-arising cervical conditions of chronic neck pain syndrome, cervical disc degeneration, and cervicgia which were based on their continuous examination and treatment of appellant. Dr. Bailey and Dr. DePaz both clearly indicated that appellant had additional restrictions due to her subsequently-arising cervical conditions. OWCP's procedures provide that the claimant must be taken as a whole person. If an additional condition arises which results in work restrictions, those restrictions must be considered when making an offer of suitable work. The Board finds that OWCP failed to establish a suitable work position as it did not develop the medical evidence to determine whether appellant was capable of performing the position given her subsequently-arising cervical conditions, including chronic neck pain syndrome, cervical disc degeneration, and cervicgia.¹¹ As a penalty provision, section 8106(c)(2) must be narrowly construed.¹² OWCP did not discharge its burden of proof to justify the termination of appellant's wage-loss compensation benefits and schedule award.

¹¹ See *supra* note 10, see also Federal (FECA) Procedure Manual, Part 2 -- Claim, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.3 (June 1993).

¹² See *Karen Spurling*, 56 ECAB 189 (2004); *Christine P. Burgess*, 43 ECAB 449 (1992).

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's entitlement to wage-loss and schedule award compensation benefits effective September 11, 2015 as she refused an offer of suitable work under section 8106(c)(2) of FECA.

ORDER

IT IS HEREBY ORDERED THAT the February 12, 2016 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 9, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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