

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

S.W., Appellant	)	
	)	
and	)	<b>Docket No. 20-0240</b>
	)	<b>Issued: January 26, 2021</b>
U.S. POSTAL SERVICE, BARTLETT POST OFFICE, Memphis, TN, Employer	)	
	)	

*Appearances:*  
*Appellant, pro se*  
*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 November 11, 2019 appellant filed a timely appeal from an October 25, 2019 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 this case.

**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 24, 2019, because he refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

**FACTUAL HISTORY**

On December 21, 2016 appellant, then a 53-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained severe right wrist pain due to his federal employment duties, including frequent handling and lifting of large boxes and heavy objects. He

---

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

stopped work on December 16, 2016 and returned to part-time work on January 2, 2017. OWCP accepted the claim for unspecified right wrist sprain. Appellant underwent right scapulate ligament repair with intercarpal pinning surgery, which occurred on May 31, 2017, and removal of right wrist implants, which occurred on July 18 and August 23, 2017. OWCP paid appellant wage-loss compensation on the supplemental rolls effective March 13, 2017 and on the periodic rolls effective June 25, 2017.

In a September 27, 2017 report, Dr. David L. Cannon, a Board-certified orthopedic and hand surgeon, noted appellant's history of injury and medical treatment. He also related appellant's physical examination findings. Dr. Cannon diagnosed status right scapholunate ligament disruption, status post intercarpal pinning repair, and status post implants removal and referred appellant for physical therapy. He attached a form report, dated September 27, 2017, in which he noted that he had released appellant to return to light-duty work, wearing a wrist brace, and with a restriction of no lifting or gripping more than 15 pounds.

On October 26, 2017 Dr. Cannon related that appellant's right wrist condition was improving, with increased motion and strength. He indicated that appellant was capable of light-duty work and he increased appellant's lifting/carrying limitation to 30 pounds. Dr. Cannon again attached a form report dated October 27, 2017 in which he noted that appellant should work with a wrist brace, and not perform lifting or gripping over 30 pounds with the right hand.

On November 8, 2017 the employing establishment offered appellant a modified assignment as a city carrier. The duties of the job required two to four hours of casing mail and two to eight hours of delivering routes. The physical restrictions listed were four to eight hours of lifting up to 30 pounds, four to eight hours pulling/pushing, and up to eight hours walking and simple grasping. On November 10, 2017 appellant refused the modified job offer asserting that the limitations required modification.

Dr. Cannon, in a report and form dated November 27, 2017, indicated that appellant was capable of light-duty work with use of a brace and no lifting or gripping more than 35 pounds.

In a December 8, 2017 letter, Susan Townsend, a registered nurse in Dr. Cannon's office advised that appellant's work restrictions included no twisting of the wrist.

Dr. Cannon reported on January 8, 2018 that appellant's right wrist mobility was improving, but he was not gaining as much improvement regarding increased strength. He concluded that appellant should be allowed to work with a brace, and with a lifting restriction of 35 pounds.

In a letter dated February 1, 2018, OWCP forwarded the November 8, 2017 modified job offer to Dr. Cannon for his opinion as to whether appellant could perform the offered job. It requested a response within 30 days.

In response, OWCP received a form report dated January 8, 2018 in which Dr. Cannon noted that appellant should work in a brace, and with restrictions of no lifting or gripping over 35 pounds with the right hand/wrist, and no twisting of the wrist.

On February 7, 2018 OWCP referred appellant for a second opinion evaluation with Dr. James T. Galyon, a Board-certified orthopedic surgeon, to determine the status of his accepted condition and work capacity.

Dr. Cannon provided in a February 19, 2018 report, that appellant's work restrictions were working with a wrist brace and no lifting more than 35 pounds. In a form report of the same date, he noted appellant's restrictions as "work in brace, no lifting or gripping over 35 pounds with the right hand/wrist, and no twisting of the wrist."

In a February 28, 2018 report, Dr. Galyon noted appellant's histories of injury and medical treatment. He indicated that appellant's physical examination of the left wrist revealed pain on excess strain, weakness, and restricted range of motion. Dr. Galyon opined that appellant sustained a left wrist sprain on December 16, 2016 and that he currently had a persistent left scapholunate subluxation at the scaphoid joint. He reviewed the November 8, 2017 modified job offer and concluded that the job was not suitable. Dr. Galyon explained that appellant still had significant restricted lifting and pulling ability and he did not believe appellant was capable of two to eight hours of casing and delivering mail. In an attached work capacity evaluation (Form OWCP-5c), he indicated that appellant was capable of working up to two hours per day with restrictions and that his restrictions were permanent. The restrictions included up to one hour of reaching/reaching above the shoulder, one hour of repetitive wrist motion, and pulling/pushing/lifting limited to five pounds.

Dr. Galyon, in a March 28, 2018 supplemental report, advised that he mistakenly referred to the left wrist when the examination was of the right wrist.

In an April 2, 2018 report, Dr. Cannon noted that appellant was seen for right wrist pain complaint. He provided appellant's physical examination findings and concluded that appellant still had some limitations, but this did not mean that appellant could not return to work in some capacity at the employing establishment. Dr. Cannon reported that appellant continued to have the same limitation of 35 pounds lifting and gripping, and that he should be able to use a splint at work. He completed an April 2, 2018 form report wherein he again provided appellant's restrictions as "work in brace, no lifting or gripping over 35 pounds with the right wrist/hand, no twisting wrist."

On April 9, 2018 appellant underwent a functional capacity evaluation (FCE) as ordered by Dr. Cannon. The FCE found appellant was capable of performing medium work range of 21 to 50 pounds, and occasional gripping and pinching of the right upper extremity for one minute, up to 2 hours and 30 minutes based on an 8-hour day.

On May 2, 2018 the employing establishment offered appellant a modified assignment as a city carrier. The duties of the job required two to four hours of casing mail and two to eight hours of delivering routes. The physical restrictions listed were four to eight hours of lifting up to 35 pounds, four to eight hours pulling/pushing, and up to eight hours walking and simple grasping. On May 2, 2018 appellant refused the offered modified job asserting it was not based on Dr. Galyon's work restrictions.

On July 30, 2018 the employing establishment offered appellant a modified assignment as a city carrier. The duties of the job required one hour of casing mail and one to three hours of

taking parcels and cut offs to streets. The physical restriction listed were one to three hours of lifting up to five pounds, one to eight hours of walking/driving, one to three hours of simple grasps, and one hour of reaching. Appellant accepted the job offer.

Dr. Cannon, in an August 20, 2018 report, provided physical examination findings and concurred with Dr. Galyon's work restrictions, which were for administrative or clerical work.

In a letter dated August 30, 2018, the employing establishment informed OWCP that while appellant accepted the July 30, 2018 job offer, he had not reported to work.

On August 31, 2018 OWCP requested that Dr. Galyon review an updated statement of accepted facts (SOAF)<sup>2</sup> and the April 9, 2018 FCE, and advise whether there was any change in appellant's work restrictions.

On October 22, 2018 OWCP received an updated modified city carrier job offer dated August 17, 2018. Work hours were listed as 8:00 a.m. to 16:50 p.m. The duties of the job required one hour of casing routes, one hour of removing and replacing case labels, and one hour of sedentary work. The physical restrictions were one hour of lifting up to five pounds, one hour of walking, one hour of reaching/reaching above the shoulder, and one hour of pushing/pulling. On November 4, 2018 appellant refused the job offer.

In a November 16, 2018 supplemental report, Dr. Galyon reviewed appellant's April 9, 2018 FCE, which he advised clearly showed significant right wrist loss of dexterity and strength. He opined that appellant had sustained a serious injury with progressive deterioration. Dr. Galyon indicated that "he will not be able to do repetitious work with his right hand, even light work like 5 or 10 pounds repetitious or frequent." He also indicated that appellant could lift up to 25 pounds occasionally, but not repeatedly, and that there was a possibility that appellant's work restrictions would progress.

In a letter dated December 3, 2018, OWCP advised appellant of its determination that the modified city carrier position offered by the employing establishment was suitable based on the February 28, 2018 report and November 16, 2018 supplemental report from Dr. Galyon and the April 9, 2018 FCE. OWCP noted that the position was within his work restrictions. It advised appellant that pursuant to 5 U.S.C. § 8106(c)(2) his wage-loss compensation and entitlement to a schedule award would be terminated if he did not accept the job offer or provide good cause for not doing so within 30 days of the date of the letter.

Subsequent to the December 3, 2018 letter, OWCP received an October 22, 2018 report from Dr. Cannon. Dr. Cannon provided physical examination findings and diagnosed right de Quervain's syndrome, which he opined was likely due to his prior wrist injuries and surgeries. Appellant stated that he would like to return to work, but that the employing establishment was not providing work within his restrictions.

In a December 3, 2018 report, Dr. Cannon noted appellant's physical examination findings. He concluded that appellant's right de Quervain's syndrome had resolved.

---

<sup>2</sup> The August 31, 2018 SOAF noted appellant's accepted condition as "Unspecified Sprain of Right Wrist."

On December 26, 2018 OWCP received undated letters from appellant to the employing establishment concerning a new modified job offer delivered to his home by certified mail on December 19, 2018.

Appellant retired from the employing establishment effective February 28, 2019.

On February 4, 2019 OWCP requested that Dr. Galyon provide an updated Form OWCP-5c in order to assist it with obtaining suitable employment for appellant. In a February 25, 2019 Form OWCP-5c, Dr. Galyon diagnosed right wrist ligament tear and failed repair. He determined that appellant was capable of working four hours per day with restrictions. The restrictions included up to three hours of reaching, up to one hour of pulling and pushing, up to 10 pounds and lifting, and up to one hour of repetitive wrist and elbow movements, and no climbing. He advised, in a March 1, 2019 report, that appellant could perform light or sedentary with a 10-pound lifting limit.

On April 11, 2019 the employing establishment offered appellant a modified city carrier job working 8:00 a.m. to 12:30 p.m. The duties of the position required up to one hour of casing mail, up to one hour of casing labels, up to one hour of handling undeliverable bulk business mail, and up to one hour performing administrative duties. The physical requirements of the position included up to one hour of lifting no more than eight pounds, up to one hour of walking, up to one hour of reaching/reaching above the shoulder, and up to one hour pushing/pulling. On the second page of the job offer, the employing establishment noted that the restrictions were based on the opinion of second opinion physician including no more than four hours of work per day, reaching up to three hours per day, up to one hour per day of repetitive wrist and elbow movement, up to one hour per day of pushing/pulling/lifting up to 10 pounds per day, and no climbing. Appellant refused the job offer asserting that it did not meet his physical restrictions.

In a letter dated June 18, 2019, OWCP advised appellant of its determination that the modified city carrier position offered by the employing establishment by notice dated April 11, 2019 was suitable based on the February 28, 2018 report and supplemental reports dated November 16, 2018, February 25, and March 1, 2019 from Dr. Galyon. It noted that the position was within his work restrictions. OWCP advised appellant that pursuant to 5 U.S.C. § 8106(c)(2) his wage-loss compensation and entitlement to a schedule award would be terminated if he did not accept the job offer or provide good cause for not doing so within 30 days of the date of the letter.

On June 25, 2019 OWCP received appellant's undated response. Appellant asserted that the April 11, 2014 job offer was not within Dr. Galyon's work restrictions. He noted that the job offer lacked any specific weight restrictions with respect to pushing and pulling.

In a July 17, 2019 letter to the employing establishment, OWCP noted that the April 11, 2019 modified job offer failed to contain the weight restriction for pulling and pushing.

In a letter dated August 13, 2019 to OWCP, the employing establishment noted that a permanent job offer was not available, but a modified assignment had been identified within appellant's restrictions, and the job offer remained available. It attached a copy of the April 11, 2019 modified job offer. On the second page of the job offer the employing establishment noted that "this assignment is currently available and is subject to revision based on changes in your

physical restrictions and/or the availability of work. If a revision is necessary, you will be given a revised written modified assignment.”

OWCP, in an August 13, 2019 letter, advised appellant that his reasons for refusing to accept the modified city carrier position were unjustified. On July 17, 2019 the employing establishment clarified that the April 11, 2014 job offer appellant had been given consisted of two pages with weight limits for pushing/pulling/lifting noted on the second page of the job offer. 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.

On September 6, 2019 appellant elected to receive retirement benefits from the Office of Personnel Management in lieu of FECA benefits effective August 18, 2019.

By decision dated October 25, 2019, OWCP terminated appellant’s entitlement to wage-loss compensation and a schedule award effective October 24, 2019, because he refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2). It determined that the duties and physical requirements of the April 11, 2019 job offer were suitable based on the work restrictions prescribed by Dr. Galyon. OWCP found that appellant’s reasons for his job refusal and his failure to report to work were not justified because the position was within his treating physician’s restrictions.

### **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) of FECA (5 U.S.C. § 8106(c)(2)), 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>6</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

---

<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).

<sup>5</sup> *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>6</sup> *S.D.*, Docket No. 18-1641 (issued April 12, 2019); *Joan F. Burke*, 54 ECAB 406 (2003).

and other relevant factors.<sup>7</sup> A temporary job will be considered unsuitable for the purposes of 5 U.S.C. § 8106(c)(2) unless the claimant was a temporary employee when injured and the temporary job reasonably represents the claimant's wage-earning capacity. Even if these conditions are met, a job which will terminate in less than 90 days will be considered unsuitable.<sup>8</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>9</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>10</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>11</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 October 24, 2019, for refusing an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

On April 11, 2019 the employing establishment offered appellant the position of modified city carrier. The physical requirements of the offered position were within appellant's medical restrictions provided by Dr. Galyon, in his capacity as a second opinion referral physician. However, the employing establishment advised OWCP by letter dated August 13, 2019 that a permanent job offer was not available and that the April 11, 2019 modified assignment had been identified to be within appellant's restrictions. It confirmed that the modified job offer remained available.

As previously noted, OWCP's procedures relate that a temporary job will be considered unsuitable for the purposes of 8106(c) unless the claimant was a temporary employee when injured and the temporary job reasonably represents the claimant's wage-earning capacity.<sup>12</sup>

The record does not support a finding that appellant was a temporary employee at the time of injury. The employing establishment explained in its August 13, 2019 letter that the April 11, 2019 modified job offer was made because a permanent job offer was not available. The Board thus finds that the April 11, 2019 modified job offer was temporary in nature and not a permanent job offer.

---

<sup>7</sup> *Supra* note 6 at Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.(4)(c) (June 2013).

<sup>8</sup> *Id.* at Chapter 2.814.4(c)(5) (June 2013); *see also R.A.*, Docket No. 19-0065 (issued May 14, 2019); *Leonard W. Larson*, 48 ECAB 507 (1997).

<sup>9</sup> 20 C.F.R. § 10.517(a).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 10.516.

<sup>12</sup> *Supra* footnote 10.

The Board therefore finds that OWCP improperly determined that the April 11, 2019 modified job offer was suitable.<sup>13</sup> OWCP did not meet its burden of proof to terminate 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 October 24, 2019, for refusing an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 25, 2019 decision of the Office of Workers' Compensation Programs is reversed.

Issued: January 26, 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

---

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