



## 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 18, 2023, because she refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

## FACTUAL HISTORY

On July 22, 2017 appellant then a 55-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging on that date she injured her back, buttocks, head, neck, right knee and both hands when lifting a parcel she slipped and fell from her postal vehicle while in the performance of duty. She stopped work on that date. OWCP accepted the claim for lumbar sprain/strain, cervical sprain/strain, right shoulder strain, and contusions of the head, right hand, bilateral wrists, and left elbow. It paid compensation on the supplemental rolls beginning September 7, 2017 and on the periodic rolls beginning September 19, 2020. OWCP expanded acceptance of the claim to include triangular fibrocartilage complex sprain of the left wrist, left radial styloid tenosynovitis, left hip trochanteric bursitis, and cervical and lumbar radiculopathies.

On September 14, 2021 OWCP referred appellant, along with a statement of accepted facts (SOAF), a copy of the case record, and a series of questions, to Dr. Leon Sultan, a Board-certified orthopedic surgeon, for a second opinion evaluation.

In an October 12, 2021 report, Dr. Sultan evaluated appellant, noted her history of injury and medical treatment, and provided physical examination findings. He diagnosed head contusion, resolved, cervical spine strain, resolved, lumbar spine derangement superimposed over a preexisting multilevel lumbar disc disease, unresolved, and trauma to the left elbow and wrist, clinically resolved. Dr. Sultan found that appellant was incapable of returning to her date-of-injury position as a letter carrier and that work restrictions were medically warranted. In his report and in an October 21, 2022 work capacity evaluation (Form OWCP-5c), he opined that she required restrictions on sitting, pushing, pulling, carrying, lifting, squatting, stooping, and crawling. Dr. Sultan related that appellant could engage in light-work activities, eight hours a day lifting up to 20 pounds using both hands.

On March 29, 2022 Dr. Laurence Mermelstein, a Board-certified orthopedic surgeon, examined appellant and found that she was totally disabled due to lumbar radiculopathy, lumbar stenosis with neurogenic claudication, herniated disc L4-5, and lumbar degenerative disc disease. He repeated these findings and diagnoses in an attending physician's report, (Form CA-20) of even date.

In reports dated June 9 and June 17, 2022, Dr. Mermelstein, opined that appellant had continued marked partial disability and that she was restricted to standing or walking for no longer than 10 to 15 minutes, to sitting no longer than 35 minutes at a time without changing position, and to no repetitive lifting of no greater than 10 to 15 pounds. He completed a June 16, 2022 Form CA-20 advising that appellant was unable to return to work.

In a letter dated October 3, 2022, OWCP informed appellant that a conflict of medical evidence existed between Dr. Mermelstein and Dr. Sultan necessitating referral to an impartial medical examiner (IME) to resolve the issue of the extent of her work restrictions.

On December 7, 2022 OWCP referred appellant, a SOAF, and a series of questions to Dr. Donald Cally, a Board-certified orthopedic surgeon designated as an IME, to resolve the existing conflict of medical opinion evidence.

In a January 19, 2023 report, Dr. Cally described appellant's accepted employment incident and her current symptoms of constant low back pain, intermittent neck pain with headaches, and left wrist pain with activity. He reviewed the SOAF and responded to OWCP's queries finding that she continued to experience residuals of her accepted low back conditions and relating that she was not capable of returning to her date of injury position. Dr. Cally agreed with the work restrictions provided by Dr. Mermelstein's June 17, 2022 report including: no sitting longer than 35 minutes at a time, no lifting greater than 10 to 15 pounds, and no standing or walking longer than 10 to 15 minutes at a time. In an attached form work capacity evaluation (Form OWCP-5c) he opined that appellant could not return to her date-of-injury position and indicated that she could performed sedentary or light strength level work.

Dr. Mermelstein examined appellant on May 11, 2023 and found that she was partially disabled. He did not provide additional work restrictions.

In a letter dated July 10, 2023, the employing establishment offered appellant a part-time, limited-duty assignment as a modified city carrier at the East Hampton Post Office. The workdays and hours were Monday to Thursday and Saturday, from 7:30 a.m. to 11:30 a.m. The duties of the job required casing mail/pulling down mail into trays and answering telephone calls. The physical requirements of the job were classified as sedentary and involved lifting up to 15 pounds, sitting up 35 minutes at a time, and standing and walking no more than 15 minutes at a time. It noted that the job was available effective July 29, 2023. On July 15, 2023 appellant declined the position as she felt unable to sit for longer than 30 minutes at a time including commuting time. She asserted that she needed intervals to lie down, could not walk distances without support, could not bend or lift.

On August 25, 2023 OWCP advised appellant that it found the July 10, 2023 job offer was suitable work within the work limitations provided by Dr. Cally. It afforded her 30 days to accept the offered position or to provide valid reasons for refusal.

Appellant responded on September 22, 2023 declining the offered suitable work position. She again asserted that she was not able to commute the 43 miles one way from her home address of record to the employing establishment which she estimated could require up to two hours of travel time. Appellant provided a September 12, 2023 report from Mohammed W. Sanzar, a physician assistant.

On September 28, 2023 OWCP notified appellant that the job remained available to her and that she had 15 days to accept the offered modified position and report for work. It further notified her that if she either did not provide a valid reason for accepting the job offer, or failed to

report for work, it would terminate her compensation benefits and entitlement to a schedule award, pursuant to 5 U.S.C. § 8106(c)(2).

Appellant completed a narrative statement asserting that she could not complete the 44-mile one way commute to the East Hampton Station from her home within 35 minutes allotted for sitting by Drs. Cally and Mermelstein. She based her argument on the directions between the two locations provided by the internet navigation sites, Google Maps and Waze. Appellant also provided a May 1, 2023 report from Dr. Nabil Farakh, an osteopath, relating her chronic left hip pain with severe osteoarthritis and trochanteric bursitis. Dr. Mermelstein completed a September 15, 2023 Form CA-20 indicating that she was partially disabled. She provided an illegible form report. On September 18, 2023 appellant underwent a left hip magnetic resonance imaging (MRI) scan demonstrating moderate left hip arthropathy.

By decision dated October 18, 2023, OWCP terminated appellant's wage-loss compensation and entitlement to schedule award benefits, effective that date, under 5 U.S.C. § 8106(c)(2), as she refused an offer of suitable work. It found that the July 10, 2023 job offer was suitable based upon her current work restrictions as provided by Dr. Cally on January 19, 2023. OWCP also found that appellant's reasons for job refusal were not justified.

On October 26, 2023 appellant, through counsel requested a hearing before an OWCP hearing representative. A telephonic hearing was held on January 11, 2024 and appellant confirmed her address of record.

By decision dated March 27, 2024, OWCP's hearing representative affirmed OWCP's October 18, 2023 decision.

### **LEGAL PRECEDENT**

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify 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 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 as it serves as a

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<sup>3</sup> See *S.W.*, Docket No. 20-0240 (issued January 26, 2021); *A.D.*, Docket No. 18-0497 (issued July 25, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

<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).

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 provides that an employee who refuses or neglects to work after suitable work has been offered or secured by the employee, has the burden of proof to show 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 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>

### ANALYSIS

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award compensation, effective October 18, 2023.

In a January 19, 2023 report, Dr. Cally, the IME, provided work restrictions including: no sitting longer than 35 minutes at a time, no lifting greater than 10 to 15 pounds, and no standing or walking longer than 10 to 15 minutes at a time. On July 10, 2023 the employing establishment offered appellant a part-time, limited-duty assignment as a modified city carrier at the East Hampton Post Office. The physical requirements of the job assignment were within the work restrictions provided by Dr. Cally. However, appellant repeatedly contended before OWCP that the commute from her address of record to the East Hampton Post Office, exceeded her physical restrictions as she could sit no longer than 35 minutes at a time and as her commute from her address of record significantly exceeded this limitation.

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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; see *Ronald M. Jones*, 52 ECAB 406 (2003).

<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); *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).

OWCP procedures provide that an acceptable reason for refusing an offered position is that the medical evidence establishes that the claimant is unable to travel to the job.<sup>12</sup> In the current case, OWCP did not address appellant's contentions that the commute between her address of record and the location of the modified duty-job offer exceeded her travel/sitting restrictions or undertake further development of this issue. The Board has repeatedly held that it was reversible error for OWCP to terminate appellant's compensation benefits without undertaking development to elicit positive medical evidence that the commute is within established restrictions.<sup>13</sup> As a penalty provision section 8106(c)(2) must be narrowly construed.<sup>14</sup>

The Board finds that OWCP did not substantiate that the commute from appellant's address of record to the employing establishment was within her established work restrictions. OWCP, therefore, did not properly determine that the offered position was suitable.

### 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 18, 2023, because she refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

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<sup>12</sup> *Supra* note 11.

<sup>13</sup> *C.W.*, Docket No. 10-2074 (issued May 23, 2011); *W.F.*, Docket No. 10-1828 (issued May 13, 2011); *B.S.*, Docket No. 09-1067 (issued February 2, 2010); *M.H.*, Docket No. 09-0252 (issued October 23, 2009); *R.B.*, Docket No. 08-2154 (issued May 8, 2009); *M.N.*, Docket No. 07-0873 (issued November 9, 2007); *Janice S. Hodges*, 52 ECAB 370 (2001); but *see B.R.*, Docket No. 19-0088 (issued August 13, 2019)(appellant voluntarily moved further from the employing establishment); *R.L.*, Docket No. 16-1275 (issued September 27, 2017)(appellant's physician indicated that he should consider public transportation); *Eric Alexander*, Docket No. 06-0581 (issued July 10, 2006)(the employing establishment indicated that door-to-door transportation would be provided).

<sup>14</sup> *Supra* note 13; *Karen M. Nolan*, 57 ECAB 589 (2006); *see Stephen A. Pasquale*, 57 ECAB 396 (2006).

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 27, 2024 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 6, 2024  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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