

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

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<b>J.O., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 24-0278</b>
	)	<b>Issued: May 17, 2024</b>
<b>DEPARTMENT OF VETERANS AFFAIRS,</b>	)	
<b>MINNEAPOLIS VA MEDICAL CENTER,</b>	)	
<b>Minneapolis, MN, Employer</b>	)	
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*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On January 25, 2024 appellant filed a timely appeal from a December 20, 2023 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.<sup>2</sup>

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

<sup>2</sup> The Board notes that following the December 20, 2023 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## **ISSUE**

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective December 20, 2023, because she refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

## **FACTUAL HISTORY**

On September 11, 2012 appellant, then a 57-year-old licensed practical nurse, filed a traumatic injury claim (Form CA-1) alleging that on August 30, 2012 she sustained neck pain, headaches, and swelling on the left side of her neck when bending over to examine a patient while in the performance of duty. OWCP accepted the claim for neck sprain. It subsequently expanded its acceptance of the claim to include a permanent aggravation of degenerative disc disease at C4 and C5-6. OWCP paid appellant wage-loss compensation for disability on the periodic rolls effective November 15, 2014. On April 16, 2015 Dr. Mahmoud G. Nagib, a Board-certified neurosurgeon, performed an anterior cervical discectomy, decompression, and fusion at C4-5 and C5-6 with placement of a cage.

A May 31, 2016 report of a functional capacity evaluation (FCE) performed on May 24 and 25, 2016 indicated that appellant could perform sedentary work, changing positions and taking breaks to stretch as needed.

On April 9, 2018 Dr. Edwin H. Funk, a Board-certified internist and appellant's attending physician, discussed her history of an August 30, 2012 work-related injury. He diagnosed cervical degenerative disc disease, status post cervical fusion, and paresthesia. Dr. Funk indicated that appellant had been released to return to work based on the restrictions of the FCE.

In a report dated January 23, 2023, Dr. Funk evaluated appellant for an exacerbation of chronic neck pain. He recounted her history of a cervical fusion in April 2015. Dr. Funk diagnosed acute neck pain, chronic neck pain, status post spinal surgery, and a work-related injury. He noted that appellant remained off work "despite being available for work within her FCE restrictions now for several years."

On March 6, 2023 Dr. Funk indicated that he was treating appellant for cervical radiculopathy due to her employment. He related that she had been "released to work based upon an FCE dated May 31, 2016, but has not been recalled to work." Dr. Funk noted that appellant had increased neck pain and required a physical therapy evaluation.

The employing establishment, on May 30, 2023, offered appellant a position as a medical support assistant beginning no later than July 16, 2023. It advised that it was a full-time sedentary position and that she could change positions and take stretch breaks as needed. The shift was Monday through Friday with work hours from 7:30 a.m. until 4:00 p.m.

On June 7, 2023 appellant accepted the position of medical support assistant.

On June 19, 2023 Dr. Funk noted that he had released appellant to work with restrictions, but that she was "not working." He again advised that appellant could "[m]aintain current work restrictions" as per the May 31, 2016 FCE.

In a report dated July 13, 2023, Dr. Leela Engineer, a Board-certified psychiatrist, evaluated appellant for chronic neck pain. She diagnosed chronic neck pain, myofascial pain, a history of a cervical fusion, and cervical foraminal stenosis. Dr. Engineer recommended a medical marijuana trial.<sup>3</sup>

In an August 3, 2023 letter, the employing establishment advised appellant that her onboarding had been delayed and that she would receive an e-mail within a week to begin onboarding. It informed her that it would provide a new date to begin work once she was onboarded.

On August 24, 2023 J.G. indicated that appellant had telephoned asking whether using cannabis would affect her ability to work. He responded that onboarding would provide her with more information. J.G. related that appellant “mentioned she had returned the [j]ob [o]ffer on August 21, 2023, and she was in contact with Onboarding.”

On October 23, 2023 the employing establishment requested that OWCP provide a suitability determination on its May 30, 2023 job offer. It advised that appellant had requested that it waive “its federally mandated requirements of cannabis use and carrying while on federal property.” The employing establishment asserted that this constituted “a constructive refusal” of the job offer. It provided an e-mail string between appellant and its onboarding specialist, M.S. regarding her inquiries about returning to work.

In an e-mail dated September 27, 2023, M.S. asked appellant to complete attached forms and asked if she had scheduled her fingerprint appointment. In a response of even date, appellant informed M.S. that she was taking medical cannabidiol (CBD) and delta-9-tetrahydrocannabinol (THC), which she noted was against federal law. She asked if the use of CBD/THC would prevent her from working at the employing establishment.

In an October 4, 2023 e-mail, M.S. advised appellant that her prescribed medications were between her and her physician and that the employing establishment had provided her with a job offer and accommodations. He requested that she complete an attached form if she wanted to proceed.

In an e-mail dated October 13, 2023, appellant related, “Before I continue with my onboarding, I would like a signed waiver by a person of authority, that I shall not be arrested, prosecuted or terminated for the possession and/or use of my medically prescribed CBD/THC on federal property.” She also expressed concern about her ability to stay awake after 9:00 or 9:30 p.m. given her age and the chance of her falling asleep on her hour drive home after work. M.S. forwarded this e-mail to management and requested assistance on how to respond.

By letter dated November 17, 2023, OWCP advised appellant that it had determined that the May 30, 2023 offered position was suitable and afforded her 30 days to accept the position or provide reasons for her refusal. It found that the position was in accordance with the limitations provided by Dr. Funk in his January 23, 2023 report. OWCP informed appellant that an employee who refused an offer of suitable work without cause was not entitled to wage-loss or schedule award compensation, pursuant to 5 U.S.C. § 8016(c)(2). It notified her that it would render a

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<sup>3</sup> On July 18, 2023 a nurse certified appellant for medical cannabis use due to chronic pain.

decision at the end of the 30-day period based on the evidence of record. OWCP further notified appellant that she would receive any difference in pay between the offered position and the current pay rate of the position held at the time of injury.

In a memorandum of telephone call (Form CA-110) dated December 19, 2023, the employing establishment confirmed that the May 30, 2023 offered position remained available and was a permanent position.

By decision dated December 20, 2023, OWCP terminated appellant's wage-loss compensation and entitlement to a schedule award effective that date as she had refused an offer of suitable work under 5 U.S.C. § 8106(c)(2).

### **LEGAL PRECEDENT**

Under FECA,<sup>4</sup> once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of compensation benefits.<sup>5</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>6</sup>

Section 10.517 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 showing before a determination is made with respect to termination of entitlement to compensation.<sup>8</sup>

To justify termination of compensation, OWCP must show that the work offered was suitable, that appellant was informed of the consequences of his or her refusal to accept such employment, and that he or she was allowed a reasonable period to accept or reject the position and submit evidence or provide reasons why the position is not suitable.<sup>9</sup> Section 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>10</sup>

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<sup>4</sup> *Supra* note 1.

<sup>5</sup> *M.S.*, Docket No. 20-0676 (issued May 6, 2021); *D.M.*, Docket No. 19-0686 (issued November 13, 2019); *L.L.*, Docket No. 17-1247 (issued April 12, 2018); *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

<sup>6</sup> *Supra* note 1 at § 8106(c)(2); *see also M.S., id.*; *M.J.*, Docket No. 18-0799 (issued December 3, 2018); *Geraldine Foster*, 54 ECAB 435 (2003).

<sup>7</sup> 20 C.F.R. § 10.517.

<sup>8</sup> *Id.* at § 10.516; *see M.S., supra* note 5; *Ronald M. Jones*, 52 ECAB 406 (2003).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.4 (June 2013); *see also R.A.*, Docket No. 19-0065 (issued May 14, 2019).

<sup>10</sup> *B.H.*, Docket No. 21-0366 (issued October 26, 2021); *C.M.*, Docket No. 19-1160 (issued January 10, 2020); *see also Joan F. Burke*, 54 ECAB 406 (2003).

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>11</sup> OWCP's 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>12</sup> In a suitable work determination, OWCP must consider preexisting and subsequently-acquired medical conditions in evaluating an employee's work capacity.<sup>13</sup>

When the employing establishment extends an offer of modified-duty work, the offer must be in writing and must include the following information: (1) a description of the duties to be performed; (2) the specific physical requirements of the position and any special demands of the workload or unusual working conditions; (3) the organizational and geographical location of the job; (4) the date on which the job will first be available; and (5) the date by which a response to the job offer is required.<sup>14</sup> The employing establishment should also provide pay rate information for the offered job.<sup>15</sup>

### ANALYSIS

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss and compensation and entitlement to a schedule award effective December 20, 2023.

On January 23 and March 6, 2023 Dr. Funk, appellant's attending physician, advised that she could work within the restrictions of the May 2016 FCE, which indicated that she could perform sedentary work changing positions and taking stretch breaks as needed.

On May 30, 2023 the employing establishment offered appellant a position as a medical support assistant beginning July 16, 2023. The position was sedentary, with the ability to change positions and take breaks to stretch as needed. Appellant accepted the position on June 7, 2023. Subsequently, however, on August 3, 2023, the employing establishment advised that her onboarding had been delayed and that after her onboarding it would provide her with a new date to start work. The record, however, does not contain a new start date for the position.<sup>16</sup>

As noted above, OWCP procedures require that a job offer must be in writing and contain the date that the job is available.<sup>17</sup> The Board finds that the modified job offer is insufficient to

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<sup>11</sup> *M.A.*, Docket No. 18-1671 (issued June 13, 2019); *Gayle Harris*, 52 ECAB 319 (2001).

<sup>12</sup> *See supra* note 9 at Chapter 2.814.5a (June 2013); *see D.P.*, Docket No. 21-0596 (issued August 31, 2021).

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

<sup>14</sup> *See supra* note 9 at Chapter 2.814.4a(1).

<sup>15</sup> *Id.*

<sup>16</sup> Additionally, the Board notes that the record does not contain a 15-day letter pursuant to 20 C.F.R. § 10.516.

<sup>17</sup> *Supra* note 14; *see also M.G.*, Docket No. 07-1515 (issued January 18, 2008).

base a termination of compensation for refusal of suitable work as it failed to contain an accurate start date.<sup>18</sup>

As a penalty provision, section 8106(c)(2) must be narrowly construed.<sup>19</sup> As the record contains no valid start date for the offered position, OWCP did not discharge its burden of proof to support the termination of her wage-loss compensation and entitlement to a schedule award pursuant to section 8106(c)(2).

### **CONCLUSION**

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss and compensation and entitlement to a schedule award effective December 20, 2023.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the December 20, 2023 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 17, 2024  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

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<sup>18</sup> *Id.*

<sup>19</sup> *See B.H.*, Docket No. 22-0993 (issued November 28, 2022); *S.S.*, Docket No. 20-0123 (issued July 28, 2022); *A.M.*, Docket No. 12-1301 (issued March 14, 2013).