

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

A.P., Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,
Houma, LA, Employer

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**Docket No. 13-30
Issued: March 18, 2013**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 3, 2012 appellant filed a timely appeal of an August 27, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 effective March 9, 2012 on the grounds that she refused an offer of suitable work.

FACTUAL HISTORY

On January 9, 2006 appellant, then a 49-year-old distribution clerk, filed a Form CA-2 alleging that she injured her neck and wrists as a result of repetitive sorting and handling of mail. She stopped work on September 26, 2006 and did not return. OWCP accepted appellant's

¹ 5 U.S.C. § 8101 *et seq.*

occupational disease claim for cervical spondylosis with myelopathy and bilateral carpal tunnel syndrome. Appellant received wage-loss compensation.²

A June 22, 2011 memorandum from the employing establishment's Office of the Inspector General indicated that special agents conducted an in-person interview with Dr. William H. Kinnard, appellant's attending physician and a Board-certified orthopedic surgeon, on June 21, 2011. They informed him that they were investigating appellant for workers' compensation fraud and showed a surveillance video of her visiting homes on behalf of her church. Afterward, Dr. Kinnard remarked that she would be able to return to full-time duty with permanent restrictions. He advised that appellant could lift items weighing up to 10 pounds regularly and items weighing up to 25 pounds occasionally, but limited continuous standing, walking, and sitting to two-hour intervals and prohibited any reaching above shoulder level. Dr. Kinnard noted these restrictions in a Form OWCP-5c (Work Capacity Evaluation -- Musculoskeletal Conditions) dated June 21, 2011.³

A June 27, 2011 investigative report from the employing establishment's Office of the Inspector General specified that special agents observed appellant walking, driving, shopping, bending, stooping, and visiting her church and various residences on 22 separate occasions from September 15, 2009 to February 23, 2011.⁴

On August 10, 2011 the employing establishment offered appellant the position of modified clerk, which entailed sorting letters, flats, and parcels for approximately three hours, identifying and handling undeliverable mail for approximately three hours and attending to customers in the lobby for approximately two hours. The physical requirements included eight hours of intermittent sitting, standing, walking, bending, stooping, grasping and lifting of items weighing up to 25 pounds. Appellant rejected the offer.

OWCP asked Dr. Kinnard in an August 18, 2011 letter to review the August 10, 2011 job offer and render an opinion as to whether appellant was capable of performing the duties of the modified position. Dr. Kinnard replied in a November 29, 2011 letter that she would be able to perform these duties.⁵

In a November 4, 2011 note, Dr. Lisa B. Black, a family practitioner, recommended that appellant remain off duty because she continued to experience left shoulder and neck pain.

OWCP informed appellant in a January 5, 2012 letter that the weight of the medical evidence established that she was partially disabled and that the modified clerk position was suitable in light of her physical capabilities. It gave her 30 days to accept the position without penalty or provide an explanation justifying her refusal.

² Information was incorporated into the November 17, 2011 statement of accepted facts.

³ The record documents that, prior to the June 21, 2011 OWCP-5 form, the most recent treatment report of Dr. Kinnard was dated January 18, 2011.

⁴ The case record contains detailed surveillance reports for the period October 5, 2009 to February 23, 2011.

⁵ The case record does not contain any treatment notes by Dr. Kinnard after January 18, 2011.

In a January 18, 2012 letter, appellant contended that Dr. Black found the position of modified clerk unsuitable.

OWCP informed appellant in a February 14, 2012 letter that she failed to provide a valid reason for refusing the modified clerk position and afforded her 15 days to accept the job offer.

In an undated letter, appellant contended that Dr. Black's opinion constituted the weight of the medical evidence. She also mentioned that the Social Security Administration (SSA) determined that she was disabled.⁶

By decision dated March 9, 2012, OWCP terminated appellant's wage-loss compensation on the grounds that she refused an offer of suitable work.⁷

Appellant requested a review of the written record on March 22, 2012. On August 27, 2012 an OWCP hearing representative affirmed the March 9, 2012 decision.

LEGAL PRECEDENT

OWCP may terminate compensation for any partially-disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for him or her.⁸ To discharge its burden to justify termination, OWCP must show that the job offered was suitable, the employee was informed of the consequences of refusing to accept such employment, and the employee was afforded a reasonable period to accept or reject the position or submit evidence or reasons why the position was not suitable and could not be accepted.⁹

The threshold issue is whether the position offered by the employing establishment is suitable.¹⁰ In determining what constitutes suitable work for a particular disabled employee, OWCP considers the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work and other relevant factors. The issue of whether an employee has the physical ability to perform a modified position is primarily a medical question that must be resolved by medical evidence. Once OWCP has demonstrated that the job offered is suitable, the burden shifts to the employee to show that his or her refusal to work is reasonable or justified.¹¹

When OWCP considers a job to be suitable, it shall notify the employee and afford him or her 30 days to either accept the job or present any reasons to counter its finding. If it

⁶ Appellant furnished a September 13, 2011 letter from SSA corroborating this assertion.

⁷ While the case record contains additional medical evidence, including a December 29, 2011 report from Dr. Alain F. Cracco, a Board-certified orthopedic surgeon and second opinion physician, OWCP found that Dr. Kinnard's opinion was dispositive.

⁸ 5 U.S.C. § 8106(c)(2). The Board has recognized that section 8106(c) of FECA serves as a penalty provision as it may bar an employee's entitlement to future compensation. For this reason, it will be narrowly construed. *Stephen A. Pasquale*, 57 ECAB 396, 402 (2006).

⁹ *M.M.*, 59 ECAB 680, 683 (2008).

¹⁰ *Martha A. McConnell*, 50 ECAB 129 (1998).

¹¹ *L.C.*, Docket No. 08-1923 (issued May 13, 2009). *See also* 20 C.F.R. § 10.517.

determines that the reasons are unacceptable, it shall notify the employee and afford him or her 15 days to accept the job without penalty. After providing these 30-day and 15-day notices, OWCP will terminate the employee's entitlement to further compensation. However, the employee remains entitled to medical benefits.¹²

ANALYSIS

OWCP accepted that appellant sustained cervical spondylosis with myelopathy and bilateral carpal tunnel syndrome while in the performance of duty. It paid wage-loss compensation. Following a meeting with special agents from the employing establishment's Office of the Inspector General, Dr. Kinnard advised in a Form OWCP-5c dated June 21, 2011 that she was able to return to full-time duty with permanent restrictions. The employing establishment offered the position of modified clerk, which OWCP deemed suitable in a November 29, 2011 letter. After appellant rejected the job, OWCP issued 30-day and 15-day notices in the manner prescribed by law, determined that she did not provide valid reasons for her refusal and terminated her wage-loss compensation on the basis of Dr. Kinnard's June 21, 2011 form report.

The Board finds that OWCP improperly terminated appellant's wage-loss compensation.

To facilitate a disabled employee's return to suitable work, an employer may contact his or her physician in writing with regard to the physical limitations imposed by the effects of the industrial injury and possible job assignments. However, the employer "shall not contact the physician by telephone or through a personal visit."¹³ In this case, agents of the employing establishment violated this regulation when they interviewed Dr. Kinnard in person on June 21, 2011. They revealed that they were investigating workers' compensation fraud, a situation that may compel a physician to "exert every effort to appear cooperative" so as to avoid any extended involvement.¹⁴ Furthermore, while the agents showed Dr. Kinnard a surveillance video of appellant visiting various homes on behalf of her church, appellant herself was not made aware of its existence and use. The Board disfavors investigative evidence that is presented for the purpose of obtaining an adverse medical opinion, but is not disclosed to the injured worker.¹⁵ Although video footage may be of some value to a physician asked to render a medical opinion, it may also be misleading if material facts are omitted. Thus, OWCP is obliged to notify claimant when such footage is given to a physician and, upon request, provide a copy of the recording and a reasonable opportunity to respond to its accuracy.¹⁶

¹² *S.G.*, Docket No. 08-1992 (issued September 22, 2009). *See also* 20 C.F.R. § 10.516.

¹³ 20 C.F.R. § 10.506.

¹⁴ *F.S.*, Docket No. 11-863 (issued September 26, 2012).

¹⁵ *Id.*

¹⁶ *See id.* *See also Frederick Nightingale*, 6 ECAB 268 (1953) ("[A]ppellant should have been apprised of the conflicts and inconsistencies, and of the general nature of the adverse evidence developed, in order that he might know the nature of the issues to be met and have an opportunity to present such rebuttal or explanation as was available. This is ... vital in the nonadversarial proceedings under [FECA], as it is the function of [the Bureau [OWCP's predecessor agency]] to adjudicate the rights of claimants in the light of all the relevant facts, facts which can only be developed fully when the claimant is fairly advised as to the nature of evidence from other source which bears on his claim.")

In this appeal, the nonadversarial claims administration process was impermissibly mingled with the investigative process. Under these circumstances, Dr. Kinnard's opinion is an insufficient medical basis on which to support a termination of wage-loss compensation under section 8106(c). Appellant was wrongly deprived of the opportunity to be heard on the matter of surveillance video. For the reasons stated, the Board finds that OWCP did not discharge its burden to justify termination of compensation.

CONCLUSION

The Board finds that OWCP did not properly terminated appellant's wage-loss compensation.

ORDER

IT IS HEREBY ORDERED THAT the August 27, 2012 decision of the Office of Workers' Compensation Programs be reversed.

Issued: March 18, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board