

FACTUAL HISTORY

OWCP accepted that on January 5, 1993 appellant, then a 43-year-old first head cook supervisor, sustained a right knee strain, left ankle contusion, left elbow contusion, right Achilles tendinitis and right medial meniscus tear when she stumbled over a milk crate but did not fall to the ground.² On November 7, 2001 she underwent an OWCP-authorized chondroplasty of her right medial femoral condyle, lateral femoral condyle and trochlear groove.³ Appellant received compensation from OWCP for periods of disability.

In December 2001, appellant began to participate in OWCP-sponsored vocational rehabilitation efforts. Her rehabilitation case was closed in February 2002 but it was reopened in May 2008.

On September 2, 2008 appellant underwent a right total knee arthroplasty which was authorized by OWCP.

In May 2009, appellant's vocational rehabilitation counselor advised that she could work as a desk clerk/greeter.

Due to a lack of current medical evidence, OWCP referred appellant to Dr. Alexander N. Doman, a Board-certified orthopedic surgeon, for an examination and opinion on her ability to work. The case file, a statement of accepted facts and a description of the desk clerk/greeter position were provided to Dr. Doman.

In a December 7, 2010 report, Dr. Doman described appellant's medical history, including both her work-related and nonwork-related conditions.⁴ He reported findings on examination, noting that there was no instability of the right knee. Range of motion was excellent from 0 to 120 degrees of flexion. With respect to the elbows, there was full range of motion and no evidence of swelling or tenderness. Dr. Doman stated that, with respect to the right ankle, appellant had a well-healed surgical scar over the Achilles tendon posteriorly. There was mild swelling about the right ankle similar to the mild swelling of the left ankle. Dr. Doman noted that x-rays of the right knee showed stable and excellent position of the right total knee arthroplasty involving both the femoral and tibial components. He found that appellant's right medial meniscus tear had resolved, but that the right Achilles tendinitis had some mild residual subjective symptoms of pain over the Achilles tendon area. Dr. Doman stated, "With respect to the capabilities performing a desk clerk/greeter position, I have reviewed these work duties and it is my firm and definite opinion that this lady can perform the full-time job of a desk clerk/greeter."

² Appellant had preexisting left inguinal hernia and herniated disc at L4-5 and underwent hernia repair and back surgery. She also had other nonwork-related conditions, including vascular problems in her legs, thyroid dysfunction and coronary artery disease.

³ Appellant later underwent surgery for the Achilles tendinitis of her right ankle.

⁴ Dr. Doman discussed appellant's nonwork-related back, hernia, vascular, heart and thyroid problems.

On January 25, 2011 the employing establishment offered appellant a job as a desk clerk/greeter for 40 hours per week. The position involved greeting customers who entered the canteen, answering customer questions about merchandise for sale and performing limited clerical duties.⁵ The job description stated that, when restricted or not permitted, the duties did not require lifting, bending, reaching, climbing, stooping, squatting, pushing, pulling or other medically restricted physical activity. The desk clerk/greeter could sit, stand or walk around the immediate area of assignment as necessary or desired. Rest breaks would be allowed as frequently as needed to avoid stress.

Appellant submitted a February 9, 2011 report from Dr. Charlton J. Pickett, an attending Board-certified family practitioner, who discussed the vascular problems in her legs. Dr. Pickett noted that appellant was treated for superficial thrombophlebitis in 1996 and received treatment for subsequent episodes of superficial thrombophlebitis and deep vein thrombosis. Appellant continued to have bilateral leg pain and swelling.

In a February 24, 2011 letter, OWCP advised appellant of its determination that the desk clerk/greeter position offered by the employing establishment was suitable. It informed appellant that her compensation would be terminated if she did not accept the position or provide good cause for not doing so within 30 days of the date of the letter. Appellant did not respond to OWCP's February 24, 2011 letter within the allotted time.

In an April 11, 2011 letter, OWCP advised appellant that it had not received any response to its OWCP's February 24, 2011 letter and therefore she had not presented reasons for not accepting the position offered by the employing establishment. It advised appellant that her compensation would be terminated if she did not accept the position within 15 days of the date of the letter.

Appellant resubmitted the February 9, 2011 report of Dr. Pickett. She also submitted an April 21, 2011 report from Dr. Jewell B. Duncan, an attending Board-certified orthopedic surgeon, who stated that appellant had right knee arthritis, neck arthritis, cervical strain and bursitis of the right shoulder and that she was "unable to work secondary to the arthritis."

In an April 20, 2011 letter received by OWCP on April 27, 2011, appellant rejected the desk clerk/greeter position offered by the employing establishment. She stated that she had been approved for a disability retirement on December 20, 2001. Appellant also submitted a report detailing left shoulder surgery performed on August 16, 2010, including decompression and rotator cuff repair.

Appellant's union representative contacted OWCP by telephone on August 22, 2011 and advised that she had expressed "no desire to be on OWCP rolls."

In an August 22, 2011 decision, OWCP terminated appellant's monetary compensation effective August 27, 2011 on the grounds that she refused an offer of suitable work. It found that the weight of the medical evidence regarding the suitability of the position rested with the opinion of Dr. Doman.

⁵ Appellant would operate a cash register on occasion if within medical restrictions.

In a December 16, 2011 letter received by OWCP on December 20, 2011, appellant requested a hearing with an OWCP hearing representative.⁶

In a January 11, 2012 decision, OWCP denied appellant's request for a hearing, noting that she was not entitled to a hearing as a matter of right because her hearing request was not made within 30 days of its August 22, 2011 decision. It further stated that it had considered the matter in relation to the issue involved and had denied her hearing request on the basis that the issue in the present case could be resolved by requesting reconsideration and submitting additional evidence to justify her refusal of the position offered by the employing establishment.

LEGAL PRECEDENT -- ISSUE 1

Section 8106(c)(2) of FECA provides in pertinent part, "A partially disabled employee who... (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation."⁷ However, to justify such termination, OWCP must show that the work offered was suitable.⁸ An employee who refuses or neglects to work after suitable work has been offered to her has the burden of showing that such refusal to work was justified.⁹

ANALYSIS -- ISSUE 1

OWCP accepted that on January 5, 1993 appellant sustained a right knee strain, left ankle contusion, left elbow contusion, right Achilles tendinitis and right medial meniscus tear when she stumbled over a milk crate but did not fall to the ground. It authorized several surgical procedures relating to her right knee and right ankle and she participated in vocational rehabilitation. Appellant stopped work for an extended period and, in January 2011, the employing establishment offered her a job as a desk clerk/greeter for 40 hours per week. She rejected the job offer noting that she had retired on disability retirement.

The evidence of record establishes that appellant is capable of performing the desk clerk/greeter position offered by the employing establishment and determined to be suitable by OWCP. The position involved greeting customers who entered the canteen, answering customer questions about merchandise for sale and performing limited clerical duties.¹⁰ The record does not reveal that the desk clerk/greeter position was temporary or seasonal in nature.¹¹

⁶ The postmark on the envelope in which the hearing request was sent is illegible.

⁷ 5 U.S.C. § 8106(c)(2).

⁸ *David P. Camacho*, 40 ECAB 267, 275 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341, 345 (1981).

⁹ 20 C.F.R. § 10.517; *see Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

¹⁰ The job description indicated that, when restricted or not permitted, the duties did not require lifting, bending, reaching, climbing, stooping, squatting, pushing, pulling or other medically restricted physical activity. The desk clerk/greeter could sit, stand or walk around the immediate area of assignment as necessary or desired. Rest breaks would be allowed as frequently as needed to avoid stress.

¹¹ *See* Federal (FECA) Procedure Manual, Part 2 -- Claim, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4b (July 1997).

The desk clerk/greeter position was selected by appellant's vocational rehabilitation counselor and OWCP properly relied on the opinion of appellant's counselor in determining that appellant is vocationally and educationally capable of performing the position.¹²

In determining that appellant is physically capable of performing the desk clerk/greeter position, OWCP properly relied on the opinion of Dr. Doman, a Board-certified orthopedic surgeon serving as an OWCP referral physician. In a December 7, 2010 report, Dr. Doman discussed both appellant's work-related and nonwork-related conditions and reported findings of his examination. He reviewed the description of the desk clerk/greeter position offered by the employing establishment and determined that appellant was able to perform the position.

The Board finds that OWCP established that the desk clerk/greeter position offered by the employing establishment is suitable. As noted, once OWCP has established that a particular position is suitable, an employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified. The Board has carefully reviewed the evidence submitted by appellant in support of her refusal of the desk clerk/greeter position and notes that it is not sufficient to justify her refusal of the position.

Appellant submitted medical reports concerning her left shoulder condition and the vascular condition of her legs; however, the reports do not establish that these medical conditions prevented her from performing the limited duties of a desk clerk/greeter. In an April 21, 2011 report, Dr. Duncan, an attending Board-certified orthopedic surgeon, stated that appellant had right knee arthritis, neck arthritis, cervical strain and bursitis of the right shoulder and that she was "unable to work secondary to the arthritis." The Board notes that this report is of limited probative value regarding appellant's ability to work because Dr. Duncan did not provide any findings on examination or diagnostic testing and he did not provide any medical rationale explaining why he felt that appellant's arthritis prevented her from performing any work.¹³

For these reasons, OWCP properly terminated appellant compensation effective August 27, 2011 on the grounds that she refused an offer of suitable work.¹⁴

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

¹² See Federal (FECA) Procedure Manual, Part 2 -- Claim, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8d (December 1993).

¹³ See *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (finding that a medical opinion not fortified by medical rationale is of little probative value). On appeal, appellant alleged that when she went to the employing establishment on August 26, 2011 to accept the desk clerk/greeter position she was instructed to complete paperwork regarding her disability retirement. She did not explain why she failed to accept the offered position prior to the time that OWCP issued its August 22, 2011 termination decision.

¹⁴ The Board notes that OWCP complied with its procedural requirements prior to terminating appellant's compensation, including providing her with an opportunity to accept the desk clerk/greeter position after informing her that her reasons for initially refusing the position were not valid; see generally *Maggie L. Moore*, 42 ECAB 484 (1991); *reaff'd on recon.*, 43 ECAB 818 (1992).

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of FECA, concerning a claimant's entitlement to a hearing before an OWCP hearing representative, provides in pertinent part: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."¹⁵ As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.¹⁶ The date of filing is fixed by postmark or other carrier's date marking.¹⁷

The Board has held that OWCP, in its broad discretionary authority in the administration of FECA, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that OWCP must exercise this discretionary authority in deciding whether to grant a hearing.¹⁸ Specifically, the Board has held that OWCP has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to FECA which provided the right to a hearing,¹⁹ when the request is made after the 30-day period for requesting a hearing,²⁰ and when the request is for a second hearing on the same issue.²¹

ANALYSIS -- ISSUE 2

In the present case, appellant's hearing request was made more than 30 days after the date of issuance of OWCP's prior decision dated August 22, 2011 and, thus, she was not entitled to a hearing as a matter of right. She requested a hearing before an OWCP representative in a letter dated December 16, 2011 and received on December 20, 2011. Hence, OWCP was correct in stating in its January 11, 2012 decision that appellant was not entitled to a hearing as a matter of right because her hearing request was not made within 30 days of its August 22, 2011 decision.

While OWCP also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, OWCP, in its January 11, 2012 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's hearing request on the basis that the issue in the present case could be resolved by requesting reconsideration and submitting additional evidence to justify her refusal of the position offered by the employing establishment. The Board has held that as the

¹⁵ 5 U.S.C. § 8124(b)(1).

¹⁶ *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

¹⁷ *See* 20 C.F.R. § 10.616(a); *N.M.*, 59 ECAB 511 (2008).

¹⁸ *Henry Moreno*, 39 ECAB 475, 482 (1988).

¹⁹ *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

²⁰ *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

²¹ *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

only limitation on OWCP's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.²² In the present case, the evidence of record does not indicate that OWCP committed any act in connection with its denial of appellant's hearing request which could be found to be an abuse of discretion.

CONCLUSION

The Board finds that OWCP properly terminated appellant's compensation effective August 27, 2011 on the grounds that she refused an offer of suitable work. The Board further finds that OWCP properly denied her request for a hearing under section 8124 of FECA.

ORDER

IT IS HEREBY ORDERED THAT the January 11, 2012 and August 22, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 6, 2012
Washington, DC

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

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

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

²² *Daniel J. Perea*, 42 ECAB 214, 221 (1990).