

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

R.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Rockford, IL, Employer**

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**Docket No. 12-807
Issued: August 16, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 29, 2012 appellant filed a timely appeal from a January 31, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) denying modification of its termination of his compensation for refusing suitable work. 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 this case.

ISSUE

The issue is whether appellant has established that OWCP's termination of his compensation effective April 30, 1998 for refusing suitable work under 5 U.S.C. § 8106(c) should be modified.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. By decision dated May 1, 2003, the Board set aside a July 16, 2001 decision denying appellant's request for reconsideration under 5 U.S.C. § 8128.² The Board found that he had submitted new and relevant evidence sufficient to warrant reopening his case for further review of the merits. By decision dated October 27, 2004, the Board affirmed an October 31, 2003 decision denying modification of its termination of appellant's compensation effective April 30, 1998 for refusing suitable work offered by the employing establishment on January 28, 1998.³ The Board found that OWCP properly relied upon the opinion of Dr. Richard A. Geline, a Board-certified orthopedic surgeon and impartial medical examiner, in finding that appellant's bilateral plantar fasciitis, bilateral tarsal tunnel syndrome and lumbar disc disease would not prevent him from performing sedentary work. The Board further determined that the opinion of Dr. Daniolo V. Domingo, a Board-certified psychiatrist and second opinion physician, established that he had no limitations due to his depression. On March 2, 2006 the Board affirmed a July 6, 2005 OWCP decision denying appellant's request for reconsideration under section 8128(a). On November 7, 2007 the Board affirmed a February 23, 2007 decision denying his request for reconsideration under section 8128.⁴ The facts and circumstances as set forth in these prior Board decisions are hereby incorporated by reference.

On July 13, 2009 appellant disagreed with the finding of the second opinion physician that his major depression was in remission.⁵ He submitted medical reports from his attending physicians dated 1998 to 2005 in support of his request. In a report dated October 17, 1997, Dr. Rokshana Zaheen, an attending physician Board-certified in family medicine, evaluated appellant for bipolar disorder and sinusitis. She found that he was having panic attacks and anxiety due to pressure. Dr. Zaheen noted that OWCP "wants him to go back to work, but he has been declared unable to work." She advised appellant to "let [OWCP] know about his psychological state."

On January 20, 1998 Dr. Zaheen treated appellant for low back pain and found that his bipolar disorder was stable. In April and May 1998, she treated him for dizziness with a history of palpitations. In office visit notes dated July through October 1998, Dr. Zaheen evaluated appellant for an ear condition and diabetes mellitus. In February 1999, she treated him for bipolar disorder and back pain.

² Docket No. 02-1027 (issued May 1, 2003). OWCP accepted that appellant sustained bilateral plantar fasciitis and bilateral tarsal tunnel syndrome due to factors of his federal employment. By decisions dated April 30, 1998 and March 30, 1999, it terminated his compensation on the grounds that he refused an offer of suitable work.

³ Docket No. 04-805 (issued October 27, 2004). OWCP found that the evidence was insufficient to show that he was disabled from the offered modified-duty assignment due to a psychiatric condition.

⁴ Docket No. 06-165 (issued March 2, 2006); Docket No. 07-1530 (issued November 7, 2007). On July 18, 2008 the Board dismissed appellant's petition for reconsideration as untimely. *Order Dismissing Petition for Recon.*, Docket No. 07-1530 (issued July 18, 2008).

⁵ Appellant expressed his disagreement with the Board's dismissal of his petition for reconsideration.

In a decision dated December 11, 2009, OWCP denied appellant's request to reopen his case for further review of the merits under section 8128.⁶ By order dated November 15, 2010, the Board set aside the December 11, 2009 nonmerit decision.⁷ The Board found that OWCP's decision was devoid of any factual findings or legal conclusions as required under 20 C.F.R. § 10.126 and remanded the case for an appropriate decision explaining its denial of his reconsideration request.

By decision dated December 7, 2010, OWCP denied modification of its April 30, 1998 decision terminating his compensation for refusing suitable work.

In an undated letter received May 31, 2011, appellant argued that his major depression was not in remission at the time OWCP terminated his compensation. He maintained that the April 15, 1998 report from Dr. Zaheen established that his mental condition had worsened. On June 7, 2011 appellant requested reconsideration.

In an August 1, 2011 letter, appellant described the effects of his work injury on his life and asserted that he sustained depression due to his injury and the employing establishment's failure to provide work within his restrictions.⁸ He contended that OWCP relied upon false statements in finding his depression in remission.

By decision dated January 31, 2012, OWCP denied modification of its December 7, 2010 decision. It noted that it was adjudicating the merits of this claim as more than 90 days had elapsed since he requested reconsideration.

LEGAL PRECEDENT

An employee who refuses or neglects to work after suitable work has been offered to him must show that such refusal to work was justified.⁹ Section 10.517 of FECA's implementing regulations provide that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee, has the burden of showing that such refusal or failure to work was reasonable or justified.¹⁰

⁶ By letter dated August 1, 2009, OWCP informed appellant that he should follow his appeal rights. On August 23, 2009 appellant requested reconsideration. He advised that his July 13, 2009 correspondence was also a request for reconsideration. On October 9, 2009 OWCP requested that appellant clarify his reconsideration request. On October 24, 2009 appellant referred to his July 13, 2009 request for reconsideration and questioned why OWCP had not reviewed the evidence that he submitted.

⁷ *Order Remanding Case*, Docket No. 10-756 (issued November 15, 2010).

⁸ By letter dated August 7, 2011, appellant maintained that he had shown that OWCP erred in failing to provide him with a merit review.

⁹ See *Sandra K. Cummings*, 54 ECAB 493 (2003).

¹⁰ 20 C.F.R. § 10.517(a); see *Ronald M. Jones*, 52 ECAB 190 (2000).

ANALYSIS

The Board previously affirmed OWCP's termination of appellant's compensation effective April 30, 1998 for refusing suitable work and its October 31, 2003 decision denying modification of its termination of compensation. As OWCP met its burden of proof to terminate his compensation, the burden shifted to him to establish that his refusal was justified.¹¹ Appellant must provide medical evidence substantiating that he was unable to report to work during the period of time between the job offer and the date that OWCP terminated benefits.¹²

Appellant argued that OWCP erred in relying on the second opinion physician in finding that he was not disabled due to his depression. He submitted treatment notes from his attending physician dated 1998 to 2005. None of the treatment notes, however, establish that appellant was unable to perform the duties of the modified position when OWCP terminated his benefits. On October 17, 1997 Dr. Zaheen treated appellant for bipolar disorder and sinusitis. She noted that he had "been declared unable to work" but that OWCP wanted him to resume work. Dr. Zaheen advised appellant to inform OWCP about his psychological condition. She did not, however, specifically address the issue of whether he could perform the duties of the offered modified position. Instead, Dr. Zaheen noted that appellant had been found unable to work. A physician's report is of diminished probative value unless it is on a physician's independent judgment.¹³

In progress reports dated January 1998 to February 1999, Dr. Zaheen discussed her treatment of appellant for low back pain, bipolar disorder, dizziness and ear condition and diabetes mellitus. She did not, however, address his work capabilities and thus her reports are of little probative value.

The remaining medical evidence addressed appellant's condition subsequent to the termination of his compensation for refusing suitable work and, therefore, is not relevant to the issue at hand.¹⁴ The Board finds that he submitted no probative medical evidence supporting that he had valid reasons for refusing suitable work.

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.

CONCLUSION

The Board finds that appellant has not established that OWCP's termination of his compensation for refusing suitable work under section 8106(c) should be modified.

¹¹ *Id.*; see also *M.S.*, 58 ECAB 328 (2007); *Gayle Harris*, 52 ECAB 319 (2001).

¹² See *Shirley B. Livingston*, 42 ECAB 855 (1991).

¹³ *Earl David Seale*, 49 ECAB 152 (1997).

¹⁴ See *Shirley B. Livingston*, *supra* note 12.

ORDER

IT IS HEREBY ORDERED THAT the January 31, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 16, 2012
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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