

FACTUAL HISTORY

On October 23, 2007 appellant, then a 57-year-old registered nurse, filed a traumatic injury claim, Form CA-1, alleging that she turned and caught her foot on a call-bell cord and fell and hit her head on the foot board of the bed, hit her right knee on the floor and landed on her back while administering medicine to a patient. On February 20, 2008 OWCP accepted her claim for a concussion without loss of consciousness and headache, noting that her preexisting conditions of Sjogren's syndrome, chronic back pain and arthritic conditions were not accepted as arising out of the employment incident. On March 5, 2008 it expanded appellant's claim to include displacement of cervical intervertebral disc without myelopathy and brachial neuritis or radiculitis, noting that the following preexisting conditions had not been accepted degeneration of cervical intervertebral disc, degeneration of lumbar or lumbosacral intervertebral disc and spinal stenosis in cervical region. Effective February 8, 2008, appellant was placed on the periodic compensation rolls for temporary total disability.

In a July 31, 2008 work capacity evaluation, Dr. Rajan Gulati, a Board-certified internist, indicated that appellant was unable to perform her usual job.

OWCP referred appellant to Dr. Ira Neustadt, a Board-certified neurologist, for a second opinion examination. In a July 11, 2008 report, Dr. Neustadt noted that appellant complained of increased pain in her neck that spread to the upper shoulder, leg pain and constant headaches. He performed a physical examination and diagnosed low back trauma and mild head trauma. Upon neurological examination, Dr. Neustadt diagnosed subjective sensory finding suggesting symptom embellishment and functional overlay. Upon musculoskeletal examination, he diagnosed residual myofascial-type pain and residual cervical, shoulder girdle and lumbosacral strain patterns of pain. Dr. Neustadt noted that appellant had a longstanding history of chronic low-back pain and rheumatological conditions and was stated to have Sjogren's syndrome. He opined that, although the accepted conditions had not totally resolved, she was not totally disabled from work and could resume light duty as a registered nurse. Dr. Neustadt noted that the job should be sedentary, without heavy duties, such as repetitive bending, lifting more than 10 to 15 pounds or extensive walking.

On October 24, 2008 appellant, through counsel, informed OWCP that she had moved to Painted Post, New York. By letter dated November 24, 2008 OWCP acknowledged receipt of her change of address request which it received on October 27, 2008.

On February 4, 2009 the employing establishment offered appellant a modified-duty position as a modified registered nurse in Castle Point, New York beginning March 2, 2009. Appellant would work part time, Monday through Friday from 12:00 a.m. to 4:00 p.m. The physical requirements of the position conformed to the limitations provided in Dr. Neustadt's July 11, 2008 report, including mostly sedentary activities, sitting no more than one hour at a time, intermittent walking no more than 20 minutes at a time and intermittent standing no more than 20 minutes at a time.

In a report dated December 18, 2008, Dr. Ibrahim Y. Al-Sinjari, a Board-certified orthopedic surgeon, indicated that appellant did not have objective findings of brachial neuritis or radiculitis at all. Appellant did not have objective findings of displacement of cervical

intervertebral disc without myelopathy and no signs of a headache or concussion with no loss of consciousness. Dr. Al-Sinjari opined that she was not able to perform her regular duties, but was able to work light-duty sedentary work which did not require any overhead work, lifting more than 5 to 10 pounds, heavy pushing or long time standing.

On February 16, 2009 appellant declined the modified registered nurse position. She indicated that her physician advised her that she was unable to fulfill the physical requirements of the position offered.

By letter dated February 20, 2009, OWCP advised appellant that the modified registered nurse position had been found to be suitable and conformed to the work limitations provided by Dr. Neustadt in his July 11, 2008 report. The employing establishment confirmed that the position remained available. OWCP allowed appellant 30 days to accept the position or provide her reasons for refusal. It noted that she was reevaluated on December 18, 2008 by Dr. Al-Sinjari who made the opinion that she was able to do sedentary work with restrictions. OWCP advised that, pursuant to 5 U.S.C. § 8106(c)(2), an employee who refuses an offer of suitable work without reasonable cause is not entitled to compensation.

In a February 13, 2009 report, Dr. Gulati opined that appellant was totally disabled from work. On February 27, 2009 he reiterated his opinion that she was totally disabled for work, indicating that she could not sit, walk or stand for more than five minutes at a time.

By letter dated March 20, 2009, OWCP advised appellant that her reasons for refusing the offered position were not determined to be reasonable. It advised that her wage-loss and schedule award benefits would be terminated if she did not accept the position within 15 days.

On April 6, 2009 the employing establishment notified OWCP that appellant did not report to duty as stipulated in the March 20, 2009 letter and requested termination of her wage-loss compensation.

In an April 6, 2009 report, Dr. Gulati reiterated his medical opinion that appellant remained totally and permanently disabled as a result of the injury sustained on October 23, 2007. He indicated that she was unable to turn her head without restriction or exacerbation of the left-sided cervical radicular symptoms including tingling in the hand, she could not drive, lift, push, pull or carry nor walk, sit or stand for extended periods.

On April 7, 2009 OWCP found a conflict in medical opinion between Dr. Gulati and Drs. Neustadt and Al-Sinjari on the issues of diagnosis and whether appellant had continuing disability due to the accepted employment injury. It referred appellant to Dr. Peter Remec, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict.

In an April 22, 2009 report, Dr. Remec reviewed the statement of accepted facts and appellant's medical records and diagnosed chronic neck and upper back pain and indicated that it appeared to be a permanent condition. He opined that she was not able to perform her full registered nurse duties and based on his evaluation would not be able to return to those activities. Dr. Remec opined that appellant was able to perform a light to sedentary level of work activity based on the orthopedic evaluation which would include no repetitive lifting more than 5 pounds,

lifting 10 pounds maximum, no repetitive overhead work and ability to change position frequently at work.

On May 20, 2009 the employing establishment offered appellant a modified-duty position as a modified registered nurse in Castle Point, New York beginning June 8, 2009. Appellant would work part time, Monday through Friday from 12:00 a.m. to 4:00 p.m. The physical requirements of the position conformed to the limitations provided in Dr. Remec's April 22, 2009 report.

By letter dated May 22, 2009, OWCP advised appellant that the modified registered nurse position had been found to be suitable and conformed to the work limitations provided by Dr. Remec in his April 22, 2009 report. It allowed her 30 days to accept the position or provide her reasons for refusal. OWCP advised that, pursuant to 5 U.S.C. § 8106(c)(2), an employee who refuses an offer of suitable work without reasonable cause is not entitled to compensation. It indicated that the modified-duty position was located in Montrose, New York.

In a May 29, 2009 report, Dr. Gulati reiterated his opinion that appellant was unable to fulfill the requirements of the modified registered nurse position and was totally and permanently disabled for work.

By letter dated June 24, 2009, OWCP advised appellant that her reasons for refusing the offered position were not determined to be reasonable. It advised that her wage-loss and schedule award benefits would be terminated if she did not accept the position within 15 days.

On July 5, 2009 appellant, through counsel, explained that her reason for refusing the modified registered nurse position was based on Dr. Gulati's medical opinion that she was totally disabled for work and unable to perform the duties of the offered position.

By decision dated July 13, 2009, OWCP terminated appellant's entitlement to wage-loss compensation, effective July 18, 2009, on the basis that she refused an offer of suitable work.

On July 5, 2010 appellant, through counsel, requested reconsideration. Counsel argued that the distance of approximately 230 miles between the claimant's home in Painted Post, New York and the offered position in Castle Point, New York rendered the position unsuitable as a matter of law. Appellant submitted copies of a map between Castle Point and Painted Post indicating a distance of 221 or 235 miles, depending on the route and approximately four hours in driving time.

By letter dated January 7, 2011, OWCP confirmed that appellant was separated from the employing establishment on August 20, 2009 when she was placed on Office of Personnel Management (OPM) disability retirement.

By decision dated January 20, 2011, OWCP denied modification of the July 13, 2009 termination decision. It found that the job offer was not improper as it was appellant's choice to move from her residence in Middletown, New York. OWCP indicated that she was separated from the employing establishment effective August 20, 2009 when she began receiving disability retirement benefits from OPM. Appellant was still on the employing establishment's rolls at the time the termination decision was issued on July 13, 2009. OWCP stated that the offered

position was only 30.91 miles from her residence at the time the injury occurred. While she did not refuse the offer of employment on the basis that it was too far from her new residence, OWCP found that appellant's move away from the area in which the employing establishment was located was not considered an acceptable reason for refusal of the job offer.

By decision dated January 25, 2011, OWCP vacated its January 20, 2011 decision on the grounds that it contained a typographical error and issued a new decision with the typographical error corrected, containing the same findings and conclusions.

LEGAL PRECEDENT

Once OWCP accepts a claim it has the burden of justifying termination or modification of compensation benefits.² This includes cases in which OWCP terminates compensation under section 8106(c)(2) of FECA for refusal to accept suitable work.

Section 8106(c)(2) of FECA³ states that a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or secured for him is not entitled to compensation.⁴ OWCP has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects suitable work when offered. Before compensation can be terminated, however, OWCP has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work, and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.⁵ In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, OWCP has the burden of showing that the work offered to and refused or neglected by the employee was suitable.⁶

With regards to relocation, OWCP regulations provide that the employer, if possible, should offer suitable reemployment in the location where the employee currently resides. If this is not practical, the employer may offer suitable reemployment at the employee's former duty station or other location.⁷

ANALYSIS

In this case, the employing establishment offered appellant a sedentary position in Castle Point, New York, which accommodated the work restrictions given by Dr. Remec, the impartial medical specialist. OWCP reviewed the position and found it to be suitable for appellant. It

² See *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

³ 5 U.S.C. §§ 8101-8193.

⁴ *Id.* at § 8106(c)(2).

⁵ See *M.L.*, 57 ECAB 746, 750 (2006). See also *Frank J. Sell, Jr.*, 34 ECAB 547, 552 (1983).

⁶ *Id.* See also *Albert Pineiro*, 51 ECAB 310, 312 (2000).

⁷ 20 C.F.R. § 10.508. See also *Sharon L. Dean*, 56 ECAB 175 (2004).

terminated appellant's wage-loss compensation on the grounds that she refused the employing establishment's May 20, 2009 job offer of a modified registered nurse position in Castle Point, New York. On appeal, counsel contends that the location of the offered position renders it unsuitable as a matter of law as it is approximately 230 miles away from appellant's home in Painted Post.

To properly terminate compensation under 5 U.S.C. § 8106(c), OWCP must provide appellant notice of its finding that an offered position is suitable and give her an opportunity to accept or provide reasons for declining the position.⁸ By letter dated May 22, 2009, it advised her that the position was suitable and provided her 30 days to accept the position or provide reasons for her refusal. OWCP further notified appellant that the position remained open, that she would be paid for any difference in pay between the offered position and her date-of-injury job, that she could still accept without penalty and that a partially disabled employee who refused suitable work was not entitled to compensation.

The record reflects that on October 24, 2008 appellant informed OWCP that she had moved to Painted Post, New York. By letter dated May 22, 2009, OWCP advised appellant that the modified registered nurse position had been found to be suitable and in accordance with her medical restrictions, indicating that the position was located in Montrose, New York. The Board notes that contrary to OWCP's statement the job was located in Castle Point. By decision dated January 20, 2011, OWCP found that appellant's move away from the area in which the employing establishment was located was not considered an acceptable reason for refusal of the job offer as it was her choice to move from her residence in Middletown to Painted Post. It stated that the offered position in Castle Point was only 30.91 miles from her residence at the time the injury occurred, which was in Middletown.

However, the Board notes that OWCP did not make any attempt to determine whether suitable employment was possible in or around Painted Post, New York, where appellant resided at the time of the job offer, which is approximately 230 miles from the location of the offered position in Castle Point. OWCP should have developed this aspect of the case before finding the offer suitable. Its regulations state that the employer should offer suitable reemployment where the employee currently resides, if possible.⁹ The Board has previously held in *Sharon L. Dean*¹⁰ that it is reversible error for OWCP to terminate appellant's compensation benefits without positive evidence showing that such an offer was not possible or practical. Because OWCP found that the modified registered nurse position in Castle Point was suitable, without taking into consideration whether there was suitable reemployment available in the location where appellant resided, it did not meet its burden of proof in terminating her compensation for refusing suitable work. The Board finds that it erred in terminating appellant's compensation benefits without positive evidence showing that such an offer was not possible or practical. Under the

⁸ See *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

⁹ 20 C.F.R. § 10.508. See *Sharon L. Dean*, *supra* note 7.

¹⁰ *Sharon L. Dean*, *supra* note 7. Cf. *T.T.*, 58 ECAB 296 (2007) (where the Board found that OWCP met its burden of proof to terminate appellant's compensation benefits for refusing a suitable job offer on the basis that she did not relocate until after a suitable position was offered to her and her compensation benefits were terminated).

circumstances of this case, OWCP did not properly find that appellant refused suitable work. Thus, the Board will reverse OWCP's January 25, 2011 decision.

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation benefits effective July 18, 2009 on the grounds that she refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the January 25, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: February 8, 2012
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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