

November 30, 2002 injury.² OWCP treated this as a new injury claim and accepted it for aggravated post-traumatic stress disorder in File No. xxxxxx950. Appellant then injured her left foot on April 25, 2006 while in the performance of duty. She stopped work, did not return and eventually underwent left ankle arthroscopy on July 30, 2007 and partial left plantar fasciotomy on November 16, 2009. OWCP accepted appellant's traumatic injury claim, assigned File No. xxxxxx516, for left ankle sprain.³ It subsequently combined the claims under File No. xxxxxx516. Appellant received wage-loss compensation and medical benefits accordingly.

OWCP referred appellant to three physicians to determine whether she was able to return to work.⁴ Dr. Alain De La Chapelle, a Board-certified psychiatrist and second opinion physician, reviewed the July 21, 2010 statement of accepted facts and medical file, conducted a mental status examination and noted limited reactive affect. Appellant complained of general anxiety, nightmares, flashbacks, irritability and dysphoric mood due to pain, unemployment and loss of function. Dr. De La Chapelle diagnosed post-traumatic stress disorder and depressive disorder. He attributed appellant's symptoms to the March 4, 2003 recurrence and an ankle fracture in 2007. In an August 10, 2010 work capacity evaluation form, Dr. De La Chapelle advised that she was able to perform her regular job on a part-time basis to minimize stress.

In a September 7, 2010 report, Dr. Peter Warwick Green, a Board-certified orthopedic surgeon and second opinion physician, reviewed the October 30, 2008 statement of accepted facts and August 10, 2010 addendum as well as the medical file. A physical examination of the left foot revealed multiple surgical scars, limited dorsiflexion and plantar flexion and positive Tinel's sign. Dr. Green opined that appellant was partially disabled as a result of the April 25, 2006 employment injury and "not capable of returning to work as a letter carrier." He recommended eight-hour workdays consisting of sedentary tasks and intermittent standing and walking. October 21 and 27, 2010 progress notes added that an October 6, 2010 electromyogram (EMG) and nerve conduction study ruled out tarsal tunnel syndrome. In an October 27, 2010 work capacity evaluation form, Dr. Green restricted walking and standing to 30 minutes each and pushing, pulling and lifting of items weighing up to 10 pounds to one hour each. He also prohibited squatting, kneeling, climbing and operating a motor vehicle on the job.

In a September 21, 2010 report, Dr. Solomon Miskin, a Board-certified psychiatrist, related that appellant experienced aversion, avoidance, preoccupation, intrusive thoughts, automatic hyper-responsiveness and exaggerated startle response, *inter alia*, following the March 4, 2003 recurrence. After the April 25, 2006 work injury, appellant complained of pain,

² On November 30, 2002 appellant developed an emotional condition, which OWCP accepted for a prolonged reaction to stress in File No. xxxxxx597. By decision dated November 13, 2005, OWCP denied her claim that she sustained a recurrence of disability on August 10, 2005. Claim number xxxxxx597 is not presently before the Board.

³ The foregoing facts were incorporated into October 30, 2008 and July 21, 2010 statements of accepted facts as well as an August 10, 2010 addendum.

⁴ The record indicates that the employing establishment offered appellant the position of modified letter carrier effective April 6, 2010. In a May 7, 2010 letter, OWCP noted that the duties and physical requirements delineated in the offer were based on medical reports from 2008. In view of appellant's authorized November 16, 2009 surgery, it advised that updated findings were required to properly assess job suitability.

limited mobility and frustration concerning her diminished physical capability. Dr. Miskin performed a mental status examination and observed anxiety, apprehension and dysphoric mood. He reviewed the October 30, 2008 statement of accepted facts, an August 10, 2010 addendum and the medical file and diagnosed major depressive disorder and post-traumatic stress disorder aggravated by the April 25, 2006 work injury. Dr. Miskin explained that appellant's psychiatric condition adversely affected her ability to interact with the public and advised that she be removed from mail deliveries. In an October 6, 2010 work capacity evaluation form, he approved work inside the postal facility for eight hours a day.

On December 1, 2010 the employing establishment offered appellant the position of modified letter carrier, which entailed casing mail at work for up to six hours. The physical requirements included intermittent sitting, standing, reaching above shoulder level and lifting for up to six hours. OWCP informed the employing establishment in a December 10, 2010 letter that the offer needed to specify the number of hours allocated to standing, sitting and lifting, respectively and the weight of the mail or the approximate number of pieces to be cased. In an amended December 16, 2010 job offer, the employing establishment reduced the workday to four hours and revised the physical requirements to limit sitting, standing and walking to a four-hour maximum and intermittent reaching above the shoulder and lifting of items weighing less than 10 pounds to a four-hour maximum. Appellant rejected the amended offer.

In December 16, 2010 letter, OWCP informed appellant that the medical evidence established that she was partially disabled and the modified letter carrier 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.

Appellant asserted in an undated letter that the job offered was unsuitable because nerve damage in her left foot inhibited her ability to stand for a prolonged period. She submitted medical records from Dr. George G. Fairey, a Board-certified psychiatrist, for the period November 30, 2010 to January 11, 2011 that detailed ongoing anxiety, depression, pain and total disability, *inter alia*.⁵

OWCP informed appellant in a January 18, 2011 letter that she failed to provide a valid reason for refusing the letter carrier position and afforded her 15 days to accept the job offer.

In October 26 and November 23, 2010 reports, Dr. Tejpreet Singh, a Board-certified neurologist, examined appellant and observed left foot dorsal swelling, positive Tinel's signs over the superficial peroneal and tibial nerves, hyperesthesia and antalgic gait. An EMG showed left peroneal and tibial nerve slowing. Dr. Singh diagnosed unspecified neuralgia/neuritis and possible reflex sympathetic dystrophy/complex regional pain syndrome. In a December 21, 2010 follow-up report, he advised that appellant was unable to stand continuously for 20 to 30 minutes and needed intermittent breaks.⁶ A January 7, 2011 work capacity form later clarified that she was unable to work indefinitely.

⁵ OWCP later received Dr. Fairey's various reports and session notes from March 24, 2010 to October 12, 2011.

⁶ OWCP later received Dr. Singh's reports for the period January 21 to April 22, 2011 reports.

By decision dated March 10, 2011, OWCP terminated appellant's wage-loss compensation on the grounds that she refused an offer of suitable work.

Counsel requested reconsideration on June 30, 2011 contending that OWCP did not discharge its burden of proof to terminate appellant's wage-loss compensation in light of the medical evidence.⁷

On October 17, 2011 OWCP denied modification of the March 10, 2011 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 meet its burden to justify termination, it 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 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

⁷ Counsel alternatively argued that: (1) OWCP improperly doubled appellant's claims; and (2) OWCP shopped for a favorable medical opinion.

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 and, for this reason, will be narrowly construed. *Stephen A. Pasquale*, 57 ECAB 396, 402 (2006).

⁹ *M.M.*, 59 ECAB 680, 683 (2008). *See also* 20 C.F.R. § 10.515 *et seq.*

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

¹¹ *L.C.*, Docket No. 08-1923 (issued May 13, 2009).

¹² *S.G.*, Docket No. 08-1992 (issued September 22, 2009).

ANALYSIS

OWCP accepted that appellant sustained prolonged reaction to stress, aggravated post-traumatic stress disorder and left ankle sprain while in the performance of duty and subsequently combined the claims under File No. xxxxxx516. It referred her to three separate physicians to determine whether she was able to return to work. Drs. De La Chapelle and Miskin, both Board-certified psychiatrists, each opined in their respective August 3 and September 21, 2010 reports that appellant had emotional symptoms related to her employment injuries. In an August 10, 2010 work capacity evaluation form, Dr. De La Chapelle recommended a part-time schedule to reduce stress. In an October 6, 2010 work capacity evaluation form, Dr. Miskin specified reassignment from mail delivery to a position inside the postal facility to limit interaction with the public. Dr. Green, a Board-certified orthopedic surgeon, opined in a September 7, 2010 report that appellant remained partially disabled due to the April 25, 2006 work injury and was unable to physically perform the tasks of a letter carrier. He thereafter advised that she be placed on sedentary duty and imposed the following restrictions in an October 27, 2010 work capacity evaluation form: 30 minutes of walking, 30 minutes of standing, one hour of pushing items weighing up to 10 pounds, one hour of pulling items weighing up to 10 pounds, one hour of lifting items weighing up to 10 pounds and no squatting, kneeling, climbing or driving on the job.

On December 1, 2010 the employing establishment offered appellant the job of casing mail as a modified letter carrier, which involved intermittent sitting, standing, reaching above shoulder level and lifting for up to six hours while casing mail. After OWCP requested additional details about the physical requirements, the employing establishment revised the job offer to limit sitting, standing and walking to four hours and intermittent reaching above the shoulder and lifting of items weighing less than 10 pounds to four hours. It determined that this position was suitable, followed its procedures by issuing 30-day and 15-day notices to appellant and then terminated her wage-loss compensation.

The Board finds that OWCP improperly terminated appellant's wage-loss compensation. As noted, the threshold issue is whether the position offered by the employing establishment is suitable. In this case, the modified letter carrier job was part time and performed indoors, which conformed to Drs. De La Chapelle and Miskin's restrictions pertaining to appellant's emotional condition.¹³ However, as written, the physical requirements specify up to four hours of walking and standing as well as four hours of lifting items weighing up to 10 pounds. These exceed the limits set by Dr. Green in his October 27, 2010 work capacity evaluation form. Because appellant was not physically capable of performing the duties of a modified letter carrier, the position was not suitable.¹⁴

¹³ See *D.B.*, Docket No. 07-854 (issued September 11, 2007) (an employee's psychological impairments must be considered in conjunction with his or her physical limitations when determining whether an offered position is suitable).

¹⁴ See, e.g., *T.S.*, 59 ECAB 490 (2008). Since OWCP did not demonstrate job suitability, the Board finds it unnecessary to address the medical evidence appellant submitted after she received the December 16, 2010 notice.

CONCLUSION

The Board finds that OWCP improperly terminated appellant's wage-loss compensation on the grounds that she refused an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the October 17, 2011 decision of the Office of Workers' Compensation Programs be reversed.

Issued: November 8, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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