

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

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**D.M., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Pittsfield, ME, Employer**

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**Docket No. 12-226  
Issued: September 19, 2012**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On November 22, 2011 appellant, through counsel, filed a timely appeal from an October 18, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) of his compensation benefits. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 OWCP properly terminated appellant's wage-loss compensation effective January 9, 2001 on the grounds that he abandoned suitable work.

On appeal, counsel asserts that OWCP's October 18, 2011 decision is "contrary to fact and law."

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

This is the fourth appeal before the Board in the case. In the first appeal, on January 21, 2004,<sup>2</sup> the Board issued an order remanding the case for further development of appellant's emotional condition claim. In the second appeal, by decision and order issued March 16, 2006,<sup>3</sup> the Board modified OWCP's June 21, 2005 decision denying an emotional condition claim to find that appellant had established a compensable factor of employment. The Board found that the employing establishment erred in issuing appellant's continuation of pay and in paying his wages during a limited-duty assignment. The Board further found that appellant did not submit sufficient rationalized medical evidence to establish a causal relationship between claimed gastroesophageal reflux disease and the identified work factors. In the third appeal, regarding File No. xxxxxx847, by order issued September 15, 2011, the Board remanded the case to OWCP for clarification, finding that OWCP's hearing representative's October 19, 2010 decision did not properly identify the issues or discuss the evidence. The law and the facts of the case as set forth in the Board's prior decisions and orders are incorporated by reference. The relevant factual and procedural history appears below.

On April 20, 2010 OWCP reinstated appellant's January 8, 2003 request for an oral hearing regarding OWCP's December 31, 2002 decision under File No. xxxxxx847, terminating his compensation benefits effective January 9, 2001 under 5 U.S.C. § 8106(c) on the grounds that he abandoned suitable work.<sup>4</sup> During an August 3, 2010 telephonic hearing, counsel asserted that appellant stopped work on January 9, 2001 due to the claimed emotional condition with consequential gastroesophageal reflux disease. Appellant testified that he stopped work due to frustration over errors in pay and stress from being made to sit in a metal chair that aggravated his lumbar spine. Counsel also argued that the light-duty position he performed was not suitable work as he was entitled to a permanent rehabilitation position.

In an August 30, 2010 letter, the employing establishment commented on the hearing transcript. It explained that appellant was a noncareer rural carrier associate, he was not entitled to a permanent rehabilitation position. The employing establishment acknowledged the pay error in June 2000, corrected by a pay adjustment in October 2000.

In a September 22, 2010 letter, appellant contended that he was not offered a permanent rehabilitation position developed by a vocational rehabilitation counselor that was to begin on June 5, 2000.

By decision dated and finalized October 19, 2010, OWCP found that appellant did not establish a recurrence of disability commencing January 10, 2001. Counsel filed an appeal with the Board on November 22, 2010. By order issued September 15, 2011, the Board remanded the

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<sup>2</sup> Docket No. 03-669 (issued January 21, 2004), regarding File No. xxxxxx778.

<sup>3</sup> Docket No. 05-1916 (issued March 16, 2006), regarding File No. xxxxxx778.

<sup>4</sup> At the time of the December 31, 2002 termination decision, OWCP found that appellant had not established that a December 6, 1997 lumbar injury accepted under File No. xxxxxx591 disabled him from performing an offered modified-duty job.

case to OWCP for issuance of a new decision, finding that OWCP's hearing representative did not properly identify the issues involved.

By decision dated and finalized October 18, 2011, OWCP's hearing representative affirmed OWCP's December 31, 2002 decision, finding that OWCP properly terminated appellant's compensation effective January 9, 2001 on the grounds that he abandoned suitable work. She reviewed the medical records pursuant to the three prior appeals, including appellant's emotional condition claim. The hearing representative found that no physician of record provided medical rationale stating that appellant was disabled for work on and after January 9, 2001 due to the accepted lumbar injury.

### **LEGAL PRECEDENT**

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits. It has authority under section 8106(c)(2) of FECA to terminate compensation for any partially disabled employee who refuses or neglects to work after suitable work is offered. To justify termination, OWCP must show that the work offered was suitable, that appellant was informed of the consequences of his refusal to accept such employment and that he was allowed a reasonable period to accept or reject the position or submit evidence or provide reasons why the position is not suitable.<sup>5</sup>

OWCP regulations provide factors to be considered in determining what constitutes "suitable work" for a particular disabled employee, include 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.<sup>6</sup> The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by medical evidence.

OWCP procedures require that consideration be given to the kind of appointment in determining whether an offered position is suitable. For example, a written offer of modified duty will generally be considered unsuitable if the position offered is less than four hours a day when a claimant is capable of working full time; if the position is temporary when the date-of-injury position was permanent; or if the position is seasonal when the date-of injury position was permanent, full time.<sup>7</sup>

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<sup>5</sup> See *Ronald M. Jones*, 52 ECAB 190, 191 (2000); see also *Maggie L. Moore*, 42 ECAB 484, 488 (1991), *reaff'd on recon.*, 43 ECAB 818, 824(1992). See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.10 (July 1997) (The claims examiner must make a finding of suitability, advise the claimant that the job is suitable and that refusal of it may result in application of the penalty provision of 5 U.S.C. 8106(c)(2), and allow the claimant 30 days to submit his or her reasons for abandoning the job. If the claimant submits evidence and/or reasons for abandoning the job, the claims examiner must carefully evaluate the claimant's response and determine whether the claimant's reasons for doing so are valid).

<sup>6</sup> *Rebecca L. Eckert*, 54 ECAB 183 (2002).

<sup>7</sup> Federal (FECA) Procedure Manual, *supra* note 5.

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.<sup>8</sup>

### ANALYSIS

OWCP accepted that appellant sustained lumbar injuries on December 6, 1997 and October 16, 1999. At the time of these injuries, appellant was a noncareer rural carrier associate. He stopped work in October 1999, returned to work as a part-time flexible carrier in June 2000, again stopped work on January 9, 2001 and did not return. Appellant claimed that he stopped work due to a work-related psychiatric condition with consequential gastroesophageal reflux disease. OWCP denied his emotional claim by decision dated June 21, 2002. By December 31, 2002 decision, it terminated appellant's wage-loss compensation effective January 9, 2001 on the grounds that he abandoned suitable work. The burden now shifts to appellant to demonstrate that his refusal to work was reasonable or justified.<sup>9</sup>

During an August 3, 2010 hearing, appellant reiterated prior arguments that he was totally disabled for work as of January 9, 2001 due to a claimed emotional condition and consequential gastroesophageal reflux disease. However, OWCP denied his emotional condition claim by decision dated June 21, 2005. By decision and order issued March 16, 2006, pursuant to the second appeal, the Board found that appellant had established administrative pay errors as a compensable factor of employment, but that there was insufficient medical evidence establishing that this factor caused or aggravated the claimed emotional condition. Appellant did not offer any medical evidence at or after the August 3, 2010 hearing addressing whether he sustained a psychiatric condition related to the June 2000 pay error or otherwise supporting that an emotional condition precluded him from performing the modified job. Therefore, he did not establish that he was justified in stopping work due to the denied emotional condition.

Appellant also contended that sitting in a metal chair at work caused a worsening of his lumbar injuries, disabling him for work as of January 9, 2001. However, he did not submit any medical evidence explaining how and why sitting in a metal chair at work disabled him from performing the light-duty position on and after January 9, 2001. Therefore, appellant did not establish that he was justified in stopping work due to a worsening of the accepted lumbar injuries.

Counsel reiterated appellant's arguments in prior appeals that the part-time flexible carrier position he performed from June 2000 to January 9, 2001 was not suitable work as he was entitled to a permanent rehabilitation position. However, the employing establishment explained that as appellant was a noncareer employee, he was not entitled to a permanent job. Counsel's argument is therefore without merit.

On appeal, counsel asserts that OWCP's October 18, 2011 decision is "contrary to fact and law." However, the Board finds that appellant did not submit evidence or argument justifying his abandonment of the light-duty position on January 9, 2001. Therefore, OWCP's

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<sup>8</sup> 20 C.F.R. § 10.517. See *Kathy E. Murray*, 55 ECAB 288 (2004); see also *Ronald M. Jones*, *supra* note 5.

<sup>9</sup> *Ronald M. Jones*, *supra* note 5.

October 18, 2011 decision affirming the termination of his wage-loss compensation was proper under the law and the facts of this case.

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 OWCP properly terminated appellant's wage-loss compensation effective January 9, 2001 on the grounds that he abandoned suitable work.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated October 18, 2011 is affirmed.

Issued: September 19, 2012  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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