

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

C.M., Appellant	)	
	)	
and	)	<b>Docket No. 13-1733</b>
	)	<b>Issued: December 20, 2013</b>
U.S. POSTAL SERVICE, POST OFFICE,	)	
New York, NY, Employer	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On July 16, 2013 appellant filed a timely appeal from the June 26, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 entitlement to wage-loss and schedule award compensation effective March 10, 2013 on the grounds that he refused an offer of suitable work.

**FACTUAL HISTORY**

OWCP accepted that on July 30, 2001 appellant, then a 38-year-old carrier, sustained a lumbar strain and herniated lumbar disc at L4-5 due to slipping down steps in the performance of

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

duty. Appellant stopped work on August 1, 2001 and later began to receive disability compensation on the periodic rolls.

In a February 26, 2004 report, Dr. Alan M. Crystal, a Board-certified orthopedic surgeon serving as an OWCP referral physician, stated that appellant did not have objective findings that would prevent him from returning to his regular work as a carrier.

In a number of reports dated between 2004 and 2009, Dr. George V. DiGiacinto, an attending Board-certified neurosurgeon, posited that appellant was totally disabled from all work due to his accepted neck and back conditions.<sup>2</sup> In an April 13, 2009 report, he indicated that his finding that appellant was totally disabled was based on the fact that appellant could only walk a block or two at a time while in pain the whole time.

In a December 6, 2010 work capacity evaluation form, Dr. DiGiacinto indicated that appellant was permanently disabled from all work. He mentioned appellant's cervical and lumbar discs in support of this determination and also stated that appellant had "severe neck and back pain." In a December 14, 2011 form report, Dr. DiGiacinto indicated that appellant had been totally disabled on a permanent basis since July 30, 2001 due to the C5-6 disc herniation he sustained on that date.

Due to a lack of rationalized medical evidence regarding appellant's ability to work, OWCP referred appellant to Dr. Leon Sultan, a Board-certified orthopedic surgeon, for an examination and opinion on his ability to work.

In a May 23, 2012 report, Dr. Sultan discussed appellant's medical history and reported the findings of his examination. He noted that the accepted work conditions due to the July 30, 2001 work injury were still active and causing objective symptoms. Dr. Sultan stated that appellant had low grade motion restriction in regard to the lumbar spine with nonradiating lower back pain when tilting to the right. He indicated that appellant also had mild structural thoracolumbar scoliosis, L4-5 disc herniation and preexisting multilevel lumbar degenerative changes, but noted that his accepted conditions should not be expanded to include other medical conditions as a result of the July 30, 2001 work injury. Dr. Sultan stated:

"There is an ongoing mild partial lower back disability secondary to the incident of July 30, 2001. He is presently disabled as a mail carrier. It is now more than 10 years since the occurrence of July 30, 2001 and I do not anticipate that this gentleman will return to his job as a mail carrier. He is able to return to work on a part-time four [to] six hour-a-day basis with restrictions. These restrictions would include lifting or carrying more than 10 [to] 15 pounds at a time using both hands along with restrictions on bending, stooping, squatting or crawling. These restrictions are permanent."

OWCP requested clarification of Dr. Sultan's report with respect to the recommended work restrictions. In his supplemental report dated July 24, 2012, Dr. Sultan opined that

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<sup>2</sup> Dr. DiGiacinto indicated that appellant had pathologies at L4-5 and C5-6, but it should be noted that no cervical disc condition has been accepted by OWCP.

appellant had an ongoing mild partial lower back disability secondary to the accident of July 31, 2001 and stated:

“[Appellant] demonstrated low grade motion restriction in regard to his lumbar spine secondary to a disc herniation at the L4-5 level along with multilevel preexisting lumbar spine degenerative changes. I was of the opinion that he may resume part-time work activity four [to] six hours a day with restrictions on pushing, pulling or lifting up to 15 pounds at a time along with avoiding any squatting, kneeling or climbing so as not to trigger off disabling lower back symptoms. The word ‘avoid’ means refraining from these activities all the time.”

In July 2012, appellant began to participate in an OWCP-sponsored vocational rehabilitation program. Appellant’s efforts did not result in job placement.

On December 11, 2012 the employing establishment offered appellant a position as a modified clerk for four hours per day based on the work limitations provided by Dr. Sultan. The limited-duty job offer indicated that appellant would be required to stand intermittently, reach and perform simple grasping and fine manipulation for up to four hours per day. The job offer also indicated that appellant would not be required to twist, bend, stoop, squat, kneel, climb or crawl. Appellant would not have to sit, walk or stand for more than six hours per day and he would not be required to push, pull, or lift more than 15 pounds.

The modified clerk position was approved by appellant’s vocational rehabilitation counselor. Appellant did not accept the modified clerk position offered by the employing establishment.

In a December 31, 2012 letter, OWCP advised appellant of its determination that the modified carrier position offered by the employing establishment was suitable. It informed appellant that his entitlement to wage-loss and schedule award compensation would be terminated if he did not accept the position or provide good cause for not doing so within 30 days of the date of the letter.

On January 4, 2013 appellant refused the modified clerk position offered by the employing establishment explaining that his retirement had been approved. He alleged that he was unable to perform the physical duties of the job.

In a January 7, 2013 narrative report, Dr. DiGiacinto stated that appellant was seen in follow up, but that there was no significant change in his condition. He indicated that appellant continued to show marked limitations in range of motion in both the cervical and lumbar spine. Appellant’s neurological examination was otherwise nonfocal and he had significant paraspinous spasm in his neck and back. Dr. DiGiacinto stated that, given the duration of appellant’s symptoms, he would be permanently totally disabled. In work capacity evaluation and attending physician’s reports dated January 7, 2013, he indicated that appellant was totally disabled.

In a February 13, 2013 letter, OWCP advised appellant that his reasons for not accepting the modified carrier position offered by the employing establishment were unjustified. It advised him that his entitlement to wage-loss and schedule award compensation would be terminated if he did not accept the position within 15 days of the date of the letter. Appellant did not accept the modified clerk position.

In a March 5, 2013 decision, OWCP terminated appellant's entitlement to wage-loss and schedule award compensation effective March 10, 2013 on the grounds that he refused an offer of suitable work.

In his reports dated April 1 and May 6, 2013, Dr. DiGiacinto continued to indicate that, given the duration of appellant's symptoms, he would be permanently totally disabled. He again stated that appellant continued to show marked limitations in range of motion in both the cervical and lumbar spine, that his neurological examination was otherwise nonfocal and that he had significant paraspinous spasm in his neck and back.

By decision dated June 26, 2013, OWCP affirmed its March 5, 2013 decision terminating appellant's entitlement to wage-loss and schedule award compensation effective March 10, 2013.

### **LEGAL PRECEDENT**

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."<sup>3</sup> However, to justify such termination, OWCP must show that the work offered was suitable.<sup>4</sup> 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.<sup>5</sup>

### **ANALYSIS**

OWCP accepted that on July 30, 2001 appellant sustained a lumbar strain and herniated lumbar disc at L4-5 due to slipping down steps while handling a mail cart. Appellant stopped work on August 1, 2001 and later began to receive disability compensation on the periodic rolls. OWCP terminated appellant's entitlement to wage-loss and schedule award compensation effective March 10, 2013 on the grounds that he refused an offer of suitable work.

The evidence of record shows that appellant is capable of performing the modified clerk position offered by the employing establishment and determined to be suitable by OWCP in December 2012. The job offer required appellant to stand intermittently, reach and perform simple grasping and fine manipulation for up to four hours per day. The job offer also indicated that appellant would not be required to twist, bend, stoop, squat, kneel, climb or crawl. Appellant would not have to sit, walk or stand for more than six hours per day and he would not be required to push, pull or lift more than 15 pounds. The record does not reveal that the modified clerk position was temporary or seasonal in nature.<sup>6</sup>

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<sup>3</sup> 5 U.S.C. § 8106(c)(2).

<sup>4</sup> *David P. Camacho*, 40 ECAB 267, 275 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341, 345 (1981).

<sup>5</sup> 20 C.F.R. § 10.517; see *Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

<sup>6</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claim, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4b (July 1997).

The modified clerk position was approved 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.<sup>7</sup>

The Board finds that, in determining that appellant is physically capable of performing the position, OWCP properly relied on the opinion of Dr. Sultan, a Board-certified orthopedic surgeon who served as an OWCP referral physician. In a report dated May 23, 2012 and a supplemental report of July 24, 2012, Dr. Sultan stated that appellant could resume part-time work activity for four to six hours a day with restrictions on pushing, pulling or lifting up to 15 pounds at a time along with no engaging in squatting, stooping, bending, kneeling, climbing or crawling. In his reports, Dr. Sultan extensively described appellant's medical history and reported the findings of his comprehensive examination of appellant. The Board finds that the work restrictions provided by Dr. Sultan would allow appellant to perform the duties of the modified clerk position offered by the employing establishment.

The Board notes that, therefore, OWCP has established that the modified clerk position offered by the employing establishment is suitable. As noted above, 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 and argument submitted by appellant in support of his refusal of the modified clerk position and notes that it is not sufficient to justify his refusal of the position.

Appellant submitted several reports in which Dr. DiGiacinto, an attending Board-certified neurosurgeon, indicated that he had been totally and permanently disabled since July 30, 2001 due to the effects of the July 30, 2001 injury. For example, in reports dated January 7, April 1 and May 6, 2013, Dr. DiGiacinto indicated that, given the duration of appellant's symptoms, he would be permanently totally disabled. He stated that appellant continued to show marked limitations in range of motion in both the cervical and lumbar spine, that his neurological examination was otherwise nonfocal and that he had significant paraspinous spasm in his neck and back. These reports, as well as a brief form report dated January 7, 2013, are of limited probative value because they do not contain sufficient medical rationale supporting their opinions on total disability. Dr. DiGiacinto indicated that appellant had limited cervical and lumbar spine motion, but he provided no specific findings of the extent of such limited motion. He stated that appellant had paraspinous spasm in his neck and back, but did not describe the course of these symptoms or explain how appellant's medical condition would render him totally disabled for more than 10 years.<sup>8</sup>

On appeal, appellant contends that he could not work as a modified clerk because he is still sick. However, appellant's own opinion on his ability to work would not be a substitute for probative medical evidence. The Board notes that OWCP complied with its procedural requirements prior to terminating appellant's compensation, including providing appellant with

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<sup>7</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claim, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8d (December 1993).

<sup>8</sup> Appellant indicated that he could not work as a modified clerk because he was planning on retiring, but he did not show that this was a valid reason for refusing the job.

an opportunity to accept the offered position after informing him that his reasons for initially refusing the position were not valid.<sup>9</sup>

For these reasons, OWCP properly terminated appellant's entitlement to wage-loss and schedule award compensation effective March 10, 2013 on the grounds that he refused an offer of 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 OWCP properly terminated appellant's entitlement to wage-loss and schedule award compensation effective March 10, 2013 on the grounds that he refused an offer of suitable work.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the June 26, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 20, 2013  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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

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<sup>9</sup> See generally *Maggie L. Moore*, 42 ECAB 484 (1991); *reaff'd on recon.*, 43 ECAB 818 (1992).