

FACTUAL HISTORY

OWCP accepted that on September 10, 2009 appellant, then a 36-year-old rural carrier associate, sustained lumbar and cervical sprains as a result of a motor vehicle accident while in the performance of duty. She stopped work on the date of injury.

Appellant underwent a functional capacity evaluation on April 13, 2010, which showed that she was in a light-duty classification with floor to waist and waist to overhead lifting restrictions.

In a May 13, 2010 medical report, Dr. Hoon J. Park, an attending Board-certified physiatrist, advised that appellant had a lumbar and cervical herniated nucleus pulposus. He released her to return to work on that date subject to restrictions which included lifting no more than 30 pounds on an intermittent basis.

On June 7, 2010 the employing establishment offered appellant a full-time modified rural carrier position which she accepted on that date. The position required lifting up to 30 pounds and included the normal duties of a rural carrier associate. Appellant was scheduled to return to work on June 22, 2010. She returned to work on that date but then resigned. On June 24, 2010 OWCP advised appellant that the position was found suitable to her physical restrictions and currently available. It provided her 30 days to return to work or explain why she abandoned the position.

In a July 14, 2010 letter, appellant stated that when she entered her office building on June 22, 2010 she had a panic attack. This incident was witnessed by her immediate supervisor who asked her what was wrong. Appellant began to cry and shake uncontrollably. She responded that she was too afraid to work in the building and drive a postal vehicle. Appellant resigned because she could not safely fulfill the duties of a rural carrier associate which required her to drive a postal vehicle.

In a July 12, 2010 report, Dr. Ronald M. Podell, a Board-certified psychiatrist, noted that appellant was undergoing psychotherapy on a weekly basis.² Appellant was taking medication for anxiety and panic disorder. Dr. Podell advised that appellant was unable to work at the employing establishment or drive a postal vehicle. He stated that the September 10, 2009 injury contributed to her current anxiety disorder and disability.

On July 28, 2010 OWCP advised appellant that her reasons for refusing to accept the offered position were not valid and provided her 15 days to accept the position or have her compensation terminated.

In an August 4, 2010 letter, appellant stated that her physical incapacity to safely perform the required duties of the offered position was due to the accepted September 10, 2009 employment injuries. She experienced daily anxiety and panic disorder, controlled only through prescription medications and weekly care and supervision by a psychiatrist. Appellant stated that, while Dr. Park had medically cleared her to perform the offered modified position,

² The report was also signed by Mayda Podell, a licensed social worker.

Dr. Podell found that she was unable to work at the employing establishment in her current state due to her work-related disability.

In a September 20, 2010 decision, OWCP terminated appellant's compensation effective September 26, 2010 on the grounds that she abandoned suitable work under section 8106(c) of FECA. It found that Dr. Podell's July 12, 2010 report was insufficiently rationalized to establish that she sustained work-related anxiety or panic attacks that prevented her from performing the duties of the offered position.

On September 8 and 9, 2011 appellant, through her attorney, requested reconsideration.

In progress notes dated August 30, 2010 to October 4, 2011, Dr. Park noted appellant's left hand symptoms and low back and cervical pain. He also noted that she was not working. Dr. Park listed findings on physical examination and ordered an upper extremity bone scan to rule out complex regional pain syndrome (CRPS) that may have been caused by appellant's work-related neck injury. He addressed her medical treatment plan.

In a January 17, 2011 report, Dr. Podell advised that appellant's preexisting anxiety and acute stress disorders, which she attributed to being previously stalked and sexually harassed by an employee, developed into chronic post-traumatic stress disorder when she saw the employee upon her return to work in June 2010. Due to this incident, appellant could not work at the employing establishment in any capacity. Dr. Podell recommended an equitable separation from this work environment to preserve her emotional well being.

In an October 24, 2011 report, Dr. Benjamin M. Hentel, a Board-certified radiologist, advised that a bone scan of the left wrist showed no evidence of CRPS.

In a December 12, 2011 decision, OWCP denied modification of the September 20, 2010 termination decision. It found that the medical evidence submitted was insufficient to establish that appellant was unable to perform the duties of the offered position.³

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.⁴ Section 8106(c)(2) of FECA provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee is not entitled to compensation.⁵ To justify termination of compensation, OWCP must show that the work offered was suitable and must inform appellant

³ Following the issuance of OWCP's December 12, 2011 decision, OWCP received additional evidence. The Board may not consider evidence for the first time on appeal which was not before OWCP at the time it issued the final decision in the case. *See* 20 C.F.R. § 501(c)(1); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

⁴ *Linda D. Guerrero*, 54 ECAB 556 (2003).

⁵ 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

of the consequences of refusal to accept such employment.⁶ Section 8106(c) will be narrowly construed as it serves as a penalty provision, which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.⁷

Section 10.517(a) of FECA's implementing regulations provide that an employee who refuses or neglects to work after suitable work has been offered or secured by the employee, has the burden of showing that such refusal or failure to work was reasonable or justified.⁸ Pursuant to section 10.516, the employee shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.⁹

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, establishing that a position has been offered within the employee's work restrictions and setting forth the specific job requirements of the position.¹⁰ 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 by appellant was suitable.¹¹

Once OWCP establishes that the work offered is suitable, the burden shifts to the employee who refuses to work to show that the refusal or failure to work was reasonable or justified.¹² The determination of whether an employee is physically capable of performing a modified assignment is a medical question that must be resolved by medical evidence.¹³ OWCP procedures state that acceptable reasons for refusing an offered position include medical evidence of inability to do the work.¹⁴

ANALYSIS

The Board finds that OWCP failed to meet its burden of proving that the June 7, 2010 modified-duty job was suitable as it did not properly consider whether appellant was unable to perform the duties of the position due to an emotional condition.

⁶ *Ronald M. Jones*, 52 ECAB 190 (2000).

⁷ *Joan F. Burke*, 54 ECAB 406 (2003).

⁸ 20 C.F.R. § 10.517(a); *see Ronald M. Jones*, *supra* note 6.

⁹ *Id.* at § 10.516.

¹⁰ *See Linda Hilton*, 52 ECAB 476 (2001).

¹¹ *Id.*

¹² 20 C.F.R. § 10.517(a).

¹³ *Gayle Harris*, 52 ECAB 319 (2001).

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(3) (July 1997).

OWCP accepted that appellant sustained lumbar and cervical sprains as a result of a September 10, 2009 motor vehicle accident while working as a rural carrier associate. It terminated her compensation effective September 26, 2010 on the grounds that she abandoned an offer of suitable work. OWCP determined that the modified rural carrier position was suitable based on the opinion of her attending physician. In a report dated May 13, 2010, Dr. Park found that appellant could work with limitations on lifting over 30 pounds on an intermittent basis. The modified rural carrier position required lifting up to 30 pounds and included the normal duties of a rural carrier associate.

Prior to the termination of benefits, on July 12, 2010, Dr. Podell noted that appellant was undergoing psychotherapy on a weekly basis and taking medication for anxiety and panic disorder. He advised that she was unable to work at the employing establishment or drive a postal vehicle. Dr. Podell concluded that the September 10, 2009 employment injuries contributed to appellant's current anxiety disorder and disability. It is well established that OWCP must consider preexisting and subsequently acquired conditions in evaluating the suitability of an offered position.¹⁵ At the time that it terminated appellant's compensation, Dr. Podell had advised that she was disabled from an anxiety disorder. He attributed the diagnosed condition and resultant disability to her September 10, 2009 work injury. Dr. Podell's opinion, while not adequately rationalized to establish that appellant sustained a disabling psychiatric condition, stands uncontradicted in the record and was sufficient to warrant further development of the medical evidence.¹⁶ As a penalty provision, section 8106(c)(2) must be narrowly construed.¹⁷ The medical evidence does not clearly establish that the abandoned position was within appellant's capabilities; consequently, OWCP did not discharge its burden of proof to justify the termination of her compensation pursuant to section 8106(c)(2) of FECA.

CONCLUSION

The Board finds that OWCP improperly terminated appellant's compensation effective September 26, 2010 on the grounds that she abandoned suitable work under 5 U.S.C. § 8106(c).

¹⁵ See *Richard P. Cortes*, 56 ECAB 200 (2004).

¹⁶ See *Phillip L. Barnes*, 55 ECAB 426 (2004).

¹⁷ See *Stephen A. Pasquale*, 57 ECAB 396 (2006); *Richard P. Cortes*, *supra* note 15.

ORDER

IT IS HEREBY ORDERED THAT the December 12, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: March 14, 2013
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