United States Department of Labor
Employees' Compensation Appeals Board

J.R., Appellant	)	
and	)	**Docket No. 13-720**
	)	**Issued: October 21, 2013**
U.S. POSTAL SERVICE, POST OFFICE, New York, NY, Employer	)	

Appearances:
Paul Kalker, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 6, 2013 appellant, through her attorney, filed a timely appeal from a December 31, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) terminating compensation on the grounds of refusing suitable work. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUE

The issue is whether OWCP properly terminated appellant's compensation effective September 7, 2010 on the grounds that she refused suitable work under 5 U.S.C. § 8106(c)(2).

On appeal, counsel contended that OWCP unreasonably sought second opinion and referee medical evidence, which was not well rationalized and lacked probative value.

[1] 5 U.S.C. §§ 8101-8193.

[2] The Board notes that, following the issuance of the December 31, 2012 OWCP decision, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

OWCP accepted that appellant, then a 30-year-old city carrier, sustained lumbosacral radiculitis as a result of lifting and pushing heavy parcels in the performance of duty on October 27, 2009. Appellant was placed on the periodic rolls and received appropriate compensation benefits. She stopped work on the date of injury and did not return.

OWCP referred appellant to Dr. Robert J. Orlandi, a Board-certified orthopedic surgeon, for a second opinion evaluation. In an April 19, 2010 report, Dr. Orlandi took a detailed medical history, reviewed appellant's medical records and performed a physical examination. He concluded that appellant's lumbar condition had resolved. Dr. Orlandi found that appellant was capable of working full-time regular duty without restrictions. He noted that there would be no need for additional diagnostic testing, including a post-gestational lumbar magnetic resonance imaging (MRI) scan. In an addendum dated May 25, 2010, Dr. Orlandi clarified that appellant's lumbar sprain had resolved with no evidence of lumbar radiculopathy.

Appellant underwent a functional capacity evaluation on April 28, 2010, which showed that she was not able to return to work to full or modified duty.

In an April 6, 2010 report, Dr. Andrew D. Brown, a Board-certified physiatrist, opined that appellant was totally disabled for work. Appellant was also six months pregnant. Dr. Brown explained that it was difficult to determine her work capacity based on her low back injury only as opposed to the additional effects of her pregnancy. He opined that appellant was capable of working no more than three hours a day with the following restrictions: no lifting more than 10 pounds; must change positions every 15 to 20 minutes; must take a break every 10 to 20 minutes. On May 18, 2010 Dr. Brown noted that she was seven months pregnant and reiterated his opinion that she was capable of sedentary work with restrictions. He indicated that appellant would require an MRI scan of the lumbar spine after giving birth to determine the extent of her lumbosacral pathology, which could not be assessed due to her pregnancy at that time.

On June 3, 2010 the employing establishment offered appellant a part-time modified city carrier position which was available the next day. The sedentary position required standing, walking and sitting for an average of one hour per day. Appellant would be scheduled to work no more than three hours per day. She accepted the offer on June 7, 2010 with an explanation that she could not report to duty due to her pregnancy.

By letter dated July 26, 2010, OWCP noted that appellant had accepted the job offer, but did not report to work because she was pregnant. It advised her that her reasons for refusing the offered position were not determined to be reasonable and her compensation benefits would be terminated if she did not submit medical evidence from an obstetrician/gynecologist specifically stating that she was incapable of performing the duties of the modified position within 30 days. Appellant notified OWCP by telephone that she had given birth and was no longer pregnant.

In an August 27, 2010 letter, OWCP advised appellant that it had considered her reasons for refusal and found them unacceptable. It afforded her 15 days in which to accept the position or her compensation benefits would be terminated. It noted that no further reasons for refusal would be considered.

Appellant submitted an August 12, 2010 report from Dr. Claudia Ravins, a Board-certified obstetrician and gynecologist, who diagnosed post-partum depression. Dr. Ravins opined that appellant was able to go back to work without any restrictions effective August 30, 2010.

By decision dated September 10, 2010, OWCP terminated appellant's compensation benefits effective September 7, 2010 on the basis that she refused suitable employment.

On September 29, 2010 appellant, through her attorney, requested a review of the written record by an OWCP hearing representative. In a September 10, 2010 report, Dr. Ravins indicated that appellant had a natural delivery on July 18, 2010 and took her off work for one month due to post-partum depression. He released appellant to work on September 27, 2010 without any restrictions. Appellant also submitted a September 28, 2010 report from Dr. Brown who noted that she experienced increased pain to palpation, spasm and tenderness in the paralumbar musculature and was totally disabled for her job as it had been described to him.

OWCP found a conflict in medical opinion between Dr. Brown and Dr. Orlandi. To resolve this conflict, it referred appellant to Dr. Salvatore J. Sclafani, a Board-certified orthopedic surgeon for an impartial medical examination. In an October 7, 2010 report, Dr. Sclafani reviewed a statement of accepted facts, related appellant's history, reviewed the medical record and conducted a physical examination. He found no objective evidence of any ongoing radiculopathy and concluded that appellant's lumbar condition had resolved. Dr. Sclafani found no indication upon physical examination for a need of an MRI scan and opined that appellant was capable of her normal work without restrictions.

By decision dated February 17, 2011, an OWCP hearing representative affirmed the September 10, 2010 decision based on a review of the written record.

On May 5, 2011 appellant, through her attorney, requested reconsideration and submitted a February 18, 2011 MRI scan of the lumbar spine which revealed a three-millimeter central disc herniation at L5-S1 with thecal sac flattening and transitional vertebrae lumbosacral junction. She also submitted an April 4, 2011 report from Dr. Brown who reiterated his opinion that appellant was totally disabled for her job description due to her employment-related condition. On April 17, 2011 Dr. Brown opined that the herniated nucleus pulposus (HNP) at L5-S1 documented by MRI scan was causally related to the employment injury.

By decision dated August 18, 2011, OWCP denied modification of the February 17, 2011 decision.

On September 8, 2011 appellant, through her attorney, requested reconsideration and submitted an August 30, 2011 report from Dr. Demetrios Mikelis, an internist, who diagnosed traumatic lumbosacral pain syndrome, HNP and radiculitis and opined that appellant was disabled from August 30 to September 12, 2011. Dr. Mikelis released appellant to light-duty work effective September 13, 2011 with the following restrictions: no more than 3 hours of work per day; no lifting greater than 10 pounds; must change position every 15 to 20 minutes.

By decision dated December 1, 2011, OWCP denied appellant's request for reconsideration of the merits.

On July 31, 2012 appellant's attorney requested reconsideration and submitted a June 12, 2012 report from Dr. Mikelis who reiterated his diagnoses and opinion that appellant was capable of working on a limited-duty basis with restrictions and frequent rest breaks every 15 to 20 minutes. Dr. Mikelis noted that appellant would not be able to perform job-related activities continuously.

By decision dated December 31, 2012, OWCP denied modification of its August 18, 2011 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[3] 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.[4] To justify termination of compensation, OWCP must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[5] 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.[6]

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.[7] 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.[8]

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.[9] 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.[10]

[3] *See Linda D. Guerrero*, 54 ECAB 556 (2003).

[4] 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

[5] *See Ronald M. Jones*, 52 ECAB 190 (2000).

[6] *See Joan F. Burke*, 54 ECAB 406 (2003).

[7] 20 C.F.R. § 10.517(a).

[8] *Id.* at § 10.516.

[9] *See Linda Hilton*, 52 ECAB 476 (2001).

[10] *Id.*

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.[11] 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.[12] OWCP procedures state that acceptable reasons for refusing an offered position include medical evidence of inability to do the work.[13]

ANALYSIS

It is well established that once OWCP accepts a claim and pays compensation for disability, it has the burden of justifying termination or modification of benefits. Under such circumstances it must establish either that its original determination was erroneous or that the employment-related disability has ceased.[14] The Board finds that OWCP failed to meet its burden of proof to terminate appellant's compensation benefits.[15]

OWCP accepted appellant's claim for lumbosacral radiculitis. By decision dated September 10, 2010, it terminated her monetary compensation benefits effective September 7, 2010 on the basis that she refused suitable employment in reliance upon reports from Dr. Brown, appellant's attending physician, and Dr. Orlandi, an OWCP referral physician. Following its termination decision, OWCP found a conflict in medical opinion between Dr. Brown, who opined that appellant was totally disabled for work, and Dr. Orlandi, who opined that the lumbar condition had resolved and she was capable of working full-time regular duty without restrictions. To resolve this conflict, it referred appellant to Dr. Sclafani for an impartial medical examination. By decision dated February 17, 2011, an OWCP hearing representative affirmed the September 10, 2010 decision based on a review of the written record. The Board finds that OWCP terminated appellant's compensation benefits effective September 7, 2010 without having first resolved the existing conflict in opinion between Dr. Brown and Dr. Orlandi. OWCP failed to meet its burden of proof in terminating appellant's compensation benefits.[16]

Moreover, there is no evidence that OWCP secured confirmation from the employing establishment to establish that the modified position, first offered appellant on June 3, 2010, remained open and available to her as of the February 17, 2011 decision following the impartial medical examination.[17] The duties and physical requirements of the duties of the modified

[11] 20 C.F.R. § 10.517(a).

[12] *See Gayle Harris*, 52 ECAB 319 (2001).

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.5(a)(3) (June 2013).

[14] *See Lawrence D. Price*, 47 ECAB 120 (1995).

[15] *See Nathaniel Davis*, 50 ECAB 378 (1999); *Robert Dickerson*, 46 ECAB 1002 (1995).

[16] *See Gail D. Painton*, 41 ECAB 492, 498 (1990); *Craig M. Crenshaw, Jr.*, 40 ECAB 919, 922-23 (1989).

[17] *See supra* note 13 at Chapter 2.814.5(e)(2) (June 2013); *see also Robert Dickerson, supra* note 15.

position should be described by the employing establishment[18] and OWCP should verify that the position is still available and offered to appellant.

Accordingly, the Board will reverse the December 31, 2012 decision which terminated appellant's compensation benefits on the grounds that she refused suitable work under 5 U.S.C. § 8106(c)(2).

CONCLUSION

The Board finds that OWCP did not properly terminate appellant's compensation effective September 7, 2010 on the grounds that she refused suitable work under 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the December 31, 2012 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 21, 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

[18] According to OWCP procedure, a job offer must be in writing and contain a description of the duties to be performed and the specific physical requirements of the position; *see supra* note 13 at Chapter 2.814.4(a) (June 2013); *see also Nathaniel Davis, supra* note 15.