

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

P.B., Appellant)	
)	
and)	Docket No. 13-803
)	Issued: September 18, 2013
U.S. POSTAL SERVICE, POST OFFICE, Iselin, NJ, Employer)	
)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 21, 2013 appellant, through her attorney, filed a timely appeal from a November 26, 2012 decision of the Office of Workers' Compensation Programs (OWCP) terminating his compensation benefits. Pursuant to the Federal Employees' Compensation Act¹ (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 June 28, 2011 on the grounds that she refused an offer of suitable work.

On appeal, counsel contends that OWCP deprived appellant of due process by failing to provide notification that an April 5, 2012 job offer was suitable work. Alternatively, he asserts that an impartial examiner's opinion was poorly rationalized such that the April 5, 2012 job offer exceeded appellant's medical restrictions. Counsel requests that OWCP reinstate compensation retroactive to the June 28, 2011 termination.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on April 3, 2002 appellant, then a 44-year-old letter carrier, sustained internal derangement of the right knee while evading a dog. The case was assigned File No. xxxxxx409. Appellant underwent right knee arthroscopy on September 13, 2002 to repair a partial tear of the anterior cruciate ligament. She returned to work in a limited-duty position in October 2002. Dr. Hitesh Patel, an attending Board-certified family practitioner, submitted reports from 2006 through 2009 limiting lifting to 10 pounds and standing to four hours a day.

OWCP subsequently accepted that on September 24, 2009 appellant sustained a closed dislocation of the right shoulder and cervical radiculopathy when she tripped and fell on a floor mat.² Appellant stopped work on September 24, 2009. The case was assigned File No. xxxxxx666. Dr. Ronald M. Selby, an attending Board-certified orthopedic surgeon, held her off work indefinitely due to the accepted conditions.³ Appellant received compensation for total disability as of November 3, 2009.

On August 31, 2010 the employing establishment offered appellant a light-duty job for four hours a day as a modified letter carrier, pulling down mail two to four hours a day, delivering mail one to two hours a day, standing up to four hours a day and lifting limited to 10 pounds. Appellant accepted the job on August 31, 2010. She received wage-loss compensation for four hours a day from August 30, 2010 to June 27, 2011. Dr. Patel continued limiting her to working four hours a day through March 28, 2011, with lifting limited to 10 pounds.

On December 5, 2010 OWCP obtained a second opinion from Dr. David Rubinfeld, a Board-certified orthopedic surgeon, who diagnosed cervical radiculitis and a dislocated right shoulder, noting that he could not examine appellant's right knee as she would not sit on the examination table. In a January 15, 2011 report, Dr. Rubinfeld found appellant able to work eight hours a day, with pulling, pushing, lifting and squatting limited to four hours, kneeling limited to three hours and climbing limited to two hours. He limited pushing and pulling to 40 pounds and lifting to 30 pounds.

In an April 26, 2011 report, Dr. Patel diagnosed internal derangement of the right knee with a meniscal and anterior cruciate ligament tear. He found appellant able to work four hours a day, with walking, climbing and kneeling for up to one hour, and lifting limited to 10 pounds. Dr. Patel renewed these restrictions on May 26, 2011.

On April 28, 2011 the employing establishment offered appellant a full-time job as a modified letter carrier. The position required three hours standing and reaching, six hours walking, four hours lifting and up to eight hours driving. Lifting was limited to 30 pounds, and

² OWCP initially denied the claim by December 10, 2009 decision finding that causal relationship was not established. Upon additional development, it accepted the claim in a February 19, 2010 decision.

³ A March 18, 2010 magnetic resonance imaging (MRI) scan of the cervical spine showed moderate to severe left foraminal stenosis at C4-5 and a mild disc bulge at C5-6 with mild right foraminal stenosis. A May 5, 2010 right shoulder MRI scan showed supraspinatus tendinopathy, a subchondral cyst, a small cyst at the humeral neck, and fluid in the subdeltoid burs and subcoracoid recess. A July 15, 2010 electromyogram (EMG) and nerve conduction velocity (NCV) study of the right arm was normal.

pushing and pulling to 40 pounds. The employing establishment advised OWCP that appellant refused the position.

By letter dated May 3, 2011, OWCP advised appellant that the offered position was suitable work within the limitations provided by Dr. Rubinfeld. It advised her of the penalty provision under section 8106(c) of FECA for refusing suitable work. OWCP afforded her 30 days to either accept the offered position or provide valid reasons for his refusal.

In a May 27, 2011 letter, appellant, through her representative, responded that her work limitations due to the accepted right knee injury prevented her from performing the April 28, 2011 job offer.

In a June 7, 2011 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 wage-loss compensation benefits would be terminated. OWCP noted that no further reasons for refusal would be considered. On June 24, 2011 the employing establishment confirmed that the offered modified letter carrier position remained open and available to appellant.

By decision dated June 28, 2011, OWCP terminated appellant's wage-loss compensation benefits and schedule award entitlement effective that day under 5 U.S.C. § 8106(c) on the grounds that she refused an offer of suitable work.

In a July 2, 2011 letter, appellant, through her attorney, requested an oral hearing, held October 17, 2011.⁴ At the hearing, she and two witnesses to the examination asserted that Dr. Rubinfeld's examination was incomplete and unprofessional.⁵

Following the hearing, appellant submitted a May 16, 2011 report from Dr. Patel, stating that the accepted injuries necessitated continued work restrictions. In an October 21, 2011 report, Dr. Patel explained that appellant had cervical neuritis and a right shoulder sprain causing numbness and paresthesias in the right arm. He diagnosed a right medial meniscus and anterior cruciate ligament tear. Dr. Patel renewed his prior work restrictions through November 2, 2011. Appellant continued to work four hours a day through December 2011.⁶

By decision dated and finalized December 2, 2011, an OWCP hearing representative set aside OWCP's June 28, 2011 decision in part. He affirmed the termination of compensation but also found a conflict of medical opinion between Dr. Rubinfeld, for the government, and Dr. Patel, for appellant, regarding appellant's injury-related conditions and her work capacity. The hearing representative also directed the doubling of the two accepted claims. OWCP doubled the claims on January 12, 2012.

⁴ In an August 26, 2011 letter, appellant's attorney requested that OWCP subpoena Dr. Patel and Dr. Rubinfeld. OWCP denied the request for subpoenas on September 14, 2011 as counsel did not explain why a subpoena was the only means to obtain the physicians' opinions. The denial of subpoenas is not before the Board on the present appeal.

⁵ In a November 14, 2011 letter, appellant's attorney asserted that Dr. Rubinfeld's refusal to assist her in climbing onto the examination table was an attempt to trick her into exceeding her physical limitations.

⁶ Appellant received compensation for intermittent work absences from January 16 to February 10 and April 23 to May 4, 2012.

On January 20, 2012 OWCP selected Dr. Edward Krisiloff, a Board-certified orthopedic surgeon, as impartial medical examiner. Dr. Krisiloff submitted a March 13, 2012 report reviewing the medical record and a statement of accepted facts. On examination, he noted a dropped right shoulder without, a stable right knee with pain on flexion and painful cervical spine motion. Dr. Krisiloff found appellant able to work eight hours a day with walking, standing, reaching and twisting up to six hours, pushing, pulling and lifting up to 20 pounds for up to four hours and no climbing. He stated that these restrictions were permanent and pertained to the accepted right knee injury.

In an April 2, 2012 letter, OWCP requested that the employing establishment offer appellant a job within the restrictions provided by Dr. Krisiloff. On May 2, 2012 the employing establishment offered appellant a full-time position as a modified city carrier, with walking, standing and reaching up to six hours and lifting up to 20 pounds for four hours a day. Appellant responded that the position violated her physician's restrictions limiting her to working four hours a day. She submitted a May 2, 2012 duty status report from Dr. Patel, renewing previous restrictions limiting appellant to working four hours a day light duty with lifting up to 10 pounds, sitting and standing for four hours and walking for one hour.

By decision dated May 29, 2012, OWCP affirmed the termination of appellant's wage-loss compensation benefits and schedule award entitlement on the grounds that she refused the April 28, 2011 offer of suitable work, based on Dr. Krisiloff's opinion as the weight of the medical evidence.

On June 1, 2012 appellant requested an oral hearing, held telephonically on October 5, 2012. At the hearing, counsel contended that both the April 28, 2011 and April 5, 2012 job offers exceeded the work limitations given by Dr. Krisiloff. In an October 15, 2012 letter, he noted that the May 29, 2012 decision did not mention the April 5, 2012 job offer and that appellant was not afforded due process in responding to the April 5, 2012 job offer. Counsel submitted a June 8, 2012 report from Dr. Patel renewing prior restrictions.

By decision dated and finalized November 26, 2012, an OWCP hearing representative affirmed OWCP's May 29, 2012 decision, based on Dr. Krisiloff's opinion as the weight of the medical evidence. The hearing representative found that the differences between the work limitations provided by Dr. Krisiloff and those of the April 5, 2012 job offer were not dispositive as the weight of the medical evidence established that injury-related conditions had resolved.

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 her refusal to accept such employment and that she was allowed a reasonable period to accept or reject the position or submit evidence or

provide reasons why the position is not suitable.⁷ In this case, it terminated appellant's compensation under section 8106(c)(2) of FECA, which 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."⁸

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.⁹ 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.¹⁰

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.¹¹ 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.¹² 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.¹³

ANALYSIS

OWCP accepted that appellant sustained internal derangement of the right knee, cervical radiculopathy and a closed dislocation of the right shoulder. Appellant performed light duty for four hours a day through March 28, 2011. Dr. Rubinfeld, a Board-certified orthopedic surgeon and second opinion physician, found her able to work eight hours a day light duty as of December 5, 2010. Dr. Patel, an attending Board-certified family practitioner, limited appellant to working four hours a day through April 26, 2011.

⁷ See *Ronald M. Jones*, 52 ECAB 190 (2000); see also *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818, 824. 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 refusing the job. If the claimant submits evidence and/or reasons for refusing the job, the claims examiner must carefully evaluate the claimant's response and determine whether the claimant's reasons for doing so are valid).

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

⁹ *Rebecca L. Eckert*, 54 ECAB 183 (2002); see 20 C.F.R. § 10.500(b).

¹⁰ *Kathy E. Murray*, 55 ECAB 288 (2004).

¹¹ *Joan F. Burke*, 54 ECAB 406 (2003); see *Robert Dickerson*, 46 ECAB 1002 (1995).

¹² 20 C.F.R. § 10.517(a); *Ronald M. Jones*, 52 ECAB 190 (2000).

¹³ *Id.* at § 10.516.

OWCP offered appellant a full-time light-duty position on April 28, 2011, based on Dr. Rubinfeld's opinion. As appellant refused the position, OWCP issued a June 28, 2011 decision terminating her wage-loss compensation benefits and schedule award entitlement. However, on December 2, 2011, an OWCP hearing representative set aside the June 28, 2011 decision in part due to a medical conflict regarding appellant's ability to work and her injury-related conditions.¹⁴

Dr. Krisiloff, a Board-certified orthopedic surgeon selected as impartial medical examiner, submitted a March 13, 2012 report finding appellant able to perform full-time light-duty work with restrictions. OWCP then requested that the employing establishment offer her a job based on Dr. Krisiloff's restrictions. The employing establishment offered appellant a full-time modified city carrier position on May 2, 2012. Appellant declined the position as Dr. Patel limited her to working four hours a day. Based on her refusal of the May 2, 2012 job offer, OWCP issued a May 29, 2012 decision affirming the June 28, 2011 termination. Following a hearing, counsel contended that the May 29, 2012 termination was invalid as OWCP failed to provide a pretermination notice regarding the May 2, 2012 job offer. The November 26, 2012 decision affirmed the May 29, 2012 termination invoking the penalty provisions under 5 U.S.C. § 8106(c).

The Board finds that OWCP did not afford appellant proper due process in terminating her monetary compensation benefits.¹⁵

OWCP did not issue a new notice advising appellant that the May 2, 2012 job offer was found to be suitable work or afford her 30 days to submit her reasons for refusing the position. Such notice is required by OWCP's implementing regulations at 20 C.F.R. § 10.516 and by OWCP's procedures.¹⁶ After appellant submitted reasons for refusal on May 2, 2012, she was entitled to a second notice from OWCP evaluating the reasons for refusing the job. If the reasons were considered invalid, allowing her 15 days to accept the offered work without penalty. OWCP did not comply with its implementing regulations and procedures by failing to provide

¹⁴ Although the December 2, 2012 decision found that OWCP met its burden of proof to terminate wage-loss benefits, it also found a medical conflict regarding appellant's ability to work and her injury-related conditions. As explained, 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. *See infra*, note 11. The Board finds that OWCP did not sufficiently explain how the affirmation of the termination of benefits, while simultaneously finding an unresolved medical conflict, was consistent with the narrow construction of 5 U.S.C. § 8106(c).

¹⁵ *Maggie L. Moore, supra* note 7.

¹⁶ Federal (FECA) Procedure Manual, *supra* note 7.

adequate notice.¹⁷ These procedural defects render the May 29 and November 26, 2012 decisions erroneous.¹⁸ Therefore, OWCP's November 26, 2012 decision will be reversed.¹⁹

The November 26, 2012 decision will be reversed. The case will be returned to OWCP for reinstatement of appellant's monetary compensation.

CONCLUSION

The Board finds that OWCP improperly terminated appellant's wage-loss compensation and schedule award entitlement.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 26, 2012 is reversed.

Issued: September 18, 2013
Washington, DC

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

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

¹⁷ *Id.* See 20 C.F.R. § 10.516.

¹⁸ *Maggie L. Moore, supra* note 7.

¹⁹ The Board notes that the hearing representative's November 26, 2012 decision affirmed the termination both under 5 U.S.C. § 8106(c) and because the weight of the medical evidence established that she no longer has residuals of her injury-related conditions. For the reasons noted, *infra*, OWCP did not meet its burden of proof under section 8106(c). Furthermore, OWCP did not provide any notice to appellant, prior to the November 26, 2012, decision that it was seeking to terminate benefits on the grounds that all residuals of work-related conditions had resolved. The Board notes that OWCP procedures contemplate such notice. See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.6 (March 1997).