United States Department of Labor
Employees' Compensation Appeals Board

T.R., Appellant	)	
and	)	**Docket No. 14-42**
	)	**Issued: April 7, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Santa Maria, CA, Employer	)	

Appearances:
Raquell Krueger-Denio, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 22, 2013 appellant, through her representative, filed a timely appeal from a July 8, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 the claim.

ISSUE

The issue is whether OWCP properly terminated appellant's compensation effective April 15, 2013 on the grounds that she refused suitable work under 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

OWCP accepted that appellant, then a 29-year-old city carrier, sustained lumbar disc herniation and radiculitis on or about January 26, 2010 as a result of her federal employment. Appellant stopped work on January 28, 2010 and did not return. She was paid compensation and

[1] 5 U.S.C. §§ 8101-8193.

placed on the periodic rolls effective May 8, 2011. Appellant underwent authorized lamincectomy with decompression at L5-S1 on May 13, 2011 and an authorized L5-S1 disc replacement on January 3, 2012. March 8 and April 30, 2012 lumbar x-rays showed the disc prosthesis in anatomic alignment with no fractures or instability.

In an April 30, 2012 report, Dr. Thomas H. Jones, a Board-certified neurosurgeon and appellant's physician, noted that everything looked stable on x-ray, but opined that appellant was not yet permanent and stationary. In a June 4, 2012 report, he indicated that her neurologic examination was normal and that the x-rays suggested that the disc herniation was no longer present and the artificial disc was in its proper place. Dr. Jones opined that the chronic pain reported by appellant was embellished with the chronic pain circuitry. He indicated that she should consider transitioning to work as she would soon be permanent and stationary.

In a July 16, 2012 report, Dr. Jones noted that the neurologic examination was essentially normal with increased pain in the right buttock with straight leg raising on the right. He declared appellant permanent and stationary and opined that she could not return to her previous occupation as a letter carrier. Dr. Jones indicated that appellant needed vocational rehabilitation to retrain for a job that fit into the realm of no heavy lifting or frequent bending with equivalent restrictions on pushing and pulling. He stated that she would be best in a job where there was no more than four hours sitting/standing cumulatively during the day, no climbing ladders or working in a stooped environment and with routinely lifting over 15 pounds but never over 50 pounds. Dr. Jones stated that, final x-rays were pending but if they look unremarkable, then appellant need only follow up on an as needed basis.

In a July 16, 2012 progress report addendum, Dr. Jones recommended appellant remain off work three months.

On the July 16, 2012 OWCP-5 work capacity evaluation form, Dr. Jones indicated that appellant had reached maximum medical improvement and had permanent restrictions comprised of no more than four hours sitting/standing, two hours of walking, occasional bending, stooping/twisting, no lifting/pushing/pulling more than 20 pounds. He also indicated that she could operate a motor vehicle at work one to two hours and operate a motor vehicle to/from work no more than two hours. Dr. Jones stated that appellant could rarely squat/kneel and could not climb.

A July 16, 2012 lumbar x-ray report concluded a stable appearance of artificial disc at L5-S1 with no significant changes since previous radiograph of April 30, 2012 and no evidence of postoperative complications or instability.

On September 19, 2012 the employing establishment requested that Dr. Jones clarify whether appellant was able to work with restrictions as outlined in his July 16, 2012 neurological report or whether she should remain off work as indicated in his July 16, 2012 progress report addendum. On September 28, 2012 Dr. Jones opined with a check mark that she was able to perform modified duties with the restrictions outlined in the July 16, 2012 neurosurgical report.

On November 20, 2012 the employing establishment offered appellant a full-time modified carrier position. The offered job required lifting 15 pounds routinely and never more

than 50 pounds, four hours of standing/sitting, no stooping and no climbing ladders. The position involved case and delivery to Route 43, with a casing time of approximately 1.5 hours and delivery time of approximately 6.5 hours for park & loop, neighborhood box unit, business and curbside deliveries, all which required driving to the delivery point(s).

In a November 27, 2012 letter, the employing establishment notified OWCP of an interactive job offer meeting held on November 20, 2012 with appellant and the postmaster along with the health and resource management manger and the vice president of the National Association of Letter Carriers. It noted that while she had submitted a July 16, 2012 OWCP-5 work capacity evaluation form from Dr. Jones containing different restrictions than that outlined in his July 16, 2012 report, he had, in his September 28, 2012 letter, confirmed that the prescribed restrictions are from his July 16, 2012 narrative report. The employing establishment further noted that appellant did not express an inability to perform any of the modified duties offered.

In a December 10, 2012 report, Dr. Jones indicated that appellant has been permanent and stationary since July 16, 2012. He stated that he amended the July 16, 2012 work capacity evaluation form on September 28, 2012 and that she would be able to work within the restrictions enumerated on the work capacity evaluation form of September 28, 2012. Dr. Jones stated that this itemized form should take precedence over the July 16, 2012 permanent and stationary report insofar as the details of appellant's disability restrictions.

By letter dated February 1, 2013, OWCP advised appellant that the modified carrier job offered November 20, 2012 had been found to be suitable to her work capabilities and the position remained available. It allowed her 30 days to accept the position or provide her reasons for refusal. Appellant was advised that an employee who refuses an offer of suitable work without reasonable cause is not entitled to compensation.

On a form report of February 28, 2013, Dr. Jones indicated that he reviewed the November 20, 2012 modified letter carrier position. He opined that appellant was not capable of performing the modified position because it exceeded limits of his July 16 and September 28, 2012 permanent and stationary reports. Dr. Jones enclosed a copy of his July 16, 2012 OWCP-5 work capacity evaluation, which he signed again on September 28, 2012.

In a February 28, 2013 letter, appellant's representative argued that the November 20, 2012 modified letter carrier position does not accommodate all of appellant's permanent restrictions given the physical requirements of the position. A copy of Dr. Jones' December 10, 2012 report, noting that the itemized form should take precedence over the July 16, 2012 permanent and stationary report was provided along with the July 16, 2012 OWCP-5c form resigned by Dr. Jones on September 28, 2012.

Appellant submitted a February 12, 2013 statement advising that the offered position required walking and lifting in excess of her restrictions. In a February 28, 2013 statement, her husband, also a letter carrier, opined that she would not be able to perform the duties of the modified job given her prescribed restrictions.

By letter dated March 8, 2013, OWCP advised appellant that her reasons for refusing the offered position were not valid and she had 15 additional days to accept the offered position and, if she did not do so, her compensation benefits would be terminated.

In a February 8, 2013 report, Dr. Jones indicated that he will review all of the records and will fill out new forms and refax old forms that indicate appellant's work restrictions.

In a March 31, 2013 letter, appellant's representative argued that Dr. Jones' reports established that the offered job was not consistent with the prescribed restrictions. She further stated that appellant knew first hand from previously performing the route offered that she could not walk the length of time required or frequently lift to deliver mail within her current restrictions. Copies of Dr. Jones' February 28, 2013 letter, December 10, 2012 letter, July 16, 2012 permanent and stationary report and OWCP-5 form updated to September 28, 2012 were provided as support.

On March 26, 2013 the employing establishment indicated that the offered position remained available. It also advised that appellant refused the offered position on March 23, 2013.

By decision dated April 15, 2013, OWCP terminated appellant's compensation benefits effective that day on the basis that she refused suitable employment. It noted that she and her physician repeatedly stated that the permanent and stationary report of July 16, 2012 should not be used as a basis for her work restrictions, but rather the restrictions of the September 28, 2012 work capacity evaluation should be used. OWCP found that Dr. Jones did not provide any rationale to support changes to the prescribed restrictions.

On April 29, 2013 appellant requested a review of the written record before an OWCP hearing representative.

In a May 24, 2013 report, Dr. Jones stated that his July 16, 2012 permanent and stationary report was not dictated to reflect all the answers to the questions on the OWCP-5c form. Although the July 16, 2012 permanent and stationary report indicated that appellant should not routinely lift over 15 pounds and never over 50 pounds, he stated that this report did not answer the question of whether she should lift 50 pounds and, if so, how frequently. Dr. Jones advised that the OWCP-5c form he filled out on July 16, 2012 and reiterated on September 28, 2012 clearly states that cumulative pushing, pulling and lifting was restricted to no more than two to three hours a day and less than 20 pounds. He stated that this was based on appellant's previous surgical procedures, her serial physical examinations and her subjective complaints. Dr. Jones reiterated that her permanent restrictions were reflected on the OWCP-5c form dated July 16, 2012 and reiterated on September 28, 2012. He also indicated that he clearly stated on February 28, 2013 that the modified letter carrier position exceeded the limits of appellant's capabilities.

In a June 10, 2013 letter, appellant's representative restated arguments previously raised.

By decision dated July 8, 2013, an OWCP hearing representative affirmed the April 15, 2013 denial of appellant's compensation. The hearing representative found that the modified job

offer was correctly based on the July 16, 2012 detailed narrative report as opposed to the July 16, 2012 OWCP-5c form.

LEGAL PRECEDENT

It is well settled that, once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[2] 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.[3] Section 8106(c)(2) 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.[4]

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.[5] 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.[6]

To justify termination, OWCP must show that the work offered was suitable and that appellant was informed of the consequences of his or her refusal to accept such employment.[7] Determining what constitutes suitable work for a particular disabled employee, it considers the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area and the employee's qualifications to perform such work.[8] OWPC's procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.[9]

ANALYSIS

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's compensation benefits on the basis that she refused an offer of suitable work. OWCP found that the modified letter carrier position offered by the employing establishment on November 20,

[2] *See Mohamed Yunis*, 42 ECAB 325, 334 (1991).

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

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

[5] 20 C.F.R. § 10.517(a).

[6] *Id*. at § 10.516.

[7] *See Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff d on recon*., 43 ECAB 818 (1992).

[8] 20 C.F.R. § 10.500(b).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work, Job Offer Refusal*, Chapter 2.814.5a (June 2013); *see E.B.*, Docket No. 13-319 (issued May 14, 2013).

2012 was suitable as it was within Dr. Jones' restrictions provided in his narrative report of July 16, 2012. Dr. Jones, however, had provided more restrictive restrictions in his July 16, 2012 OWCP-5 work capacity evaluation form. At no point, however, did OWCP attempt to clarify with Dr. Jones which restrictions (*i.e.*, those in the July 16, 2012 narrative report or in the July 16, 2012 OWCP-5 work capacity evaluation form) were applicable to appellant. Dr. Jones and appellant maintained that the restrictions enumerated on the work capacity evaluation form took precedence over the report generated on the same date as it provided more details regarding her disability restrictions. It is noted that, while the employing establishment attempted to obtain clarification from him, it only clarified the issue as to whether she was able to work with restrictions as outlined in his July 16, 2012 neurological report or whether she should remain off work as indicated in his July 16, 2012 progress report addendum. The employing establishment never had Dr. Jones clarify which restrictions pertained to appellant, *i.e.*, those in his July 16, 2012 narrative report or in his July 16, 2012 OWCP-5 work capacity evaluation form. OWCP failed to meet its burden of proof to terminate her compensation benefits based on a refusal of suitable work position as the medical evidence from him pertaining to her restrictions required clarification before a determination on the suitability of a position could be determined.[10]

CONCLUSION

The Board finds that the July 16, 2012 medical evidence from Dr. Jones pertaining to appellant's work restrictions requires clarification before a suitability of work can be determined. OWCP, therefore, failed to meet its burden of proof to terminate her compensation benefits effective April 15, 2013 on the grounds that she refused suitable work under 5 U.S.C. § 8106(c)(2).

[10] In light of the disposition of this case, the arguments raised by appellant's representative will not be addressed.

ORDER

IT IS HEREBY ORDERED THAT the July 8, 2013 decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 7, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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