United States Department of Labor
Employees' Compensation Appeals Board

F.M., Appellant	)	
and	)	**Docket No. 15-1176**
	)	**Issued: August 7, 2015**
U.S. POSTAL SERVICE, POST OFFICE, Lenox Hill, NY, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
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 May 1, 2015 appellant, through counsel, filed a timely appeal from a December 5, 2014 merit decision and a March 5, 2015 nonmerit 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 this case.

ISSUES

The issues are: (1) whether OWCP properly terminated appellant's entitlement to wage-loss and schedule award compensation effective December 20, 2013 due to his refusal of an offer of suitable work; and (2) whether it properly denied his request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On October 14, 2010 appellant, then a 57-year-old letter carrier, filed a traumatic injury claim alleging that on October 13, 2010 he lost his balance and fell, and injured his right ankle, right knee, neck, and low back. OWCP accepted his claim for right ankle sprain, lumbar sprain, right shoulder sprain, right knee sprain, right shoulder impingement, cervical sprain, and right knee osteoarthritis. Appellant stopped work on the date of injury and received disability compensation on the daily rolls beginning November 28, 2010. He later received disability compensation on the periodic rolls.[2]

On August 3, 2012 appellant underwent authorized right shoulder arthroscopic surgery with rotator cuff repair, bursectomy, and debridement. The surgery was performed by Dr. Eial Faierman, an attending Board-certified orthopedic surgeon.

In a December 4, 2012 report, Dr. Hormozan Aprin, an attending Board-certified orthopedic surgeon serving as an OWCP second opinion physician, discussed appellant's history and reported examination findings. He noted restricted cervical and lumbar range of motion, and negative straight leg raising. For the right shoulder, Dr. Aprin reported restricted range of motion, negative Hawkins and Neer tests, no effusion, positive tenderness, and healed arthroscopy scar. For the right wrist, he noted restricted range of motion, normal sensation, negative Tinel's and Phalen's signs, no tenderness, and no swelling. For the right knee, Dr. Aprin found normal range of motion, bony tenderness, no swelling, no crepitus, no joint line tenderness, and no effusion. For the right ankle, he noted normal range of motion, 5/5 strength, normal sensation, no effusion, no tenderness, and no trophic changes. On neurologic testing, Dr. Aprin noted negative Babinski sign, no muscle atrophy, normal sensation, normal reflexes, and 5/5 muscle power. He provided a review of diagnostic testing and found partial disability of the right knee, right shoulder, right wrist, neck, and back referable to the October 13, 2010 work injury, as well as to preexisting coronary artery disease, kidney disease, and obesity. Dr. Aprin determined that appellant could work four hours a day with no lifting/pushing/pulling more than 10 pounds for one to two hours, no squatting, kneeling, or climbing, repetitive wrist motion limited to two hours, no reaching above the shoulder, walking/standing for one-hour, bending/stooping for one hour, and a 15-minute break every two hours.

In a March 19, 2013 report, Dr. Faierman, the treating physician, found appellant unable to work even sedentary duty due to persistent neck, back, and knee pain. He provided various findings on physical examination, including findings of limited neck, back, and knee motion.

OWCP determined that there was a conflict in the medical opinion evidence regarding appellant's ability to work between Dr. Aprin and Dr. Faierman. It referred him to Dr. Michael J. Katz, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on this matter.

[2] Appellant sustained prior work-related injuries to his left wrist and right wrist, and a prior work-related inguinal hernia. On April 4, 2006 he sustained injuries to his right shoulder, neck, and back in a nonoccupational motor vehicle accident.

In a July 2, 2013 report, Dr. Katz provided an extensive discussion of appellant's factual and medical history and detailed his findings on physical examination. For the cervical spine, he noted no tenderness, no spasm, normal range of motion, intact sensation, normal reflexes, and normal motor strength. For the lumbar spine, Dr. Katz found restricted range of motion, negative straight leg raising bilaterally, intact sensation, and normal motor strength in the lower extremities. For the right shoulder, he noted well-healed arthroscopy portal, no swelling, restricted range of motion, negative impingement, no crepitation, no joint line tenderness, no effusion, no dislocation, and negative Hawkins, O'Brien and Kennedy tests. For the right wrist, Dr. Katz reported no joint line tenderness, no swelling, normal range of motion, negative Tinel's sign, and normal compression test. For the right knee, he noted normal range of motion, no swelling, no effusion, no medial or joint line tenderness, negative Lachman's and apprehension tests, negative pivot shift test, negative drawer sign, negative McMurry test, and no crepitus. For the right ankle, Dr. Katz found normal range of motion, no joint line tenderness, no crepitation, negative drawer signs, and 5/5 strength. He opined that the October 13, 2010 injury affected prior accepted injuries and contributed to partial disability. Dr. Katz stated that appellant could work eight hours a day with restrictions of sitting/standing/walking for only four hours; reaching/reaching above the shoulder for two hours; no bending, stooping or operating a motor vehicle at work; two hours to operate a motor vehicle to and from work; pushing/pulling/lifting up to 20 pounds, no kneeling, climbing or squatting; and eight hours of repetitive movement of the wrists/elbows.

On September 4, 2013 the employing establishment offered appellant a full-time position as a modified carrier at Murray Hill Station with restrictions as prescribed by Dr. Katz. The job duties included casing and tying down mail up to four hours and delivering first class or express mail for up to four hours.

On September 17, 2013 OWCP notified appellant that the offered modified carrier job was suitable in light of the prescribed work restrictions. It advised him that he had 30 days to accept the position or to provide a valid reason for refusing suitable work.

Appellant submitted additional medical records. On a form report dated September 6, 2013, Dr. Faierman stated that appellant was unable to work. In a report of September 10, 2013, Dr. Winfred P. Wu, an attending Board-certified neurologist, diagnosed cervical radiculopathy and stated that appellant was unable to work.

On November 14, 2013 OWCP notified appellant that he had 15 days to accept the offered job and that, if he did not do so, his entitlement to wage-loss and schedule award compensation benefits would be terminated. Appellant submitted additional reports in which attending physicians generally indicated that he could not work.

On December 16, 2013 appellant reported to work at the Murray Hill Station. On January 16, 2014 OWCP queried the employing establishment as to appellant's work status as of December 16, 2013. By telephone on January 17, 2014, the employing establishment reported that on December 16, 2013 appellant reported for training, which was conducted through December 18, 2013. Appellant then presented a report by his attending physician stating he was unable to work. In a letter of January 17, 2014, Paula Pearce, manager of customer services at Murray Hill Station, stated that appellant went home because he stated that he had to contact his

lawyer and his doctor. She noted she advised appellant that he had signed the written job offer and thus he was required to work, but he insisted he was unable to perform the job duties.

In early April 2014, the employing establishment advised appellant that the modified carrier position was still available. In an April 14, 2014 letter, OWCP notified him that the position was suitable and that he had 30 days to accept the position or provide a valid reason for not doing so.

In an April 21, 2014 letter, counsel argued that appellant was sent home on December 20, 2013 because no suitable work was available. Appellant submitted statements in which he and coworkers asserted that management sent him home on December 20, 2013.

In a May 15, 2014 letter, OWCP advised appellant that his reasons for refusing suitable work were not valid. It informed him that he had 15 additional days in which to report to the offered position or his wage-loss and schedule award benefits would be terminated.

In a June 2, 2014 decision, OWCP terminated appellant's entitlement to wage-loss and schedule award compensation effective December 20, 2013 because he refused an offer of suitable work.

Appellant requested a video hearing with an OWCP hearing representative. During the hearing held on October 20, 2014, he again argued that he was sent home on December 20, 2013 because no suitable work was available.

In a December 5, 2014 decision, the hearing representative affirmed OWCP's June 2, 2014 decision terminating appellant's entitlement to wage-loss and schedule award compensation effective December 20, 2013 due to his refusal of an offer of suitable work.

In a letter received on December 17, 2014, appellant, through counsel, requested reconsideration of his claim. He argued in a statement that he did not, in fact, refuse suitable work because management sent him home on December 20, 2013 due to lack of work. A coworker also provided a statement that appellant advised her on December 20, 2013 that management was sending him home due to lack of work.

In a March 5, 2015 decision, OWCP denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a). It found that he had not submitted new and relevant evidence or argument.

LEGAL PRECEDENT -- ISSUE 1

It is well settled that, 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] Section

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

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

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.[5]

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.[6] 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.[7]

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.[8] Determining what constitutes suitable work for a particular disabled employee, it considers the employee's current physical limitations, and whether the work is available within the employee's demonstrated commuting area and the employee's qualifications to perform such work.[9] OWPC 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.[10]

Section 8123(a) of FECA provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[11] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.[12] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[13]

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

[6] 20 C.F.R. § 10.517(a).

[7] *Id.* at § 10.516.

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

[9] 20 C.F.R. § 10.500(b).

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

[11] 5 U.S.C. § 8123(a).

[12] *William C. Bush*, 40 ECAB 1064, 1075 (1989).

[13] *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

ANALYSIS -- ISSUE 1

The evidence of record shows that appellant can perform the offered full-time modified carrier position which was found suitable by OWCP in September 2013. The position involved casing and tying down mail up to four hours a day and delivering first class or express mail up to four hours a day. The record does not reveal that the modified carrier position was temporary in nature.[14]

The physical requirements of the modified carrier position were within the July 2013 work restrictions provided by Dr. Katz, a Board-certified orthopedic surgeon who served as an impartial medical specialist. The well-rationalized report of Dr. Katz constituted the weight of the medical evidence with respect to appellant's ability to work.[15] Dr. Katz stated that appellant could work eight hours a day with restrictions of sitting/standing/walking for four hours; reaching/reaching above the shoulder for two hours; no bending, stooping, or operating a motor vehicle at work; two hours to operate a motor vehicle to and from work; pushing/pulling/lifting up to 20 pounds, no kneeling, climbing or squatting; and eight hours of repetitive movement of the wrists/elbows. These restrictions allowed appellant to perform the modified carrier position offered by the employing establishment and determined to be suitable by OWCP in September 2013.

The Board finds that, therefore, OWCP has established that the modified carrier position offered by the employing establishment is suitable. Once it 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 carrier position and notes that it is not sufficient to justify his refusal of the position. Appellant submitted reports in which attending physicians generally indicated that he was unable to work but these reports were not sufficiently well rationalized to outweigh the opinion of Dr. Katz, the impartial medical specialist, with respect to work capability.

Before OWCP and on appeal, appellant has argued that he did not actually refuse the modified carrier position because management told him that it did not have work for him and sent him home on December 20, 2013. However, he did not submit sufficient evidence to support this assertion. Evidence from an employing establishment official reveals that appellant went home on December 20, 2013 because he stated that he had to contact his lawyer and his doctor. The official advised appellant that he had signed the written job offer and thus he was required to work, but appellant insisted he was unable to perform the job duties.

For these reasons, OWCP properly terminated appellant's entitlement to wage-loss and schedule award compensation effective December 20, 2013 because he refused an offer of

[14] If the employing establishment offers a claimant a temporary light-duty assignment and the claimant held a permanent job at the time of injury, the penalty language of section 8106(c) cannot be applied. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.4c(5), 9 (June 2013).

[15] *See supra* note 13.

suitable work.[16] 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.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,[17] OWCP regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.[18] To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[19] When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.[20] The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record[21] and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.[22] While a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.[23]

ANALYSIS -- ISSUE 2

Appellant's timely December 17, 2014 application for reconsideration did not show that OWCP erroneously applied or interpreted a specific point of law. He did not identify a specific point of law or show that it was erroneously applied or interpreted. Appellant did not advance a new and relevant legal argument or submit new and relevant evidence in support of his claim. He presented the argument was that he did not, in fact, refuse suitable work because management sent him home on December 20, 2013 due to lack of work. However, the presentation of this

[16] The Board notes that OWCP complied with its procedural requirements prior to terminating appellant's compensation, including providing him with an opportunity to accept the position offered by the employing establishment after informing him that his reasons for initially refusing the position were not valid; *see generally Maggie L. Moore*, *supra* note 8.

[17] Under section 8128 of FECA, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[18] 20 C.F.R. § 10.606(b)(2).

[19] *Id.* at § 10.607(a).

[20] *Id.* at § 10.608(b).

[21] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

[22] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

[23] *John F. Critz*, 44 ECAB 788, 794 (1993).

argument would not require reopening of appellant's claim because he had previously made this argument and OWCP had previously considered and rejected it.[24]

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2) and that OWCP properly denied merit review under 20 C.F.R. § 10.608.

CONCLUSION

The Board finds that OWCP properly terminated appellant's entitlement to wage-loss and schedule award compensation effective December 20, 2013 due to his refusal of an offer of suitable work. The Board further finds that it properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the March 5, 2015 and December 5, 2014 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 7, 2015
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

[24] A statement was also submitted in which a coworker stated that appellant advised her on December 20, 2013 that management was sending him home due to lack of work. However, this document is not relevant to the main issue of the present case in that it merely contains an unsupported reference to appellant's claim that he was sent home on December 20, 2013.