United States Department of Labor
Employees' Compensation Appeals Board

P.A., Appellant	)	
and	)	**Docket No. 15-1675**
	)	**Issued: December 15, 2015**
U.S. POSTAL SERVICE, MAIN POST OFFICE, Pittsburgh, PA, Employer	)	

Appearances:
Joseph J. Chester, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 28, 2015 appellant, through counsel, filed a timely appeal from a January 30, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP).[1] Pursuant to the Federal Employees' Compensation Act[2] (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 met its burden of proof to terminate appellant's compensation benefits on March 6, 2007 pursuant to 5 U.S.C. § 8106(c).

[1] Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from January 30, 2015, the date of OWCP's last decision, was July 29, 2015. Since using July 30, 2015, the date the appeal was received by the Clerk of the Appellate Boards, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is July 28, 2015 rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

[2] 5 U.S.C. § 8101 *et seq.*

On appeal counsel asserts that OWCP's reasoning in finding that appellant refused suitable work is illogical and not supported by the factual and medical record.

FACTUAL HISTORY

On November 9, 2005 appellant, then a 55-year-old flexible mail handler, filed a traumatic injury claim (Form CA-1) alleging that on November 3, 2005 she injured her lower back when she fell from a chair. She stopped work on the date of injury. OWCP initially accepted lumbar and coccyx contusions. Appellant received appropriate continuation of pay and wage-loss compensation. She briefly returned to work in December 2005, but subsequently stopped work. Appellant returned to full-time light duty on January 23, 2006. On March 26, 2006 she began working six hours a day. Appellant stopped work on April 29, 2006 and did not return.

Dr. Jon A. Levy, a Board-certified orthopedic surgeon, began treating appellant in February 2006. An April 28, 2006 magnetic resonance imaging (MRI) scan of the lumbar spine demonstrated a disc herniation at L4-5. In a June 12, 2006 treatment note, Dr. Levy noted the MRI scan study findings and advised that appellant could not work. Appellant also began pain management with Dr. Edward Heres, Board-certified in anesthesiology and pain medicine, in August 2006.

OWCP continued to develop the claim and in August 2006 referred appellant to Dr. Stephen R. Bailey, Board-certified in orthopedic surgery, for a second-opinion evaluation. In an August 16, 2006 report, Dr. Bailey noted examination findings. He commented that the MRI scan findings were degenerative in nature and not related to the November 2005 employment injury. Dr. Bailey concluded that appellant could work eight hours a day without restrictions.

OWCP found that a conflict in medical evidence had been created regarding appellant's diagnoses, what treatment was needed, and whether she could return to work, with or without restrictions. On September 5, 2006 OWCP referred appellant to Dr. Yram J. Groff, a Board-certified orthopedic surgeon, for an impartial evaluation. In an October 25, 2006 report, Dr. Groff related a history that appellant was working sedentary duty for a left knee injury when she fell from a high stool on November 3, 2005.[3] He recorded appellant's complaint of radiating low back pain and current treatment. Dr. Groff noted his review of the medical record and described physical examination findings. He diagnosed L4-5 disc herniation causing foraminal narrowing which was the direct result of the November 3, 2005 employment injury. Dr. Groff advised that she could work eight hours of sedentary to light duty daily, with sitting, walking, standing, pushing, pulling, and lifting restricted to four hours each, and a 10-pound weight restriction.

On December 7, 2006 the employing establishment offered appellant a full-time modified position. The duties consisted of sitting in a chair and fixing damaged flat mail for six hours daily and standing at a prep station to place mail, weighing no more than 10 pounds, into containers.

[3] The record does not indicate that appellant has an accepted knee injury.

By letter dated January 5, 2007, OWCP advised appellant that the position offered was suitable. She was notified that if she failed to report to work and failed to demonstrate that the failure was justified, pursuant to section 8106(c)(2) of FECA, her eligibility for compensation for wage loss or a schedule award would be terminated. She was given 30 days to respond.

On January 14, 2007 appellant advised the employing establishment that she agreed to accept the offered position, but she noted that she was scheduled to see her doctor on February 10, 2007, and he would then release her to work. In a February 6, 2007 letter, she informed the employing establishment that she was not scheduled to see her doctor until February 22, 2007. The employing establishment forwarded the correspondence to OWCP. Appellant did not respond.

In a letter dated February 15, 2007, OWCP advised appellant that her reasons for refusing the offered position were not valid, and she was given an additional 15 days to accept. It noted that the position offered was within the restrictions provided by Dr. Groff, and advised her that, if it did not receive her written response within 15 days of that letter, or if she continued to refuse the offer, a final decision would be rendered. In a February 21, 2007 response, appellant stated that she was accepting the light-duty job but, as she had further treatment scheduled and would not see the doctor until March 15, 2007, she could not return to work until March 17, 2007, "the date my doctor will release me."

On March 7, 2007 appellant telephoned OWCP, advising that she was returning to work that day.

By decision dated March 7, 2007, OWCP terminated appellant's wage-loss and schedule award compensation benefits, effective March 6, 2007, finding that she had refused an offer of suitable work. It found that the weight of medical evidence rested with the opinion of Dr. Groff who provided an impartial medical evaluation.

In a letter dated March 2, 2007, received by OWCP on March 9, 2007, the employing establishment informed appellant that she was required to report to work on March 7, 2007.

Appellant ultimately accepted the job offer on March 25, 2007 with a stipulation that she could not stand at a station and prepare flat mail per restrictions. An employing establishment time analysis (CA-7a) form for the period March 3 through 16, 2007 indicated that appellant worked 5.25 hours on March 7, 2007 and left to go to physical therapy. Appellant worked eight hours on March 8, 2007. She did not return until March 21, 2007, when she began working four hours daily.[4] Appellant began working six hours a day in May 2007. She was charged leave without pay (LWOP) for the time she did not work.

Appellant timely requested a hearing before an OWCP hearing representative, which was held on August 14, 2007. She testified that she returned to work on March 7, 2007 and continued to work modified duty.

On June 4, 2007 Dr. Levy advised that conservative care had failed and recommended a lumbar laminectomy and discectomy at L4-5. Dr. Morley Slutsky, an OWCP medical adviser,

[4] Appellant occasionally worked up to eight hours daily. LWOP was verified for additional hours.

advised that the requested surgery was medically necessary and appropriate for the accepted conditions.[5]

By decision dated September 21, 2007, an OWCP hearing representative found that Dr. Groff's opinion was properly accorded special weight as the impartial examiner. He noted that, although appellant returned to work on March 7, 2007, she did not return in a full-time capacity, and Dr. Groff had advised that she could work modified duty eight hours daily. The hearing representative affirmed the March 7, 2007 OWCP decision.

On December 4, 2007 Dr. Levy performed lumbar laminectomy and discectomy at L4-5. On January 12, 2008 he performed lumbar exploration and microdiscectomy at L4-5 due to a recurrent lumbar disc herniation. In reports dated April 21 and June 23, 2008, Dr. Levy described appellant's postsurgical care and condition and advised that she could not work.

On August 21, 2008 appellant requested reconsideration. She reiterated that she had returned to work on March 7, 2007, and worked until she went to physical therapy, and on March 8, 2007 worked a full eight hours. Appellant maintained that she could not work full time due to scheduled physical therapy and injections.

On September 9, 2008 Dr. Levy advised that appellant continued to have severe lumbar radicular pain and evidence of instability superimposed on a large synovial cyst. He advised that, due to the magnitude of her pain, a lumbar exploration with excision of synovial cyst and fusion at L4-5 was warranted. Dr. Levy continued to advise that appellant could not work.

On October 3, 2008 Dr. Slutsky, the OWCP medical adviser, advised that Dr. Levy should be asked to provide objective evidence to support his assertion that there was instability of the L4-5 disc space and a synovial cyst that required surgery. By letter dated October 8, 2008, OWCP asked Dr. Levy to address its concerns. The surgery, scheduled for October 11, 2008, was postponed.

On October 9, 2008 the employing establishment forwarded records of appellant's clock rings from March 2007. These indicated that she had worked 5.75 hours on March 7, 2007 and eight hours on March 8, 2007, and then did not return to work until March 21, 2007, when she began working four hours a day.

In a merit decision dated October 9, 2008, OWCP denied modification of the March 7, 2007 decision. It found that appellant's partial return to work on March 7 and 8, 2007 did not constitute acceptance of a suitable job. OWCP again noted that the offered position was within the restrictions provided by the impartial medical examiner, Dr. Groff, who advised that appellant could work eight hours of modified duty daily.

On October 5, 2009 appellant, through counsel, requested reconsideration.

[5] OWCP informed Dr. Slutsky that the accepted conditions were contusion of buttock, contusion of back, and displacement of lumbar intervertebral disc without myelopathy.

Dr. Levy continued to recommend surgery.[6] On February 2, 2009 Dr. Slutsky, the OWCP medical adviser, agreed that the recommended surgical procedure was appropriate. Dr. Levy performed lumbar laminectomy and fusion at L4-5 on February 23, 2010.

By decision dated May 5, 2010, OWCP reviewed the merits of appellant's claim and denied modification of the prior decisions. It continued to find that the weight of the medical opinion evidence rested with Dr. Groff, the impartial medical examiner.

Dr. Levy continued to submit reports describing appellant's postoperative progress.

On October 17, 2010 appellant filed a recurrence claim, stating that the recurrence of disability occurred on December 10, 2009. On November 10, 2010 she accepted a sedentary modified clerk position for six hours daily.[7]

Dr. Levy provided restrictions to appellant's physical activity on October 25, 2010 and on April 25, 2011 reported seeing appellant one year status postlumbar laminectomy and fusion. He advised that she was doing reasonably well, working with modification, and was clinically stable.

On February 22, 2011 OWCP accepted appellant's recurrence claim and asked that she submit Form CA-7 claims for compensation, if she lost time from work. Appellant thereafter submitted a number of CA-7 claim forms. Following an inquiry by counsel on March 11, 2011 regarding the suitable work termination, on March 22, 2011 OWCP informed him that the suitable work decision had not been rescinded, but that it had been notified that appellant "returned to work and therefore she complied."

On March 31, 2011 OWCP advised that, after careful review of appellant's claim, it corrected that she was not entitled to wage-loss compensation because she had refused an offer of suitable employment. Appellant remained entitled to medical treatment.

Appellant, through counsel, requested reconsideration on May 5, 2011 and submitted medical reports from Dr. Levy dated December 17, 2007 to October 27, 2008 in which he described her condition.

In a merit decision dated August 12, 2011, OWCP denied modification of the prior decisions. It noted that the medical evidence submitted did not indicate that appellant was unable to perform the limited-duty job found suitable by the March 7, 2007 decision. OWCP admitted that the March 22, 2007 letter included an unfortunate statement that appellant had complied with the suitable work admonition but found that the fact that appellant returned to work on March 7, 2007 did not constitute compliance with FECA requirements. It concluded that the weight of the medical evidence continued to rest with the opinion of Dr. Groff, the impartial medical examiner, regarding whether the position offered was suitable.

On July 23, 2012 appellant, through counsel, again requested reconsideration. She submitted factual and medical evidence previously of record, and additional pain management

[6] Dr. Levy also reported that appellant had nonwork-related knee replacement surgery in 2009.

[7] Appellant also received pain management by Dr. Heres and his associates during this period.

treatment notes from Dr. Heres dated December 19, 2011 to March 31, 2014 and from Dr. Levy dated March 12, 2012 to April 28, 2014.

On May 22, 2014 OWCP referred appellant to Dr. Victoria M. Langa, a Board-certified orthopedic surgeon, for a second-opinion evaluation. In a June 11, 2014 report, Dr. Langa noted her review of the medical record including diagnostic studies, appellant's description of the employment injury, and her complaints of constant left buttock discomfort and intermittent radiating left-sided discomfort with numbness and tingling. She described appellant's medical and surgical treatment following the employment injury, and reported physical examination findings. Back examination demonstrated tenderness over the left sciatic notch and no muscle spasms with diminished lumbar spine range of motion. There were no motor or sensory deficits in either lower extremity. Dr. Langa diagnosed chronic lumbar postlaminectomy syndrome (failed back syndrome). In answer to specific OWCP questions, she opined that appellant had long since reached maximum medical improvement, would indefinitely continue with chronic lower back symptomatology, and would never return to a preinjury level. In an attached work capacity evaluation, Dr. Langa advised that appellant had permanent restrictions and could work eight hours of modified duty with walking and standing limited to one hour, no twisting, bending, or stooping, and pushing, pulling, and lifting limited to 10 pounds for four to six hours daily.

Dr. Heres and Dr. Levy continued to submit reports describing appellant's current condition and treatment.[8]

In a merit decision dated January 30, 2015, OWCP denied modification of the prior decisions. It noted that the arguments counsel raised had previously been reviewed by OWCP in prior decisions and that none of the recently submitted medical evidence discussed whether appellant could perform the modified position offered to her in 2007.[9]

LEGAL PRECEDENT

Section 8106(c) of FECA provides in pertinent part, "A partially disabled employee who (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation."[10] It is OWCP's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.[11] The implementing regulations provide that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of showing that such refusal or failure to work was reasonable or justified and shall be provided with the opportunity to make such a showing before entitlement to compensation is terminated.[12] To justify termination, OWCP must show that the

[8] The record also includes additional lumbar MRI scans dated March 13, 2007, September 4, 2008, February 12, 2010, April 20, 2012, and May 22, 2014.

[9] The position was actually offered appellant on December 7, 2006.

[10] 5 U.S.C. § 8106(c).

[11] *Joyce M. Doll*, 53 ECAB 790 (2002).

[12] 20 C.F.R. § 10.517(a).

work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.[13] In determining what constitutes "suitable work" for a particular disabled employee, OWCP considers 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.[14] 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.[15] OWCP 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.[16]

Section 8123(a) of FECA provides that, 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.[17] The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination, and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[18] When 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.[19]

ANALYSIS

In a March 7, 2007 decision, OWCP terminated appellant's compensation, effective March 6, 2007. It applied section 8106(c)(2) of FECA, a penalty provision, because she worked in the offered position for only four to six hours a day and used LWOP for the remaining period.

In this case, the official day-by-day breakdown of hours found on the time and analysis (CA-7a) forms show that after appellant accepted the modified job offer and returned to work on March 7, 2007, the employing establishment granted LWOP, initially for four hours a day and then for two hours daily in May 2007 when she began working six hours each day. The record supports that the employing establishment examined appellant's requests for LWOP and, taking various factors into consideration, authorized her absence from duty.

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

[14] 20 C.F.R. § 10.500(b); *see Ozine J. Hagan*, 55 ECAB 681 (2004).

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

[16] Federal (FECA) Procedure Manual, Part -- 2 Claims, *Job Offers and Return to Work*, Chapter 2.814.5 (June 2013); *see Lorraine C. Hall*, 51 ECAB 477 (2000).

[17] 5 U.S.C. § 8123(a); *see Y.A.*, 59 ECAB 701 (2008).

[18] 20 C.F.R. § 10.321.

[19] *V.G.*, 59 ECAB 635 (2008).

As the Board held in the case *Dawn L. Westmoreland*,[20] where the employing establishment authorizes a claimant's absence from duty, there is no basis for finding neglect of suitable work under 5 U.S.C. § 8106(c)(2). The Board found no more neglect than if the employing establishment had authorized the use of annual leave to cover the absences in question.[21]

As the evidence fails to support OWCP's application of 5 U.S.C. § 8106(c)(2), the Board will reverse the January 30, 2015 decision denying modification of the termination of appellant's compensation.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation benefits effective March 6, 2007 pursuant to 5 U.S.C. § 8106(c).

ORDER

IT IS HEREBY ORDERED THAT the January 30, 2015 decision of the Office of Workers' Compensation Programs is reversed. The case is remanded for further action consistent with this opinion of the Board.

Issued: December 15, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

[20] 56 ECAB 446 (2005); *see also S.G.*, Docket No. 08-1992 (issued September 22, 2009).

[21] *Id*.