

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

N.B., Appellant)	
)	
and)	Docket No. 14-1778
)	Issued: July 27, 2015
U.S. POSTAL SERVICE, POST OFFICE)	
Santa Ana, CA, Employer)	

Appearances:
Chester J. Shelton, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 28, 2014¹ appellant filed a timely appeal from a January 27, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

¹ Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of the last OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. In computing the date of filing, the 180-day time period for filing an appeal begins to run on the day following the date of OWCP's decision and the last day of the period so computed shall be included unless it is a Saturday, a Sunday, or a Federal holiday. 20 C.F.R. § 501.3(f)(2). One hundred and eighty days from January 27, 2014, the date of OWCP's decision, was on Saturday, July 26, 2014. To be considered timely, appellant's claim must have been filed by Monday, July 28, 2014. Since using August 6, 2014, the date the appeal was received by the Clerk of the Board, 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, 2014, which renders the appeal timely filed. See 20 C.F.R. § 501.3(f)(1).

² 5 U.S.C. §§ 8101-8193.

ISSUE

The issue is whether OWCP properly terminated appellant's wage-loss compensation effective August 24, 2013, finding that she refused suitable work under 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On April 15, 2004 appellant, then a 52-year-old mail processor, filed an occupational disease claim alleging that she sustained several medical conditions due to her federal employment. She first became aware of her condition on February 18, 2000 and realized that it was caused or aggravated by her employment March 31, 2004. OWCP accepted the claim for bilateral carpal tunnel syndrome; bilateral internal derangement of knee; and tear of medial meniscus of right knee. It authorized right knee surgery which was performed on January 3 and October 10, 2008 and left knee surgery which was performed on October 14 and December 28, 2011. Appellant has not worked since August 14, 2010.

On March 6, 2013 OWCP referred appellant to Dr. Steven M. Ma, a Board-certified orthopedic surgeon, for a second opinion evaluation.

In a March 7, 2013 report, Dr. Thomas W. Gibson, a Board-certified orthopedic surgeon, declared appellant permanent and stationary with regard to her left knee condition. He prescribed permanent work restrictions of no squatting or kneeling, no climbing ladders or stairs, and sitting 25 percent of time in an eight-hour day. Dr. Gibson recommended that appellant be allowed a chair with a backrest to allow her feet to rest on the floor. He also recommended that she be afforded future medical care.

In his March 25, 2013 report, Dr. Ma performed an OWCP-directed second opinion examination. He reviewed the statement of accepted facts and the medical record, noted the history of injury, interviewed appellant, and set forth examination findings of both hands and wrists, the upper and lower extremities. Dr. Ma opined that appellant had reached maximum medical improvement with regard to her accepted conditions for approximately one year or more. In a work capacity evaluation, he opined that appellant was able to perform eight hours of sedentary work a day with no more than three hours of walking, standing, pushing, pulling, and lifting over 10 pounds.

Appellant underwent a vocational assessment on March 26, 2013. In a May 9, 2013 report, Dr. Gibson diagnosed left long trigger finger, bilateral carpal tunnel syndrome, and history of right and left knee replacement. He opined that appellant was capable of modified work with no repetitive grasping, no keying, no squatting or kneeling and sitting for 24 percent of the time. Dr. Gibson requested that she be allowed a chair with backrest with her feet on the floor. Additional progress reports from him indicated no change in appellant's conditions.

On May 23, 2013 the employing establishment offered appellant a customer care agent position. The position required sitting in an office chair with a supportive back or stand at workstation, as needed for comfort, occasional simple grasping (mouse), occasional pushing/pulling using a computer mouse, interchangeable to right/left side as needed for comfort, and occasional fine manipulation or use of single finger when using a keyboard. It stated that

there was no squatting/kneeling involved and appellant was able to sit 25 percent of time, with chair with backrest and feet on floor.

In a June 14, 2013 letter, OWCP determined that the offered position as a Customer Care Agent was suitable to appellant's work capabilities and was available. It allowed appellant 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.

In a July 5, 2013 report of telephone call, appellant stated that she was planning to retire. The claims examiner recommended that she accept the offered position, as her eligibility for compensation and schedule awards were in the balance.

In a July 16, 2013 report of telephone call, the claims examiner noted that appellant "signed the paperwork and turned in a medical report stating that she was off work for one month due to knee pain." The claims examiner verified that the offered position was still available to appellant. However, the record is devoid of any paperwork or medicals taking appellant off work.

In a July 16, 2013 letter, OWCP noted that it received notice that appellant's refusal to accept or report to the offered position continues, and that her reasons for refusing the offered position were not valid. Appellant was advised that the offered position remained available. She was afforded a period of 15 additional days to either accept and report to the position or her entitlement to wage loss and schedule award benefits would be terminated. No response was received from appellant.

By decision dated August 1, 2013, OWCP terminated appellant's compensation to wage-loss and schedule award benefits effective August 24, 2013 on the basis that she refused suitable work.³ It noted that she did not return to work as directed or provide any reasons for her refusal of suitable work. OWCP found that the weight of the medical evidence continued to rest with Dr. Ma in his March 25, 2013 second opinion report.

On August 6, 2013 OWCP received a copy of the May 23, 2013 job offer with appellant showing that she had accepted the position on July 11 and 29, 2013.⁴

In an August 14, 2013 letter, appellant indicated that she returned to work on July 27, 2013. A copy of her pay stub for pay period 17 indicated that she took 80 hours of sick leave. This pay stub was dated August 16, 2013.

Progress reports from Dr. Gibson indicated no change in appellant's medical condition or work status. Work status reports from Dr. Gibson continued to indicate that appellant could work full time with the same restrictions and that she needed to sit with a chair with a backrest and feet on the floor.

³ Appellant's entitlement to payment of medical expenses for treatment of the accepted conditions was not affected.

⁴ On August 7, 2013 OWCP closed vocational rehabilitation services.

On November 1, 2013 OWCP received appellant's representative's request for reconsideration. In an October 21, 2013 letter, appellant's representative indicated that she was on sick leave for the entire pay period beginning July 27, 2013, for a condition unrelated to the subject case. He indicated that the pay period was within 15 days of OWCP's July 16, 2013 letter and, therefore, appellant had complied with the July 16, 2013 letter and her right to compensation should be reinstated. A copy of appellant's pay stub for pay period 17 was resubmitted.

In a November 5, 2013 letter, OWCP requested that the employing establishment verify that for pay period 17 (August 25 through September 7, 2013), appellant received sick leave for a nonindustrial condition. It also requested confirmation that the job offer of customer care agent was available for the period August 25 through September 7, 2013. On November 8, 2013 the employing establishment confirmed that the customer care agent position was available for the period August 25 through September 7, 2013 and appellant's time was entered as sick leave during that period as she claimed she was out for a nonwork-related illness.

By decision dated January 27, 2014, OWCP denied modification of its August 1, 2013 decision. It found that appellant did not report for duty and it was not sufficient that she was on sick leave for a nonindustrial condition.

LEGAL PRECEDENT

A disabled employee is obligated to perform such work as he or she can.⁵ OWCP's goal is to return each disabled employee to suitable work as soon as the employee is medically able.⁶ A partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by, or secured for him or her is not entitled to compensation.⁷

Whether an employee has the physical or psychological ability to perform an offered position is primarily a medical question that must be resolved by the medical evidence.⁸ In evaluating the suitability of a particular position, OWCP must consider preexisting and subsequently acquired medical conditions.⁹

When OWCP considers a job to be suitable, it shall advise the employee of its finding and afford her 30 days to either accept the job or present any reasons to counter OWCP's finding of suitability.¹⁰ If the employee presents such reasons and OWCP determines that the reasons

⁵ 20 C.F.R. § 10.500(b) (2009).

⁶ 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. *Id.*

⁷ 5 U.S.C. § 8106(c) (2006); 20 C.F.R. § 10.517.

⁸ *Gayle Harris*, 52 ECAB 319, 321 (2001).

⁹ *Id.*; *Martha A. McConnell*, 50 ECAB 129, 132 (1998).

¹⁰ 20 C.F.R. § 10.516.

are unacceptable, it will notify the employee of that determination and further inform the employee that she has 15 days in which to accept the offered work without penalty.¹¹ After providing the 30-day and 15-day notices, OWCP will terminate the employee's entitlement to further compensation.¹² However, the employee remains entitled to medical benefits.¹³

ANALYSIS

The Board finds that OWCP improperly terminated appellant's compensation benefits. As a penalty provision, 5 U.S.C. § 8106(c) should be narrowly construed and not lightly invoked.¹⁴

The regulatory scheme for imposing this penalty provides for a two-tiered notification process.¹⁵ The initial 30-day notification was issued on June 14, 2013 when OWCP informed appellant that it found the customer care agent position suitable. OWCP advised appellant that she had 30 days to either accept the job or present, in writing, any reasons to counter its finding of suitability. While the record is unclear whether appellant returned to work on July 27, 2013, appellant's pay stub for pay period 17 indicated 80 hours of sick leave were taken prior to August 16, 2013 and that the employing establishment granted sick leave to cover this absence.

OWCP issued the 15-day pretermination notice on July 16, 2013.¹⁶ The July 16, 2013 15-day notice stated in relevant part: We have received notice that your refusal to accept or report to the offered position continues. OWCP further indicated that it had considered all reasons that you provided for refusing to accept the offered position and do not find them to be valid.

When OWCP issued the July 16, 2013 notice, it was aware that appellant had "signed the paperwork" and would be "off work for one month due to knee pain." It never advised appellant in its July 16, 2013 notice of its consideration of her sick leave and that it was aware that she had accepted the position on July 11, 2013. Appellant did not receive proper evaluation of the evidence prior to the termination of benefits.¹⁷

¹¹ *Id.* However, the 15-day notification need not explain why OWCP found the employee's reasons for refusal unacceptable. *Id.*

¹² 20 C.F.R. § 10.517(b). This includes compensation for lost wages as well as compensation for any permanent loss of use of a schedule member. *Id.*; see 5 U.S.C. §§ 8105, 8106 and 8107.

¹³ *Id.* at § 10.517(b).

¹⁴ *Stephen A. Pasquale*, 57 ECAB 396, 402 (2006).

¹⁵ 20 C.F.R. §§ 10.516, 10.517(b).

¹⁶ *Id.* at § 10.516.

¹⁷ *Id.* at §§ 10.516, 10.517(b); see *S.G.*, Docket No. 08-1992 (September 22, 2009).

Moreover, the employing establishment authorized appellant's use of sick leave. Where it 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).¹⁸

While appellant claims sick leave was taken for nonwork-related illness starting July 27, 2013, there is a discrepancy in OWCP's finding regarding the dates period 17 covers. She asserts that pay period 17 began on July 27, 2013 while OWCP indicated it covered the period August 25 through September 7, 2013. The pay stub for pay period 17 however was dated August 16, 2013, which supports appellant's assertion. OWCP therefore did not properly consider appellant's approved sick leave starting July 27, 2013 when finding that appellant refused suitable work on August 1, 2013. Accordingly, the termination of appellant's compensation benefits effective August 24, 2013 is reversed.

CONCLUSION

The Board finds that OWCP improperly terminated appellant's compensation benefits under section 8106(c)(2).¹⁹

ORDER

IT IS HEREBY ORDERED THAT the January 27, 2014 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 27, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁸ See *Dawn L. Westmoreland*, 56 ECAB 446, 450 (2005).

¹⁹ In light of the disposition of this case, counsel's arguments on appeal are moot.