United States Department of Labor
Employees' Compensation Appeals Board

C.V., Appellant	)	
and	)	**Docket No. 14-1572**
	)	**Issued: June 19, 2015**
U.S. POSTAL SERVICE, POST OFFICE, New York, NY, Employer	)	

Appearances:
Thomas S. Harkins, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On July 2, 2014 appellant, through counsel, filed an application for review of a January 15, 2014 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(a) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly terminated appellant's compensation effective November 26, 2012 for refusing an offer of suitable work.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 2, 2009 appellant then a 50-year-old clerk, was injured when she stumbled on tiles in a workplace restroom and fell on her knees and hands.[2] She stopped work on December 2, 2009. On August 2, 2010 OWCP accepted the claim for bilateral contusions of the knees, hands, and sprain of the right wrist. Appellant received wage-loss compensation and was placed on the periodic rolls.

Appellant received treatment from Dr. Dante A. Trovato, a Board-certified orthopedic surgeon, found her totally disabled and held her off work.

In its attempt to obtain current medical evidence, by letters dated March 16 and April 5, 2011, OWCP referred appellant for a second opinion examination, along with a statement of accepted facts, a set of questions and the medical record to Dr. Michael Katz, a Board-certified orthopedic surgeon. In an April 28, 2011 report, Dr. Katz noted appellant's history of injury and treatment, and diagnosed resolved bilateral hand and wrist contusion, resolved left knee contusion, and right knee internal derangement. He recommended a right knee arthroscopy as he found the degenerative joint condition had been aggravated by the fall. Dr. Katz explained that, if appellant did not proceed with the surgery, she could return to work for eight hours a day with limited duty.

On May 9, 2011 OWCP contacted the employing establishment and requested a limited-duty job offer. The treating physician, Dr. Trovato continued to treat appellant and advised that she was disabled.

On June 30, 2011 the employing establishment formulated a modified job offer for appellant, but she did not return to work.

By letter dated May 9, 2012, OWCP again referred appellant for a second opinion to obtain an updated medical report, along with a statement of accepted facts, a set of questions, and the medical record to Dr. Leon Sultan, a Board-certified orthopedic surgeon.[3] In a May 23, 2012 report, Dr. Sultan noted appellant's history of injury and treatment, and provided examination findings. He determined that she had a right knee medial meniscus tear, superimposed on a preexisting degenerative osteoarthritic condition, along with obesity. Dr. Sultan explained that appellant would benefit from arthroscopic surgery. He advised that, if surgery was not conducted, she could return to work for four to six hours per day in a modified clerical position with no lifting over 10 pounds and no squatting, kneeling, and climbing.

[2] The record reflects that appellant had a prior Claim No. xxxxxx101 for an orthopedic injury on July 15, 2004, which was accepted for lumbar sprain. Appellant was temporarily totally disabled for 19 months following the injury and returned to eight hours limited duty in March 2006. She was working limited duty when she sustained the present injury. This prior claim is not presently before the Board.

[3] OWCP initially referred appellant to Dr. Marvin Gilbert, a Board-certified orthopedic surgeon, but OWCP's referral letter was sent to an incorrect address as appellant had moved. Thereafter, OWCP referred appellant to Dr. Sultan.

On June 7, 2012 OWCP contacted the employing establishment and provided a copy of Dr. Sultan's May 23, 2012 report. The employing establishment was requested to determine whether a job offer was available to accommodate appellant's restrictions. On June 22, 2012 it provided her with a modified mail processing clerk position, for eight hours per day, utilizing the restrictions of Dr. Sultan.

On July 25, 2012 appellant declined the modified job offer based upon her physician's advice. She provided the employing establishment with a copy of Dr. Trovato's July 25, 2012 treatment note, advising that she was currently disabled and incapable of performing her duties. Dr. Trovato continued to treat appellant and advised that she was disabled and unable to work.

By letter dated August 20, 2012, OWCP advised appellant that the modified mail processing clerk position had been found to be suitable to her capabilities and was currently available. It found the work restrictions set by Dr. Sultan to be consistent with the offered position. Appellant was advised that she should accept the position or provide an explanation for refusing the position within 30 days. OWCP informed her that, if she failed to accept the offered position and failed to demonstrate that the failure was justified, her compensation would be terminated.

OWCP received a September 5, 2012 medical update from Dr. Trovato who noted that appellant was under his care and fully disabled and incapable of performing the modified duties as outlined. It also received previously submitted treatment notes and physical therapy notes. In letters dated September 14, 2012, appellant's counsel argued that Dr. Trovato's September 5, 2012 report supported that appellant was unable to work.

On September 21, 2012 OWCP informed appellant that her reasons for refusing the position were not acceptable and allowed an additional 15 days for appellant to accept the position. Appellant was advised that no further reasons for refusal would be considered.

On October 1, 2012 appellant's counsel argued that Dr. Trovato's September 5, 2012 report supported that appellant was unable to work and there was an unresolved conflict. In reports dated October 3, 2012, Dr. Trovato repeated that appellant was disabled and unable to work.

On October 16, 2012 the employing establishment provided appellant with a new modified mail processing clerk position, for four hours a day, based upon Dr. Sultan's restrictions.

In a letter dated October 23, 2012, OWCP notified appellant that the modified position of a mail processing clerk had been found to be suitable to her capabilities and was currently available. It advised that on June 22, 2012 the employing establishment provided a modified job offer for appellant which she declined. OWCP explained that, upon making a final determination of her wage-loss benefits, it was discovered that the original job offer was for an eight-hour workday. It explained that the employing establishment was contacted and a four-hour job offer was formulated for appellant. OWCP stated that appellant had 30 days to accept the new four-hour-a-day position or provide reasons as to why the position was not suitable. It

informed her that, if she failed to accept or demonstrate that her failure was justified, compensation benefits would be terminated.

On November 26, 2012 OWCP received appellant's counsel's response to OWCP's October 23, 2012 letter. Counsel argued that Dr. Trovato's opinion in his September 5, 2012 report supported that appellant could not perform the duties of the offered position. He argued that his opinion could not be ignored. Furthermore, counsel asserted that the opinions of Drs. Trovato and Sultan were in conflict and an impartial medical examiner should be selected by OWCP. He indicated that an unresolved conflict remained and the termination was not justified.

By decision dated November 26, 2012, OWCP terminated appellant's entitlement to monetary compensation benefits, effective that date, on the basis that she had refused suitable work. It determined that the position was suitable and in accordance with the restrictions of the second opinion physician, Dr. Sultan, who had released appellant to work four to six hours per day in a modified clerical position with restrictions of no lifting over 10 pounds and avoiding squatting, kneeling, and climbing. OWCP stated that no response to its October 23, 2012 notification was received.

Appellant's counsel requested reconsideration on November 17, 2013 and submitted additional evidence.

By decision dated January 15, 2014, OWCP denied modification of the November 26, 2012 decision.

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."[4] It is OWCP's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.[5] 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.[6] To justify termination, OWCP must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.[7] 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

[4] 5 U.S.C. § 8106(c).

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

[6] 20 C.F.R. § 10.517(a).

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

qualifications to perform such work and other relevant factors.[8] 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.[9] 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.[10]

When OWCP considers a job to be suitable, it shall advise the employee of its finding and afford him or her 30 days to either accept the job or present any reasons to counter OWCP's finding of suitability.[11] If the employee presents such reasons and OWCP determines that the reasons are unacceptable, it will notify the employee of that determination and further inform the employee that she has 15 days within which to accept the offered work without penalty.[12] After providing the 30-day and 15-day notices, OWCP will terminate the employee's entitlement to further wage-loss compensation and schedule award benefits.[13] The employee, however, remains entitled to medical benefits.[14]

The Board has further found that, although OWCP cannot ignore evidence submitted after the period allotted for submitting reasons for not accepting an offered position, submission of such belated evidence does not require OWCP to afford appellant another 15 days to accept or reject the position. Otherwise an appellant could postpone indefinitely the termination of compensation for refusal of suitable work by offering new reasons each time OWCP advises appellant that she must accept the position or have her compensation terminated.[15] Nevertheless, OWCP must consider the reasons and evidence and may then reject them as unacceptable and terminate compensation.[16]

ANALYSIS

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's compensation benefits as it did not consider evidence submitted by appellant at the time of its termination decision.

[8] 20 C.F.R. § 10.500(b); *see Ozine J. Hagan*, 55 ECAB 681 (2004).

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

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity, Refusal of Job Offer*, Chapter 2.814.5 (June 2013); *see Lorraine C. Hall*, 51 ECAB 477 (2000).

[11] 20 C.F.R. § 10.516.

[12] *Id*.

[13] *Id*. at § 10.517(b).

[14] *Id*.

[15] *Melvin James*, 55 ECAB 406 (2004).

[16] *Id., Kenneth R. Love*, 50 ECAB 193, 198 (1998).

Under *Maggie L. Moore*,[17] the Board found that OWCP denied appellant a reasonable opportunity to comply with 5 U.S.C. § 8106(c) when it terminated her compensation for refusal of suitable work without first advising her that her reasons for refusal were insufficient to justify such refusal. In *Maggie L. Moore*, the Board held that due process and elementary fairness require that OWCP must not only inform each claimant of the provisions of the above statute, but also inform her that a specific position offered is suitable; the consequences of refusal of the position; and allow the claimant a reasonable period to accept or reject the position or submit evidence or reasons why the position is not suitable and cannot be accepted.[18]

In this case, in a letter dated October 23, 2012, OWCP advised appellant that the position was suitable and provided her 30 days to accept the position or provide reasons for her refusal. It further notified her that the position remained open and that a partially disabled employee who refused suitable work was not entitled to compensation. Appellant's counsel provided a response, but it was not received within the allotted 30-day period. The response was received on November 26, 2012. In its November 26, 2012 decision, OWCP specifically found that no response was received and did not discuss this evidence or address whether it was sufficient to render the offered position unsuitable. When OWCP receives relevant evidence prior to its decision, it must consider the evidence.[19]

Because appellant did not submit a timely response to OWCP's October 23, 2012 letter, appellant is not entitled to further notice prior to the termination of benefits under section 8106(c).[20] However, as noted, OWCP had an obligation to consider the evidence received on

[17] *See also supra* note 7.

[18] *Id.*

[19] *See Kenneth R. Love*, *supra* note 16. *See for example, Shelia Jordan-Glover*, Docket No. 04-341 (issued November 12, 2004). *Jordan-Glover*, in response to OWCP's 15-day letter, appellant submitted a report from her physician advising that she could not be gainfully employed. OWCP did not discuss the evidence received or address whether it was sufficient to render the offered position unsuitable. The Board found that OWCP did not meet its burden of proof to terminate appellant's compensation as OWCP had not addressed all of the relevant evidence of record.

[20] *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992), if a claimant submits evidence or reasons or both, within the time period so provided, then OWCP must evaluate the new evidence or reasons submitted and inform the claimant of its decision as to whether the evidence or reasons submitted were accepted or rejected and provide an additional period in which to accept the position. In this case, appellant failed to submit evidence or reasons for not accepting the position within the 30-day period. *See also Sheila J. Antley*, Docket No. 94-2564 (issued December 11, 1996) (where no response was provided to OWCP after being advised of the ramifications of her refusal of the suitable work); *Tronna Nichelson*, Docket No. 01-1264 (issued April 16, 2002) ("Because appellant submitted additional evidence within the 30-day period provided by the Office for responding to the suitability determination, she was entitled to have her evidence evaluated to determine whether or not she provided acceptable reasons for refusing the offer of suitable work. Thereafter, she was entitled to an additional 15 days to accept the offered job"); *Thomas R. Mulvihill*, Docket No. 99-2588 (issued August 1, 2001) (where appellant failed to timely provide a response to the 30-day suitability termination letter); or *Melvin James*, 55 ECAB 406 (2004) (where failure to submit reasons within 30 days did not afford appellant an additional 15-day notice).

November 26, 2012.[21] As OWCP did not address this evidence submitted by appellant at the time of the suitable work termination, the Board finds that OWCP did not comply with Board precedent. Consequently, OWCP committed error in its invocation of section 8106(c) and improperly terminated appellant's compensation effective November 26, 2012 because she refused suitable work.

CONCLUSION

The Board finds that OWCP improperly terminated appellant's compensation effective November 26, 2012.

ORDER

IT IS HEREBY ORDERED THAT the January 15, 2014 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 19, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

[21] The Board has also held that it is necessary that OWCP review all evidence submitted by a claimant and received by OWCP prior to issuance of its final decision and noted that this principle applies with equal force when evidence is received by OWCP the same day a final decision is issued. *Linda Johnson*, 45 ECAB 439, 440 (1994).