United States Department of Labor
Employees' Compensation Appeals Board

S.C., Appellant	)	
and	)	**Docket No. 15-10**
	)	**Issued: June 12, 2015**
U.S. POSTAL SERVICE, POST OFFICE, San Diego, CA, Employer	)	

Appearances:
Stephen Larkin, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 5, 2014 appellant, through her representative, filed a timely appeal from a September 3, 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(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUE

The issue is whether OWCP properly terminated appellant's wage-loss compensation and schedule award eligibility effective August 16, 2013 as she refused suitable work under 5 U.S.C. § 8106(c)(2).

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the issuance of the September 3, 2014 OWCP decision, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c)(1).

On appeal, appellant's representative contends that the impartial medical examiner restricted appellant to sedentary work and, therefore, she was unable to accept the modified job offer.

FACTUAL HISTORY

OWCP accepted that appellant, then a 48-year-old mail handler, sustained a lumbar sprain and aggravation of lumbar degenerative disc disease as a result of pushing a cage of bulk mail in the performance of duty on July 13, 2002. The claim was accepted. Appellant was placed on the periodic rolls and received compensation benefits. She returned to modified duty and then stopped working on June 14, 2012 when the employing establishment could no longer accommodate her restrictions.

OWCP referred appellant to Dr. Aubrey Swartz, a Board-certified orthopedic surgeon, to determine the nature and extent of her employment-related conditions. In a January 27, 2012 report, Dr. Swartz found that appellant's accepted conditions had resolved and the chronic degenerative disease in the lumbar spine was unrelated to her employment injury.

In a February 8, 2012 report, Dr. Jack Akmakjian, a Board-certified orthopedic surgeon and appellant's attending physician, indicated that appellant continued to complain of pain across the lower back and diagnosed lumbar discogenic disease and chronic lumbar strain. He opined that she was capable of modified work.

OWCP found a conflict in medical opinion between Dr. Swartz and Dr. Akmakjian on the issue of whether appellant continued to have any disability or residuals as a result of the accepted employment conditions. To resolve this conflict, it referred appellant to Dr. Neil Halbridge, a Board-certified orthopedic surgeon, for an impartial medical examination. In his April 5, 2013 report, Dr. Halbridge reviewed a statement of accepted facts, related appellant's history, reviewed the medical record, and conducted a physical examination. He diagnosed low back pain with bilateral posterior thigh pain and intermittent muscle spasms with mild degenerative disc disease at L4-S1 with less than two millimeter disc protrusions at the L4-S1 levels noted on a magnetic resonance imaging (MRI) scan dated July 31, 2002. Dr. Halbridge opined that appellant's employment injury was at a permanent and stationary status and she had reached maximum medical improvement on December 2, 2004. He found that she was capable of modified work with restrictions. Dr. Halbridge opined that appellant was capable of performing sedentary work with the following restrictions: standing, walking, and exerting up to 10 pounds of force occasionally for ⅓ of an eight-hour workday. He also indicated that an OWCP-5c (work capacity evaluation) form would be completed and returned with his report. No such OWCP-5c form was submitted.

On May 30, 2013 appellant was referred for an assessment of academic achievement levels and vocational interests. She was administered the Raven Standard Progressive Matrices, Wide Range Achievement Test, Career Occupational Preference Systems, and select sections of the ABLE III. Under a rehabilitation plan and award dated July 16, 2013, appellant was placed in a vocational rehabilitation program to help her find suitable employment.

In a June 19, 2013 report, Dr. Akmakjian examined appellant and found decreased low back pain. In an accompanying duty status report (Form CA-17) dated June 19, 2013, he provided the following restrictions: lifting 30 pounds continuously and 30 to 35 pounds intermittently; sitting and standing for six to eight hours a day; climbing and kneeling for five to six hours a day; bending, stooping, and twisting for four hours a day; reaching above the shoulder for seven hours a day; and driving for a half-hour a day.

Based on the restrictions provided by Dr. Akmakjian in his June 19, 2013 report, the employing establishment offered appellant a modified position as a mail handler outlined in an August 10, 2013 "Offer of Modified Assignment" form. The duties required sorting and distributing trays of mail, removing mail from containers, and placing mail onto conveyor belts or into other containers for further processing or dispatch.

On August 16, 2013 appellant returned to work as a modified mail handler. She worked for four hours and then left, indicating that she could no longer perform her duties and filed a claim for a recurrence of total disability.

In an August 28, 2013 letter, OWCP indicated that the offered position was suitable work within appellant's medical limitations and she had accepted the job offer, but abandoned the position because she believed it no longer met her medical restrictions. It advised her of the penalty provision under section 8106(c) of FECA for refusing suitable work and afforded her 30 days to either accept the offered position or provide valid reasons for her refusal.

On September 11, 2013 appellant submitted an August 21, 2013 report from Dr. Akmakjian who noted that she had tried to return to work, but could not do the job that was given to her.

In a September 30, 2013 letter, OWCP advised appellant that it had considered her reasons for refusal and found them unacceptable. It afforded her 15 days in which to accept the position or her compensation benefits would be terminated. OWCP noted that no further reasons for refusal would be considered.

In a narrative statement dated October 17, 2013, appellant indicated that she went back to her modified mail handler position on October 9, 2013 and worked within updated restrictions of standing for four hours in accordance with Dr. Akmakjian's August 21, 2013 report. She further indicated that her work area had a conveyer belt which she had to walk around while carrying heavy trays, making it impossible for her to lift and carry intermittently per her restrictions.

By decision dated November 19, 2013, OWCP found that appellant had failed to establish her recurrence of disability claim she filed after leaving her employment duties on August 16, 2013. It then terminated her wage-loss compensation benefits and schedule award eligibility effective August 16, 2013 on the basis that she abandoned suitable work in accordance with 5 U.S.C. § 8106(c)(2).

On December 17, 2013 appellant, through her representative, requested an oral hearing before an OWCP hearing representative and submitted a December 16, 2013 affidavit indicating that she returned to her modified mail handler position from October 9 to November 25, 2013

and followed her restriction of standing for four hours, but was not able to follow the other restrictions as her job assignment required bending and stooping for more than four hours a day.

In reports dated November 25 and 26, 2013, Dr. Michael Valdez, an occupational medicine specialist, diagnosed back pain and lumbar strain. He indicated that appellant sustained an injury on August 16, 2013 and was not capable of working under the restrictions given by her orthopedic surgeon. Dr. Valdez released her to work with the following restrictions: no stooping, bending, lifting, pushing or pulling, and sedentary work only.

On December 5, 2013 Dr. Akmakjian reiterated his diagnoses and restrictions.

In reports dated January 29 through April 14, 2014, Dr. Scott Goldman, a Board-certified orthopedic surgeon, diagnosed L5-S1 posterior annual tear with two millimeter disc bulge and facet joint arthrosis and left-sided S1 radiculopathy. He indicated that appellant returned to work for one day and was not able to tolerate the pain. Dr. Goldman recommended desk work only with restrictions of no bending, stooping, or lifting more than 10 pounds.

A telephonic hearing was held before an OWCP hearing representative on July 14, 2014.

By decision dated September 3, 2014, an OWCP hearing representative affirmed the November 19, 2013 termination decision as appellant refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

LEGAL PRECEDENT

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] To justify termination of compensation, OWCP must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[5] Section 8106(c) 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.[6]

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.[7] Pursuant

[3] *See Linda D. Guerrero*, 54 ECAB 556 (2003).

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

[5] *See Ronald M. Jones*, 52 ECAB 190 (2000).

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

[7] 20 C.F.R. § 10.517(a).

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.[8]

Before compensation can be terminated, however, OWCP has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work, establishing that a position has been offered within the employee's work restrictions and setting forth the specific job requirements of the position.[9] In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, it has the burden of showing that the work offered to and refused by appellant was suitable.[10] OWCP procedures provide that if a claimant returns to work and then stops working and submits a claim for compensation, the claims examiner must make a finding of suitability unless a loss of wage-earning capacity decision has been issued.[11]

Once OWCP establishes that the work offered is suitable, the burden shifts to the employee who refuses to work to show that the refusal or failure to work was reasonable or justified.[12] The determination of whether an employee is physically capable of performing a modified assignment is a medical question that must be resolved by medical evidence.[13] OWCP procedures state that acceptable reasons for refusing an offered position include medical evidence of inability to do the work.[14]

ANALYSIS

OWCP accepted that appellant sustained a lumbar sprain and aggravation of lumbar degenerative disc disease in the performance of duty on July 13, 2002. Appellant was placed in a vocational rehabilitation program and the employing establishment offered her a modified position as a mail handler. On August 16, 2013 she returned to work for four hours and then left, indicating that she could no longer perform her duties. Appellant filed a claim for a recurrence of total disability. In its November 19, 2013 decision, OWCP found that she failed to establish her claim and terminated her compensation benefits effective August 16, 2013 as she abandoned suitable work. On appeal, counsel contends that the impartial medical examiner restricted appellant to sedentary work and, therefore, she was unable to accept the modified job offer.

The Board finds that the offered mail handler position was not suitable work as it exceeded appellant's medical restrictions.

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[8] *Id.* at § 10.516.

[9] *See Linda Hilton*, 52 ECAB 476 (2001).

[10] *Id.*

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.8 (June 2013).

[12] 20 C.F.R. § 10.517(a).

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

[14] *Supra* note 11 at Chapter 2.814.5(a)(4) (June 2013).

OWCP found a conflict in medical opinion between Dr. Akmakjian, appellant's attending Board-certified orthopedic surgeon, who opined that appellant continued to suffer residuals of her accepted back conditions and Dr. Swartz, the second opinion examiner, who found that appellant's accepted conditions had resolved and the chronic degenerative disease in the lumbar spine was unrelated to her employment injury. It properly referred appellant to Dr. Halbridge for an impartial medical examination to resolve the medical conflict, pursuant to 5 U.S.C. § 8123(a). In his April 5, 2013 report, Dr. Halbridge reviewed a statement of accepted facts, related appellant's history, reviewed the medical record, and conducted a physical examination. He found that she was capable of modified work with restrictions. Dr. Halbridge opined that appellant was capable of performing sedentary work with the following restrictions: standing, walking, and exerting up to 10 pounds of force occasionally for ⅓ of an eight-hour workday.

Subsequently, Dr. Akmakjian provided the following restrictions in his June 19, 2013 report: lifting 30 pounds continuously and 30 to 35 pounds intermittently; sitting and standing for six to eight hours a day; climbing and kneeling for five to six hours a day; bending, stooping, and twisting for four hours a day; reaching above the shoulder for seven hours a day; and driving for a half-hour a day. Based on the restrictions provided by Dr. Akmakjian, the employing establishment offered appellant a modified position as a mail handler and she returned to modified duty on August 16, 2013. On August 21, 2013 Dr. Akmakjian stated that appellant had tried to return to work, but could not do the job that was given to her.

The Board finds that Dr. Halbridge's opinion was not given the proper weight of evidence regarding appellant's medical restrictions. In situations where there are 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 on a proper factual background, must be given special weight.[15] Although Dr. Akmakjian advised that appellant could not perform the duties of the modified position, it was his opinion that was the basis of one side of the conflict in medical opinion. Reports from a physician who was on one side of a medical conflict that an impartial specialist resolved, are generally insufficient to overcome the weight accorded the opinion of the impartial physician or to create a new conflict.[16] The Board finds that as Dr. Halbridge provided a comprehensive, well-rationalized opinion in which he provided physical examination findings, his opinion is entitled to the special weight accorded an impartial medical examiner and constitutes the weight of the medical evidence.[17]

The modified mail handler position offered to appellant on August 10, 2013 required standing for six to eight hours a day and lifting 30 pounds continuously and 30 to 35 pounds intermittently. The standing and lifting requirements exceed Dr. Halbridge's April 5, 2013 restrictions of standing and exerting up to 10 pounds of force occasionally for ⅓ of an eight-hour workday. Dr. Halbridge further opined that appellant was restricted to sedentary work and the modified mail handler position required sorting and distributing trays of mail, removing mail

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

[16] *See Jaja K. Asaramo*, 55 ECAB 200 (2004).

[17] *See L.B.*, Docket No. 14-1794 (issued January 7, 2015).

from containers, and placing it onto conveyor belts or into other containers for further processing or dispatch. As the modified job offer exceeded his restrictions, the Board finds that it was not suitable work under section 8106(c) of FECA. Thus, OWCP erred in terminating appellant's wage-loss compensation and schedule award eligibility.[18]

Accordingly, OWCP's termination decision will be reversed and the case returned to OWCP for reinstatement of appropriate benefits.

CONCLUSION

The Board finds that OWCP improperly terminated appellant's wage-loss compensation and schedule award eligibility effective August 16, 2013 under 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the September 3, 2014 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 12, 2015
Washington, DC

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

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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

[18] *See R.B.*, Docket No. 12-1868 (issued April 22, 2013).