United States Department of Labor
Employees' Compensation Appeals Board

T.S., Appellant	)	
and	)	**Docket No. 15-1539**
	)	**Issued: November 18, 2015**
DEPARTMENT OF THE ARMY, FORT POLK, LA, Employer	)	

Appearances:
Alan J. Shapiro, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 8, 2015 appellant, through counsel, filed a timely appeal of a March 30, 2015 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.

ISSUE

The issue is whether OWCP properly terminated appellant's compensation benefits effective August 26, 2012 pursuant to 5 U.S.C. § 8106(c)(2).

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has been before the Board on prior appeal.[2] On November 15, 2013 the Board affirmed the termination of compensation benefits, effective August 26, 2012, pursuant to 5 U.S.C. § 8106(c)(2) as appellant had refused an offer of suitable work.[3] The facts relevant to this appeal are set forth below.

On June 30, 2009 appellant, then a 41-year-old nursing assistant, injured her right ankle. OWCP accepted a claim for right ankle fracture and nonunion of right ankle fracture. It paid appellant compensation for temporary total disability compensation.

On June 14, 2010 appellant underwent right foot bone graft surgery to repair the nonunion of the right distal fibula. The procedure was performed by Dr. J. David De Lapp, Board-certified in orthopedic surgery.

In a February 4, 2012 report, Dr. Oghale Eleyae, a specialist in podiatry, noted appellant's history of right foot pain and trauma. He advised that she had developed arthritis in her right ankle and was experiencing sharp and burning pain with walking. Dr. Eleyae reported that appellant had developed chronic regional pain syndrome. He advised that she had been restricted to a desk chair but still complained of pain and swelling to her right foot and ankle after sitting for long periods. Dr. Eleyae opined that appellant would not be able continue working even with light-duty limitations. He recommended that she be referred to her primary care physician for a disability evaluation.

In order to determine appellant's current condition and ascertain her ability to engage in gainful employment, she was referred to Dr. John P. Sandifer, Board-certified in orthopedic surgery, for a second opinion examination. In a report dated February 14, 2012, Dr. Sandifer advised that appellant had continued complaints of pain and numbness in her right ankle and right foot and had apparently developed reflex sympathetic dystrophy. He noted that appellant had also undergone additional surgery for extensive tendon repair. Dr. Sandifer reported that appellant was not able to return to her prior employment as a nursing assistant; he opined, however, that she could work in a limited work, sedentary job. He outlined restrictions of no standing for more than 15 to 20 minutes at a time or more than 2 hours in an 8-hour day. Dr. Sandifer asserted that appellant needed to elevate her foot and ankle frequently, during the day. In a work capacity evaluation accompanying his report, he noted that she could work an eight-hour a day with these additional restrictions: intermittent sitting for no more than four hours per day; walking, standing and lifting not exceeding five pounds for no more than one-hour per day; pushing, pulling not exceeding five pounds for no more than two hours per day; and no bending, stooping, squatting, kneeling, or climbing.

[2] In Docket No. 12-624 (issued August 2, 2012) the Board found that OWCP properly determined that appellant had received an overpayment of compensation due to the incorrect deduction of health benefit premiums and that the overpayment should not be waived.

[3] Docket No. 13-1046 (issued November 15, 2013).

On March 14, 2012 Dr. De Lapp advised with his signature that he approved of Dr. Sandifer's opinion that appellant could work an eight-hour day within his reported restrictions, for one year.

On March 30, 2012 the employing establishment offered appellant a job as a modified nursing assistant based on the restrictions set forth by Dr. Sandifer and approved by Dr. De Lapp. The job entailed calling patients to verify appointments; taking vital signs sitting down or intermittently standing up; advising patients of their appointment time; advising patients to reschedule appointments if they cancelled; providing patients with the appointment line number to reschedule appointments; bringing specimens to the lab twice a day; communicating closely with providers and coworkers; attending a four-hour BLS class; intermittently weighing adult patients by having them step on a scale and using a computer with her left hand and arm only. In addition, the employing establishment noted that appellant would be provided with a foot stool to elevate her right ankle and would be permitted to intermittently stand up and move around as needed.

On March 30, 2012 appellant accepted the employing establishment's modified job offer.

The employing establishment advised, however, that on April 3, 2012 she contacted her supervisor and requested that she be placed in a leave-without-pay status.

In an April 5, 2012 report, Dr. De Lapp noted that appellant still had pain and swelling in her right ankle but was feeling much better. He advised that her condition was essentially the same as it had been and had basically stabilized since her distal fibula procedure. Dr. De Lapp related that appellant's supervisors believed that appellant could continue to perform light duty, though she did not think they had actually made any accommodations for her. He advised that appellant was under the influence of prescription narcotics and felt very distraught and anxious about her multiple problems, including her foot, ankle, and hip.

Dr. De Lapp noted that x-rays of appellant's right ankle showed a well-healed distal fibula previous nonunion, with intact hardware, no evidence of loosening and no acute bony abnormalities. He also advised that she had a negative bone scan for complex regional pain syndrome. Dr. De Lapp opined that appellant could continue light duty pursuant to the functional capacity evaluation he had submitted with his report. He submitted an April 5, 2012 duty status report (Form CA-17) which outlined restrictions of intermittent simple grasping and fine manipulation for four hours per day; intermittent sitting, standing, and walking for no more than four hours per day; intermittent bending, stooping twisting, pulling, pushing and reaching above her shoulder for no more than one-hour per day and intermittent lifting not exceeding 10 pounds for no more than one-hour per day.

By letter dated June 5, 2012, OWCP advised the claimant that the offered position was suitable, advised her of the sanctions for refusal of suitable work, and allowed her 30 days to reply. No response was received.[4]

[4] Appellant did file a Form CA-7, requesting a schedule award on June 27, 2012.

By letter dated July 6, 2012, OWCP advised appellant that the modified manual distribution job was suitable and that she had provided no valid reason for refusing the suitable position. Appellant was advised that, pursuant to section 8106(c)(2), she had 15 days to accept the job otherwise her entitlement to compensation benefits would be terminated. She did not respond within the allotted time.

By decision dated August 13, 2012, OWCP terminated appellant's eligibility for compensation benefits and for schedule award benefits effective August 26, 2012 as she had refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2). It found that the position offered by the employing establishment was within her treating physician's prescribed work restrictions and found that the medical evidence established that she was capable of performing the modified nursing assistant's job. OWCP also noted that appellant had been afforded the requisite 15-day notice and opportunity to comply with 5 U.S.C. § 8106(c)(2). Appellant did file a Form CA-7, requesting a schedule award on June 27, 2012.

By letter dated August 23, 2012, counsel requested an oral hearing, which was held before an OWCP hearing representative on December 7, 2012.

By decision dated February 20, 2013, an OWCP hearing representative affirmed the August 13, 2012 decision.

Appellant, through counsel, timely appealed the Board's decision on March 26, 2013. In a decision dated November 15, 2013, the Board affirmed OWCP's February 20, 2013 decision.[5]

On November 13, 2014 appellant, through counsel, requested reconsideration. Appellant submitted a November 13, 2014 report from Dr. Barton L. Warren, Board-certified in orthopedic surgery, who noted that she was having difficulty maintaining her weight due to a loss of appetite; he noted that she had lost over 100 pounds in recent months and was experiencing severe right foot pain which limited her ability to work. Dr. Warren advised that appellant had several other orthopedic problems which caused her constant pain and was also experiencing severe depression and anxiety. He asserted that she continued to have severe emotional fallout due to the fact that she had always worked but was no longer able to keep up the pace she maintained prior to the injury, and was currently unable to engage in gainful employment. Dr. Warren opined that appellant's severe depression and anxiety led her to develop psychomotor retardation, and insomnia. He asserted that she was severely depressed and had nutritional deficiencies which were causing her to be significantly weak and fatigued.

By decision dated March 30, 2015, OWCP denied modification of the August 13, 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."[6]

[5] Docket No. 13-1046 (issued November 15, 2013).

[6] 5 U.S.C. § 8106(c).

It is OWCP's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.[7] 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.[8]

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.[9] In determining what constitutes "suitable work" for a particular disabled employee, it 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.[10] 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.[11]

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.[12] It is well established that OWCP must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.[13]

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish that the March 30, 2012 job offer was not suitable and that her refusal to accept the offer was reasonable or justified. As noted above, OWCP terminated appellant's monetary compensation effective August 26, 2012 on the basis that she refused a March 30, 2012 offer of suitable work. It found that the weight of the medical evidence established that the modified nursing assistant's position was within the physical restrictions set forth by Dr. Sandifer, the referral physician, and approved by Dr. De Lapp, her treating physician. The Board's previous review of evidence regarding the suitable work termination is *res judicata*.[14] The issue currently on appeal is whether the evidence submitted established that the termination decision should be modified.

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

[8] 20 C.F.R. § 10.517(a).

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

[10] 20 C.F.R. § 10.500(b); *see Ozine J. Hagan*, 55 ECAB 681 (2004).

[11] *Gloria G. Godfrey*, 52 ECAB 486 (2001).

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

[13] *Richard P. Cortes*, 56 ECAB 200 (2004).

[14] *See G.S.*, Docket No. 14-408 (issued June 10, 2014).

The Board has explained that, if a claimant requests reconsideration of a suitable work termination, the issue remains whether appellant has established that she was unable to perform the duties of the offered position, as of the date of the termination.[15]

Appellant requested reconsideration and submitted the November 13, 2014 report from Dr. Warren, who opined that she was experiencing weight loss due to loss of appetite, additional orthopedic problems which caused her constant pain, and severe depression, and anxiety. Dr. Warren asserted that she continued to have severe emotional fallout due to the fact that she had always worked but was no longer able to keep up the pace she maintained prior to the injury and was currently unable to engage in gainful employment she was disabled. He opined that appellant's severe depression and anxiety led her to develop psychomotor retardation, and insomnia. Dr. Warren asserted that she was severely depressed and had nutritional deficiencies which were leading her to be significantly weak and fatigued a diagnosis of reflex sympathy dystrophy. He, however, did not address the central issue in this case, that is whether appellant was unable to perform the duties of the offered position as of the date of termination. Such an explanation is necessary to support that appellant was disabled from performing the offered position to reverse the sanction decision.[16] An employee who refuses or neglects to work after suitable work has been offered has the burden of showing that such refusal to work was justified.[17] As appellant has still failed to provide an acceptable reason for neglecting to work in the suitable work position, OWCP properly denied modification of its sanction decision.

The Board finds that OWCP properly terminated appellant's monetary compensation due to her refusal of suitable work and that she did not thereafter establish that her refusal of suitable work was justified. The Board therefore affirms OWCP's March 30, 2015 decision denying modification of the August 13, 2012 decision which terminated appellant's compensation pursuant to 5 U.S.C. § 8106(c)(2).

CONCLUSION

The Board finds that OWCP properly terminated appellant's wage-loss compensation pursuant to 5 U.S.C. § 8106(c)(2).

[15] *See J.J.*, Docket No. 14-951 (issued September 2, 2014).

[16] *Id*.

[17] 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the March 30, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 18, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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