

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

---

C.G., Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,  
Mullica Hill, NJ, Employer

---

)  
)  
)  
)  
)  
)  
)  
)  
)

**Docket No. 15-1035  
Issued: September 11, 2015**

*Appearances:*

*Thomas R. Uliase, 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 April 7, 2015 appellant, through counsel, filed a timely appeal from a March 9, 2015 nonmerit decision and a November 5, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether OWCP properly terminated appellant's compensation effective November 5, 2014 pursuant to 5 U.S.C. § 8106(c)(2); and (2) whether OWCP properly determined that appellant's request for reconsideration was insufficient to warrant merit review of the claim.

---

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On March 24, 2011 appellant, then a 41-year-old rural carrier, filed an occupational disease or illness claim (Form CA-2) alleging a low back injury as a result of her federal employment. On the claim form she reported that her job involved repetitive motions including twisting, turning, bending, and lifting and that she stopped working as of August 28, 2010. By letter dated March 28, 2011, OWCP requested that appellant provide additional factual and medical evidence to support her claim.

Appellant submitted a December 22, 2010 report from Dr. Thomas Obade, a Board-certified orthopedic surgeon, who described an onset of low back pain in August 2010. Dr. Obade stated that her job duties required repetitive lifting of up to 70 pounds. He noted that appellant had previously undergone right shoulder arthroscopic surgery. Dr. Obade noted the results of a September 24, 2010 magnetic resonance imaging (MRI) scan showed L4-S1 disc bulging, and an August 28, 2010 left hip x-ray was within normal limits with minimal cystic changes to the greater trochanteric area. He diagnosed chronic lumbosacral strain and left hip greater trochanteric bursitis.

By decision dated June 2, 2011, OWCP denied the claim for compensation. It found that the factual and medical evidence were insufficient to establish the claim.

Appellant requested a hearing before an OWCP hearing representative on June 9, 2011. At the hearing on September 21, 2011, she described her work duties, which included lifting tubs of mail, bending, twisting, and turning to sort the mail. Appellant submitted a May 24, 2011 report from Dr. Obade, in which he diagnosed lumbar radiculopathy, chronic lumbosacral strain, and left hip greater trochanteric bursitis. Dr. Obade opined that her current condition was casually related to repetitive lifting at work.

By decision dated December 5, 2011, the hearing representative remanded the case for referral to a second opinion physician. OWCP referred appellant to Dr. Kenneth Heist, an osteopath. In his January 3, 2012 report, Dr. Heist provided a history and results on examination. He diagnosed lumbar strain and greater trochanteric bursitis, with no signs of acute lumbar radiculopathy. Dr. Heist opined that the trochanteric bursitis was employment related. He opined that appellant could work eight hours per day with a 20-pound lifting restriction.

On February 24, 2012 OWCP accepted the claim for lumbar sprain and left trochanteric bursitis. Appellant received compensation for wage loss commencing December 3, 2010.

Appellant was referred for another second opinion examination to determine her work capacity. In a report dated February 1, 2013, Dr. Stanley Askin, a Board-certified orthopedic surgeon, provided a history and results on examination. He reported tenderness to the touch in the left greater trochanteric area, with some limitation of forward flexion, and side bending. Dr. Askin reported overall there were no objective findings to report. As to disability he found that the accepted conditions were not present as appellant was no longer exposed to the same repetitive activity. Dr. Askin opined that there was no injury-related reason why she could not return to her date-of-injury position. He noted that any restriction would be based only on

appellant having not maintained an appropriate level of fitness, as she continued to smoke cigarettes.

OWCP requested that Dr. Askin provide an additional report to clarify work restrictions. By report dated March 7, 2013, Dr. Askin stated that there were no objective findings, as the examination results were subjective not based on clinical or documentary evidence.

By letter dated May 6, 2013, OWCP advised appellant that it proposed to terminate her compensation for wage-loss and medical benefits. It found that the weight of the evidence was represented by Dr. Askin.

Appellant submitted a June 17, 2013 report from Dr. Steven Valentino, an osteopath. Dr. Valentino provided results on examination and indicated that appellant was scheduled for a series of lumbar medial branch blocks. An August 7, 2013 report from him stated that he had initially seen her on May 16, 2013 with complaints of low back pain radiating into the legs and left hip pain. Dr. Valentino reported that appellant's complaints were apportioned to a work-related injury of August 27, 2010 when she lifted mail and complained of back pain. He reported a June 4, 2013 MRI scan showed left hip hyper intense foci which could be related to a degenerative process. Dr. Valentino reported a June 11, 2013 lumbar MRI scan confirmed moderate L5-S1 radiculopathy, with an annular tear at L5-S1 and small annular tear at L4-5. He diagnosed aggravation of lumbar degenerative disc disease, lumbar sprain/strain, facet mediated low back pain, and lumbar radiculopathy. Dr. Valentino opined that these diagnoses and appellant's symptoms were directly related to the work injury.

OWCP determined that a conflict in the medical evidence existed between Dr. Askin and Dr. Valentino as to a continuing employment-related disability and need for treatment. It selected Dr. Howard Zeidman, a Board-certified orthopedic surgeon, as a referee physician. The record contains an ME023 form and a bypass history report showing no physicians were bypassed in the selection process.

In a report dated October 24, 2013, Dr. Zeidman provided a history, results on physical examination, and review of medical evidence. He stated that there was some tenderness in the lumbosacral area, with no spasm. The left hip also showed some tenderness in the trochanteric region, but motion was intact and symmetrical to the right hip. Dr. Zeidman reported that there was no objective evidence of neurologic loss or disc disease. He noted that the diagnosis had been a chronic lumbar strain, which may be aggravated by repetitive heavy activities. Dr. Zeidman opined that appellant could return to work on a regular basis, but would probably not be capable of lifting more than 30 to 35 pounds.

The record contains a December 8, 2013 report from the employing establishment's Office of Inspector General regarding observation of appellant's activities from April 23 to November 27, 2013. The report indicates a surveillance video was provided to OWCP.

By letter dated February 4, 2014, OWCP requested an additional report from Dr. Zeidman. It stated that he had used terms such as "probably" with respect to lifting restrictions and requested additional explanation and completion of an OWCP-5 medical form. OWCP also requested that Dr. Zeidman review the surveillance video.

In a report dated February 12, 2014, Dr. Zeidman stated that the lifting limitations noted were appropriate based on a diagnosis of chronic lumbar strain. He found that review of the video did not change any previously stated opinion. In an OWCP-5c (work capacity evaluation), Dr. Zeidman indicated that appellant could work eight hours per day with a 30-pound lifting restriction.

Appellant submitted a November 18, 2013 report from Dr. Valentino providing results on examination and diagnosing lumbago and inter disc syndrome and an undated OWCP 5c form report limiting work to four hours per day of sitting, walking, standing, and 10 pounds lifting.

On July 10, 2014 the employing establishment offered appellant a full-time position as a sales solution team member. The duties of the position were described as contacting customers by telephone, light data entry, answering telephones, and administrative assistance. The physical requirements were described as sitting with occasional standing up to eight hours, simple grasping to move a computer mouse intermittently up to four hours, pushing and pulling to use a computer mouse intermittently four to six hours, intermittent use of the right hand for keyboard data entry four to six hours, and speaking on telephone. The job offer stated that the duties would be in strict compliance of Dr. Zeidman's October 24, 2013 report, with no lifting greater than 35 pounds.

By letter dated September 17, 2014, OWCP advised appellant that it found the job offer from the employing establishment to be a suitable position. Appellant was advised of the provisions of 5 U.S.C. § 8106(c)(2), and notified that she should accept the position or provide reasons for not accepting within 30 days.

On September 17, 2014 OWCP received a September 4, 2014 report from Dr. Valentino, providing results on examination and stating that appellant was awaiting a functional capacity evaluation. On September 19, 2014 it received a note from her that she would not accept the position until she was seen by her physician. Appellant submitted a July 17, 2014 report from Dr. Valentino, who indicated that she was upset at being notified by the employing establishment she was to return to work. In a note dated October 2, 2014, Dr. Valentino stated that she was to remain out of work until a function capacity evaluation was completed.

The employing establishment confirmed on October 17, 2014 that the offered position was still available. By letter dated October 20, 2014, OWCP notified appellant that she had not provided valid reasons for refusing the job offer and that it remained available. Appellant was again advised that refusal of suitable work would result in termination of compensation. OWCP stated that she had 15 days to accept the position.

By decision dated November 5, 2014, OWCP terminated appellant's compensation for wage loss effective November 5, 2014. It found that she had refused an offer of suitable work under 5 U.S.C. § 8106(c)(2). The decision was issued to appellant's last known address and to her counsel.

On November 25, 2014 appellant submitted a report (Form CA-20) dated November 17, 2014 from Dr. Valentino diagnosing lumbar radiculopathy. Dr. Valentino found her totally disabled through November 16, 2014, and remained partially disabled. His November 17, 2014

narrative report diagnosed sciatica and lumbago. Dr. Valentino stated that appellant could return to full-time work in a modified capacity.

By letter dated February 12, 2015, counsel alleged that neither he nor appellant had received a copy of a termination decision. On February 13, 2015 OWCP resent a copy of the November 5, 2014 decision to counsel and to appellant. By letter dated February 26, 2014, appellant, through counsel, requested reconsideration. Counsel argued that the November 5, 2014 decision should be reissued as it had not been received by the parties.

In a decision dated March 9, 2015, OWCP declined to review the merits of the claim. It found that the reconsideration request was insufficient to warrant merit review of the claim.

### **LEGAL PRECEDENT -- ISSUE 1**

5 U.S.C. § 8106(c) 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.” It is OWCP’s burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.<sup>2</sup> To justify such a termination, it must show that the work offered was suitable.<sup>3</sup> An employee who refuses or neglects to work after suitable work has been offered to him or her has the burden of showing that such refusal to work was justified.<sup>4</sup>

With respect to the procedural requirements of termination under section 8106(c), the Board has held that OWCP must inform appellant of the consequences of refusal to accept suitable work, and allow her an opportunity to provide reasons for refusing the offered position.<sup>5</sup> If appellant presents reasons for refusing the offered position, OWCP must inform the employee if it finds the reasons inadequate to justify the refusal of the offered position and afford her a final opportunity to accept the position.<sup>6</sup>

It is well established that when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.<sup>7</sup>

### **ANALYSIS -- ISSUE 1**

In the present case, OWCP offered appellant a full-time position as a sales solution team member. The initial question is whether the offered position was medically suitable. In this

---

<sup>2</sup> *Henry P. Gilmore*, 46 ECAB 709 (1995).

<sup>3</sup> *John E. Lemker*, 45 ECAB 258 (1993).

<sup>4</sup> *Catherine G. Hammond*, 41 ECAB 375, 385 (1990); 20 C.F.R. § 10.124(c).

<sup>5</sup> *Maggie L. Moore*, 42 ECAB 484 (1991); *reaff’d on recon.*, 43 ECAB 818 (1992).

<sup>6</sup> *Id.*

<sup>7</sup> *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

regard OWCP had found a conflict under 5 U.S.C. § 8123(a) regarding the nature and extent of appellant's continuing disability.<sup>8</sup> Dr. Askin had found no objective findings and opined that she could return to work, while Dr. Valentino found that she was totally disabled. The Board notes that, in evaluating the suitability of a particular position, OWCP must consider preexisting and subsequently acquired medical conditions.<sup>9</sup>

The referee physician, Dr. Zeidman, provided reports dated October 24, 2013 and February 12, 2014. He provided a history and results on examination in his October 24, 2013 report. With respect to work restrictions, Dr. Zeidman completed a work capacity evaluation (OWCP-5c) and found that appellant could work full time with a 30-pound lifting restriction. His rationalized medical report is entitled to special weight and is properly considered as representing her work restrictions.

The offered position was a sedentary position which involved answering telephones and light data entry. The Board notes that, while the job offer referred to a 35-pound lifting limitation, there was no evidence the job was outside the work restrictions. The job duties were sedentary and did not indicate that any specific lifting was required. Moreover, the offer clearly indicated that it would conform to any restrictions provided by Dr. Zeidman.

The Board finds that the offered position was medically suitable based on the evidence of record. OWCP issued a September 17, 2014 letter advising appellant that it found the offered position suitable and notified her of the consequences of refusing suitable work. Appellant submitted reports from Dr. Valentino dated July 17, September 4, and October 2, 2014, but these reports did not discuss the job duties of the offered position or provide an opinion that she could not perform the job duties. As noted above, Dr. Valentino was on one side of the conflict that was resolved by Dr. Zeidman. The referee's report is the weight of the evidence with respect to work restrictions.

OWCP properly found that appellant did not provide valid reasons for refusing the position. In accord with procedures, it advised her that the reasons were not acceptable and that she had an additional 15 days to accept the position. Based on the evidence of record, OWCP properly terminated appellant's compensation for wage-loss pursuant to 5 U.S.C. § 8106(c)(2), when she refused to accept the position following the period of 15 days.

Counsel has raised several arguments on appeal. According to appellant, it was not clear if Dr. Zeidman was properly selected as a referee physician, but the record contains documentation regarding his selection. An ME023 appointment notification was provided for

---

<sup>8</sup> FECA provides that, if there is a 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 the examination. 5 U.S.C. § 8123(a). 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 or impartial examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case. 20 C.F.R. § 10.321.

<sup>9</sup> *S.G.*, Docket No. 08-1992 (issued September 22, 2009); *Gayle Harris*, 52 ECAB 319, 321 (2001); *Martha A. McConnell*, 50 ECAB 129, 132 (1998).

the physician selected.<sup>10</sup> The record also contains a bypass history reflecting that no physicians were bypassed prior to the selection of Dr. Zeidman. This is sufficient documentation that he was properly selected as a referee physician in this case.<sup>11</sup> Appellant argues the report from Dr. Zeidman was not current as it was a year old. Dr. Zeidman's report was dated October 24, 2013 and the second report outlining her work restrictions was dated February 12, 2014. OWCP's determination that the offered position was suitable was dated September 17, 2014. There is no evidence that Dr. Zeidman's reports failed to represent appellant's current work restrictions.<sup>12</sup>

The Board also notes that appellant states that Dr. Zeidman did not complete an OWCP-5c form report with work restrictions. As noted above, Dr. Zeidman did complete an OWCP-5c form dated February 12, 2014. For the reasons discussed above, the Board finds that OWCP properly terminated compensation pursuant to 5 U.S.C. § 8106(c)(2), effective November 5, 2014.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **LEGAL PRECEDENT -- ISSUE 2**

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>13</sup> OWCP regulations provide that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent evidence not previously considered by OWCP.<sup>14</sup>

While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.<sup>15</sup> 20 C.F.R. § 10.608(b) states that any application for review that does not

---

<sup>10</sup> See Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.5 (May 2013). OWCP uses the Medical Management Assistant to schedule referee examinations using a strict rotational scheduling feature.

<sup>11</sup> See *N.G.*, Docket No. 15-567 (issued April 27, 2015).

<sup>12</sup> Cf. *S.H.*, Docket No. 10-1531 (issued April 13, 2011) (the medical report upon which OWCP relied to terminate compensation for refusing suitable work was not sufficient as it was more than two years old at the time OWCP found the offered job suitable).

<sup>13</sup> 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application").

<sup>14</sup> 20 C.F.R. § 10.606(b)(3).

<sup>15</sup> *J.P.*, Docket No. 10-0403 (issued September 16, 2010).

meet at least one of the requirements listed in 20 C.F.R. § 10.606(b)(3) will be denied by OWCP without review of the merits of the claim.<sup>16</sup>

### **ANALYSIS -- ISSUE 2**

Although counsel could have argued the merits of the termination in his timely request for reconsideration, he instead argued that the November 5, 2014 decision had not been properly issued. 20 C.F.R. § 10.127 states that a copy of the decision will be mailed to the employee's last known address. If the employee has counsel, a copy of the decision will also be mailed to counsel. The November 5, 2014 decision of record contains appellant's last known address and counsel's address. The Board has held that, in the absence of evidence to the contrary, it is presumed that a notice mailed to an addressee in the ordinary course of business was received by the addressee.<sup>17</sup> The appearance of a properly addressed copy in the case record, together with the mailing custom or practice of the sender, will raise a presumption that the original was received by the addressee. This is known as the mailbox rule.<sup>18</sup>

There was no contrary evidence presented to rebut the presumption of receipt in this case. The argument that the November 5, 2014 decision was improperly issued is without a reasonable color of validity and is insufficient to warrant reopening the claim for merit review.<sup>19</sup> The Board finds that appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or constitute relevant and pertinent evidence not previously considered by OWCP. Accordingly, OWCP properly declined to reopen the case for merit review.

### **CONCLUSION**

The Board finds that OWCP properly terminated appellant's compensation effective November 5, 2014 pursuant to 5 U.S.C. § 8106(c)(2). The Board further finds that it properly denied her request for reconsideration without merit review of the claim.

---

<sup>16</sup> 20 C.F.R. § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

<sup>17</sup> *See Larry L. Hill*, 42 ECAB 596, 600 (1991).

<sup>18</sup> *S.A.*, Docket No. 14-1345 (issued December 15, 2014).

<sup>19</sup> *R.S.*, Docket No. 11-1589 (issued February 6, 2012) (appellant's argument that she did not receive a properly addressed letter from OWCP had no reasonable color of validity and was not sufficient to reopen the case for merit review).



**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated March 9, 2015 and November 5, 2014 are affirmed.

Issued: September 11, 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