

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

C.C., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Houston, TX, Employer)

**Docket No. 15-1882
Issued: April 27, 2016**

Appearances:
Appellant, pro se
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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 15, 2015 appellant filed a timely appeal from an April 29, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether OWCP properly terminated appellant's compensation effective April 29, 2015 because he refused suitable work under 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On October 3, 2012 appellant, then a 54-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on October 2, 2012 he suffered a hernia when he caught a buggy that had tipped off the ramp. He stopped work on October 3, 2012 and returned to work

¹ 5 U.S.C. § 8101 *et seq.*

on October 10, 2012. Appellant then stopped work on December 12, 2012 and did not return. OWCP accepted the claim for inguinal hernia without obstruction or gangrene, bilateral. No surgeries have been performed. Appellant received periodic compensation payments for disability commencing December 16, 2012.

In reports dated October 15, November 12 and 13, 2012, Dr. Mark Ciaglia, an osteopath and orthopedic surgeon, indicated that medical clearance from appellant's cardiologist was needed prior to surgical repair of the hernias. In his November 13, 2012 report, he opined that appellant was capable of telephone duties for four to six hours per day. The employing establishment, however, did not have the requested sedentary work available.

In a March 12, 2013 report, Dr. Amilcar Avendano, a Board-certified internist, indicated that appellant was unable to undergo hernia surgery because he had five cardiac stents placed in August 2012, he should not have surgery for one year, and would be unable to stop medications until then.

In a March 28, 2014 letter, OWCP requested that Dr. Ciaglia provide a well-rationalized medical report regarding appellant's disability status.² No response was received.

In October 2014, OWCP referred appellant, along with the medical record, a statement of accepted facts (SOAF) and lists of questions, to Dr. Howard L. Beaton, a Board-certified general surgeon, for a second opinion examination. Dr. Beaton was asked to provide a medical opinion as to whether appellant had any residuals of the accepted condition and whether his current disability was due to the October 2, 2012 employment event or due to any medical conditions not related to the October 2, 2012 employment event. In a November 11, 2014 report, he noted the history of injury, his review of the SOAF, and the medical record. Dr. Beaton noted that elective surgical repair of the bilateral inguinal hernias were advised following medical clearance. Appellant's past medical history was significant for coronary artery disease, for which five percutaneous stents have been inserted several months prior to the October 2, 2012 employment incident. He was maintained on anticoagulation medication and has not been cleared for elective surgery. In April 2013, appellant underwent coronary artery bypass surgery to relieve obstructions in three vessels and, two weeks prior to his evaluation, two additional percutaneous coronary stents were inserted. Dr. Beaton noted that appellant continued on antiplatelets agents. He opined that the accepted work-related conditions have not resolved. Dr. Beaton also opined that appellant could not perform his date-of-injury job as a rural carrier due to the fact that his hernias must be repaired prior to a full-time, full-duty return to work. He indicated that even though appellant was medically disabled from his date-of-injury job as a rural carrier, he could perform full-time, limited-duty work with restrictions of no pushing, no pulling, and no lifting over 20 pounds during an eight-hour day. Dr. Beaton further opined that even though appellant has nonwork-related coronary artery disease, he may perform full-time, limited-duty work within

² In several letters, OWCP wrote appellant's treating physician, Dr. Ronald A. Buczek, an osteopath, and requested that he provide a well-rationalized medical report regarding appellant's work-related disability and if he was medically able to return to full-duty work or perform some type of gainful employment in a limited-duty capacity. It, however, received no response from Dr. Buczek. Appellant indicated that he was changing his physician to Dr. Ciaglia.

those restrictions until he was medically cleared to undergo surgical repair of his inguinal hernias.

On January 30, 2015 the employing establishment offered appellant a modified rural carrier position, which entailed delivering assigned routes for 5.5 hours. The physical requirements of the position required pushing, pulling, lifting, and picking up letters and parcels up to 20 pounds for 5.5 hours intermittently, walking for 30 minutes intermittently, operating motor vehicle, and reaching at shoulder level to deliver five hours intermittently.

On March 12, 2015 OWCP advised appellant that the duties and physical requirements of the modified rural carrier position were suitable as it was within the medical limitations provided by Dr. Beaton in his November 11, 2014 report and that the employing establishment confirmed that the position remained open and available to him. OWCP afforded appellant 30 days to accept the position or provide his reasons for refusal. Appellant was advised that, pursuant to 5 U.S.C. § 8106(c)(2), an employee who refuses an offer of suitable work without reasonable cause is not entitled to further compensation for wage loss or schedule award.

OWCP did not receive a response to the 30-day notice. The employing establishment confirmed that appellant did not accept the job and did not return to work during the 30-day period.

By notice dated April 13, 2015, appellant was advised that his refusal of the offered position was not justified and he was afforded an additional 15 days to accept the job. He did not accept the job and did not return to work during the 15-day period.

In an April 23, 2015 letter, appellant related that he had a discussion with his postmaster and that he could not accept the job offer because of his nonwork-related, preexisting medical conditions which include six stents in his heart, his triple bypass surgery, multiple cardiac artery blockages, and emphysema. He requested that OWCP accept those conditions as valid reasons to refuse work. Appellant also referenced Publication CA-810 (8-4C) and indicated that he could not accept the position due to those conditions.

An October 3, 2014 cardiac catheterization study and an October 4, 2014 hemodynamic report were submitted.

By decision dated April 29, 2015, OWCP terminated appellant's entitlement to compensation benefits effective April 29, 2015 because he refused to accept suitable employment in keeping with 5 U.S.C. § 8106(c)(2).

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.³ Section 8106(c)(2) of FECA⁴ provides that a partially

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

⁴ *Supra* note 1.

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.⁵ 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.⁶ 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.⁷

Section 10.517(a) of FECA's implementing regulations provides 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.⁸ Pursuant 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.⁹

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.¹⁰ In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, OWCP has the burden of showing that the work offered to and refused by appellant was suitable.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 In evaluating the suitability of a particular position, OWCP must consider preexisting and subsequently acquired medical conditions.¹⁵

⁵ *Id.* at § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

⁶ *Ronald M. Jones*, 52 ECAB 190 (2000).

⁷ *Joan F. Burke*, 54 ECAB 406 (2003).

⁸ 20 C.F.R. § 10.517(a).

⁹ *Id.* at § 10.516.

¹⁰ *See Linda Hilton*, 52 ECAB 476 (2001).

¹¹ *Id.*

¹² *See supra* note 6.

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

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.5a (July 2013).

¹⁵ *Martha A. McConnell*, 50 ECAB 129, 132 (1998).

ANALYSIS

OWCP accepted that appellant sustained inguinal hernia without obstruction or gangrene, bilateral. Although surgical repair of the hernias was recommended, no surgeries had been performed due to nonwork-related conditions.

On January 30, 2015 the employing establishment offered appellant a position as a modified rural carrier. The determination of whether an employee has the physical ability to perform a position offered by the employing establishment is primarily a medical question that must be resolved by the medical evidence.¹⁶ The Board finds that the weight of the evidence in this case clearly establishes that appellant was capable of performing the offered position.¹⁷

In late 2012, Dr. Ciaglia found that appellant was capable of sedentary work. In a March 12, 2013 report, Dr. Avendano indicated that appellant was unable to undergo hernia surgery because he had five stents placed in August 2012 and he should not have surgery for one year. However, Dr. Avendano did not provide an opinion regarding appellant's disability status.

In his November 11, 2014 report, Dr. Beaton reviewed appellant's medical records and provided a comprehensive, well-rationalized report. He noted that medical clearance was needed prior to elective surgical repair of the bilateral inguinal hernias. Dr. Beaton further noted appellant's significant past medical history for coronary artery disease and his current status with regards to medication and percutaneous coronary stents. He opined that the accepted work-related conditions had not resolved and that appellant could not perform his date-of-injury job as a rural carrier due to the fact that his hernias must be repaired prior to a full-time, full-duty return to work. Dr. Beaton indicated, however, that even though appellant has nonwork-related coronary artery disease he could perform full-time, limited-duty work with restrictions of no pushing, no pulling, and no lifting over 20 pounds during an eight-hour day until he was medically cleared to undergo surgical repair of his inguinal hernias. The employing establishment's job offer, which requires appellant to push, pull, lift, and pick up letters and parcels up to 20 pounds for 5.5 hours intermittently, walk for 30 minutes intermittently, and operate a motor vehicle and reach at shoulder level to deliver five hours intermittently, falls within the restrictions set forth by Dr. Beaton. The Board thus finds that the offered position was medically suitable.

The Board further finds that OWCP complied with its procedural requirements in advising appellant that the position was suitable, providing him with the opportunity to accept the position or provide reasons for his refusal and notifying him of the penalty provision of section 8106(c).¹⁸ Appellant did not respond to OWCP's March 12, 2015 30-day notice which found the job offer suitable and in accordance with Dr. Beaton's medical limitations. In

¹⁶ See *Robert Dickinson*, 46 ECAB 1002 (1995).

¹⁷ The Board notes that appellant's physician, Dr. Ciaglia, indicated in his November 13, 2012 report that appellant was capable of sedentary work four to six hours per day. As the employing establishment did not have total sedentary work available, appellant was referred to Dr. Beaton for a second opinion examination.

¹⁸ See *Bruce Sanborn*, 49 ECAB 176 (1997).

response to the April 13, 2015 15-day notice, which found appellant's reasons not valid, he indicated, in an April 23, 2015 letter, that he did not accept the job offer because of his nonwork-related, preexisting heart conditions, multiple cardiac procedures and other medical conditions, including emphysema. However, he did not submit any medical evidence supporting that he was unable to perform the duties of the offered position. Furthermore, appellant has not submitted any recent reports from his physicians addressing disability. The diagnostic testing he submitted fails to contain a medical opinion on disability and the causal relationship of such disability. The Board finds that OWCP properly followed its procedures in terminating compensation under section 8106.

On appeal, appellant reiterates his contention that the medical evidence supports that between the 2012 work injury and Dr. Beaton's medical examination in late 2014, he did not regain his health, but rather had multiple cardiac procedures. He indicated that he is now in need of a heart transplant. Appellant notes that his prior cardiac medical condition is known to both his employer and OWCP and that those conditions should be valid reasons to refuse suitable work. He additionally refers to Publication CA-810 (8-4C) which states, "The position should be compatible with the employee's medical condition, including any nonwork-related medical condition which either preexisted the injury at work or developed since it occurred." 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.¹⁹ OWCP procedures state that acceptable reasons for refusing an offered position include medical evidence of inability to do the work.²⁰ In this case, the medical records on file do not support that appellant is unable to perform the modified rural carrier position, either due to his preexisting cardiac condition or his accepted hernia condition. Thus, appellant's argument lacks merit.

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 and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP properly terminated appellant's compensation effective April 29, 2015 on the grounds that he refused an offer of suitable work under 5 U.S.C. § 8106(c)(2).

¹⁹ *Gayle Harris*, 52 ECAB 319 (2001).

²⁰ *Supra* note 14.

ORDER

IT IS HEREBY ORDERED THAT the April 29, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 27, 2016
Washington, DC

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

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

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