United States Department of Labor
Employees' Compensation Appeals Board

T.M., Appellant	)	
and	)	**Docket No. 16-0065**
	)	**Issued: April 4, 2016**
U.S. POSTAL SERVICE, POST OFFICE, Melville, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On October 14, 2015 appellant, through counsel, filed a timely appeal from an August 19, 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 met its burden of proof to terminate appellant's wage-loss compensation and schedule award benefits under 5 U.S.C. § 8106(c)(2) for refusing an offer of suitable work.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 15, 2014 appellant, then a 59-year-old city carrier,[2] filed a traumatic injury claim (Form CA-1) alleging that on that same date he fell down the steps of a porch and sustained a broken nose, broken eye socket, broken cheek, and broken sinus. He sought emergency medical treatment, stopped work on February 15, 2014, and did not return. OWCP accepted the claim for nasal bone fracture, fracture of malar and maxillary bones, fracture of orbital floor, and open wound of nose without complications. Appellant sought treatment with various providers including Dr. Frederic A. Mendelsohn, a Board-certified neurologist. He received wage-loss compensation for which he was placed on the periodic rolls as of April 13, 2014.

In a December 12, 2014 medical report, Dr. Shane S. Bush, a Board-certified neuropsychologist, reported that appellant sustained multiple injuries, including a mild traumatic brain injury (concussion), as a result of the February 15, 2014 employment incident. He provided findings on physical examination and opined that appellant continued to experience physical, neurological, cognitive, and emotional problems as a result of the accident. Dr. Bush recommended up to 10 hours of neuropsychological evaluation/testing to clarify and quantify the nature and extent of the cognitive and emotional problems, guide treatment, and establish a baseline against which change could be objectively measured over time.

OWCP received a number of diagnostic reports on March 17, 2015. On February 15, 2014 appellant underwent a chest x-ray, and computerized tomography (CT) scans of the maxillofacial mandible sinus and the brain. A sinus rhythm electrocardiogram was performed on February 16, 2014. On February 17, 2014 appellant underwent open reduction and internal fixation of left displaced zygomatic tripod fracture involving cranial nerve foramina, open reduction internal fixation of left orbital floor fracture with alloplastic implant by periorbital approach, repair of bilaterally displaced nasal bone fractures with manipulation and stabilization, and two-centimeter nasal laceration repair.

Following appellant's surgery, a magnetic resonance imaging (MRI) scan of the brain was performed on March 26, 2014. Pulsed Doppler, intracranial, and vasomotor reactivity neurological studies were performed on June 12, 2014.

On March 31, 2015 OWCP referred appellant, the case file, a statement of accepted facts, and a series of questions to Dr. Howard D. Pomeranz, a Board-certified ophthalmologist, for a second opinion examination to determine the nature and extent of disability.

By letter dated April 3, 2015, counsel for appellant requested that appellant's claim be expanded to include closed head trauma and postconcussion syndrome. He referenced a July 29,

[2] As a city carrier, appellant was responsible for routing and casing all classes of mail in sequence of delivery along an established route; withdrawing mail from the distribution case, and preparing it in sequence for delivery; preparing and separating all classes of mail to be carried by truck to relay boxes; delivering mail along a prescribed route, on foot or by vehicle, and picking up additional mail from relay boxes; and, collecting mail from street letter boxes. They may be required to carry mail in shoulder satchels weighing approximately 35 pounds and to load and unload sacks of mail weighing up to 70 pounds.

2014 medical report from Dr. Mendelsohn not previously of record, as well as Dr. Bush's December 12, 2014 report as support for expansion of appellant's claim.

In the July 29, 2014 medical report, Dr. Mendelsohn explained that he initially evaluated appellant on March 20, 2014 for a neurological consultation. He provided findings on physical examination and review of medical history and opined that appellant sustained a work-related injury with closed head trauma and postconcussive syndrome. Dr. Mendelsohn previously recommended an MRI scan of the brain, electroencephalogram (EEG), vestibular autorotation test (VAT), and transcranial Doppler due to appellant's headaches, cognitive difficulties, and vertigo. He reported that the EEG, MRI scan, and transcranial Doppler procedures resulted in normal findings. However, the VAT showed evidence of significant central vestibular dysfunction, which would account for appellant's persistent vertigo. Appellant was treated several times and continued to complain of diplopia on lateral gaze, persistent headache, and dizziness. Dr. Mendelsohn opined that appellant suffered from postconcussion headache and vertigo, with facial paresthesias secondary to facial fractures and diplopia secondary to orbital fractures. He reported that appellant's neurological symptomatology was permanent and that appellant was disabled due to his persistent diplopia which limited his ability to drive a vehicle. Dr. Mendelsohn further noted persistent headaches and cognitive impairment which interfered with appellant's ability to maintain a job requiring any significant cognitive effort.

In an April 27, 2015 report, Dr. Pomeranz, serving as the second opinion physician, provided findings on physical examination and noted review of a February 15, 2014 CT scan of the sinuses, and February 17, 2014 surgical report. He noted status postorbital fracture repair with residual strabismus in left gaze, up-gaze, and right gaze with none in primary gaze. Dr. Pomeranz determined that appellant was not a candidate for treatment with prisms or strabismus surgery. He opined that appellant's orbital fractures, as well as his symptoms of double vision in lateral gaze, were directly related to the February 15, 2014 employment incident, explaining that appellant did not have any subjective complaints that did not correspond to the objective findings. The double vision that appellant experienced in his peripheral gaze was significant as he would not be able to drive his mail truck as required by his employment duties. Dr. Pomeranz reported that appellant needed to turn his head in order to avoid double vision in his peripheral gaze due to his diplopia. He noted a current disability from work due to the residuals of his fracture because of the diplopia that he experienced in peripheral gaze. Dr. Pomeranz explained that these conditions were permanent, not likely to improve, and appellant had reached maximum medical improvement.

Dr. Pomeranz opined that appellant was able to perform his regular work duties, but needed to compensate for the peripheral gaze by turning his head to avoid double vision. He noted that appellant was capable of performing other types of sedentary work and could work an eight-hour day of full duty or light duty. The only restrictions would be the inability to work with any machinery that required normal vision in all directions of gaze, including peripheral gaze, which appellant was not able to do.

In a May 4, 2015 addendum note, Dr. Pomeranz reported that appellant was not capable of driving a commercial vehicle because of double vision in his peripheral gaze, but could work full time in any capacity that did not require him to depend on his peripheral vision.

By letter dated May 28, 2015, OWCP contacted the employing establishment and provided a copy of Dr. Pomeranz' April 27 and May 4, 2015 reports, finding that the weight of the medical evidence rested with the second opinion physician. The employing establishment was requested to determine whether a job offer was available to accommodate appellant's restrictions.

On June 3, 2015 the employing establishment provided appellant with an offer of a modified city carrier position. The duties involved casing and delivering mail for one to eight hours per day. The job offer noted that, as per OWCP second opinion examination Dr. Pomeranz' report dated April 27, 2015, "employee is able to perform all responsibilities and requirements of their position as a modified city carrier with the following restrictions: for facial injuries: employee must physically turn his head (left or right) rather than his eyes when the use of his peripheral vision is required."

On June 10, 2015 appellant declined the modified job offer based upon his treating physician's advice.

By letter dated June 22, 2015, the employing establishment informed OWCP that appellant refused the June 3, 2015 job offer which was based on the attached second opinion report and OWCP-5c form.[3]

By letter dated June 23, 2015, OWCP advised appellant that the modified city carrier position had been found to be suitable to his capabilities and was currently available. It found that the weight of the medical evidence rested with Dr. Pomeranz because his conclusions were based on a comprehensive medical evaluation and review of the entire medical record. OWCP found Dr. Pomeranz' work restrictions to be consistent with the offered position. Appellant was advised that he should accept the position or provide an explanation for refusing the position within 30 days. OWCP informed him that, if he failed to accept the offered position and failed to demonstrate that the failure was justified, his compensation would be terminated pursuant to 5 U.S.C. § 8106(c)(2).

OWCP received a June 10, 2015 Duty Status Report (Form CA-17) from Dr. Mendelsohn which restricted appellant from working due to diplopia and vertigo, noting that his postconcussion syndrome interfered with his memory. In a July 2, 2015 prescription note, Dr. Mendelsohn diagnosed postconcussion syndrome with vertigo.

By letter dated July 20, 2015, counsel for appellant noted that OWCP had failed to address his April 6, 2015 request to expand the claim based on the additional medical evidence provided. He further argued that Dr. Mendelsohn's newly submitted July 6, 2015 report was in conflict with that of the second opinion physician and OWCP failed to further develop the medical evidence to resolve this conflict.

In a July 6, 2015 medical note, Dr. Mendelsohn reported that appellant continued to suffer from diplopia in all directions of his gaze. His job required him to stack mail and

[3] The Board notes that the record did not contain an OWCP-5c form from Dr. Mendelsohn as referenced by the employing establishment.

continuously turn his head, resulting in vertigo, and imbalance. As such, appellant was unable to work. Dr. Mendelsohn explained that appellant had persistent headaches and cognitive impairment due to his head trauma. He noted findings of diplopia on the lateral and vertical gaze and opined that appellant was permanently and totally disabled from all gainful employment.

By letter dated July 23, 2015, OWCP informed appellant that his reasons for refusing the position were not acceptable and allowed an additional 15 days for him to accept the position.

By letter dated August 3, 2015, counsel for appellant argued that OWCP ignored his request to expand the claim, failed to consider pertinent medical evidence and legal arguments outlined in his submission, and did not resolve the conflict in medical evidence between appellant's physician and the second opinion physician.

By decision dated August 19, 2015, OWCP terminated appellant's entitlement to wage-loss compensation and schedule award effective August 18, 2015 because he refused suitable work. It determined that the offered modified city carrier position was suitable and in accordance with the restrictions of the second opinion physician, Dr. Pomeranz. OWCP further noted that the July 6, 2015 report of Dr. Mendelsohn indicated subjective complaints with no objective examination findings or rationale as to why appellant was totally disabled.

LEGAL PRECEDENT

Once OWCP has accepted a claim and pays compensation, it bears the burden of proof to justify modification or termination of benefits.[4] It has authority under section 8106(c)(2) of FECA to terminate compensation for any partially disabled employee who refuses or neglects to work after suitable work is offered. To justify termination, OWCP must show that the work offered was suitable, that appellant was informed of the consequences of his refusal to accept such employment, and that he was allowed a reasonable period to accept or reject the position or submit evidence or provide reasons why the position is not suitable.[5] 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.[6]

OWCP regulations provide factors to be considered in determining what constitutes suitable work for a particular disabled employee, which include the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area,

[4] *Bernadine P. Taylor*, 54 ECAB 342 (2003).

[5] *See Ronald M. Jones*, 52 ECAB 190, 191 (2000); *see also Maggie L. Moore*, 42 ECAB 484, 488 (1991), *reaff'd on recon.*, 43 ECAB 818, 824 (1992). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4 (June 2013) (the claims examiner must make a finding of suitability, advise the claimant that the job is suitable and that refusal of it may result in application of the penalty provision of 5 U.S.C. § 8106(c)(2) and allow the claimant 30 days to submit his or her reasons for abandoning the job. If the claimant submits evidence and/or reasons for abandoning the job, the claims examiner must carefully evaluate the claimant's response and determine whether the claimant's reasons for doing so are valid).

[6] 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

the employee's qualifications to perform such work, and other relevant factors.[7] 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.

Before compensation can be terminated, OWCP has the burden of proof to demonstrate 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.[8] 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.[9]

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.[10]

ANALYSIS

OWCP accepted that appellant sustained a nasal bone fracture, fracture of malar and maxillary bones, fracture of orbital floor, and open wound of nose as a result of the February 15, 2014 employment incident, and authorized the appropriate surgery. It terminated his compensation effective August 18, 2015 as he refused an offer of suitable work. The initial question is whether OWCP properly determined that the position was suitable.

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.[11]

Appellant's treating physician, Dr. Mendelson reported in multiple reports that appellant's neurological symptomatology was permanent and that he was disabled due to his persistent diplopia which limited his ability to drive a vehicle. He further noted that persistent headaches and cognitive impairment interfered with his ability to maintain a job requiring any significant cognitive effort.

OWCP referred appellant to Dr. Pomeranz, a Board-certified ophthalmologist, for a second opinion examination regarding the nature and extent of his disability. It found that Dr. Pomeranz' opinion constituted the weight of the medical evidence regarding appellant's

[7] *Rebecca L. Eckert*, 54 ECAB 183 (2002).

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

[9] *Id.*

[10] *Joan F. Burke*, 54 ECAB 406 (2003); *see Robert Dickerson*, 46 ECAB 1002 (1995).

[11] *Kathy E. Murray*, 55 ECAB 288 (2004).

ability to work and determined that the modified city carrier position offered by the employing establishment was within appellant's work limitations.

The Board finds, however, that it is unclear whether the work restrictions recommended by Dr. Pomeranz allow appellant to perform the position of modified city carrier. Dr. Pomeranz indicated that appellant suffered from residual strabismus in left gaze, up-gaze, and right gaze and opined that his orbital fractures, as well as his symptoms of double vision in lateral gaze, were directly related to the February 15, 2014 employment incident. The double vision that appellant experienced in his peripheral gaze was significant. Dr. Pomeranz reported a current permanent disability from work due to the residuals of his fracture because of the diplopia that he experienced in peripheral gaze.

While in his April 27, 2015 report, Dr. Pomeranz opined that appellant was able to perform his regular work duties, but needed to compensate for the peripheral gaze by turning his head to avoid double vision. He noted that appellant was capable of performing other types of sedentary work and could work an 8-hour day of full duty or light duty. The only restrictions would be the inability to work with any machinery that required normal vision in all directions of gaze, including peripheral gaze, which appellant was not able to do. Dr. Pomeranz also clearly noted that the double vision appellant experienced in his peripheral gaze was significant as he would not be able to drive his mail truck as required by his employment duties. In a May 4, 2015 addendum, he reported that appellant was not capable of driving a commercial vehicle because of double vision in his peripheral gaze, but could work full time in any capacity that did not require him to depend on his peripheral vision.

The employing establishment's June 3, 2015 modified city carrier position only vaguely noted duties of casing and delivering mail for one to eight hours per day. The only medical restriction noted on the job offer, to be adhered to by the employing establishment in assigning work, was that appellant was required to physically turn his head (left or right) rather than turn his eyes when using his peripheral vision. However, as noted by Dr. Pomeranz, OWCP's second opinion physician, appellant's double vision in his peripheral gaze necessitated some restrictions for work.

The employing establishment did not provide sufficient specificity in defining the physical requirements of appellant's offered position,[12] nor did it specify specific tasks or job duties of the offered position of a modified city carrier. The record does not substantiate that appellant would be able to perform the duties of the modified city letter carrier position, without driving. For these reasons, OWCP has not met its burden of proof to establish that appellant is physically able to perform the position of modified city carrier. It has the burden of proof to justify termination or modification of compensation benefits and when a position is selected to represent suitable work, OWCP must show that a claimant has the physical ability to perform the position.[13] The medical evidence pertaining to appellant's restrictions required clarification

[12] *E.B.*, Docket No. 13-319 (issued May 14, 2013).

[13] *See B.O.*, Docket No. 07-103 (issued May 2, 2007).

before a determination on the suitability of a position could be determined.[14] Therefore, OWCP did not meet its burden of proof in the present case.

As a penalty provision, section 8106(c)(2) must be narrowly construed.[15] Based on the evidence of record, the Board finds that OWCP improperly determined that the modified position offered to appellant constituted suitable work within his physical limitations and capabilities. Consequently, OWCP did not discharge its burden of proof to support the termination of his monetary compensation pursuant to section 8106(c)(2).[16]

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation benefits under 5 U.S.C. § 8106(c) for refusing an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the August 19, 2015 decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 4, 2016
Washington, DC

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

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

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

[14] *T.R.*, Docket No. 14-42 (issued April 7, 2014).

[15] *A.M.*, Docket No. 12-1301 (issued March 14, 2013).

[16] The Board also notes that OWCP has not responded to appellant's outstanding request to expand his claim. Lacking a final decision by OWCP, that issue is therefore not before the Board. *See* 20 C.F.R. § 501.2(c).