

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

C.C., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Minneapolis, MN, Employer)

**Docket No. 15-1778
Issued: August 16, 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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On August 25, 2015 appellant filed a timely appeal from a July 13, 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 this case.

ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's eligibility for wage-loss and schedule award compensation effective June 17, 2014 as she refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c).

On appeal, appellant contends that she had responded to OWCP's May 14, 2014 suitability determination letter within the 30-day time period and submitted a certified mail receipt dated June 10, 2014. She cites to *Maggie L. Moore*,² and contends that OWCP failed to

¹ 5 U.S.C. § 8101 *et seq.*

² 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

issue a 15-day notice allowing her another opportunity to accept the employing establishment's job offer. Appellant further contends that none of the medical evidence from her treating physician, an attending Board-certified orthopedic surgeon, particularly his March 16, 2015 medical report, or reports from a vocational rehabilitation counselor was considered by OWCP.

FACTUAL HISTORY

On August 27, 2006 appellant, then a 53-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) under File No. xxxxxx833 alleging that on that day she hurt her left shoulder and right knee when she tripped over a raised floor in an elevator.³ OWCP accepted the claim for contusion of the right knee and lower leg, right lumbosacral joint sprain, left shoulder and acromioclavicular (AC) sprain, right anterior cruciate ligament injury, strain and overuse trochanteric tendinitis of the left hip, and overuse quadriceps tendinitis of the left leg.⁴

Appellant returned to part-time work, every other day, in a modified mail processing clerk position effective March 29, 2007. In a July 16, 2008 decision, OWCP found that her actual earnings as a modified mail processing clerk, effective March 29, 2007, fairly and reasonably represented her wage-earning capacity with zero wage loss.

On June 5, 2010 OWCP accepted that appellant sustained a recurrence of disability from June 5 through 18, 2010 as the employing establishment withdrew her modified-duty position under the National Reassessment Process. It authorized total disability compensation beginning on June 5, 2010. Appellant did not return to work and was placed on the periodic rolls.

In work capacity evaluations (Form OWCP-5c) and medical reports dated July 18, 2012 to August 14, 2013, Dr. John R. Kearns, an attending Board-certified orthopedic surgeon, advised that appellant was not able to perform her usual job, but she could perform light-duty work four hours a day as tolerated with permanent restrictions due to her low back, left shoulder, and right knee injuries, five days a week. The restrictions included sitting up to four hours a day as tolerated, standing and walking for short intervals, sitting with the freedom to move around, occasional reaching, repetitive wrist and elbow movements, pushing and lifting up to 10 pounds, no reaching above shoulder, twisting, or repetitive activities using the back, neck, and upper extremities, rare bending and stooping, and pulling up to 10 pounds. Appellant was also required to use a chair with back support.

³ In a prior appeal before the Board with respect to appellant's claim under File No. xxxxxx641, the Board, in a January 3, 2008 decision, affirmed a March 30, 2007 OWCP decision which terminated her compensation benefits effective November 30, 2005 as she no longer had any residuals or disability causally related to her accepted May 22, 1997 lumbosacral strain. Docket No. 07-1795 (issued January 3, 2008). In an order dated August 5, 2008, the Board denied appellant's petition for reconsideration of its January 3, 2008 decision. *Order Denying Petition for Reconsideration*, Docket No. 07-1795 (issued August 5, 2008).

⁴ By decision dated June 4, 2008, OWCP granted appellant a schedule award for 10 percent impairment of the right lower extremity and 7 percent impairment of the left upper extremity. The decision was affirmed on October 14, 2008 by an OWCP hearing representative. In a January 30, 2009 decision, OWCP granted appellant an additional schedule award for 9 percent impairment of the right lower extremity, for a total of 19 percent.

By letter dated October 4, 2012, OWCP requested that the employing establishment provide appellant with a written offer for a position within the restrictions of Dr. Kearns within 30 days.

By letter dated January 14, 2013, the employing establishment informed OWCP that it did not have any positions available within appellant's restrictions. It recommended that she be referred to vocational rehabilitation.

On August 2, 2013 OWCP referred appellant for vocational rehabilitation. On March 11, 2014 a vocational rehabilitation counselor performed vocational testing and a labor market survey. In an April 24, 2014 report, she determined that appellant was unemployable in the open labor market as a result of the assessment and medical restrictions. Appellant lacked a General Education Diploma (GED) and transferrable skills, the labor market survey supported the unavailability of jobs within her skill set and the medical record indicated a four-hour restriction "as tolerated." The rehabilitation counselor stated that a GED assessment put her at a seventh to eighth grade level and it was unknown as to when she would reach an appropriate level leading to actual testing for the GED or equivalent. She further stated that two target jobs were identified that did not require a GED, but they required frequent to constant reaching and the medical restrictions indicated only occasional reaching and four hours of work as tolerated. The rehabilitation counselor recommended that OWCP follow up for continued medical management and an ability to increase beyond four hours of work with concrete restrictions for the entire work shift and not as tolerated.

On May 7, 2014 the employing establishment offered appellant a modified lobby assistant position, four hours a day, five days a week, effective May 12, 2014 based on Dr. Kearns' work restrictions.⁵ The duties required verbally assisting postal customers, answering mailing questions, providing instructions on holding mail, change of address, and proper mailing, assisting customers with concerns and complaints, and answering the telephone as needed for an average of four hours. The physical requirements included no lifting over five pounds which only involved lifting minimal paperwork for an average of .25 hour, sitting up to 4 hours for an average of 3.50 hours and moving around as desired, intermittent standing and walking in short intervals for an average of .50 hour, and talking to customers for an average of 4 hours. Appellant did not respond to the job offer.

By letter dated May 15, 2014, OWCP advised appellant that it had been informed that she had refused or failed to report to the offered position. It further advised her of its determination that the modified position offered by the employing establishment was suitable. OWCP indicated that the position was based upon the physical restrictions set forth by Dr. Kearns. The employing establishment confirmed that the position remained available to appellant. OWCP instructed her that she must, within 30 days, either accept the position or provide a written explanation of the reason she did not accept the position or she could lose her right to compensation under 5 U.S.C. § 8106(c) of FECA.

⁵ The Board notes that it appears OWCP inadvertently misidentified the offered position as a modified mail processing clerk as the employing establishment's May 7, 2014 job offer indicated that appellant was offered a modified lobby assistant position.

On May 20, 2014 OWCP received a May 14, 2014 note from Dr. Kearns documenting that appellant was unable to work through June 14, 2014.

In a May 19, 2014 left knee magnetic resonance imaging (MRI) scan report, Dr. Cooper R. Gundry, a Board-certified radiologist, found complex cleavage tearing of the posterior one-third of the medial meniscus, grade 2 chondromalacia of the patellofemoral compartment, small knee joint effusion, and prepatellar bursal inflammation. He also reported that a lumbar MRI scan revealed moderate disc degeneration at L5-S1 and L4-5 and mild or moderate at multiple levels at the thoracolumbar junction, advanced facet arthropathy bilaterally at L5-S1 with two millimeter (mm) spondylolisthesis and mild at L4-5, a patent central canal and mild foramina narrowing on the left at L5-S1 and L4-5, and no neural impingement, intradural lesion, neoplasm, fracture, or infection.

In a letter dated June 9, 2014, received by OWCP on June 17, 2014 appellant set forth in writing four issues she claimed precluded her from accepting the offered employment position. In support of her assertions she included supporting documentation including a June 9, 2014 narrative note from Dr. Kearns along with a letter from her rehabilitation counselor and an MRI scan report of her left knee, right knee, and lumbar spine.

By decision dated June 17, 2014, OWCP terminated appellant's wage-loss and schedule award compensation benefits effective that day because she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c). It noted that she did not respond to its May 15, 2014 30-day notice, nor did she accept the suitable work position and return to work within the allotted time period. OWCP further noted that authorization for further medical treatment continued.

On June 26, 2014 appellant requested reconsideration. She submitted letters dated June 9, July 2, and September 9, 2014, in which she responded to OWCP's May 15, 2014 suitability determination letter. Appellant asserted that her condition had worsened and her physician had opined that she could not work at that time. She submitted draft documents which addressed the classification and duties of a lobby assistant position and the rehabilitation counselor's vocational closure report.

In reports dated May 14 to October 27, 2014, Dr. Kearns noted appellant's work-related injuries, continuing symptoms, and medical treatment. He provided examination findings and diagnosed cleavage tearing of the posterior one-third of the medial meniscus and grade 2 chondromalacia of the patellofemoral compartment of the left knee, moderate disc degeneration at L5-S1 and L4-5, and facet arthropathy L5-S1 with mild spondylolisthesis at L4-5. Dr. Kearns noted the May 19, 2014 lumbar and left knee MRI scan results. He also noted that a prior right knee MRI scan revealed findings consistent with an ACL injury. Dr. Kearns opined that appellant was completely disabled for work.

In an appeal request form and a letter dated July 7, 2014, appellant withdrew her request for reconsideration and instead requested a review of the written record by an OWCP hearing representative.

In a January 22, 2015 decision, an OWCP hearing representative affirmed the June 17, 2014 decision. She found that the medical evidence submitted was insufficient to establish that appellant was not capable of performing the offered position.

By letter dated March 24, 2015, appellant again requested reconsideration. In an April 2, 2015 letter, she contended that the offered position was not suitable because it was a customer service job that required classroom and window training. Appellant did not have either training. She submitted draft documents which addressed the classification and duties of a lobby assistant position.

In a March 9, 2015 report, Dr. Kearns provided appellant's symptoms and social and medical history, and addressed her treatment plan. In a March 16, 2015 report, he noted the accepted employment injuries and the physical requirements of her mail processing clerk position. Dr. Kearns noted, however, that in recent years appellant's symptoms had progressed to the point, particularly involving the low back and knees, where she was unable to work, even part time. Appellant was unable to use her arms for any length of time due to degenerative issues in her back. She needed to rest, sitting, standing, walking, and laying down as needed to help relieve her pain and discomfort. Dr. Kearns related that lying down provided the best relief because pain was generally aggravated by movement and activity. He noted that the work restrictions outlined in the May 2014 modified job offer were not accurate because appellant could only work as tolerated and currently she was not able to tolerate any work. Appellant was also on narcotic and nonnarcotic pain medications that made her drowsy. Dr. Kearns recommended that she should not work or drive under the influence of these medications.

In a July 13, 2015 decision, OWCP denied modification of the January 22, 2015 decision. It found that Dr. Kearns' reports were insufficient to establish that appellant was unable to perform the duties of the offered position.

LEGAL PRECEDENT

Section 8106(c)(2) of FECA states that a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by, or secured for him or her is not entitled to compensation.⁶ Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits under section 8106(c) for refusing to accept 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 The Board has recognized that section 8106(c)

⁶ 5 U.S.C. § 8106(c)(2).

⁷ *Joyce M. Doll*, 53 ECAB 790 (2002); *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

⁸ 20 C.F.R. § 10.517(a).

serves as a penalty provision as it may bar an employee's entitlement to future compensation and, for this reason, will be narrowly construed.⁹

To justify termination, OWCP must show that the work offered was suitable and that appellant was informed of the consequences of his or her refusal to accept such employment.¹⁰ In determining what constitutes suitable work for a particular disabled employee, it considers the employee's current physical limitations, whether the work was available within the employee's demonstrated commuting area and the employee's qualifications to perform such work.¹¹ OWCP procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.¹²

Section 10.516 of FECA's implementing regulations provide that OWCP shall advise the employee that it has found the offered work to be suitable and afford the employee 30 days to accept the job or present any reasons to counter OWCP's finding of suitability. If the employee presents such reasons and OWCP determines that the reasons are unacceptable, it will notify the employee of that determination and that he or she has 15 days in which to accept the offered work without penalty. At that point in time, OWCP's notification need not state the reasons for finding that the employee's reasons are not acceptable.¹³ After providing the 30-day and 15-day notices, OWCP will terminate the employee's entitlement to further wage-loss compensation and schedule award benefits.¹⁴ However, the employee remains entitled to medical benefits.¹⁵

ANALYSIS

To justify termination of compensation, OWCP, must show that the work offered was suitable.¹⁶ The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation under 5 U.S.C. § 8106(c)(2) as it failed to properly give consideration to all of the evidence of record prior to its termination decision on July 17, 2014.¹⁷

OWCP accepted that appellant sustained a contusion of the right knee and lower leg, sprain of the right lumbosacral joint, sprain of the left shoulder, upper arm, and an AC joint

⁹ See *Joan F. Burke*, 54 ECAB 406 (2003).

¹⁰ *T.S.*, 59 ECAB 490 (2008); *Linda Hilton*, 52 ECAB 476 (2001); *Ronald M. Jones*, 52 ECAB 190 (2000); *Maggie L. Moore*, *supra* note 2.

¹¹ 20 C.F.R. § 10.500(b).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work, Job Offer Refusal*, Chapter 2.814.5a (June 2013); see *E.B.*, Docket No. 13-319 (issued May 14, 2013).

¹³ 20 C.F.R. § 10.516.

¹⁴ *Id.* at § 10.517(b).

¹⁵ *Id.*

¹⁶ See cases cited *supra* note 10.

¹⁷ See *E.Z.*, Docket No. 14-0247 (issued March 16, 2015).

injury, right anterior cruciate ligament, strain and overuse trochanteric tendinitis of the left hip, and overuse quadriceps tendinitis of the left lower extremity while in the performance of duty on August 27, 2006. It terminated her monetary compensation effective June 17, 2014 based on her failure to accept suitable work.

Once OWCP accepts a claim, it has the burden of proving that the employee's disability has ceased or lessened before it may terminate or modify compensation benefits.¹⁸ Following its suitability determination of the modified lobby assistant position, appellant was properly afforded 30 days to either accept the offer of suitable work or provide reasons for rejecting the offered position. In response, she submitted medical records and other documentation along with a letter stating four issues precluding the offered position from being suitable.

Within these records, Dr. Kearns opines that appellant is completely disabled and unable to return to work under any capacity at the time. He noted that a recent MRI scan of the lumbosacral spine revealed moderate disc degeneration at L5-S1 and L4-5 along with advanced fact arthropathy bilaterally with 2 mm spondylolisthesis. Dr. Kearns also noted that a recent MRI scan of the left knee revealed findings consistent with complex cleavage tearing of the posterior one-third of the medial meniscus as well as grade 2 chondromalacia of the left patellofemoral compartment. Following appellant's submission of the additional medical evidence and her statement of her reasons for finding the offered position unsuitable, OWCP failed to sufficiently discuss or analyze the new medical evidence, and her arguments in support of her refusal of work. The June 17, 2014 decision erroneously finds that appellant did not respond to OWCP's 30-day notice. This finding is clearly erroneous as the June 9, 2014 letter was received by OWCP on June 17, 2014 and was of evidence at the time of its termination decision. As appellant submitted additional evidence within the 30-day period afforded by OWCP of responding to the suitability determination, she was entitled to have this evidence evaluated to determine whether or not she had provided acceptable reasons for refusing the offer of suitable work.

The Board finds that OWCP failed to properly consider the evidence submitted by appellant within the 30 days it afforded to her to contest the termination and therefore it improperly terminated her eligibility for wage-loss and schedule award compensation effective June 17, 2014 based upon a refusal of suitable work under 5 U.S.C. § 8106(c)(2).

Consequently, OWCP's July 13, 2015 merit decision shall be reversed.

On appeal, appellant contends that she had responded to OWCP's May 14, 2014 suitability determination letter within the 30-day time period and submitted a certified mail receipt dated June 10, 2014.

Appellant further cites to *Maggie L. Moore*,¹⁹ and contends that OWCP failed to issue a 15-day notice allowing her another opportunity to accept the employing establishment's job offer.

¹⁸ *Karen L. Majewski*, 45 ECAB 219 (1993); *Bettye F. Wade*, 37 ECAB 556 (1986).

¹⁹ *Supra* note 2.

Lastly, appellant also contends that none of the medical evidence from Dr. Kearns, particularly, his March 16, 2015 report, or reports from the vocational rehabilitation counselor were considered by OWCP. For the reasons set forth in this decision, the Board has reversed the June 17, 2014 termination decision.

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's eligibility for wage-loss and schedule award compensation effective June 17, 2014, pursuant to 5 U.S.C. § 8106(c).

ORDER

IT IS HEREBY ORDERED THAT the July 13, 2015 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 16, 2016
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