United States Department of Labor
Employees' Compensation Appeals Board

G.R., Appellant	)	
and	)	**Docket No. 16-0455**
	)	**Issued: December 13, 2016**
DEPARTMENT OF VETERANS AFFAIRS, CARL VINSON VETERANS MEDICAL CENTER, Dublin, GA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 11, 2016 appellant, through counsel, filed a timely appeal from a September 11, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly terminated appellant's wage-loss compensation and entitlement to schedule award benefits effective December 18, 2014 because she refused an offer of suitable work under 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On March 12, 2009 appellant, then a 47-year-old file clerk, filed a traumatic injury claim (Form CA-1) alleging that she injured her right ankle, right knee, right hip, left toe, and back when the heel of her shoe got caught in a crack in the pavement in the parking lot, causing her to fall. OWCP initially accepted the claim for abrasion or friction burn of leg, except foot, neck sprain, lumbar sprain, right ankle sprain, and left toe contusion. It subsequently accepted additional conditions of degeneration of lumbar or lumbosacral intervertebral disc, displacement of lumbar intervertebral disc without myelopathy and spinal stenosis, lumbar region, without neurogenic claudication. OWCP authorized an August 27, 2012 low back surgery (hemilaminectomy, facetectomy, foraminotomy, and fusion at L4-5). Appellant last worked on or around February 1, 2012 and was retained on OWCP's periodic compensation rolls as of May 6, 2012. She has a previous history of neck surgery (anterior cervical discectomy and fusion at C3-4 and C4-7) in 2007 and 2008.

In a July 17, 2013 report, Dr. George S. Stefanis, a neurosurgeon, reported that appellant was not working. He noted that she had discomfort at the base of the skull into her neck. Dr. Stefanis related that appellant had a high disc at C2-3 and previously had neck surgery. With regard to her lower back, he reported that there was no significant change in her neurological examination and that pain management seemed to be helping.

On July 17, 2013 appellant was initially seen by Dr. Carlos Giron, an anesthesiologist specializing in interventional pain management, for her lower back, and neck pain. Dr. Giron noted a history of the work injury, provided results on examination and reviewed the medical evidence in the record. An impression of lumbar disc displacements with radiculopathy, cervical sprain/postlaminectomy syndrome, lumbar spinal stenosis, and lumbar sprain were provided. Dr. Giron recommended physical therapy and aquatic therapy, along with caudal epidural local anesthetic/corticosteroid injections, which OWCP authorized and appellant underwent.

On January 15, 2014 OWCP referred appellant to a second opinion examiner, Dr. Raju M. Vanapalli, a Board-certified orthopedic surgeon, to determine her work capacity and whether she had any residuals of her work-related condition. In addition to the medical evidence of record, it provided Dr. Vanapalli with a statement of accepted facts (SOAF), questions to be addressed, and a work capacity evaluation (Form OWCP-5c). Included in the list of questions, OWCP "authorized" him to refer appellant for a functional capacity evaluation (FCE), "if required." Further, it requested that he complete a Form OWCP-5c.

In his June 7, 2014 report, Dr. Vanapalli noted the history of injury, his review of the medical record and SOAF, and set forth examination findings. He advised that the residuals of the compensable injuries included persistent neck and arm pain with limitation of movements and weakness in the upper extremities, persistent lower back pain, and weakness in the lower

extremities. Magnetic resonance imaging (MRI) scan and computerized tomography findings suggested degenerative disc disease with spinal canal stenosis both in the cervical region as well as the lumbosacral region, especially at L4-5 with narrowing of spinal canal and foraminal narrowing.

Dr. Vanapalli noted that, although he had been authorized to refer appellant for an FCE which he requested, he had not received a report from the evaluation. He noted that his completion of the Form OWCP-5c was based on his physical examination of appellant. Dr. Vanapalli thereafter related that appellant could perform sedentary levels of work with restrictions of standing, walking, bending, and twisting as file clerk with frequent breaks. He concluded that, without surgical treatment, she had reached maximum medical improvement with respect to the residuals from aggravation of preexisting degenerative disease resulting in herniated disc at L4-5 and radiculopathy.

On the Form OWCP-5c, Dr. Vanapalli reported that permanent restrictions applied to the accepted conditions of: lumbar strain, degenerative disc disease lumbar spine with intervertebral disc aggravated displaced disc L4-5 with myelopathy. He related that appellant could work with permanent restrictions of 3 hours walking and standing, 1 hour twisting and bending/stooping, 3 hours pushing, pulling, lifting, squatting no more than 10 pounds, and climbing with 30-minute breaks in the morning and in the afternoon.

Appellant was referred to vocational rehabilitation on June 25, 2014.

In a June 30, 2014 report, Dr. Stefanis indicated that appellant had a herniation at the L3-4 level, just above the L4-5 postsurgical site, and that she had stenosis at the C2-3 level. However, he did not feel that she was a candidate for any further lumbar procedures until her cervical problems were corrected. Dr. Stefanis indicated that appellant would be at risk of paralysis during lumbar surgery, if her cervical conditions were not corrected.

In a June 30, 2014 job offer, the employing establishment offered appellant a position as a modified file clerk with a duty station in Dublin, GA. The physical requirements of the position included: walking up to 3 hours per shift, standing up to 3 hours per shift, bending/stooping up to 1 hour per shift, no operation of a motor vehicle at work; and no pushing, pulling, or lifting over 10 pounds for greater than 3 hours daily. Appellant would be provided two 30-minute breaks from her sitting position in the morning and afternoon hours in which she would be expected to pick up medical records weighing less than four pounds. She was also authorized two 15-minute breaks, one in the morning and one in the afternoon, and a 30-minute lunch break. The job offer noted that the position was sedentary and appellant would be allowed to sit or stand as needed. The duties of the position included such tasks as: the receiving, indexing, scanning, and assignment of appropriate nomenclature to health and administrative information, as assigned, for incorporation into the correct patient's record in the computerized patient records system, filing of paper health and administrative documents, maintaining a system of paper medical records, and retrieving and delivering records or documents from such system, requesting from, and transferring records to, other employing establishment medical facilities, identifying and preparing records for retention and disposition, performing clerical duties, and routinely transferring or preparing for archiving records of patients not receiving medical care within a three-year period.

In a July 2, 2014 letter, Dr. Stefanis opined that appellant was unable to work due to her cervical spine problems. He questioned whether her cervical spine issues, specifically the spinal cord compression at C2-3, were considered by Dr. Vanapalli. Dr. Stefanis also explained why he could not do back surgery until appellant's neck conditions were corrected and stated that, until that time, she could not work eight hours a day.

On July 7, 2014 appellant refused the job offer. She indicated that she could not return to work without a second surgery on her neck. Appellant noted that Dr. Stefanis would not do surgery on her back unless she had surgery on her neck at C2-3. She further stated that she had not been released to return to work.

By notice dated July 30, 2014, OWCP reviewed the June 30, 2014 modified file clerk position and found it suitable as the duties could be performed within the medical limitations provided by Dr. Vanapalli in his June 7, 2014 report. It also noted that the employing establishment confirmed that the position remained available to her. OWCP afforded appellant 30 days to accept the position or provide her reasons for refusal. Appellant was advised that an employee who refuses an offer of suitable work without reasonable cause is not entitled to further compensation for wage loss or schedule award.

In response to the 30-day notice, OWCP received an August 13, 2014 medical report and an August 27, 2014 work restriction slip from Dr. Stefanis, indicating that appellant was capable of sedentary work four hours a day. The work restriction slip indicated that she could return to work on September 8, 2014 and listed restrictions.

OWCP also received an August 5, 2014 follow-up report from Dr. Julian M. Earls, Jr., a physician specializing in pain management, regarding appellant's low back pain related to lumbar disc displacement with radiculopathy, lumbar spinal stenosis, lumbar postlaminectomy syndrome and lumbar sprain and her neck pain for cervical sprain, cervical postlaminectomy syndrome, and overlying myofascial component. Dr. Earls reported on her drug regimen.

By notice dated September 9, 2014, OWCP advised appellant that her refusal of the offered job was not justified and afforded her an additional 15 days to accept the job. It considered the medical evidence and found that Dr. Stefanis' restrictions were not bolstered by objective clinical findings or medical rationale and that the August 5, 2014 report from Dr. Earls did not provide any medical rationale to show that her condition was so severe that she was unable to perform the physical requirements of the offered positon.

Additional reports from Dr. Earls dated September 4 and 22, 2014 were received. In his September 22, 2014 report, Dr. Earls noted Dr. Stefanis' diagnosis of spinal cord compression at C2-3 and that, if appellant returned to work, she would be placed at risk for serious spinal cord injury. He further noted that she should not be working in any capacity, but that Dr. Stefanis and appellant had agreed that she could try working four hours a day. Dr. Earls opined that, if appellant fell at work or was rear ended on route to work, this could be potentially neurologically devastating. He also indicated that she believed that the position offered would require repetitive movement of her neck and upper extremities, which in his medical opinion would exacerbate her symptoms and place her at risk of spinal cord injury. Other reports from Dr. Earls dated October 7, November 7 and December 5, 2014 was also received.

Chart notes from Dr. Stefanis dated September 24 and November 5, 2014 were also received. Dr. Stefanis noted that appellant's examination was unchanged. He noted that he released her to return to work four hours a day, but she stated that OWCP was not allowing her to return to work. Dr. Stefanis noted that appellant's pain physician also felt going back to work was appropriate. In his November 5, 2014 report, he noted that she had showed up at work, but was told to go home.

In a November 12, 2014 letter, the employing establishment indicated that appellant showed up for work on September 8, 2014 and sought to work in the capacity consistent with the limitations from Dr. Stefanis for a four-hour workday. It advised that her refusal of the modified file clerk positon continued.

By decision dated December 18, 2014, OWCP terminated appellant's entitlement to wage-loss compensation and schedule award benefits, effective December 18, 2014 on the basis that she refused to accept an offer of suitable employment, pursuant to 5 U.S.C. § 8106(c)(2). OWCP noted that the fact appellant was "participating in an OWCP[-]sponsored vocational rehabilitation program (including training) is not a valid reason for refusing a suitable offer of employment."

On December 23, 2014 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative, which was held on July 7, 2015. At the hearing, she reported that she was in receipt of Office of Personnel Management (OPM) disability retirement benefits. Appellant also testified that she made two attempts to return to work. On September 8, 2014 she was told to go home by a section leader unless she was 100 percent. On September 24, 2014 appellant was told that human resources (HR) paperwork had not been completed and, therefore, there was no work for her. Counsel argued that a conflict in medical evidence exists between Dr. Vanapalli and Dr. Stefanis over appellant's capacity to work and she should be referred to an impartial medical specialist.

Evidence received included: two witness statements which documented that appellant showed up at work on September 24, 2014 and a December 23, 2013 statement from Willie May Taylor, Medical Records, which indicated that appellant came in on September 8, 2014 to start working. Ms. Taylor indicated that appellant had brought with her a narrative explanation from her pain specialist and a disability certificate from Dr. Stefanis. She commented on the interactions between the section leader and appellant and that appellant could be called when the paperwork was finalized in HR. Ms. Taylor noted that appellant had not yet received a call from either her supervisor or anyone in HR.

Evidence submitted included rehabilitation reports dated January 13 and 30, 2015, a January 26, 2015 letter from OPM with notice of appellant's approval for disability retirement, lab tests results from May 7, 2015, and Dr. Earls' medical reports dated February 3, March 2, May 1 and June 3, 2015 for management of her narcotic analgesics and overall coordination of her pain management.

A July 29, 2015 report from Dr. Giron was received, which listed the management of her narcotic analgesics and overall coordination of her pain management, along with accompanying list of urine test results from August 3, 2015.

In a July 22, 2015 letter, Kristin D. Bryan, HR specialist, provided comments in reference to the hearing. She indicated that appellant reported to work on September 8, 2014 and was told to report to HR to discuss the permanent job offer of June 30, 2014, which appellant again refused to accept. While appellant presented an August 27, 2014 note from Dr. Stefanis indicating that she could work four hours per day sedentary work with restrictions, she was again offered the June 30, 2014 position, which she refused to accept. Ms. Bryan again returned to the employing establishment attempting to work under the restrictions imposed by Dr. Stefanis and was again offered the file clerk position, which appellant verbally refused.

By decision dated September 11, 2015, an OWCP hearing representative affirmed OWCP's December 18, 2014 decision. The hearing representative found that the weight of the medical evidence was properly accorded to Dr. Vanapalli's second opinion. While appellant claimed that she was sent home for lack of work and because paperwork had not been completed, the hearing representative found that there was no evidence to refute the employing establishment's contention that she was only willing to work per the restrictions from her own physician and, thus, her refusal of the June 30, 2014 job offer continued.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[3] Section 8106(c)(2) of FECA[4] 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.[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]

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

[4] *Supra* note 2.

[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); *see supra* note 6.

[9] *Id*. at § 10.516.

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.[10] OWCP procedures state that acceptable reasons for refusing an offered position include medical evidence of inability to do the work.[11] In a suitable work determination, it must consider preexisting and subsequently acquired medical conditions in evaluating an employee's work capacity.[12]

ANALYSIS

OWCP accepted appellant's claim for abrasion or friction burn of leg, except foot; cervical sprain, lumbar sprain, right ankle sprain, left toe contusion, degeneration of lumbar, or lumbosacral intervertebral disc, displacement of lumbar intervertebral disc without myelopathy; and spinal stenosis, lumbar region, without neurogenic claudication, and paid appropriate benefits. It authorized appellant's August 27, 2012 hemilaminectomy, facetectomy, foraminotomy, and fusion at L4-5. The record also substantiates that appellant had a history of previous anterior cervical discectomy and fusion at C3-4, C4-7, which was performed in 2007 and 2008.

OWCP found that the weight of the evidence with regard to appellant's ability to work a modified file clerk positon offered by the employing establishment rested with Dr. Vanapalli, the second opinion referral physician, whose medical restrictions were consistent with the modified job offer. By decision dated December 18, 2014, it terminated her compensation benefits as a result of appellant's refusal to accept this offer of suitable work. The Board, however, finds that OWCP did not meet its burden of proof.

Dr. Vanapalli reviewed the history of appellant's employment injury, medical treatment, questions posed by OWCP, and the SOAF. He also performed an examination of the cervical spine, lumbar spine, and bilateral upper extremities. Dr. Vanapalli's June 7, 2014 report noted that appellant had a prior work-related cervical injury in 2002, that a cervical fusion had previously been performed, and that x-rays and MRI scan tests results were indicative of findings of degeneration and stenosis in both the cervical and lumbar areas. Injury residuals were identified and noted to include neck, and arm pain, upper extremity limited range of motion and weakness, low back pain, and lower extremity weakness. Despite ongoing residuals, Dr. Vanapalli indicated on the Form OWCP-5c that appellant could perform sedentary levels of work for 8 hours with permanent restrictions of 3 hours walking and standing, 1 hour twisting and bending/stooping, 3 hours pushing, pulling, lifting, squatting no more than 10 pounds, and climbing with 30-minute breaks in the morning and in the afternoon. However, he also indicated that he had requested an FCE to determine appellant's work restrictions, but that he had not seen a report regarding this evaluation. Dr. Vanapalli added that his completion of the Form OWCP-5c was based on his physical examination of appellant.

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

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

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

Dr. Vanapalli noted that he was authorized to obtain and had requested an FCE to determine appellant's work capacity, but had not received one prior to providing his opinion regarding her work restrictions.

Once it undertook development of the medical evidence, OWCP had the responsibility to do so in a manner that would resolve the relevant issues in the case.[13] As such, it should have obtained a supplemental report from Dr. Vanapalli, after he had secured and reviewed the requested FCE report it had authorized him to obtain.[14]

The Board thus finds, for the reasons, stated that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award benefits as of December 18, 2014 based on her refusal to accept an offer of suitable work.[15]

CONCLUSION

The Board finds that OWCP improperly terminated appellant's wage-loss compensation and entitlement to schedule award benefits because she refused an offer of suitable work under 5 U.S.C. § 8106(c)(2).

[13] *Id*.

[14] *See e.g., Glenn P. Buckmann,* Docket No. 96-356 (issued December 5, 1997) (where the Board remanded the case for a clarifying opinion from the impartial medical examiner as both he and the second opinion physician before him had indicated that further diagnostic testing was warranted before assessing whether appellant had sustained an employment-related injury. However, OWCP had denied appellant's claim for an employment-related injury prior to obtaining the requested testing. The Board found, therefore, that OWCP was obligated to undertake further development of the evidence).

[15] *See B.P.*, Docket No. 15-1096 (issued January 20, 2016); *C.S.*, Docket No. 12-663 (issued September 25, 2012).

ORDER

IT IS HEREBY ORDERED THAT the September 11, 2015 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 13, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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