United States Department of Labor
Employees' Compensation Appeals Board

R.W., Appellant	)	
and	)	**Docket No. 16-1064**
	)	**Issued: December 6, 2016**
U.S. POSTAL SERVICE, POST OFFICE, Harrisburg, PA, Employer	)	

Appearances:
Aaron B. Aumiller, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On April 22, 2016[2] appellant, through counsel, filed a timely appeal of an October 28, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to

[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] Under the Board's *Rules of Procedure*, the 180-day time period for determining jurisdiction is computed beginning on the day following the date of OWCP's decision. *See* 20 C.F.R. § 501.3(f)(2). One hundred eighty days from October 28, 2015 was April 25, 2016. Since using April 26, 2016, the date the appeal was received by the Clerk of the Board, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is April 22, 2016, which renders the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

the Federal Employees' Compensation Act[3] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and schedule award benefits as she refused a suitable work position.

On appeal counsel argues that OWCP's decision was incorrect as it was based upon flawed findings of fact and conclusions of law.

FACTUAL HISTORY

On September 12, 2012 appellant, then a 38-year-old carrier, filed a traumatic injury claim (Form CA-1) alleging that she injured her low back on August 31, 2012 carrying a heavy mail load on a long walking route. She underwent a magnetic resonance imaging (MRI) scan on September 12, 2012, which demonstrated a moderately bulging L4-5 disc with a small broad-based central disc herniation and a bulging L5-S1 disc. OWCP accepted this claim for herniated disc at L4-5 on October 26, 2012.

Appellant's attending physician, Dr. Richard J. Weinstein, a Board-certified family practitioner and occupational medicine specialist, released appellant to return to work on November 27, 2012. He provided work restrictions and indicated that she could work four hours a day commencing April 5, 2013. Appellant accepted a new, light-duty position on April 9, 2013.

Appellant underwent electrodiagnostic testing on June 3, 2013, which was normal with no evidence for peripheral neuropathy, lumbosacral radiculopathy, thoracic radiculopathy, or peripheral nerve impairment.

OWCP referred appellant for a second opinion evaluation with Dr. Robert F. Draper, a Board-certified orthopedic surgeon, on June 25, 2013. Appellant underwent a cervical MRI scan on July 15, 2013 which demonstrated a small right paracentral disc herniation at C4-5. In a report dated July 23, 2013, Dr. Draper noted her history of injury and her accepted condition of herniated disc at L4-5. He reported that appellant was working four hours a day. Dr. Draper concluded that she could lift 20 pounds occasionally and 10 pounds frequently and could work 40 hours a week. He noted that appellant had not reached maximum medical improvement.

On November 16, 2013 the employing establishment offered appellant a light-duty position working six hours day, walking, driving while seated, and delivering parcels weighing less than 10 pounds. Appellant accepted that position on that date.

Dr. Martin J. Wall, an osteopath, examined appellant on January 28, 2014 and diagnosed displacement of intervertebral disc. He provided the work restrictions of no lifting over 10 pounds and working four hours a day five days a week. Dr. Wall referred appellant to

[3] 5 U.S.C. § 8101 *et seq.*

Dr. Kevin Lasko, a chiropractor, for therapy and noted that he recommended that she work only four hours a day. Appellant underwent a lumbar MRI scan on January 9, 2014 which demonstrated a moderate broad-based disc herniation at L4-5 with a generalized disc bulge at L5-S1 and minimal disc bulge at L2-3. Her findings had not significantly changed since April 2013.

Appellant filed a recurrence of disability claim (Form CA-2a) on February 10, 2014 alleging that working six hours a day with a 20-pound lifting restrictions had increased her pain level. In a report dated February 10, 2014, Dr. Lasko noted that he and Dr. Wall agreed that a four-hour workday was in keeping with her work capacity. He further noted that appellant should work only five days a week and lift, push, or pull no more than 10 pounds. Dr. Lasko noted that he had diagnosed low back pain and lumbosacral sprain/strain throughout the course of her ongoing treatment.

In reports dated February 11 and 28, 2014, Dr. Wall diagnosed lumbar strain, lumbar herniated disc, and cervical paracentral disc herniation. He provided appellant's work restrictions as no lifting over 10 pounds.

OWCP referred appellant for an additional second opinion evaluation with Dr. Draper on February 14, 2014. Dr. Draper examined her on February 25, 2014 and noted her report that her back pain had increased when working six hours a day. He found that appellant continued to experience residuals of her accepted condition and opined that her work injury permanently aggravated her preexisting degenerative disc disease at L5-S1. Dr. Draper opined that she could perform light-duty work lifting 20 pounds occasionally and 10 pounds frequently. He concluded that appellant could stand and walk for two hours out of six-hour day and could sit for four hours of a six-hour day. Dr. Draper limited her to a five-day workweek.

OWCP requested a supplemental report from Dr. Draper on March 11, 2014 and noted that appellant had not returned to full-time work, but worked six hours a day, six days a week from November 16, 2013 through January 24, 2014. It asked that he provide rationalized support relative to his work limitations.

Dr. Wall completed a report on March 11, 2014 and opined that appellant should work four hours a day five days a week. He suggested that these limitations would assist in her healing process. Dr. Wall based his recommendations on appellant's September 12, 2012 MRI scan and her clinical conditions.

Dr. Draper completed a supplemental report on March 17, 2014 and indicated that appellant could work six days a week rather than five with restrictions. Appellant's work restrictions were no lifting more than 20 pounds occasionally and 10 pounds frequently. She could stand and walk for two hours out of the six-hour day and sit for four hours. Dr. Draper found that appellant could not walk for six hours a day.

On March 20, 2014 appellant accepted a light-duty position working four hours a day. She was not required to lift more than 10 pounds. Dr. Wall continued to restrict appellant to four hours of work a day, five days a week with a lifting weight restriction of 10 pounds from March 27 through June 5, 2014.

The employing establishment offered appellant a city delivery position on April 4, 2014 which required six hours a day, walking for two hours, seated driving for four hours, and casing a route while seated for two hours. Appellant was to deliver parcels and items weighing less than 20 pounds. She accepted this position on April 4, 2014.

On April 23, 2014 Dr. Lasko noted that appellant continued to show slow, but steady improvements in her condition as she continued to work under the given restrictions, repetitively bending and sorting mail as well as delivering mail *via* walking with a mail pouch. He noted that with the change in job duties he had altered her rehabilitation plan to mimic her work duties.

By decision dated May 23, 2014, OWCP accepted appellant's claim for recurrence of total disability from February 7 through March 19, 2014.

On June 19, 2014 the employing establishment noted that while appellant had been returned to limited-duty work for six hours a day, six days a week, she was only working what she feels she is capable of performing and claiming leave without pay. Due to her sporadic work the employing establishment noted difficulty verifying her leave without pay hours.

In a letter dated June 23, 2014, OWCP informed appellant that the April 4, 2014 position was suitable based on her medical limitations as provided by Dr. Draper. The employing establishment confirmed that this position continued to be available to her for the entire six hours. OWCP informed appellant that she must accept the position within 30 days or offer written reasons for her refusal within that period. It further informed her that if she failed to work when suitable work was provided for her, she would not be entitled to further compensation for wage loss or a schedule award. OWCP concluded that, at the end of the 30-day period, a decision would be rendered based on the evidence of record and that if appellant failed to report to the offered position and her reasons for refusing were not deemed justified, her right to compensation and schedule award benefits would be terminated.

On June 18, 2014 Dr. Wall found that appellant's symptoms had increased as she was required to work outside his restrictions. He repeated his restrictions of no lifting over 10 pounds, working four hours a day, five days a week, and added no repetitive twisting of the low back. Dr. Wall repeated these restrictions from July 1 through October 9, 2014.

OWCP referred appellant for an additional evaluation with Dr. Draper on September 24, 2014.

The employing establishment offered appellant an alternate light-duty position separating Postal Automated Redirection System (PARS) mail for return to senders on October 16, 2014. This position required appellant to lift up to 20 pounds occasionally and 10 pounds frequently for four to six hours a day. She was also required to stand or walk for one to two hours a day and to be seated with a change in position every hour for four to six hours a day. Appellant refused this position on October 18, 2014 as it did not adhere to her restriction of sitting for no more than four hours a day.

In a letter dated October 30, 2014, OWCP noted that appellant was offered the PARS position on October 18, 2014. It found that this position was suitable work as it complied with Dr. Draper's March 17, 2014 restrictions including no lifting over 20 pounds occasionally and 10

pounds frequently, standing for two hours out of a six-hour day, and sitting for four hours out of a six-hour day. OWCP informed appellant of her right to respond within 30 days and the consequences of refusing a suitable work position including termination of her wage-loss compensation and schedule award benefits.

Dr. Wall completed a report on October 22, 2014 and found that appellant was experiencing a new onset of pain and tingling radiating down her right leg. He noted that she was working six hours a day with twisting to put mail in boxes. Dr. Wall restricted appellant to no lifting over 10 pounds, sitting two hours a day, walking two hours a day, and working four hours a day, five days a week.

On November 4, 2014 the employing establishment reiterated the physical requirements of the PARS position, noting that sitting was a tolerated as this was a "work at your own pace assignment." Appellant had the option to change positions as needed from sitting to standing any length of time of her choosing.

In a letter dated November 7, 2014, appellant contended that the PARS job offer did not follow Dr. Draper's restrictions as she could not sit for six hours a day. She further noted that she could not perform the position while standing without bending at the waist to sort through mail in the trays. Appellant alleged that Dr. Draper allowed only limited bending and twisting of her back and requested a more suitable position.

OWCP identified a conflict in medical opinions as existing between Drs. Draper and Wall regarding appellant's work restrictions. It referred her, a statement of accepted facts, and a list of specific questions for an impartial medical examination to Dr. John Francis Perry, a Board-certified orthopedic surgeon, on November 7, 2014. Following the November 7, 2014 letter referring appellant to an impartial medical examination for purposes of establishing proper work restrictions, OWCP informed her, by letter dated November 20, 2014, that the PARS position was suitable work. It further concluded that the weight of the medical evidence of record rested with Dr. Draper as Dr. Walls merely noted that he agreed with Dr. Lasko's restriction that appellant could work only four hours a day. OWCP found that she had 30 days to accept the position or provide a written reason for her refusal. It again informed appellant of the penalties of refusing a suitable work position.

In a decision dated December 2, 2014, OWCP denied appellant's claim for compensation for the period March 8 through August 23, 2014 as it remained unable to determine any period of disability as she failed to submit proper medical evidence, as requested on November 4, 2014 supporting disability during the period claimed.[4] The employing establishment had noted that it had offered suitable work during this period, but she sporadically worked what she felt capable of working.

[4] Appellant requested a review of the written record from OWCP's Branch of Hearings and Review on December 30, 2014 from the December 2, 2014 denial of compensation. In a decision dated June 12, 2015, OWCP's hearing representative affirmed OWCP's December 2, 2014 decision denying compensation for benefits for the period March 8 through August 23, 2014.

On January 5, 2015 OWCP informed appellant that her reasons for refusing the PARS position were not valid. It noted that the employing establishment reported that this position was still available and granted her an additional 15-day period to accept and report to this position. OWCP informed appellant that if she did not accept and report to the position within the allotted 15-day period her entitlement to wage loss and schedule award benefits would be terminated.

Appellant underwent an additional lumbar MRI scan on December 4, 2014. This study demonstrated broad disc protrusions and central annular tears at L4-5 and L5-S1.

Dr. Perry, the impartial medical specialist, completed his report on January 2, 2015. He listed appellant's history of injury and reviewed her medical history. Dr. Perry found normal lower extremity sensation, musculature, and reflexes. He found that appellant's motion tests were nondiagnostic, that she had no atrophy, and that her straight leg raising test did not indicate mechanical low back pain problems. Dr. Perry diagnosed low back pain of questionable origin, degenerative disc disease of the lumbar spine, small noncompressive central disc herniation of L4-5 of questionable age, inconsistent examination, subjective presentation, and possible left hip trochanteric bursitis. He opined that due to appellant's inconsistencies she could return to work without restrictions due to her August 31, 2012 work injury.

On January 29, 2015 OWCP contacted the employing establishment and confirmed that the PARS position was still available for appellant and that she could change positions so that she was not required to sit for more than four hours.

By decision dated January 29, 2015, OWCP terminated appellant's wage-loss compensation and schedule award benefits effective January 20, 2015 as she had refused suitable work in accordance with 5 U.S.C. § 8106(c)(2). Counsel requested an oral hearing regarding this decision from OWCP's Branch of Hearings and Review on February 3, 2015.

In a letter dated February 27, 2015, counsel argued that appellant had attempted to accept the offered position beginning on January 20, 2015, but that the employing establishment ignored her. Appellant submitted a series of e-mails dated January 20, 22, and 29, 2015 addressed to officials at the employing establishment indicating that she was accepting the PARS position and asking when to report. On January 30, 2015 her supervisor informed her that as of January 28, 2015 the PARS position was no longer available as Dr. Perry found that she could return to work without restrictions.

On March 3, 2015 OWCP requested that Dr. Perry provide a supplement report following review of appellant's MRI scan reports. In a report dated April 20, 2015, Dr. Perry reviewed her MRI scans and found degenerative disc disease in the lumbar spine with very small noncompressive protrusions of L4-5 and L5-S1. He concluded that these studies did not change his prior expressed opinions.

Appellant testified at the oral hearing regarding the suitable work determination decision on August 13, 2015 and asserted that she had attempted to accept the PARS job offer. She received a voice mail from her supervisor that the position was no longer available sometime before January 20, 2015.

By decision dated October 28, 2015, OWCP's hearing representative found that OWCP met its burden of proof to terminate appellant's wage-loss compensation benefits as she failed to accept a suitable work position. She found that the offered position was within appellant's established medical restrictions. OWCP's hearing representative further found that OWCP had provided appellant with 15 days to accept the offered position on January 5, 2015. Counsel argued that appellant had attempted to accept the position, but was told that the suitable work position was no longer available. OWCP's hearing representative found that the position was still available.

LEGAL PRECEDENT

It is well settled that once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[5] As OWCP in this case terminated appellant's compensation under 5 U.S.C. § 8106(c), OWCP must establish that appellant refused an offer of suitable work. Section 8106(c) of FECA[6] 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. Section 10.517 of the applicable regulations[7] provides 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 showing before a determination is made with respect to termination of entitlement to compensation. 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.[8] 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.[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]

[5] *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[6] 5 U.S.C. § 8106(c)(2).

[7] 20 C.F.R. § 10.517(a).

[8] *Arthur C. Reck*, 47 ECAB 339, 341-42 (1995).

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

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

[11] *Id.*

ANALYSIS

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and schedule award benefits effective January 20, 2015 under 8106(c)(2).

OWCP accepted appellant's claim for herniated disc at L4-5 on October 26, 2012. By decision dated January 29, 2015, it terminated her wage-loss compensation and schedule award benefits effective January 20, 2015 as she had refused suitable work in accordance with 5 U.S.C. § 8106(c)(2). OWCP relied upon the findings of Dr. Draper, the second opinion physician, to determine that the offered PARS position was suitable work. However, before issuing the January 29, 2015 termination decision, it found that there was an unresolved conflict of medical opinion evidence between appellant's attending physician Dr. Wall and Dr. Draper regarding the extent of appellant's restrictions. OWCP referred her to Dr. Perry on November 7, 2014 for an impartial medical examination. It, however, based its suitable work termination on Dr. Draper's report rather than the report of Dr. Perry, the impartial medical specialist selected to resolve conflict as to appellant's restriction, the exact issue in question. Once OWCP undertakes development of the record on a particular issue, herein her work capacity, it needs to complete the process and resolve the existing medical conflict before terminating her benefits.[12]

The Board finds that OWCP terminated appellant's compensation benefits effective January 20, 2015 without having first resolved the existing conflict in opinion between Dr. Draper and Dr. Wall. Due to this defect, OWCP failed to meet its burden of proof to terminate her compensation benefits.[13]

Accordingly, the Board will reverse the October 28, 2015 decision which terminated appellant's compensation benefits because she had refused suitable work under 5 U.S.C. § 8106(c)(2).

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and schedule award benefits effective January 20, 2015.

[12] *Richard F. Williams*, 55 ECAB 343, 346 (2004).

[13] *See J.R.*, Docket No. 13-0720 (issued October 21, 2013); *Gail D. Painton*, 41 ECAB 492, 498 (1990); *Craig M. Crenshaw, Jr.*, 40 ECAB 919, 922-23 (1989).

ORDER

IT IS HEREBY ORDERED THAT the October 28, 2015 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 6, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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