United States Department of Labor
Employees' Compensation Appeals Board

D.S., Appellant	)	
and	)	**Docket No. 16-1593**
	)	**Issued: December 21, 2016**
U.S. POSTAL SERVICE, POST OFFICE, New Orleans, LA, Employer	)	

Appearances:
Michael E. Woods, 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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 25, 2016 appellant, through his representative, filed a timely appeal from a January 27, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP).[2]

[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*, an appeal must be filed within 180 days from the date of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from January 27, 2016, the date of OWCP last decision was July 25, 2016. Since using August 1, 2016, the date the appeal was received by the Clerk of the Appellate Boards 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 July 25, 2016 rending the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

Pursuant to the Federal Employees' Compensation Act[3] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[4]

ISSUE

The issue is whether OWCP properly terminated appellant's compensation effective March 25, 2015 pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On March 31, 1994 appellant, then a 30-year-old motor vehicle operator, filed a traumatic injury claim (Form CA-1) alleging that on March 14, 1994 he sustained injuries in a motor vehicle accident while in the performance of duty. OWCP accepted lumbar strain and aggravation of lumbar spinal stenosis. Appellant returned to work on November 23, 1994 in a modified distribution clerk position. By decision dated March 13, 1995, OWCP found his actual earnings fairly and reasonably represented his wage-earning capacity. It held that appellant had no loss of wage-earning capacity. On July 28, 2010 appellant received a schedule award for five percent permanent impairment to each leg. The period of the award was 28.80 weeks from February 11, 2010.

Appellant filed claims for compensation (Forms CA-7) for intermittent periods of wage loss commencing June 15, 2010. He stopped work on January 25, 2012 as the employing establishment indicated that there was no work available within his work restrictions. OWCP paid wage-loss compensation and as of July 29, 2012 he was placed on the periodic rolls and received compensation every 28 days.

With respect to medical evidence, the attending Board-certified physiatrist, Dr. Mike Shah, provided a February 8, 2012 report with work restrictions indicating: "No lifting over 15 [pounds], standing and walking no more than two hours combined with alternating between both, no kneeling, limited squatting 1 [to] 4 [hours] of pushing or pulling." In a report dated April 30, 2012, he provided results on examination and diagnosed lumbago, and lumbar sprain. Dr. Shah indicated work restrictions should continue and that disability retirement was "pending." He completed a duty status report (Form CA-17) dated May 23, 2012, indicating that appellant had a 15-pound lifting restriction, as well as a two-hour standing and walking limitation.

The record contains an August 14, 2012 report from Dr. Robert Mandell, a psychologist. He diagnosed chronic pain syndrome, major depressive disorder, generalized anxiety disorder, and post-traumatic stress disorder. According to Dr. Mandell, appellant's symptoms interfered with his ability to work and lead a productive life. He did not provide work restrictions.

OWCP referred appellant for vocational rehabilitation services in August 2012. The rehabilitation counselor indicated that appellant would benefit from office support training and

[3] 5 U.S.C. § 8101 *et seq.*

[4] The record also contains a July 26, 2016 schedule award decision. Appellant's representative has not requested review of this decision on this appeal.

identified the positions of office clerk and administrative support clerk as possible suitable positions. The selected positions were described a "light" positions with up to 20 pounds lifting.

In a report dated December 27, 2012, Dr. Shah indicated that he had reviewed the job descriptions for office clerk and administrative support clerk. He opined that appellant was unable to perform the positons, or complete a 17-week training program. Dr. Shah wrote that appellant was "unable to stand for any length of time and cannot perform repetitive bending activities or lifting over 15 [pounds]. These restrictions are permanent." He indicated that he had advised appellant to seek disability retirement to prevent further progression of his injury.

On March 20, 2013 OWCP indicated that it was referring appellant for a second opinion examination and an opinion as to whether he could perform training for the selected positions.

On April 15, 2013 the employing establishment offered appellant a full-time light-duty position as a mail processing clerk. The job offer indicated that the job involved casing mail for up to eight hours. The physical requirements were up to 8 hours intermittent lifting of 15 pounds, 2 hours intermittent standing or walking, 4 hours intermittent pulling or pushing mail, and 7 hours intermittent simple grasping of mail. The record indicates that appellant returned to work on April 20, 2013.

OWCP selected Dr. Martin Van Hal, a Board-certified orthopedic surgeon, as a second opinion physician. Dr. Van Hal was requested to provide an opinion with respect to appellant's work capabilities, specifically with respect to office clerk and administrative support clerk. In a report dated May 19, 2013, he provided a history and results on examination. Dr. Van Hal diagnosed status post motor vehicle accident, history and anxiety and depression, hypertension, asthma, and left ventricular hypertrophy. He indicated that he was unaware of the specific job requirements of office clerk and administrative support clerk. Dr. Van Hal completed a work capacity evaluation (OWCP-5c) with a 20-pound lifting restriction, 30 pounds pushing and pulling, and two hours of squatting, kneeling, or climbing.[5]

In a rehabilitation counselor report dated May 30, 2013, the counselor indicated that appellant had returned to work on April 20, 2013, with hours from 10:00 p.m. to 6:30 a.m. He reported on April 23, 2013 that appellant felt working the night shift might place additional stress on him. The counselor indicated that on May 13, 2013 appellant indicated that he felt the job was within his current capabilities, but he was sore and was feeling some stress. On May 30, 2013 he reported that appellant had been granted disability retirement and had "quit" the employing establishment position.

The record contains a May 29, 2013 "follow up note" from Dr. Shah, reporting that appellant indicated that his lower back had been "ok." The note reported that appellant was "officially retired today," and also checked a box that his condition was unchanged since last visit.

By letter dated November 12, 2014, OWCP advised appellant that it found the April 15, 2013 job offer to be suitable and in accord with medical restrictions. It indicated that appellant

[5] The record contains a May 16, 2013 functional capacity evaluation.

had chosen to retire, and therefore had abandoned suitable work. Appellant was advised of the provisions of 5 U.S.C. § 8106(c)(2). He was provided 30 days to submit evidence or argument with respect to the work stoppage.

Appellant's representative submitted a November 23, 2014 letter, contending that appellant had retired, but did not abandon suitable work. He argued that under OWCP procedures, a claimant had a right to elect Office of Personnel Management (OPM) retirement benefits in lieu of OWCP benefits or vocational rehabilitation. Appellant's representative argued that OWCP had not followed its procedures with respect to the job offer, and there remained a conflict in opinion between Dr. Shah and Dr. Van Hal.

OWCP requested that the employing establishment provide information as to whether the job appellant had performed commencing April 20, 2013 was still available. In a December 19, 2014 e-mail, the employing establishment indicated that the job remained available.

By letter dated December 31, 2014, OWCP advised appellant that the evidence supported a finding that he had abandoned suitable work. It notified him that he 15 days to accept the position or his compensation and entitlement to schedule award benefits would be terminated.

On January 15, 2015 appellant's representative submitted a letter of the same date, arguing that appellant had returned to a job that was outside of his work restrictions. He listed the job requirements and asserted they were not within Dr. Shah's restrictions. In addition, appellant's representative again argued that there was a conflict in the medical evidence. Finally, he argued that appellant's condition had worsened and he could not perform the job.

Appellant submitted a November 21, 2014 report from Dr. Shah. Dr. Shah wrote that he had advised appellant to pursue disability retirement because in his opinion both vocational rehabilitation and the modified-duty job would aggravate appellant's condition and possibly cause further injury. He referred to his December 27, 2012 report and asserted that appellant's condition "had worsened at the end of 2012 and the beginning of 2013 to where [appellant] was requiring injections to function." According to Dr. Shah, appellant's range of motion was limited and he had positive straight leg raising and neurological deficit in the legs, and he would not be able to work eight hours per day at that time. Dr. Shah reported that appellant would not have been able to load and unload mail for that duration, and was limited in his ability to bend, stand and walk as well as push and pull mail. He reported the "twisting involved in casing mail would have also further injured [appellant]. At this time he really needs to be medically retired to avoid further injury to his lower back."

By decision dated March 26, 2015, OWCP determined that appellant had abandoned suitable work and his entitlement to compensation and schedule award were terminated as of March 25, 2015. It found that the job offer of April 15, 2013 was suitable work and he had abandoned the suitable work without a valid reason.

Appellant, through his representative, requested a hearing before on OWCP hearing representative on April 7, 2015. A hearing was held on November 3, 2015. At the hearing the representative asserted that the job provided to appellant was a makeshift or odd-lot job and not a *bona fide* position.

By decision dated January 27, 2016, the hearing representative affirmed the March 26, 2015 decision. The hearing representative found that OWCP had properly determined that appellant had abandoned suitable work based on the evidence of record.

LEGAL PRECEDENT

5 U.S.C. § 8106(c) provides in pertinent part, "A partially disabled employee who … (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation." It is OWCP's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.[6] To justify such a termination, OWCP must show that the work offered was suitable.[7] An employee who refuses or neglects to work after suitable work has been offered to him or her has the burden of showing that such refusal to work was justified.[8]

To establish that a claimant has abandoned suitable work, OWCP must make a finding of suitability.[9] If a formal loss of wage-earning capacity decision has not been made, it evaluates the evidence and the reasons for the work stoppage. When the evidence of file is insufficient to establish a recurrence of disability,[10] and OWCP has determined that the job is suitable, OWCP must advise the claimant that the job is suitable. A claimant must be advised that refusal of the job offer may result in application of the penalty provision of 5 U.S.C. § 8106(c), and allow the claimant 30 days to submit his or her response.[11] OWCP then determines whether the reasons offered for the work stoppage are valid. Reasons that are not sufficient include when the claimant elects to receive disability retirement.[12] If a recurrence of disability is not established and the reasons for the work stoppage are not deemed justified, OWCP will allow appellant another 15 days to accept the position and return to work.[13]

ANALYSIS

In the present case, the employing establishment offered appellant a position as a mail processing clerk on April 15, 2013. Appellant worked in that position from April 20 to May 29, 2013. OWCP subsequently found that he abandoned suitable work in violation of 5

[6] *Henry P. Gilmore*, 46 ECAB 709 (1995).

[7] *John E. Lemker*, 45 ECAB 258 (1993).

[8] *Catherine G. Hammond*, 41 ECAB 375, 385 (1990); 20 C.F.R. § 10.517(a).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.8 (June 2013).

[10] When a claimant returns to a light-duty job, to establish a recurrence of disability the claimant must show either a change in the nature and extent of the injury-related condition, or a change in the nature and extent of the light-duty requirements. *Terry R. Hedman*, 38 ECAB 222 (1986).

[11] *Supra* note 9.

[12] *Id.*

[13] *Id.*

U.S.C. § 8106(c)(2). The initial question presented under 5 U.S.C. § 8106(c)(2) is whether the job was medically suitable.

Appellant has argued that the offered job was outside of established medical restrictions, however, the record does not contain any probative medical evidence showing that was the case. Dr. Shah indicated that, on February 8, 2012, appellant had a 15-pound lifting restriction, with two hours of standing and walking. The April 15, 2013 job offer was specifically based on those work restrictions. The December 27, 2012 report from Dr. Shah did not make any specific changes to the existing work restrictions. Dr. Shah primarily addressed the office clerk and administrative support clerk positions, which required 20 pounds of lifting. He again indicated that appellant had a 15-pound lifting restriction, and referred to appellant being unable to stand "for any length of time." Dr. Shah did not report that the prior limitation of two hours intermittent standing had been modified.[14]

With respect to any additional medical restrictions, the Board notes that Dr. Mandell had diagnosed emotional conditions in his August 14, 2012 report. He did not provide a specific work restriction relating to any diagnosed condition.[15]

The Board finds that the April 15, 2013 mail processing clerk job offer was in accord with existing medical restrictions and was properly found to be medically suitable. There is no probative evidence establishing that as of April 20, 2013 appellant was unable to perform the offered position.[16]

With respect to whether the position was vocationally or otherwise suitable, the Board notes that appellant has argued that the offered position was makeshift, but this analysis would be appropriate if OWCP had performed a loss of wage-earning capacity determination pursuant to 5 U.S.C. § 8115(a).[17] That is not the issue presented. To be suitable, a job offer must be in writing and with a proper description of the job duties. It cannot be a temporary position.[18] There is no evidence that the job offer was temporary in nature or otherwise vocationally unsuitable in this case.

The next question is whether appellant has established that the work stoppage on May 29, 2013 was for a valid reason that would preclude OWCP from finding he had abandoned a suitable position. The Board notes that appellant himself indicated to a rehabilitation counselor on May 13, 2013 that he felt the job was within his current capabilities. When he stopped work,

[14] *W.D.*, Docket No. 15-1297 (issued August 23, 2015); 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.

[15] *See supra* note 9 at Chapter 2.814.4(c)(7) (June 2013); *Mary E. Woodard*, 57 ECAB 211 (2005). All of appellant's medical conditions, whether work related or not, must be considered in assessing the suitability of the position.

[16] *Supra* note 14.

[17] *See D.B.*, Docket No. 16-0261 (issued June 9, 2016).

[18] *Supra* note 9 at Chapter 2.814.4 (June 2013).

appellant indicated that it was because he had chosen OPM retirement. It is well established that this is not a valid reason for leaving suitable work.[19]

Appellant can establish that the work stoppage was valid if there is medical evidence showing that he could no longer perform the position as of May 29, 2013. With respect to a worsening of his condition, the Board finds that the medical evidence is not sufficient.[20] Dr. Shah briefly asserted in his November 21, 2014 report that appellant's condition had "worsened" at the end of 2012 and early 2013. He did not provide additional details or explain how appellant's condition prevented him from performing the mail processing clerk position as of May 29, 2013. Dr. Shah referred to "loading and unloading" of mail, without discussing the specific job duties of the mail processing clerk, or appellant's medical history. The May 29, 2013 note from Dr. Shah indicated only that appellant had retired and his condition was unchanged.

The second opinion physician, Dr. Van Hal, examined appellant on May 19, 2013. Appellant had been working since April 20, 2013. Dr. Van Hal was not asked about, and did not address, the mail processing clerk position. He did not indicate that appellant's condition had worsened or that appellant was unable to perform the job. In addition, there was no indication that job was outside of the work restrictions provided in the May 19, 2013 OWCP-5c, which included a 20-pound lifting restriction.

OWCP followed its procedures in this case. It notified appellant by letter dated November 12, 2014 that it found the mail processing clerk position to be suitable, discussed the provisions of 5 U.S.C. § 8106(c)(2), and provided 30 days to respond. The December 31, 2014 letter advised appellant that OWCP found the reasons for the work stoppage unacceptable, the job remained available, and appellant had 15 days to accept the position and return to work.[21]

The Board accordingly finds that, based on the evidence of record, OWCP properly terminated appellant's compensation, effective March 25, 2015, pursuant to 5 U.S.C. § 8106(c)(2). The position that appellant performed from April 20 to May 29, 2013 was suitable work, and he did not provide valid reasons for the work stoppage.

On appeal, appellant's representative argues that the job was not consistent with work restrictions, and appellant's work stoppage was medically warranted. For the reasons discussed above, the Board finds that OWCP properly terminated compensation in this case.

CONCLUSION

The Board finds that OWCP properly terminated appellant's compensation, effective March 25, 2015, pursuant to 5 U.S.C. § 8106(c)(2).

[19] *See Roy E. Bankston,* 39 ECAB 380 (1987).

[20] *See Sharon Y. Swaim*, Docket No. 03-1324 (issued May 18, 2004).

[21] *Supra* note 8.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 27, 2016 is affirmed.

Issued: December 21, 2016
Washington, DC

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

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

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