United States Department of Labor
Employees' Compensation Appeals Board

E.T., Appellant	)	
and	)	**Docket No. 15-1765**
	)	**Issued: January 4, 2016**
U.S. POSTAL SERVICE, WESTLAKE POST OFFICE, Bethesda, MD, Employer	)	

Appearances:
Stephen Larkin, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 16, 2015 appellant, through his representative, filed a timely appeal from March 9 and August 7, 2015 merit decisions 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 properly terminated appellant's compensation effective February 9, 2014 as he refused an offer of suitable work under 5 U.S.C. § 8106(c).

FACTUAL HISTORY

On September 13, 2010 appellant, then a 47-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on July 15, 2010 he injured his back pushing a heavy cart and lifting a tub of mail. He stopped work on July 16, 2010. OWCP accepted the claim for an

[1] 5 U.S.C. § 8101 *et seq.*

aggravation/exacerbation of degenerative disc disease at L4-5 and L5-S1. It paid compensation benefits for total disability on the supplemental rolls beginning July 16, 2010.

To determine whether appellant could return to work, on April 14, 2011 OWCP referred appellant to Dr. Robert F. Draper, Jr., a Board-certified orthopedic surgeon, for a second opinion examination. Dr. Draper provided a report dated April 27, 2011 in which he diagnosed lumbar strain and degenerative lumbar disc disease at L4-5 and L5-S1. He noted that the degenerative disc disease at L4-5 and L5-S1 was evident on a June 9, 2005 magnetic resonance imaging (MRI) scan study. Dr. Draper advised that appellant's employment-related aggravation of degenerative disc disease "would be a permanent aggravation with herniated discs at L4-5," but found that appellant could work limited duty lifting not more than 50 pounds occasionally and 25 pounds frequently. He further determined that appellant could walk and stand combined for six hours a day and sit for six hours a day.

Based on Dr. Draper's report, on May 2, 2012 OWCP referred appellant to a rehabilitation counselor for vocational rehabilitation.

On March 2, 2013 the employing establishment offered appellant a position as a modified city letter carrier. The position necessitated walking six to eight hours per day. On April 11, 2013 the rehabilitation counselor advised the employing establishment that the walking requirement exceeded his work restrictions.

In a March 8, 2013 form report, Dr. James M. Weiss, an attending Board-certified orthopedic surgeon, diagnosed radiculitis and checked a box marked "yes" that the condition was caused or aggravated by employment. He advised that appellant was "unable to work indefinitely."

On June 3, 2013 the employing establishment offered appellant a position as a modified city letter carrier lifting up to 50 pounds occasionally but no more than 25 pounds frequently for two hours per day, walking four to six hours per day, bending and stooping four to six hours per day, and performing fine manipulation for four to six hours per day.

By letter dated June 10, 2013, the rehabilitation counselor advised appellant that the employing establishment had offered him a position and expected him to start work on June 19, 2013. She requested immediate contact to assist appellant with the return to work process.

On June 18, 2013 OWCP notified appellant that the offered position was suitable and provided 30 days to accept the position or provide reasons for his refusal. It informed him that an employee who refused an offer of suitable work without cause was not entitled to compensation.

On June 18, 2013 appellant accepted the offered position. He attached a notation from Dr. Weiss on the prior job offer of March 2, 2013 that he was disabled from employment.

By letter dated June 26, 2013, the employing establishment informed OWCP that appellant had accepted the offered position on June 18, 2013 and noted that the work was "available effective immediately."

In a report dated August 6, 2013, Dr. Weiss related that he had treated appellant beginning in 2004 for a back condition. He indicated that appellant had worked limited duty at the time of his July 15, 2010 employment injury. On examination Dr. Weiss found no weakness but a positive Tinel's sign of the lumbar spine and a positive straight leg test. He advised that appellant was totally disabled from employment.

On February 5, 2014 OWCP noted that appellant had not responded to the rehabilitation counselor's June 2013 letter. It placed vocational rehabilitation in interrupted status.

By decision dated February 6, 2014, OWCP terminated appellant's compensation and entitlement to a schedule award effective February 9, 2014 as he refused an offer of suitable work under section 8106(c). It found that the opinion of Dr. Draper represented the weight of the evidence and established that the offered position was suitable. OWCP further noted that appellant did not report to work after accepting the June 13, 2013 job offer.

On April 22, 2014 appellant requested reconsideration.

In a July 8, 2014 form report, Dr. Weiss diagnosed a history of low back pain and radiculitis, checked "yes" that the condition was work related, and found that appellant was totally disabled.

By decision dated July 14, 2014, OWCP denied modification of its February 6, 2014 decision.

On July 28, 2014 appellant again requested reconsideration. In form reports dated September 23, 2014, Dr. Weiss advised that he was unable to work.

In a decision dated October 23, 2014, OWCP denied modification of its July 14, 2014 decision. It found that appellant had not submitted sufficient medical evidence to overcome the weight of Dr. Draper's opinion.

On December 18, 2014 Dr. Weiss described his treatment of appellant for a July 15, 2010 work injury. He noted that appellant had reduced motion and a positive straight leg raise on examination, with multiple positive Tinel's signs in the lumbar spine. Dr. Weiss reviewed Dr. Draper's April 27, 2011 report and disagreed with his work restrictions. He opined that the June 3, 2013 job offer was not suitable for appellant and that he was currently disabled from employment.

By decision dated March 9, 2015, OWCP denied modification of its October 23, 2014 decision. It determined that the medical evidence from Dr. Weiss was not rationalized and was thus insufficient to counter the opinion of Dr. Draper and establish that appellant was unable to perform the duties of the June 3, 2013 position.

On April 21, 2015 appellant, through his representative, requested reconsideration.[2] The representative contended that the December 18, 2014 report from Dr. Weiss was sufficient to

[2] In a report dated April 21, 2015, Dr. Weiss discussed appellant's work history. He provided restrictions on walking, bending, lifting, and carrying.

show that the offered position was not suitable. He also asserted that Dr. Draper relied upon an MRI scan that predated the work injury and that his opinion was stale.

In a statement dated April 21, 2015, appellant maintained the offered position required walking for four to six hours per day but did not list the standing requirement. He noted that Dr. Draper limited him to six hours a day of combined walking and standing. Appellant advised that the duties of the position required all standing. He indicated that on September 24, 2013 he received a return to work notice and submitted a statement accepting the position. Appellant did not hear anything further from OWCP or the employing establishment until the termination of his compensation.

By decision dated August 7, 2015, OWCP denied modification of its March 9, 2015 decision. It determined that the offered position was within appellant's work restrictions as it did not require over four to six hours per day of casing and carrying mail.

On appeal appellant's representative contends that the June 3, 2013 offered position was not within his restrictions as it did not indicate the standing requirement. He further asserts that Dr. Draper's report was stale, citing as support *June E. Briand*[3] and *John E. Perez*.[4] The representative also notes that appellant accepted the position. He contends that Dr. Weiss provided rationalized medical evidence sufficient to create a conflict with the opinion of Dr. Draper.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[5] It terminated appellant's compensation under section 8106(c)(2) of FECA,[6] which 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.[7] 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,

[3] Docket No. 02-1489 (issued November 8, 2002) (finding that OWCP improperly relied upon a report that was over 19 months old at the time of the offer in terminating a claimant's compensation for refusal of suitable work).

[4] Docket No. 99-0816 (issued February 1, 2000) (finding that OWCP improperly based its termination of a claimant's compensation for refusing suitable work on the 1994 restrictions of a second opinion examiner based on a 1992 examination when the job was offered in April 1996).

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

[6] 5 U.S.C. § 8101 *et seq*.

[7] *Id*. at § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

[8] *Ronald M. Jones*, 52 ECAB 190 (2000).

which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.[9]

Section 10.517(a) of FECA's implementing regulations provide that an employee who refuses or neglects to work after suitable work has been offered to or secured by him, has the burden of showing that such refusal or failure to work was reasonable or justified.[10] 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.[11]

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 for the specific job requirements of the position.[12] 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.[13]

Once OWCP establishes that the work offered is suitable, the burden shifts to the employee who refuses to work to show that the refusal or failure to work was reasonable or justified.[14] 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.[15] OWCP procedures state that acceptable reasons for refusing an offered position include medical evidence of inability to do the work.[16]

ANALYSIS

OWCP accepted that appellant sustained an aggravation of degenerative disc disease at L4-5 and L5-S1 due to a July 15, 2010 employment injury. It paid him compensation for total disability. On June 3, 2013 the employing establishment offered appellant a position as a modified city letter carrier. OWCP terminated his compensation under section 8106(c) effective February 9, 2014 after finding that he had refused the June 3, 2013 offer of suitable employment. It determined that the April 27, 2011 opinion of Dr. Draper, who provided a second opinion

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

[10] 20 C.F.R. § 10.517(a); *see supra* note 8.

[11] *Id*. at § 10.516.

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

[13] *Id*.

[14] 20 C.F.R. § 10.517(a).

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

[16] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(3) (June 2013).

examination, constituted the weight of the evidence and established that appellant had the capacity to perform the duties of the offered position.

The Board finds that OWCP improperly relied upon Dr. Draper's report as it was not a reasonably current medical opinion and, therefore, did not form a valid basis for determining that the offered position was suitable. OWCP must consider an employee's current physical limitations when determining the suitability of a position. Dr. Draper examined appellant on April 27, 2011, more than two years before OWCP issued its June 18, 2013 letter finding the position suitable and almost three years prior to its February 6, 2014 termination of his wage-loss compensation.[17] The Board has recognized the importance of medical evidence being contemporaneous with a job offer to ensure that a claimant is medically capable of returning to work.[18] As the medical evaluation relied upon by OWCP to find the position suitable was not reasonably current, OWCP has not met its burden of proof to terminate appellant's compensation for refusing suitable work.[19]

Furthermore, Dr. Weiss, appellant's attending physician, found in a March 8, 2013 form report that appellant was disabled from employment. In another report dated August 6, 2013, he provided positive objective findings on examination and further opined that appellant was unable to work. As a penalty provision, section 8106(c) should be narrowly construed. The record does not contain a medical report contemporaneous with OWCP's February 6, 2014 termination of appellant's compensation for refusal of suitable work supporting that the offered position was within his work restrictions. The Board therefore finds that OWCP has not met its burden of proof to terminate his compensation as a sanction for failure to accept an offer of suitable work.

CONCLUSION

The Board finds that OWCP improperly terminated appellant's compensation effective February 9, 2014 as he refused an offer of suitable work under 5 U.S.C. § 8106(c).

[17] *See S.H.*, Docket No. 10-1531 (issued April 13, 2011) (finding that a report more than two years old at the time of OWCP's suitability determination and almost three years old at the time it terminated a claimant's compensation for refusing suitable work was stale and thus insufficient to meet OWCP's burden of proof).

[18] *See Ruth Churchwell*, Docket No. 02-0792 (issued October 17, 2002).

[19] *See A.G.*, Docket No. 08-2265 (issued September 28, 2009) (finding that the report from the impartial medical examiner was stale as she examined the claimant 23 months prior to the job offer).

ORDER

IT IS HEREBY ORDERED THAT the April 7 and March 9, 2015 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: January 4, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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