

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

L.G., Appellant)	
)	
and)	Docket No. 16-1255
)	Issued: November 22, 2016
DEPARTMENT OF VETERANS AFFAIRS,)	
VETERANS HEALTH ADMINISTRATION,)	
Tampa, FL, Employer)	

Appearances: *Case Submitted on the Record*
Capp P. Taylor, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

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

JURISDICTION

On May 30, 2016 appellant, through counsel, filed a timely appeal from a December 3, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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 and entitlement to schedule award compensation effective February 17, 2015 because he refused an offer of suitable work.

FACTUAL HISTORY

On July 20, 2011 appellant, then a 55-year-old housekeeping aid, filed a traumatic injury claim (Form CA-1) alleging that on July 20, 2011 he sustained injury when he sat on an office chair at its top position and it suddenly plummeted 12 to 18 inches to its bottom position, jarring his body. He stopped work around the time of his July 20, 2011 injury.

OWCP initially accepted appellant's claim for lumbar strain, neck strain, and thoracic back strain. Appellant's case was later expanded to accept the additional work-related conditions of temporary aggravations of degenerative cervical disc disease, cervical spondylosis, degenerative lumbar disc disease, and lumbosacral spondylosis. He received disability compensation on the daily rolls beginning September 8, 2011 and on the periodic rolls beginning October 23, 2011.

In April 2013 OWCP referred appellant to Dr. David Osteen, a Board-certified orthopedic surgeon, for an examination and opinion on appellant's work capacity. In a May 31, 2013 report, Dr. Osteen recommended various work restrictions including lifting no more than 20 pounds.

In a report dated September 11, 2013, Dr. Samy F. Bishai, an attending Board-certified orthopedic surgeon, indicated that appellant could not go back to his regular work as a housekeeping aid.

On February 2, 2014 the employing establishment offered appellant a position as a modified housekeeping aid. Appellant did not accept the offered position at that time, but OWCP did not take any further action with respect to this offer.

In June 2014 OWCP determined that further development of the medical record was necessary and referred appellant to Dr. Richard C. Smith, a Board-certified orthopedic surgeon, for an examination and evaluation of his work capacity.

In his July 2, 2014 report, Dr. Smith discussed appellant's factual and medical history, including the results of diagnostic testing, and reported the findings of a physical examination conducted on June 28, 2014. He indicated that, upon examination, appellant exhibited tenderness of the C5, C6, and C7 spinal processes and that his cervical motion was limited in all planes. Dr. Smith indicated that appellant had tenderness of the L4 and L5 spinal processes and that he had diminished flexion and extension of his lower extremities. Appellant had 5/5 strength and normal sensory testing results in his lower and upper extremities. Dr. Smith determined that appellant was still suffering from the accepted work conditions, including aggravation of degenerative changes in the lumbar and cervical spines. He noted that magnetic resonance imaging (MRI) scans showed degenerative changes in appellant's spine with disc herniations. Dr. Smith indicated that the work-related aggravation of these conditions was permanent and posited that appellant was unable to return to his preinjury job as a housekeeping

aid due to requirements of extensive squatting, lifting, bending, and twisting that he would not be able to tolerate. He determined that, given the findings of record and the extent of his limitations, appellant was able to perform modified work in a full-time sedentary position where he would not be required to lift more than 10 pounds and could change positions on an as-needed basis. Dr. Smith indicated that appellant was at maximum medical improvement (MMI). In an accompanying work capacity evaluation report dated June 28, 2014, he indicated that appellant could sit for four hours per day, stand for four hours, bend for two hours, stoop for two hours, and lift up to 10 pounds for four hours.³

On October 30, 2014 the employing establishment offered appellant a full-time position as a modified housekeeping aid.⁴ The position involved receiving e-mail messages, reporting bed discharge status announcements, and transmitting messages to supervisors and coworkers about bed discharge and room cleaning tasks. The job required entering bed discharge and room cleaning tasks into a display monitor and activating the necessary services to respond to calls for help. Minimal computer skills were required to carry out these duties and appellant would be trained with respect to entering information on the monitor. On a typical basis, few calls were received between midnight and 8:00 a.m. The physical requirements of the modified housekeeping aid position required sitting for four hours per day, standing for four hours, bending for two hours, stooping for two hours, and lifting up to 10 pounds for four hours. Appellant would be provided a “sit to stand desk” that would allow him to change positions at will, and the employing establishment’s safety team would ensure that all ergonomic requirements were met.

In a November 3, 2014 report, Dr. Robert Reppy, an attending osteopath and Board-certified family practitioner, noted that appellant had crepitus in both knees and mild laxity in his left collateral ligament, but indicated that he could fully flex and extend both knees. Appellant had a moderate degree of paralumbar and interscapular muscle spasticity and range of motion in the back was reduced in all planes. Dr. Reppy diagnosed cervical disc syndrome, chronic cervical strain, herniated discs at C5-6, T1-2 through T7-8, and L2-3, bulging discs at C2-3 through C4-5 and C6-7, T8-9 through T11-12, and L1-2 and L3-4 through L5-S1, spondylolisthesis of L4 over L5, chronic lumbar strain, and unspecified compression fracture of vertebral body. In a work restrictions form dated November 3, 2014, Dr. Reppy indicated that appellant could lift up to 10 pounds, sit for 4 hours per day (1 hour at a time), stand for 4 hours per day (1 hour at a time), and walk for 2 hours (0.5 hours at a time, and could not engage in any bending or stooping.

In a November 21, 2014 letter, OWCP advised appellant of its determination that the modified housekeeping aid position offered by the employing establishment was suitable. It noted that appellant was vocationally able to perform the position and that the weight of the medical opinion evidence regarding his ability to work was represented by the opinion of Dr. Smith, OWCP’s referral physician. OWCP noted that the work restrictions provided by Dr. Smith would allow appellant to perform the modified housekeeping aid position. It informed appellant that his entitlement to wage-loss compensation and schedule award compensation

³ Dr. Smith did not place any restrictions on walking.

⁴ The hours of the position were 11:30 p.m. to 8:00 a.m., five days per week.

would be terminated if he did not accept the position or provide good cause for not doing so within 30 days of the date of the letter.

Appellant refused the modified housekeeping aid position offered by the employing establishment and, in a December 21, 2014 letter, counsel argued that the offered position was not physically suitable for appellant as evidenced by the reports of Dr. Reppy.

Appellant submitted December 1, 2014 and January 12, 2015 reports in which Dr. Reppy detailed examination findings similar to those found in November 2014. Dr. Reppy indicated that appellant was not at MMI and that he could not sit for eight hours per day on the job.

In a January 30, 2015 letter, OWCP advised appellant that his reasons for not accepting the modified housekeeping aid position offered by the employing establishment were unjustified. It noted that the medical reports of Dr. Reppy were of diminished probative value because his opinion on appellant's ability to work was not based on objective examination findings and was not supported by adequate medical rationale. OWCP advised appellant that his entitlement to wage-loss compensation and schedule award compensation would be terminated if he did not accept the position within 15 days of the date of the letter.

In a letter dated February 10, 2015, counsel argued that there was a conflict in the medical opinion evidence regarding appellant's ability to work between the opinions of Dr. Reppy and Dr. Smith.

In a February 17, 2015 decision, OWCP terminated appellant's entitlement to wage-loss and schedule award compensation effective February 17, 2015 because he refused an offer of suitable work. It determined that the weight of the medical opinion evidence regarding appellant ability to work was represented by the well-rationalized opinion of Dr. Smith, OWCP's referral physician, and that the work restrictions provided by Dr. Smith would allow appellant to perform the modified housekeeping aid position. OWCP again indicated that Dr. Reppy's opinion on appellant's ability to work was not based on objective examination findings and was not supported by adequate medical rationale.

Appellant submitted an April 15, 2015 report in which Dr. Reppy provided findings from an April 15, 2015 examination which were similar to those found in his prior examination reports. Dr. Reppy indicated that appellant could not descend stairs while facing forward due to anterior cruciate ligament tears, but noted that he could descend stairs while facing sideways. He noted that appellant needed a job which involved minimal walking. In a May 1, 2015 work restrictions form, Dr. Reppy indicated that appellant could not walk for more than 10 minutes at a time and that he could not engage in any bending or stooping.

Appellant requested a hearing with an OWCP hearing representative. At the hearing held on September 14, 2015, counsel continued to argue that there was a conflict in the medical evidence regarding appellant's ability to work between the opinions of Dr. Reppy and Dr. Smith. He also asserted that Dr. Smith had not considered all of appellant's medical conditions, whether work related or not, in determining his ability to perform the modified housekeeping aid position. Appellant asserted that he could not perform the standing and walking duties required by the position and noted that he would have to go upstairs and walk 10 to 15 minutes to get from the parking lot to the job location. He estimated that he could only stand for two hours per day and

walk for two hours, and that he would have to take a rest period after standing or walking for 15 to 20 minutes. Appellant acknowledged that he had some minimal computer experience, but testified that he experienced pain, numbness, and trembling in his hands when he entered data into a computer. He testified that his medications made him drowsy such that he would have difficulty in working.

In an October 8, 2015 letter, an employing establishment official noted that OWCP's referral physician provided restrictions which allowed appellant to perform the modified housekeeping aid position and that Dr. Reppy had not seen appellant until after the employing establishment had already offered the position. The official pointed out that appellant would be able to perform the computer requirements of the position as they involved very minimal exertion (use of one finger) for a very short time period. Moreover, computer training would be provided per the job description. The official indicated that there were elevators on every floor of the hospital in different areas and that the work site was less than a five-minute walk from the parking lot. Employees on the night shift could park anywhere on site, including in front of the hospital. The official noted that, if appellant were to park in the garage, there were free shuttles available to and from the hospital and that the employing establishment could provide reasonable accommodation, including motorized wheelchairs.

By decision dated December 3, 2015, OWCP's hearing representative affirmed OWCP's February 17, 2015 terminating appellant's entitlement to wage-loss and schedule award compensation effective February 17, 2015 because he refused an offer of suitable work.

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 Section 8106(c)(2) of FECA 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.⁶ Section 8106(c)(2) 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 provide 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

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

⁶ 5 U.S.C. § 8106(c)(2); see also *Geraldine Foster*, 54 ECAB 435 (2003).

⁷ See *Joan F. Burke*, 54 ECAB 406 (2003).

⁸ 20 C.F.R. § 10.517(a).

⁹ *Id.* at § 10.516.

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 Determining what constitutes suitable work for a particular disabled employee, it considers the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, and the employee's qualifications to perform such work.¹¹ OWPC 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 8123(a) of FECA provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."¹³ When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.¹⁴ In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹⁵

ANALYSIS

OWCP initially accepted appellant's claim for lumbar strain, neck strain, and thoracic back strain. Appellant's case was later expanded to accept the additional work-related conditions of temporary aggravations of degenerative cervical disc disease, cervical spondylosis, degenerative lumbar disc disease, and lumbosacral spondylosis. Appellant received disability compensation on the daily rolls beginning September 8, 2011 and on the periodic rolls beginning October 23, 2011. OWCP later terminated appellant's wage-loss and entitlement to schedule award compensation effective February 17, 2015 because he refused an offer of suitable work.

The evidence of record establishes that appellant is capable of performing the modified housekeeping aid position offered by the employing establishment in October 2014 and determined to be suitable by OWCP in November 2014. The full-time position involves receiving e-mail messages, reporting bed discharge status announcements, and transmitting messages to supervisors and coworkers concerning bed discharge and room cleaning tasks. The physical requirements of the modified housekeeping aid position require sitting for four hours per day, standing for four hours, bending for two hours, stooping for two hours, and lifting up to 10 pounds for four hours. Appellant would be provided a "sit to stand desk" that would allow him to change positions at will and the employing establishment's safety team would ensure that

¹⁰ See *Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

¹¹ 20 C.F.R. § 10.500(b).

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

¹³ 5 U.S.C. § 8123(a).

¹⁴ *William C. Bush*, 40 ECAB 1064, 1975 (1989).

¹⁵ *R.S.*, Docket No. 08-1158 (issued January 29, 2009).

all ergonomic requirements were met. He refused that position and, in a February 17, 2015 decision, OWCP terminated his entitlement to wage-loss and schedule award compensation effective February 17, 2015 because he refused an offer of suitable work. After a request for a hearing, on December 3, 2015 an OWCP hearing representative affirmed OWCP's February 17, 2015 decision.

The Board finds that the modified housekeeping aid position offered by the employing establishment was suitable and that OWCP properly terminated appellant's wage-loss compensation and schedule award compensation effective February 17, 2015 because he refused an offer of suitable work.

The Board also finds that the modified housekeeping aid position was not temporary in nature¹⁶ and that appellant is vocationally capable of performing the modified housekeeping aid position.¹⁷

In determining that appellant was physically capable of performing the modified housekeeping aid position, OWCP properly relied on the opinion of Dr. Smith, OWCP's referral physician. The Board finds that OWCP properly determined that the weight of the medical opinion evidence regarding appellant's ability to work was represented by the well-rationalized opinion of Dr. Smith, and that the work restrictions provided by Dr. Smith would allow appellant to perform the modified housekeeping aid position.

In a report dated July 2, 2014, Dr. Smith discussed appellant's factual and medical history, including the results of diagnostic testing, and reported the findings of the physical examination conducted on June 28, 2014. He determined that, given the findings of record and the extent of his limitations, appellant was able to perform modified work in a full-time sedentary position where he would not be required to lift more than 10 pounds and could change positions on an as-needed basis. In an accompanying work capacity evaluation report dated June 28, 2014, Dr. Smith indicated that appellant could sit for four hours per day, stand for four hours, bend for two hours, stoop for two hours, and lift up to 10 pounds for four hours. He provided medical rationale for this opinion by explaining that, although appellant had objective findings on examination, they were not so severe as to prevent him from engaging in the recommended work activities described in his June 28 and July 2, 2014 reports.¹⁸

The Board finds that, therefore, OWCP has established that the modified housekeeping aid position offered by the employing establishment is suitable. Once OWCP has established

¹⁶ If the employing establishment offers a claimant a temporary light-duty assignment and the claimant held a permanent job at the time of injury, the penalty language of section 8106(c) cannot be applied. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.4c(5), (10) (June 2013).

¹⁷ Counsel suggested that appellant did not have adequate computer skills to perform the offered position. However, appellant acknowledged in the hearing that he had some computer experience entering data, and the employing establishment indicated that only minimal one-finger typing would be required and that training would be provided. Therefore, the evidence shows that appellant is vocationally able to perform the limited computer tasks required by the offered position.

¹⁸ Dr. Smith noted that appellant had 5/5 strength and normal sensory testing results in his lower and upper extremities. The Board notes that Dr. Smith considered all of appellant's medical conditions, whether work-related or not, in determining the extent of his ability to work.

that a particular position is suitable, an employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.

The Board has carefully reviewed the evidence and argument submitted by appellant in support of his refusal of the modified housekeeping aid position and finds it insufficient to justify his refusal of the position. On appeal, counsel argues that Dr. Reppy, an attending physician, provided an opinion that appellant could not physically work the modified housekeeping aid position and that, therefore, there was a conflict in the medical opinion evidence regarding appellant's ability to work.

In a November 3, 2014 report, Dr. Reppy diagnosed numerous medical conditions, including herniated discs at C5-6, T1-2, through T7-8, and L2-3. In a work restrictions form dated November 3, 2014, Dr. Reppy indicated that appellant could lift up to 10 pounds, sit for 4 hours per day (1 hour at a time), stand for 4 hours per day (1 hour at a time), and walk for 2 hours (0.5 hours at a time, and could not engage in any bending or stooping. The Board finds, however, that this opinion is of limited probative value because Dr. Reppy never explained the basis for the various conditions he diagnosed nor did he explain how they supported the extent of recommended work restrictions. He failed to explain which specific findings on examination and diagnostic testing justified the restrictions and therefore his reports lack any medical rationale. The Board has held that a medical report is of limited probative value on a given medical matter if it contains a conclusion which is unsupported by medical rationale.¹⁹ In a May 1, 2015 work restrictions form, Dr. Reppy indicated that appellant could not walk for more than 10 minutes at a time and that he could not engage in any bending or stooping. However, he again failed to provide any explanation for these work restrictions. Although these work restrictions are more severe than those he recommended in November 2014, Dr. Reppy did not identify any objective worsening of appellant's medical conditions.²⁰

Given the limited probative value of Dr. Reppy's reports regarding appellant's ability to work, the Board finds that there is no conflict in the medical opinion evidence on this matter as claimed by counsel. As noted above, a conflict in the medical opinion evidence between OWCP attending physicians is only found when there exist opposing medical reports of virtually equal weight and rationale.²¹ For the above-described reasons, the reports of Dr. Smith and Dr. Reppy are not of virtually equal weight and rationale.²²

¹⁹ *C.M.*, Docket No. 14-88 (issued April 18, 2014).

²⁰ In an April 15, 2015 report, Dr. Reppy noted that appellant could only descend stairs while facing sideways. The Board notes that Dr. Reppy did not provide medical support for this assertion and that the employing establishment indicated that appellant could use elevators to get to and from his work site. In December 1, 2014 and January 12, 2015 reports, Dr. Reppy noted that appellant could not sit for eight hours per day on the job. However, the modified housekeeping aid position did not require appellant to sit for eight hours.

²¹ *See supra* note 15.

²² Appellant testified at the September 14, 2015 hearing that he had pain, numbness, and trembling in his hands when he entered data into a computer and that his medications made him drowsy such that he would not be able to work. However, the medical evidence of record does not clearly show that appellant had these claimed problems to the extent that he would not be able to work as a modified housekeeping aid. Appellant expressed concerns about walking from the parking lot to the work site of the offered position, but the employing establishment indicated that the walk only took five minutes and that appellant could also take a bus ride or use a provided motorized wheelchair.

The Board finds that OWCP complied with its procedural requirements prior to terminating appellant's compensation, including providing appellant with an opportunity to accept the modified housekeeping aid position offered by the employing establishment after informing him that his reasons for initially refusing the position were not valid. For these reasons, OWCP properly terminated appellant's entitlement to wage-loss and schedule award compensation effective February 17, 2015 because he refused an offer of suitable work.²³

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP properly terminated appellant's wage-loss compensation and entitlement to schedule award effective February 17, 2015 because he refused an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the December 3, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 22, 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

²³ See generally *Maggie L. Moore*, *supra* note 10.