United States Department of Labor
Employees' Compensation Appeals Board

J.R., Appellant	)	
and	)	**Docket No. 15-0045**
	)	**Issued: September 22, 2016**
U.S. POSTAL SERVICE, SOUTH SUBURBAN POST OFFICE, Bedford Park, IL, 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:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 6, 2014 appellant, through counsel, filed a timely appeal from a May 19, 2014 merit decision by 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 this case.

ISSUE

The issue is whether OWCP properly terminated appellant's wage-loss compensation and schedule award benefits under 5 U.S.C. § 8106(c) for refusal of suitable work.

[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.*

On appeal, appellant, through counsel, argues that the decision is contrary to fact and law.

FACTUAL HISTORY

This case has previously been before the Board. The facts as set forth in the Board's previous decision are hereby incorporated into this decision.[3] The relevant facts are as follows.

On June 17, 1994 appellant, then a 28-year-old letter sorting machine operator, filed an occupational disease and claim for compensation (Form CA-2), alleging that she sustained rotator cuff tendinitis causally related to factors of her federal employment. OWCP accepted her claim for bilateral rotator cuff tendinitis and resulting surgery. Appellant underwent a right shoulder arthroscopy with subacromial decompression and debridement of partial thickness rotator cuff tear on May 15, 1995. The Board affirmed a July 5, 2000 decision of OWCP finding that appellant had no greater than an eight percent impairment of the right upper extremity, for which she received a schedule award.[4]

In an October 2, 2012 report, Dr. Jeffrey L. Visotsky, appellant's treating Board-certified orthopedic surgeon, noted that appellant had persistent cervical pain. In a duty status report of the same date, he limited her to pushing, pulling and lifting 14 to 40 pounds. Dr. Visotsky noted that appellant was able to work eight hours a day, and could perform all other duties eight hours a day including: sitting, walking, standing, reaching, twisting, bending/stooping and operating a motor vehicle.

On February 19, 2013 OWCP received W2 forms indicating that appellant had wages from East Bank Club Venture in 2011 of $16,233.11 and in 2012 of $14,855.42. On April 3, 2013 appellant submitted a W2 form indicating that in 2010 she received wages of $1,193.00 from East Bank Club Venture.

On February 19, 2013 appellant filed a claim for compensation from August 12, 2012 through February 8, 2013.

On August 10, 2013 the employing establishment offered appellant a modified assignment (limited duty) as a full-time mail processing clerk. The duties of the modified position include: sorting letters, sweeping mail into letter trays, retrieving mail, scanning labels and making placards. The physical requirements of the limited assignment were working eight hours a day doing intermittent lifting/carrying 14 to 40 pounds, sitting, standing, walking, bending, stooping, and twisting for eight hours a day.

By letter to OWCP dated August 12, 2013, the employing establishment noted that appellant had not reported to her modified mail processing clerk position nor had she offered a reason for her refusal. It argued that her position at the East Bank Club does not represent her true earnings potential.

[3] Docket No. 99-609 (issued July 5, 2000).

[4] *Id.*

In an August 13, 2013 note, Dr. Visotsky noted that appellant had weakness on forward flexion, crepitations and loss of glenhumeral motion with compensatory scapulothoracic. He also noted weakness with supraspinatus isolation. Dr. Visotsky recommended a magnetic resonance imaging (MRI) scan of the shoulder to rule out a full-thickness tear. He noted that he will keep appellant at work restrictions until the MRI scan had been obtained.

By letter dated September 5, 2013, OWCP noted that appellant had refused to report to the position of modified mail processing clerk offered by the employing establishment. It advised her that it had reviewed the position offered and determined that it was in accordance with the medical restrictions provided by Dr. Visotsky in his report of October 2, 2012. OWCP gave appellant 30 days to accept the position or provide medical evidence for refusal of the position. It advised her of the consequences of failing to accept the position.

In an August 13, 2013 duty status report, received on October 9, 2013, Dr. Visotsky restricted appellant to lifting five pounds eight hours a day, standing two hours a day, and prohibited bending, stooping, climbing, twisting (avoiding key), fine manipulation and operating machinery. In a September 20, 2013 note, he noted that she remained symptomatic, and that her MRI scan did reveal areas of partial and full-thickness tear in the supraspinatus. Dr. Visotsky noted that in light of appellant's failure to respond to cortisone shots, anti-inflammatory medicine, and a structured rehabilitation program, he recommended proceeding with a left shoulder arthroscopic rotator cuff repair, subacromial decompression.

In a September 20, 2013 duty status report, Dr. Visotsky indicated that appellant was off work until surgery. In December 6 and 11, 2013 notes, he stated that she was having increased pain in her left shoulder with crepitation and popping, and that there was weakness in the perihomboid area. Dr. Visotsky noted that appellant needed a new series of steroid injections for her cervical disc disease. He indicated that the imaging studies did reveal a rotator cuff tear. Dr. Visotsky also noted that appellant will need surgical intervention, specifically left shoulder arthroscopic surgery, subacromial decompression and rotator cuff repair. He opined that this was directly related to her employment-related activities and left shoulder injury based on the temporal sequence and no history of previous comorbidities or inflammatory disease. Dr. Visotsky indicated that any delay in surgery may lead to protracted impairment and disability rating. He noted that, with respect to appellant's neck, she should follow up with the pain clinic, but that appellant's neck problems were not related to her employment activities. Dr. Visotsky indicated both in his medical report and in an accompanying duty status report that appellant would remain off work until surgery is obtained.

On November 22, 2013 the employing establishment proposed terminating appellant's employment, contending that she was absent from her job and failed to provide acceptable documentation. By letter dated December 28, 2013, it removed appellant from employment effective that date. The letter noted that appellant would remain on the rolls in a nonpay status until the disposition of her case.

On February 19, 2014 OWCP informed appellant that it rejected her reasons for not reporting to the position and provided her 15 additional days to accept and report to the position, and that, if she did not accept and report to the position during the allotted period, her entitlement

to wage-loss and schedule award benefits would be terminated. It noted that her work at East Bank Club was not a valid reason for refusing the offer.

By decision dated May 19, 2014, OWCP determined that the position offered by the employing establishment on August 10, 2013 was suitable and within the restrictions provided by Dr. Visotsky in his October 2, 2012 report. It terminated appellant's compensation and schedule award benefits.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[5] OWCP's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[6]

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 by the employee is not entitled to compensation.[7] It is OWCP's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.[8] The implementing regulations provide 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 a showing before entitlement to compensation is terminated.[9] The Board has recognized that section 8106(c) serves as a penalty provision as it may bar an employee's entitlement to future compensation and, for this reason, will be narrowly construed.[10]

ANALYSIS

The Board finds that OWCP did not meet its burden of proof to show that the modified clerk position offered by the employing establishment was suitable and therefore its termination of appellant's compensation for refusing such employment was improper.

In an October 2, 2012 report, Dr. Visotsky, appellant's treating orthopedic surgeon, limited appellant to pushing, pulling, and lifting 14 to 40 pounds in an eight-hour day. He opined in this report that appellant could otherwise work eight hours a day, and could work eight hours a day sitting, walking, standing, reaching, twisting, bending/stooping, and operating a

[5] *Mohamed Yunis*, 42 ECAB 325, 334 (1991); *see also J.P.*, Docket No. 13-1049 (issued August 16, 2013).

[6] *Gewin C. Hawkins*, 52 ECAB 242 (2001).

[7] 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

[8] *Joyce M. Doll*, 53 ECAB 790 (2002).

[9] 20 C.F.R. § 10.517(a).

[10] *H. Adrian Osborne*, 48 ECAB 556 (1997).

motor vehicle. Based on these restrictions, on August 10, 2013, the employing establishment offered appellant a position as a modified assignment full-time mail processing clerk.

In a letter dated September 5, 2013, OWCP noted that appellant refused to report the position of modified mail processing clerk. It indicated that it had reviewed the position description and found that the proposed job was within appellant's restrictions as set forth by Dr. Visotsky in his October 2, 2012 report. OWCP gave appellant 30 days to either accept the position or provide medical evidence for refusing the position.

In response, appellant submitted multiple notes and duty status reports by Dr. Visotsky, in which he provided more restrictions on appellant's employment. In his August 13, 2013 duty status report, Dr. Visotsky restricted appellant to lifting five pounds a day, standing two hours a day and prohibited bending, stooping, climbing, twisting, fine manipulation and operating machinery. He also noted that appellant should "avoid key." Dr. Visotsky also held appellant off work in the August 13, 2013 note. In the September 20, 2013 duty status report, he indicated that appellant was off work until surgery for left shoulder arthroscopic rotator cuff repair. In December 6 and 13, 2013 notes, Dr. Visotsky indicated that appellant's MRI scan showed a rotator cuff tear, that appellant would need left shoulder arthroscopic surgery, subacromial decompression, and rotator cuff repair. He indicated that this surgery was directly related to appellant's employment-related activities. Dr. Visotsky indicated that appellant shall remain off work until surgery. OWCP did not discuss any of these reports.

On February 19, 2014 OWCP informed appellant that it rejected her reasons for not reporting to the position and indicated that she had 15 additional days to accept the position. Although it indicated that refusal of the position due to her work at East Bank Club was rejected, OWCP did not address any of the new medical evidence submitted by appellant.

On May 19, 2014 OWCP determined that the position offered on August 10, 2013 was suitable and within the restrictions provided by Dr. Visotsky in his October 2, 2012 report.

In finding that the position was suitable, OWCP indicated that the offered position was within the restrictions set by Dr. Visotsky on October 2, 2012. In reaching this conclusion, it failed to address Dr. Visotsky's subsequent medical opinions which indicated that appellant could not work due to her employment-related shoulder injury. Accordingly, OWCP improperly terminated appellant's compensation benefits based on a previous medical report by Dr. Visotsky which expressed an opinion that he no longer held.

Furthermore, in a suitable work determination, OWCP must consider preexisting and subsequently acquired medical conditions.[11] It did not consider appellant's neck injury and its impact on her employment. OWCP did not adequately consider whether appellant's total medical condition negatively affected her ability to work the position offered by the employing

[11] *See Richard P. Cortes*, 56 ECAB 200 (2004); *see also Y.M.*, Docket Nos. 14-1050 and 14-1193 (issued December 24, 2014).

establishment.[12] The Board has held that all impairments, whether work related or not, must be considered in assessing the suitability of an offered position.[13]

Under the circumstances of this case, OWCP did not properly find that appellant refused suitable work. The Board will reverse the May 19, 2014 decision.

CONCLUSION

The Board finds that OWCP improperly terminated appellant's wage-loss compensation and schedule award benefits under 5 U.S.C. § 8106(c) for refusal of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 19, 2014 is reversed.[14]

Issued: September 22, 2016
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[12] *N.W.*, Docket No. 11-661 (issued July 6, 2012).

[13] *See Mary E. Woodward*, 57 ECAB 211 (2005).

[14] James A. Haynes, Alternate Judge, participated in the original decision but was no longer a member of the Board effective November 16, 2015.