United States Department of Labor
Employees' Compensation Appeals Board

D.C., Appellant	)	
and	)	**Docket No. 16-1665**
	)	**Issued: April 13, 2017**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Gainesville, FL, 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:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On August 17, 2016 appellant, through counsel, filed a timely appeal from a July 26, 2016 merit decision of 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.[3]

[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.*

[3] The Board notes that appellant submitted new evidence following the July 26, 2016 decision. Since the Board's jurisdiction is limited to evidence that was before OWCP at the time it issued its final decision, the Board may not consider this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c)(1); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

ISSUE

The issue is whether OWCP properly terminated appellant's wage-loss compensation benefits effective October 29, 2015 as she refused an offer of suitable work under 5 U.S.C. § 8106(c).

FACTUAL HISTORY

On June 22, 1989 appellant, then a 48-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that on June 5, 1989 she felt a sharp pain in her left hip radiating down to her left leg when she lifted a patient into an ambulance. She stopped work and returned to light duty on October 27, 1989. OWCP accepted appellant's claim for lumbar strain and aggravation of degenerative disc disease.

Appellant stopped work again on February 12, 1990 and filed a claim for recurrence of disability. She underwent lumbar surgery on July 16, 1990 and continued to seek medical treatment for her accepted June 5, 1989 employment injury. Appellant was placed on the periodic rolls as of June 16, 2002.

Dr. John Stevenson, a Board-certified neurological surgeon, submitted office notes dated January 23 to June 19, 2015, which he related appellant's complaints of continued back and leg pain. He noted that she had regular steroid epidural injections, which provided good relief. Dr. Stevenson indicated that appellant had known preexisting multilevel degenerative disc disease and degenerative facet disease. Upon examination, he observed normal muscle tone and strength in both lower extremities. Sensory function was intact. Vance Amos, a certified physician assistant for Dr. Stevenson completed a work capacity evaluation form, which found appellant not capable of working.

On April 13, 2015 OWCP referred appellant, the case file, a statement of accepted facts, and a series of questions to Dr. Steven J. Lancaster, for a second opinion examination to determine the nature and extent of her disability. In a June 12, 2015 report, Dr. Lancaster accurately described the June 5, 1989 employment injury and reviewed her medical history. He noted that appellant continued to receive medical treatment for her back and bilateral lower extremity symptoms and received epidural injections every three months. Upon examination of her lumbar spine Dr. Lancaster observed no paraspinal spasms, but he noted complaints of pain in the low back, left buttock, and sacroiliac area. Straight leg raise testing was negative bilaterally and sensation was full. Dr. Lancaster reported that examination of appellant's hips showed in both hips internal and external rotation to 40 degrees and flexion to 90 degrees. Examination of appellant's knees showed range of motion in both knees to 120 degrees with no instability. Dr. Lancaster diagnosed herniated nucleus pulposus at L4-5 with radiculopathy and status post total knee replacement bilaterally.

Dr. Lancaster responded to OWCP's questions and related that appellant's accepted condition of lumbar sprain would have resolved approximately six months after the June 5, 1989 employment injury. He reported that the accepted condition of aggravation of degenerative disc disease was permanent and still persisted. Dr. Lancaster opined that appellant could work in a modified-duty capacity, but not at her previous level of heavy lifting. He advised that she could

sit for eight hours, walk and stand for three hours, and push, pull, or lift up to 20 pounds for three hours. Dr. Lancaster completed a work capacity evaluation form which outlined appellant's work restrictions.

In a June 29, 2015 magnetic resonance imaging (MRI) scan report of the lumbar spine, Dr. Richard E. Kinard, a Board-certified diagnostic radiologist, noted no overall significant change with appellant's small central disc extrusion T12-L1. He observed resolution of the previous L4-5 disc protrusion with mild right foraminal stenosis and moderate degenerative disc disease. Dr. Kinard further reported moderate left foraminal and extraforaminal disc protrusion L3-4, causing mild displacement of the left exiting L3 nerve root unchanged, and small foraminal disc-osteophyte complex L5-S1 on the left changed.

Dr. Stevenson provided results of a July 30, 2015 examination and noted that appellant was doing well with her intermittent epidural steroid injections. He noted that she had a normal neurological examination. Dr. Stevenson related that a recent MRI scan showed multilevel degenerative disc and joint disease with minimal nerve compromise. He recommended that appellant continue with epidural steroid injections as needed. Dr. Stevenson completed a work capacity evaluation form, which noted that she was not able to work.

By letter dated August 12, 2015, OWCP contacted the employing establishment and provided a copy of Dr. Lancaster's June 12, 2015 second opinion report. It determined that the weight of the medical evidence rested with the second opinion physician. OWCP requested that the employing establishment determine whether a job position was available to accommodate appellant's restrictions and if so, to provide a written job offer to her.

On August 13, 2015 the employing establishment provided a job offer of information receptionist position, GS-03, step 10. The duties involved welcoming visitors in person or on the telephone, answering or referring inquiries from visitors and staff, and directing visitors to clinic areas. No computer or typing skills or use of fax or copy machine were required. The employing establishment noted that the job offer for information receptionist was provided pursuant to Dr. Lancaster's June 12, 2015 second opinion report. It related that the physical demands of the job position required sitting, with the discretion to stand or change positions as frequently as needed, infrequently lifting file folders weighing up to one pound, and no pushing, pulling, squatting, reaching, or reaching above the shoulders.

Appellant declined the job offer for the position of information receptionist on September 2, 2015.

On September 14, 2015 OWCP verified with the employing establishment that the August 13, 2015 job offer remained available.

In a letter dated September 16, 2015, OWCP advised appellant that the position of information receptionist offered by the employing establishment in a notice dated August 13, 2015 was found to be suitable to her capabilities and was currently available. It found that the weight of the medical evidence rested with Dr. Lancaster, the second opinion examiner, because he provided medical rationale for his opinion on the nature and extent of her accepted conditions. OWCP determined that the position of information receptionist was within the restrictions set

forth by Dr. Lancaster in his June 12, 2015 report. It provided appellant 30 days to accept the position or provide written reasons for her refusal. OWCP informed her that if she failed to accept the offered position and failed to demonstrate that the refusal of the offer of suitable work was justified, her compensation would be terminated pursuant to 5 U.S.C. § 8106(c)(2).

Appellant did not respond within the allotted 30-day time period.

By decision dated October 29, 2015, OWCP terminated appellant's compensation and entitlement to claim a schedule award effective October 30, 2015 as she refused an offer of suitable work under section 8106(c)(2). It noted that she had not responded to the proposed termination of her compensation within the allotted 30-day time period. OWCP determined that the weight of medical evidence rested with the June 12, 2015 report of Dr. Lancaster, who determined that appellant was capable of working within the restrictions of the modified job offer. It found that her failure to report to the offered position were not justified.

On November 9, 2015 appellant, through counsel, requested a telephone hearing before an OWCP hearing representative.

In a February 23, 2016 note, Dr. Stevenson indicated that appellant continued to complain of low back pain and radiating left leg pain down the calf. He noted that she had lumbar degenerative disc disease and moderate degenerative disc disease at L4-5 with facet arthrosis, moderate left foraminal stenosis with an extraforaminal disc protrusion causing posterior displacement of the left L3 nerve root. Dr. Stevenson recommended electromyography/nerve conduction velocity studies (EMG/NCV) to evaluate appellant's radiating leg pain and to rule out radiculopathy. He completed a work capacity evaluation which indicated that she was not able to work.

Appellant began to receive medical treatment from Dr. Prathmia Reddy, Board-certified in physical medicine and rehabilitation. In a March 8, 2016 treatment note, Dr. Reddy related appellant's complaints of low back pain radiating down the left leg. She reviewed appellant's history and provided results on examination. Dr. Reddy observed that appellant's lumbar spine was limited in flexion and extension. Examination of appellant's hip revealed full range of motion and normal pedal pulses bilaterally. Dr. Reddy diagnosed radiculopathy of the lumbar region. She indicated that she would "defer work restrictions and MMI [maximum medical improvement] to Dr. Stevenson." Dr. Reddy provided an EMG/NCV report, which indicated a normal study with no evidence of lumbar radiculopathy.

In treatment notes dated April 7 to July 5, 2016, Dr. Reddy noted appellant's complaints of pain in the lower back radiating to the buttocks and legs. Upon physical examination, she observed limited lumbar range of motion in flexion and extension and tenderness and spasm. Dr. Reddy reported full range of motion of the bilateral hip, knee, and ankle. She diagnosed radiculopathy of the lumbar region, low back pain, and sacroilitis. Dr. Reddy explained that since appellant was not considering surgical intervention she was at MMI with future palliative and conservative care. She opined that appellant had 10 percent whole person impairment. Dr. Reddy related that appellant was disabled and that she would defer work restrictions to Dr. Stevenson.

On April 18, 2016 appellant filed a claim for a schedule award (Form CA-7).

On June 13, 2016 a hearing was held. Appellant testified about the education she had received and the jobs she had held before she worked for the employing establishment. She noted that she had worked for the employing establishment as a nursing assistant for 19½ years and that she still experienced lower back pain and pain in her left buttocks that radiated down her left leg, which continued to require her to still take various pain medications. Appellant noted that she had other nonwork-related medical conditions which required coronary bypass surgery and two knee replacement surgeries, but that it was just her back condition which currently caused limitations. She explained that she could not work as an information receptionist because there were some mornings when she could not get out of bed. Appellant related that she could not get out of bed until about nine o'clock and took pain medication to help her relax. She noted that she would not make it to work on time and she would not be able to be there every day. Appellant believed that she would not be able to sit all day long if not taking medication because she needed to lie down and let it wear off. She pointed out that she also had difficulties with various activities of daily living such as cleaning the house.

Appellant also provided a treatment note from Dr. Robert G. Valentine, an anesthesiologist and pain medicine specialist. In the June 2, 2016 examination note, Dr. Valentine related her complaints of low back pain radiating down the left leg. He reviewed appellant's history and conducted an examination. Dr. Valentine observed limited range of motion in flexion or extension and pain with end range extension. He diagnosed other intervertebral disc degeneration of the lumbar region, lumbar radiculopathy, low back pain and sacroilitis, and other lumbar region spondylosis. Dr. Valentine reported that appellant was not able to resume work and was permanently and totally disabled.

By decision dated July 26, 2016, an OWCP hearing representative affirmed the October 29, 2015 decision finding the weight of the medical evidence rested with Dr. Lancaster, who found that appellant was capable of performing the duties of the offered information receptionist position. She found that OWCP properly terminated appellant's compensation pursuant to 5 U.S.C. § 8106(c)(2).

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying termination or modification of an employee's benefits.[4] 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.[5] To justify termination of compensation, OWCP must show that the work offered was suitable, that the employee was informed of the consequences of refusal to accept such employment, and that she

[4] *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

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

was allowed a reasonable period to accept or reject the position or submit evidence to provide reasons why the position is not suitable.[6]

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.[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, 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]

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.[10] After termination or modification of benefits clearly warranted on the basis of the evidence, the burden for reinstating benefits shifts to the employee.[11]

ANALYSIS

OWCP accepted that appellant sustained a lumbar strain and aggravation of degenerative disc disease as a result of a June 5, 1989 employment injury. Appellant stopped work on February 12, 1990 and did not return. OWCP terminated her compensation effective October 30, 2015 pursuant to 5 U.S.C. § 8106(c)(2) because she refused an offer of suitable work. The Board finds that OWCP met its burden of proof to terminate appellant's compensation benefits based upon her refusal to accept a suitable position within her medical restrictions.

Appellant was referred to Dr. Lancaster, the second opinion physician, to determine the nature and extent of her work capacity and disability. In a June 12, 2015 report, Dr. Lancaster provided an accurate history of injury and provided findings on physical examination. In response to OWCP's questions, he explained that appellant's accepted lumbar sprain would have resolved approximately six months after the accepted June 5, 1989 injury. Dr. Lancaster reported that she continued to suffer from residuals of the accepted aggravation of degenerative disc disease, but that she could work in a modified-duty capacity. He determined that appellant could sit for eight hours, walk and stand for three hours, and push, pull, or lift up to 20 pounds for three hours.

[6] *See Ronald M. Jones*, 52 ECAB 190 (2000). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4 (June 2013).

[7] *Joan F. Burke*, 54 ECAB 406 (2003); *see Robert Dickerson*, 46 ECAB 1002 (1995).

[8] 20 C.F.R. § 10.517(a); *see Ronald M. Jones*, *supra* note 6.

[9] *Id.* at § 10.516.

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

[11] *Talmadge Miller*, 47 ECAB 673, 679 (1996); *see also George Servetas*, 43 ECAB 424 (1992).

On August 13, 2015 the employing establishment offered appellant a position working as an information receptionist which required eight hours of sitting, with the discretion to stand or change positions as frequently as needed, infrequent lifting of file folders weighing up to one pound, and no pushing, pulling, squatting, reaching, or reaching above the shoulders. The employing establishment noted that no computer or typing skills or use of fax or copy machine were required.

The Board has held that 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.[12] Appellant has testified that it is her back condition which limited her ability to accept the modified position. In this case, OWCP properly determined that the physical demands of the position of information receptionist were within the restrictions set forth by Dr. Lancaster in his June 12, 2015 second opinion report.[13] The Board finds, therefore, that the medical evidence has established that appellant is physically able to perform the position of information receptionist.[14] As the offered position of information receptionist was suitable, OWCP met its burden of proof to terminate appellant's claim pursuant to 5 U.S.C. 8106(c)(2).[15]

Appellant was treated by Dr. Stevenson who indicated in a July 30, 2015 office note that she continued to complain of low back pain. Dr. Stevenson related that she was currently doing well with intermittent epidural steroid injections. He reported that a recent diagnostic examination revealed multilevel degenerative disc and joint disease with minimal nerve compromise. Dr. Stevenson completed a work capacity evaluation form and indicated that appellant was not able to work. The Board finds, however, that he did not provide any rationale for his finding that she was unable to work nor did he provide an opinion on the relevant issue of whether she could perform the duties of an information receptionist offered on August 13, 2015.[16] Likewise, Dr. Kinard's June 29, 2015 MRI scan report also failed to contain an opinion on the relevant issue of whether appellant could not perform the duties of the specified position.[17]

The certified physician assistant completed work capacity evaluation forms dated January 23 to June 19, 2015, which noted that appellant was not capable of working. His notes,

[12] *T.M.*, Docket No. 16-0065 (issued April 4, 2016); *Kathy E. Murray*, 55 ECAB 288 (2001).

[13] *Supra* note 10.

[14] The Board has held that in order to justify termination or modification of compensation benefits when a position is selected to represent suitable work, OWCP must show that a claimant has the physical ability to perform the position. *T.M., supra* note 14; *M.R.*, Docket No. 09-1811 (issued April 12, 2010).

[15] *Supra* note 6.

[16] *K.S.*, Docket No. 16-0401 (issued July 12, 2016).

[17] *Id.*

however, do not constitute competent medical evidence as a physician assistant is not considered a physician under FECA.[18]

Subsequent to OWCP's termination of compensation, appellant submitted a February 23, 2016 office note by Dr. Stevenson. Dr. Stevenson diagnosed lumbar degenerative disc disease, moderate degenerative disc disease at L4-5 with facet arthrosis, and moderate left foraminal stenosis with an extraforaminal disc protrusion causing posterior displacement of the left L3 nerve root. He provided a work capacity evaluation form, which indicated that appellant was not able to work. Dr. Stevenson did not, however, provide any medical rationale or explanation for why she was not able to work or why she was unable to perform the duties of an information receptionist.[19] Similarly, in his June 2, 2016 examination note, Dr. Valentine did not offer any explanation for his determination that appellant was totally disabled.[20]

In examination notes dated March 8, to July 5, 2016, Dr. Reddy reviewed appellant's history and provided physical examination findings. She diagnosed radiculopathy of the lumbar region. Dr. Reddy noted that she would "defer work restrictions and MMI to Dr. Stevenson." The Board notes that she did not provide any opinion on appellant's work capacity or ability to perform the duties of an information receptionist. Dr. Reddy's examination notes, therefore, are of limited probative value and are insufficient to establish that appellant could not physically perform the offered job position.[21]

On appeal counsel alleges that OWCP's decision was contrary to fact and law. Despite his argument, however, the record establishes that OWCP met its burden of proof to terminate appellant's wage-loss compensation benefits pursuant to 5 U.S.C. § 8106(c) because she refused an offer of suitable work.

CONCLUSION

The Board finds that OWCP properly terminated appellant's wage-loss compensation benefits effective October 29, 2015 as she refused an offer of suitable work under 5 U.S.C. § 8106(c).

[18] Section 8101(2) of FECA provides that the term "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. As physician assistants are not "physicians" as defined by FECA, their medical opinions are of no probative medical value. 5 U.S.C. § 8101(2); *Roy L. Humphrey*, 57 ECAB 238 (2005).

[19] The Board has held that medical conclusions unsupported by rationale are of diminished probative value. *See Jacquelyn L. Oliver*, 48 ECAB 232 (1996).

[20] *Id.*

[21] The Board has found that medical evidence that does not offer any opinion regarding the cause of an employee's condition or disability is of limited probative value. *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *J.F.*, Docket No. 09-1061 (issued November 17, 2009); *.A.D.*, 58 ECAB 149 (2006).

ORDER

IT IS HEREBY ORDERED THAT the July 26, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 13, 2017
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