

FACTUAL HISTORY

On November 18, 2003 appellant, then a 50-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on November 17, 2003 she sustained injuries to her head and body when her vehicle was struck by a train at a railroad crossing. She stopped work on November 17, 2003.

OWCP accepted the claim for phlebitis and thrombophlebitis of the deep vessels of the bilateral lower extremities, tenosynovitis of the right foot and ankle, late effective cranial nerve injury, a concussion with brief loss of consciousness, neck sprain, hearing loss due to noise, postconcussion syndrome, hearing loss, an open wound of the scalp without complications, dizziness and giddiness, a late effective intracranial injury without skull fracture, post-traumatic stress disorder, bilateral localized primary osteoarthritis of the hands, a bilateral ganglion, loss of memory, peroneal nerve atrophy, localized primary osteoarthritis of the right lower leg, and a lateral tear of the right meniscus.

Appellant returned to part-time modified employment on April 13, 2005. By decision dated November 28, 2005, OWCP reduced her compensation to zero after finding that her actual earnings as a part-time modified carrier beginning April 13, 2005 fairly and reasonably represented her wage-earning capacity.

In a decision dated December 7, 2005, OWCP granted appellant a schedule award for 20 percent permanent impairment of the right lower extremity.²

Dr. Jay Solorio, a Board-certified orthopedic surgeon and OWCP referral physician, opined in a February 16, 2012 report that appellant reached maximum medical improvement in August 2011. He provided range of motion findings for the wrist. A functional capacity evaluation (FCE) performed November 29, 2012 demonstrated that appellant could perform sedentary employment with occasional standing, bending, squatting, and walking. It further indicated that she could lift up to 30 pounds occasionally, 15 pounds frequently, and five pounds constantly. On December 5, 2012 Dr. Danny R. Sparks, a Board-certified orthopedic surgeon, concurred with the findings in the FCE that appellant was restricted to sedentary employment. He opined that her condition would not improve.

Appellant received compensation for total disability from January 16, 2011 to May 4, 2013, when she resumed work. OWCP paid her compensation for intermittent periods of disability from May 5 to October 11, 2013.

² In decisions dated April 14 and July 15, 2009, OWCP determined that appellant was not entitled to an increased schedule award for her right lower extremity. By decision dated July 26, 2006, it granted her a schedule award for 43 percent binaural hearing loss.

On October 11, 2013 appellant underwent an authorized right total knee replacement. OWCP paid her compensation for total disability beginning October 11, 2013 and placed her on the periodic rolls effective October 20, 2013.³

On March 19, 2013 appellant filed a claim for a schedule award (Form CA-7).⁴ On February 10, 2014 a physical therapist evaluated the extent of appellant's right leg permanent impairment for Dr. Sparks. He determined that she had 21 percent right leg permanent impairment.

In a report dated February 11, 2014, Dr. Sparks diagnosed degenerative joint disease of the right knee. He found that appellant could resume work with the restrictions set forth in the November 2012 FCE. Dr. Sparks continued to provide progress reports describing his treatment of appellant for degenerative joint disease of the knees.

An OWCP medical adviser, on March 24, 2014, noted that appellant underwent a right total knee replacement on October 11, 2013 and opined that she reached maximum medical improvement on February 10, 2014. He found that she had a good result from the total knee replacement which yielded 21 percent permanent right lower extremity impairment under Table 16-3 on page 511 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). The medical adviser indicated that appellant had previously received a schedule award for 10 percent permanent right lower extremity impairment and found that she had an additional 11 percent permanent impairment of the right lower extremity.

On April 16, 2014 OWCP advised its medical adviser that appellant had previously received a schedule award for 20 percent permanent impairment of the right leg. It asked that he clarify his lower extremity impairment rating and also address whether she was entitled to an award for the left lower extremity.

In an April 17, 2014 response, OWCP's medical adviser found that appellant had an additional one percent permanent impairment of the right leg. He opined that there was no evidence supporting an impairment of the left lower extremity.

On September 18, 2014 Dr. Paul O'Leary, a Board-certified psychiatrist and OWCP referral physician, discussed appellant's history of injury and continued treatment for a psychiatric condition. He diagnosed post-traumatic stress disorder. The physician noted that appellant worked either part time or full time as a clerk from April 2005 to October 2013. Dr. O'Leary found that she was disabled from her usual work due to her psychiatric condition, but was capable of performing sedentary or light-duty jobs, "such as working as a clerk." He noted that appellant worked a number of years after her injury and if she was "not placed in a

³ By decision dated October 2, 2013, OWCP denied appellant's claim for compensation on July 29, 2013. In a decision dated November 18, 2013, it denied her claim for compensation for intermittent disability on August 8 and August 10 to 25, 2013, and on December 9, 2013 it denied her claim for compensation beginning September 9, 2013. In a separate December 9, 2013 decision, OWCP denied appellant's claim for compensation on October 30, 2013. By decision dated April 10, 2014, it denied modification of its December 9, 2013 decisions.

⁴ OWCP referred appellant for vocational rehabilitation services in March 2012.

stressful environment, her psychiatric issues should not prevent her from working now.” In a September 22, 2014 work restriction evaluation, Dr. O’Leary advised that she could not work eight hours per day, but could work in the job previously performed from 2005 to 2013.

The employing establishment, on September 30, 2014, offered appellant a position as a part-time modified rural carrier with duties that included casing mail, inputting information, taping damaged mails, filing forms, assisting customers, and answering the telephone. The physical requirements were within those of the November 2012 FCE.

On November 3, 2014 OWCP notified appellant of its preliminary determination that the modified rural carrier position offered by the employing establishment on September 30, 2014 was suitable and provided her 30 days to accept the position or provide reasons for her refusal. It advised that a claimant who refused or neglected a suitable position, pursuant to 5 U.S.C. § 8106(c)(2) was not entitled to further wage-loss or schedule award compensation.

OWCP, on December 31, 2014, informed appellant that she had an additional 15 days to accept the position or have her compensation and entitlement to a schedule award terminated. It indicated that she had not provided an acceptable reason for refusal of the offered position.

By letter dated January 8, 2015, appellant notified OWCP that she did not want further wage-loss compensation as the Social Security Administration (SSA) had approved her application for disability retirement. She indicated that she believed that she could continue to receive her schedule award and medical benefits.

On January 13, 2015 OWCP advised appellant that she had 15 days from its December 31, 2014 letter to report to work or have her entitlement to a schedule award and wage-loss compensation terminated.

Appellant on May 7, 2015 informed OWCP that she did not want to return to work and asked that her compensation be terminated.⁵

On May 7, 2015 an OWCP medical adviser found that appellant reached maximum medical improvement on February 16, 2012, the date of Dr. Solorio’s report. He discussed Dr. Solorio’s finding of no tenderness but some motion loss following an arthroplasty of the right thumb in 2007. Citing Table 16-2 on page 394 of the A.M.A., *Guides*, he found that an arthroplasty of the right thumb constituted 30 percent impairment of the digit and 11 percent permanent impairment of the right upper extremity.⁶

In a decision dated May 20, 2015, OWCP granted appellant a schedule award for an additional one percent permanent impairment of the right lower extremity and 11 percent permanent impairment of the right upper extremity. It found that she reached maximum medical improvement for the right upper extremity on February 16, 2012 and for the right lower

⁵ By decision dated May 6, 2015, OWCP denied appellant’s claim for an increased schedule award for hearing loss. It found that the medical evidence was insufficient to show that she had more than the previously awarded 43 percent binaural hearing loss.

⁶ A.M.A., *Guides* 421, Table 15-12.

extremity on February 14, 2014. The period of the award ran for 29.72 weeks from May 5 to November 27, 2015. OWCP noted that appellant could not receive a schedule award at the same time as wage-loss compensation and thus adjusted the date that her schedule award compensation began to May 2015.

By decision dated May 20, 2015, OWCP terminated appellant's wage-loss compensation and entitlement to a schedule award effective that date as she refused an offer of suitable work under section 8106(c)(2).⁷

OWCP paid appellant schedule award compensation from May 5 to November 27, 2015.

OWCP, on May 2, 2016, advised appellant of its preliminary determination that she received a \$10,084.23 overpayment of compensation for the period May 20 through November 27, 2015 because it paid her compensation for a schedule award after her entitlement was terminated based on her refusal of suitable work. OWCP further informed her of its preliminary finding that she was at fault in creating the overpayment. It requested that appellant complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, OWCP notified her that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing.

On June 1, 2016 appellant requested a telephone conference on the issues of fault and waiver. She challenged the finding that an overpayment occurred and maintained that she was not at fault for its creation. Appellant contended that she had filed her schedule award claim months before the termination of compensation. She submitted an overpayment recovery questionnaire with her monthly income and a list of expenses with some supporting financial documentation.

By letter dated June 22, 2016, OWCP advised appellant that it had telephoned her, but did not receive an answer. It requested that she telephone OWCP so that it could schedule a telephone conference. In a July 8, 2016 letter, OWCP notified her that the telephone numbers she had provided were not working and again asked that she contact OWCP for scheduling of her telephone conference.

By decision dated August 25, 2016, OWCP found that appellant received an overpayment of compensation in the amount of \$10,084.23 for the period May 5 through November 27, 2015 because it paid her schedule award compensation after it terminated her compensation for refusing suitable work. It further found that she was at fault in the creation of the overpayment and that she should forward payment of \$400.00 per month as repayment.

On appeal appellant contends that she was not at fault in creating the overpayment as OWCP advised her on May 20, 2015 that she was receiving a schedule award from May 3 to November 27, 2015. She notes that she had filed a claim for a schedule award before the

⁷ The record indicates that appellant resigned from the employing establishment for personal reasons effective January 27, 2016.

termination of her compensation and that she telephoned OWCP and was told that she would receive the award even though her compensation had been terminated.

LEGAL PRECEDENT -- ISSUE 1

Section 8106(c)(2) of FECA⁸ 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.⁹ 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.¹⁰ 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.¹¹ Section 10.517(a) of FECA's implementing regulations provides 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.¹²

A claimant who refuses suitable work is not entitled to further compensation, including payment of a schedule award for the permanent impairment of a scheduled member.¹³ If, however, a claimant reached maximum medical improvement prior to the refusal of suitable employment, he or she is entitled to payment of any portion of the schedule award due to the prior termination of monetary compensation benefits.¹⁴ Maximum medical improvement means that the physical condition of the injured member of the body has stabilized and will not improve further. The determination of whether maximum medical improvement has been reached is based on probative medical evidence.¹⁵

A claimant may not receive compensation for disability and a schedule award covering the same period of time.¹⁶

⁸ *Supra* note 1.

⁹ *Id.* at § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

¹⁰ *Ronald M. Jones*, 52 ECAB 190 (2000).

¹¹ *Joan F. Burke*, 54 ECAB 406 (2003).

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

¹³ *See G.S.*, Docket No. 14-0408 (issued June 10, 2014); *D.S.*, Docket No. 08-885 (issued March 17, 2009).

¹⁴ *Id.*

¹⁵ *See J.C.*, 58 ECAB 258 (2007); *Mark A. Holloway*, 55 ECAB 321 (2004).

¹⁶ *See J.H.*, Docket No. 14-1584 (issued October 5, 2016); *Eugenia L. Smith*, 41 ECAB 409 (1990).

ANALYSIS -- ISSUE 1

OWCP based its overpayment determination on its finding that appellant was not entitled to schedule award compensation after May 20, 2015 as it had terminated her compensation for refusal 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. It accepted her claim for phlebitis and thrombophlebitis of the deep vessels of the bilateral lower extremities, tenosynovitis of the right foot and ankle, late effective cranial nerve injury, a concussion with brief loss of consciousness, neck sprain, hearing loss due to noise, postconcussion syndrome, hearing loss, an open wound of the scalp without complications, dizziness and giddiness, a late effective intracranial injury without skull fracture, post-traumatic stress disorder, bilateral localized primary osteoarthritis of the hands, a bilateral ganglion, loss of memory, peroneal nerve atrophy, localized primary osteoarthritis of the right lower leg, and a lateral tear of the right meniscus due to a November 17, 2003 employment injury. Appellant returned to modified employment in April 2005. She subsequently stopped work and received compensation from OWCP for total disability from January 16, 2011 until she returned to work on May 4, 2013. She received compensation for intermittent disability from May 5 to October 19, 2013 and total disability compensation on the periodic rolls beginning October 29, 2013.

On February 11, 2014 Dr. Sparks, an attending physician, found that appellant could perform sedentary employment within the restrictions set forth in a November 29, 2012 FCE. The FCE provided limitations of occasional standing, bending, squatting, walking, and lifting of up to 30 pounds occasionally, 15 pounds frequently, and five pounds constantly. Dr. O'Leary, an OWCP referral physician, advised that appellant could not perform her usual employment due to her employment-related psychiatric condition, but was capable of working less than full time in a position that was not stressful.

The employing establishment offered appellant a position as a part-time modified rural carrier on September 30, 2014 with duties of casing mail, inputting information, taping damaged mail, filing forms, assisting customers, and answering the telephone. The physical requirements for the job were within those set forth by the November 2012 FCE. The Board thus finds that the offered position was suitable.

In accordance with the procedural requirements of section 8106(c), OWCP advised appellant on November 3, 2014 that it had found the position offered on September 30, 2014 suitable and provided her the opportunity to accept the position or provide reasons for her refusal within 30 days. It notified her on December 31, 2014 that she had an additional 15 days to accept the position or have her wage-loss compensation and entitlement to a schedule award terminated. Appellant, on January 8, 2015, informed OWCP that she did not receive additional wage-loss compensation as she was receiving disability retirement. The Board finds that OWCP followed established procedures in terminating her compensation effective May 20, 2015 for refusing suitable work pursuant to section 8106(c)(2).

The Board further finds, however, that the case is not in posture for decision regarding whether appellant received an overpayment of compensation. OWCP found an overpayment occurred as it paid her compensation for a schedule award from May 20 to November 27, 2015, after its May 20, 2016 termination of monetary benefits under section 8106(c)(2).

A claimant who refuses suitable work is not entitled to further monetary compensation, including payment of a schedule award for the permanent impairment of a scheduled member.¹⁷ If, however, a claimant reaches maximum medical improvement prior to the date she refuses suitable employment, she is entitled to payment of any portion of the schedule award due prior to the termination of monetary compensation benefits.¹⁸ OWCP determined that appellant achieved maximum medical improvement for the right upper extremity on February 16, 2012 and for the right lower extremity on February 14, 2014. It found, however, that the period covered by the schedule award should begin May 5, 2015 as she had received disability compensation until that date as the claimant could not receive compensation for disability and a schedule award covering the same period of time.¹⁹

The Board notes, however, that OWCP did not pay appellant wage-loss compensation for total disability from May 5 to October 11, 2013, but instead paid her intermittent disability compensation for lost time during certain pay periods. It is well established that the period of a schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the accepted employment injury.²⁰ The Board finds that appellant is entitled to any portion of the schedule award due from the date she reached maximum medical improvement until the date of OWCP's termination of her entitlement to wage-loss compensation and a schedule award due to her refusal of suitable work, as long as she is not concurrently receiving wage-loss compensation. On remand, OWCP should reconsider whether she is entitled to any schedule award compensation for any portion of the period May 4 to October 11, 2013 and whether she received an overpayment of compensation.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant received an overpayment of compensation.²¹

¹⁷ See *D.S.*, *supra* note 13.

¹⁸ See *G.S.*, *supra* note 13.

¹⁹ See *J.H.*, *supra* note 16; *Eugenia L. Smith*, 41 ECAB 409 (1990).

²⁰ See *S.G.*, Docket No. 15-1919 (issued January 21, 2016); *Albert Valverde*, 36 ECAB 233 (1984).

²¹ In view of the Board's finding regarding the overpayment issue, the question of whether appellant was at fault in creating the overpayment is moot.

ORDER

IT IS HEREBY ORDERED THAT the August 25, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: April 20, 2017
Washington, DC

Christopher J. Godfrey, 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