United States Department of Labor
Employees' Compensation Appeals Board

H.L., Appellant	)	
and	)	**Docket No. 16-1810**
	)	**Issued: March 16, 2017**
TENNESSEE VALLEY AUTHORITY, DIVISION OF POWER OPERATIONS, Chattanooga, TN, 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 September 13, 2016 appellant, through counsel, filed a timely appeal from a July 29, 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.

[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 compensation benefits effective September 4, 2015 as he abandoned suitable work under 5 U.S.C. § 8106(c).

FACTUAL HISTORY

On June 1, 2013 appellant, then a 42-year-old conveyor car dumper operator, filed a traumatic injury claim (Form CA-1) alleging that on May 31, 2013 he sustained a head injury and cervical sprain when a freight elevator broke and hit him hard on the top of his head at work. He stopped work on July 1, 2013 and filed claims for wage-loss compensation (Form CA-7).

In a letter dated September 3, 2013, the employing establishment informed appellant that he was being transferred to the Allen Coal Plant effective October 7, 2013 because of a reduction of staffing in his competitive level at the Colbert Coal Plant.

OWCP accepted appellant's claim for neck sprain and cervical disc displacement without myelopathy. It subsequently expanded the acceptance of his claim to include right shoulder impingement. OWCP paid compensation and placed appellant on the periodic rolls effective November 17, 2013.

On December 2, 2013 appellant underwent anterior cervical discectomy and fusion surgery. On March 4, 2014 he underwent right shoulder subacromial decompression, acromioclavicular (AC) joint resection, and extensive debridement surgery.

Appellant was treated by Dr. Cyrus Ghavam, a Board-certified orthopedic surgeon. In a January 20, 2015 report, Dr. Ghavam related appellant's complaints of ongoing pain and difficulty with his neck and right arm. He noted that he had reviewed a magnetic resonance imaging (MRI) scan report from September 2, 2014 and noted very mild spondylosis at C5-6 and possible very small disc protrusion on the right side at C6-7. Upon examination, Dr. Ghavam observed that appellant minimized use of his right arm. He reported that he was able to bring it up to 90 degrees of abduction and appellant held it in that position. Strength testing was mainly limited by breakaway weakness. Spurling's test was negative. Dr. Ghavam reported that he would place appellant at medium level of work based on his condition.

In a February 3, 2015 work capacity evaluation form and work restriction note, Dr. Ghavam reported a diagnosis of neck pain. He indicated that appellant was able to work full time with restrictions of no repetitive overhead reaching and no lifting more than 45 to 50 pounds. Dr. Ghavam reported that the restrictions would be in effect from January 20 to July 20, 2015.

On February 4, 2015 OWCP informed the employing establishment in a Form CA-110 that appellant's restrictions were not permanent, so the restrictions could increase or decrease. It advised the employing establishment that the treating physician would decide appellant's restrictions after the temporary restrictions ended on August 1, 2015.

In a March 13, 2015 letter, B.L., the coordinator of the employing establishment's return to work program, asked Dr. Ghavam to define in writing whether his restriction of repetitive

lifting was based on a number of times (*i.e.*, 5, 10, or 15) or based on time (*i.e.*, minutes or hours). On April 10, 2015 the employing establishment received Dr. Ghavam's response. He indicated that appellant should limit reaching overhead (elbow above shoulder level) to no more than 10 to 15 times an hour.

On April 14, 2015 J.W., the supervisor at the Allen Fossil Plant Yard Operations, notified appellant that he could return to temporary light-duty work by performing most or all of the essential job functions as a conveyor car dumper operator. He indicated that the physical requirements for this position would fall within the appellant's medical restrictions as outlined in the February 3, 2015 OWCP work capacity evaluation form, which limited appellant to no repetitive reaching overhead (which meant no lifting above the shoulder level more than 15 times per hour) and no lifting more than 50 pounds. J.W. noted that appellant was transferred to the Allen Fossil Plant from the Colbert Plant effective October 7, 2013. He informed appellant to report to the Colbert Plant on May 4, 2015 to process out and then immediately report to the Allen Fossil Plant to begin his light-duty work as a conveyor car dumper operator. J.W. included a job description which described the duties and responsibilities of the position and essential qualifications for performance of the work.

The physical requirements of the job position involved sitting for four to seven hours, intermittent walking for one to four hours, intermittent lifting and squatting for one hour, intermittent bending for three hours, intermittent climbing and kneeling no more than one hour, intermittent twisting for two hours, and standing for one hour. The lifting requirement was restricted to 20 to 50 pounds. The employing establishment noted that the job description would not violate any assigned constraints from appellant's physician.

In an April 23, 2015 report, Dr. John J. Greco, a Board-certified orthopedic surgeon, indicated that appellant still complained of a combination of neck and shoulder issues. He noted that he did not think appellant's shoulder would be an impediment to what appellant had to do and authorized him to return to full duty with no restrictions. Upon physical examination of appellant's right shoulder, Dr. Greco observed good range of motion with a little bit of pain in the last 15 degrees of external and internal rotation. He explained that he thought appellant had the motion, but needed to work on getting the strengthening back. Dr. Greco diagnosed right shoulder strain and right shoulder pain status post decompression and AC joint resection.

On April 28, 2015 appellant indicated that he was accepting the job offer as a conveyor car dumper operator.

Appellant returned to work on May 4, 2015, but stopped work on May 5, 2015.

Dr. Ghavam continued to treat appellant. In a June 10, 2015 progress note, he indicated that the employing establishment had appellant return to work in Memphis, which was a drive from where he lived. Dr. Ghavam explained that this situation was more onerous for appellant and related that appellant developed elevated blood pressure and headaches, which may also be, in part, related to his neck pain. Upon physical examination, he observed diminished range of motion of the neck and some breakaway weakness of the right deltoid. Dr. Ghavam reported that a June 10, 2015 MRI scan showed a very slight right-sided disc protrusion at C5-6. He

diagnosed neck pain. Dr. Ghavam recommended a computerized tomography myelography, but he would otherwise continue with work as before.

By letter dated June 25, 2015, J.W. informed appellant that he was expected to report to work on Monday, June 29, 2015 at 6:00 a.m. with proper documentation from his primary care physician. He noted that, if appellant did not plan to return to work, he needed to contact the employing establishment.

Dr. James Stanford Faulker, Jr., a Board-certified orthopedic surgeon, began to treat appellant. In a July 2, 2015 report, he related that appellant complained of neck and right arm pain since a May 31, 2013 accident at work. Dr. Faulkner reviewed appellant's history and conducted an examination. He observed decreased sensation in appellant's right hand and weakness in his right biceps and triceps. Dr. Faulkner reported decreased range of motion in appellant's cervical spine secondary to guarding and discomfort. He noted that x-rays revealed foraminal narrowing bilaterally at the C6-7 level. Dr. Faulkner diagnosed cervical arthrosis with foraminal stenosis residual from previous anterior cervical discectomy and fusion C6-7 causing nerve root impingement and possible foraminal narrowing C5-6. He recommended a new MRI scan of appellant's cervical spine.

According to a Form CA-110 dated July 6, 2015, the employing establishment informed OWCP that appellant returned to work on May 4, 2015, but stopped after working for 1½ days due to other issues. Several managers at the employing establishment had tried to contact appellant, but he would not return their calls. The employing establishment related that the attending physician would not certify appellant's absence from work. OWCP advised the employing establishment to keep the job open and available to appellant until OWCP issued an abandonment letter.

In a letter dated July 8, 2015, OWCP advised appellant that the modified position of conveyor car dumper operator was currently available and was found to be suitable within the medical limitations provided by Dr. Ghavam in his February 3, 2015 work capacity evaluation form. It noted that appellant returned to work on May 4, 2015, but stopped on May 5, 2015. OWCP advised him that if he failed establish a recurrence of disability, failed to return to the offered position, and failed to demonstrate that his refusal of suitable work was justified, his compensation would be terminated pursuant to 5 U.S.C. § 8106(c)(2). It provided him 30 days to provide the requested information.

On August 10, 2015 appellant underwent partial hemilaminectomy foraminotomy with facetectomy C6-7 surgery. He notified OWCP on August 24, 2015 of this surgical procedure.

According to a Form CA-110, OWCP notified the employing establishment on August 12, 2015 that appellant had not submitted any information concerning OWCP's 30-day abandonment letter. It confirmed with the employing establishment that the position of conveyor car dumper operator was still available for him.

By letter dated August 12, 2015, OWCP advised appellant that he had not returned to work and had not provided any valid reasons for his refusal to return to the modified position of conveyor car dumper operator. It notified him that the position was still available and allowed

him 15 days to accept the position or compensation would be terminated pursuant to 5 U.S.C. § 8106(c)(2).

On August 26, 2015 OWCP received a progress report from appellant's rehabilitation counselor, which noted that appellant had undergone surgery to his neck on August 10, 2015, which had been paid for through his private insurance.

J.W. notified OWCP in an e-mail dated August 28, 2015 that appellant had not reported to work as of that date. He confirmed that the modified position was still available to appellant.

By letter dated August 31, 2015, B.L. requested that OWCP begin the immediate process of terminating his entitlement to further compensation benefits. He reported that as of August 28, 2015 appellant had not reported to work. B.L. confirmed that the modified position was still open.

In a decision dated September 4, 2015, OWCP terminated appellant's compensation and entitlement to a schedule award effective September 4, 2015 in accordance with 5 U.S.C. § 8106(c)(2) because he abandoned suitable work. It determined that the modified position of conveyor car dumper operator was suitable and within the work restrictions as provided in Dr. Ghavam's February 3, 2015 report, that appellant had not established disability due to his accepted condition, and that reasons proferred for failing to report to the modified position were not justified.

On September 11, 2015 OWCP received appellant's request, through counsel, for a telephone hearing before an OWCP hearing representative. Counsel submitted an examination note dated September 10, 2015 by Dr. Faulkner, who related that that appellant underwent surgery of his cervical spine on August 10, 2015. Dr. Faulkner reported that appellant was unable to do any overhead work and could not lift over 10 pounds for at least five months.

In a letter dated October 19, 2015 to appellant, J.W. noted that the employing establishment had made several attempts to contact him regarding his return to work, but had not received a response. He notified appellant that the employing establishment was discharging him from his modified position as a conveyer car dumper operator effective November 19, 2015 because appellant had abandoned his job. J.W. noted that appellant's last day of work was May 5, 2015.

Effective November 19, 2015 appellant was terminated from employment.

Appellant underwent a functional capacity evaluation on April 15, 2016 by D. Bledsoe, an occupational therapist. He recommended a light-duty physical demand level with upper limits of 15 to 20 pounds to waist, elevated 15 pounds. Mr. Bledsoe released appellant to work with restrictions of occasional lifting from floor to the waist of 15 to 20 pounds, occasional lifting from the waist to overhead of 15 pounds, occasional carrying up to 25 pounds, occasional pushing up to 30 pounds, occasional pulling up to 35 pounds, occasional reaching overhead, frequent reaching low and horizontal, standing with discretionary breaks, occasional walking, occasional stair climbing, sitting with constant discretionary breaks, and occasional crouching and stooping.

On May 17, 2016 the telephone hearing was held. Appellant was represented by counsel. He described his May 31, 2013 employment injury and the medical treatment he had received. Appellant explained that, after a year off work, the employing establishment provided him with a job offer, which he accepted. He related that the job offer was the same as his previous position as a conveyor car dumper operator, but in the Memphis plant instead of the Colbert Steam Plant. Appellant asserted that the work was the same heavy work and was not modified. He claimed that his job duties required him to work beyond Dr. Ghavam's restrictions. Appellant provided a detailed description of his duties, which involved getting in and out of the equipment, climbing up ladders, using shovels weighing 30 to 40 pounds with coal to clean up spillage, and moving dump truck loads weighing 200 pounds. He asserted that he was never informed that if any of the physical duties exceeded his restrictions he could ask for assistance.

Appellant explained that when he reported back to work his neck began to hurt and J.W. noticed that his face was red. He was examined by a nurse at the employing establishment and was informed that his blood pressure was high. Appellant related that J.W. informed him that he could not return to work until his physician cleared him to return to work. He discussed the medical treatment he received from his primary care physician and Dr. Ghavam. Appellant claimed that Dr. Ghavam informed appellant that the employing establishment was pressuring him to send appellant back to work and that he did not have any other choice, even though appellant told him that he was in a lot of pain. He indicated that Dr. Ghavam put him on permanent restrictions similar to his previous restrictions. Appellant explained that he began to see Dr. Faulkner in July 2015 because he continued to experience a lot of problems.

Counsel asserted that this was not a situation where a claimant outright refused a job offer. He pointed out that appellant returned to work, but after working for only one day began to experience high blood pressure. Counsel related that it was the employing establishment who sent appellant home and informed him that he could not return until his physician cleared him medically. He asserted that appellant's medical problems that arose and were discovered and documented following his return to work, were sufficient to justify his inability to work. Counsel also alleged that the modified conveyer car dumper operator position was a temporary job offer, by the employing establishment's own admission. He noted that a temporary job offer may not be used as the basis for a suitable job offer. Counsel requested that OWCP's termination decision be vacated and that appellant's compensation be reinstated.

In a June 17, 2016 letter, B.L. responded to the May 17, 2016 hearing transcript. He denied pressuring Dr. Ghavam to release appellant to return to work. B.L. also asserted that appellant told him directly that Dr. Marrow would not give him a note for his blood pressure issue.

By letter dated June 20, 2016, M.P., an analyst for the employing establishment's workers' compensation administration, clarified that the position of conveyor car dump operator had always been a permanent position. He related that it was appellant's restrictions that were temporary at the time that he returned to work. M.P. pointed out that there was no medical documentation to demonstrate that appellant's elevated blood pressure was causally related to any aspect of appellant's federal employment. He explained that appellant accepted a suitable, permanent job offer and was sent home to deal with a nonwork-related medical issue.

In a June 20, 2016 letter, A.A., the assistant plant manager at the Allen Fossil Plant, explained that the Allen Fossil Plant understood that appellant had temporary restrictions of no repetitive reaching overhead and no lifting more than 50 pounds and was willing to accommodate those temporary restrictions. She pointed out that the restrictions did not become permanent until June 10, 2015 after appellant had stopped working due to a nonwork-related high blood pressure issue. A.A. reiterated that on May 4, 2015 appellant reported to the Allen Fossil Plant and met with the yard supervisor. The next day appellant was taken on a tour of the coal yard and shown the duties he was to perform. A.A. related that appellant complained of not feeling well, so he was advised to see his physician about his blood pressure. She noted that appellant never returned to work at the Allen Fossil Plant and was terminated on November 19, 2015 due to job abandonment.

By decision dated July 29, 2016, an OWCP hearing representative affirmed the September 4, 2015 termination decision. She determined that the evidence demonstrated that the work offered was a permanent position and was within the established medical restrictions from appellant's treating physician. The hearing representative found that OWCP properly terminated appellant's compensation under 5 U.S.C. § 8106(c)(2) because he abandoned suitable work. She noted that appellant's August 10, 2015 surgery had been billed to his private insurer, and that appellant had not established a worsening of his cervical injury.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying termination or modification of an employee's compensation benefits.[3] 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.[4] 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 he was allowed a reasonable period to accept or reject the position or submit evidence to provide reasons why the position is not suitable.[5] 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.[6]

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.[7] Pursuant to section

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

[4] 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

[5] *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).

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

[7] 20 C.F.R. § 10.517(a); *see Ronald M. Jones*, *supra* note 5.

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.[8]

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.[9] 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.[10] OWCP procedures provide that acceptable reasons for refusing an offered position include medical evidence of inability to do the work.[11] In a suitable work determination, it must consider preexisting and subsequently acquired medical conditions in evaluating an employee's work capacity.[12]

ANALYSIS

OWCP accepted that on May 31, 2013 appellant sustained neck sprain, cervical disc displacement without myelopathy, and right shoulder impingement in the performance of duty. Appellant stopped work shortly thereafter on July 1, 2013. On April 14, 2015 the employing establishment offered him a position as a conveyor car dumper operator. On May 4, 2015 appellant returned to work. He stopped work on May 5, 2015. In its September 4, 2015 decision, OWCP terminated appellant's compensation benefits effective September 4, 2015 as he had refused suitable work.

The Board finds that OWCP failed to meet its burden of proof in terminating appellant's compensation benefits. OWCP failed to establish that he was capable of performing the position of a conveyer car dumper operator given all of his preexisting and subsequently acquired medical conditions.

In a February 3, 2015 work capacity evaluation form and work restriction note, Dr. Ghavam authorized appellant to work with restrictions of no repetitive overhead reaching and no lifting more than 45 to 50 pounds. He noted that the restrictions would last from January 20 to July 20, 2015. OWCP advised in a February 4, 2015 letter to the employing establishment that appellant's restrictions were temporary and would be reassessed on August 1, 2015, when the current restrictions expired from Dr. Ghavam. Appellant attempted to return to work on May 4, 2015, but was sent home the next day because his blood pressure was elevated.

[8] *Id.* at § 10.516.

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

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

[11] *Supra* note 5 at Part 2 -- Claims, *Job Offers and Return to Work, Job Offer Refusal*, Chapter 2.814.5a (July 2013).

[12] *See Richard P. Cortes*, 56 ECAB 200 (2004); *see also G.R.*, Docket No. 16-0455 (issued December 13, 2016).

Nevertheless, on July 8, 2015 OWCP issued a notice advising appellant that the modified position of conveyor car dumper operator was within his medical restrictions as provided by Dr. Ghavam on February 3, 2015 and that his wage-loss compensation benefits could be terminated if he refused suitable work. The record thereafter reflects that appellant underwent a partial hemilaminectomy foraminotomy with facetectomy C6-7 on August 10, 2015. On August 24, 2015 OWCP received communication from appellant noting that he had neck surgery performed in Birmingham on August 10, 2015.

OWCP did not attempt to clarify appellant's employment status after August 10, 2015, but rather terminated his wage-loss compensation benefits effective September 4, 2015 for abandoning suitable work. The Board finds OWCP bears the burden of proof to terminate compensation benefits for refusal of suitable work, and OWCP did not meet its burden of proof in this case.

As previously noted, OWCP must consider all of appellant's conditions, preexisting, work related, and subsequently acquired medical conditions in determining whether a position is suitable for appellant. The record does not substantiate that OWCP considered his C6-7 cervical condition, of which it had knowledge, and for which he underwent a surgical procedure on August 10, 2015, before terminating his compensation benefits effective September 4, 2015. The Board also notes that OWCP did not reflect consideration of appellant's hypertension status, for which he was sent home from work on May 5, 2015. Rather the termination decision dated September 4, 2015, as well as OWCP's hearing representative's July 29, 2016 decision, based the finding of refusal of suitable work only on the accepted work-related conditions. In this regard the Board notes that the work restrictions from appellant's treating physicians were provided prior to appellant's attempt to return to work in May 2015 and prior to his surgical procedure in August 2015. Therefore, OWCP has not met its burden of proof in this case.

As a penalty provision, section 8106(c)(2) must be narrowly construed.[13] Based on the evidence of record, the Board finds that OWCP improperly determined that the modified position offered to appellant constituted suitable work within his physical limitations and capabilities. Consequently, OWCP did not meet its burden of proof to justify the termination of his compensation benefits pursuant to section 8106(c)(2).

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation benefits under 5 U.S.C. § 8106(c) for refusing an offer of suitable work.

[13] *Supra* note 4.

ORDER

IT IS HEREBY ORDERED THAT the July 29, 2016 decision of the Office of Workers' Compensation Programs is reversed.

Issued: March 16, 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