United States Department of Labor
Employees' Compensation Appeals Board

K.L., Appellant	)	
and	)	**Docket No. 17-0235**
	)	**Issued: November 1, 2017**
DEPARTMENT OF THE AIR FORCE, FAIRCHILD AIR FORCE BASE, WA, Employer	)	

Appearances:
William H. Brawner, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 10, 2016 appellant, through counsel, filed a timely appeal from a June 22, 2016 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 additional evidence on appeal after OWCP's June 22, 2016 decision was issued. The Board's jurisdiction is limited to review of the evidence that was before OWCP at the time of its final decision. Therefore, the Board lacks jurisdiction to review this additional evidence. 20 C.F.R. § 501.2(c)(1).

ISSUE

The issue is whether OWCP properly terminated appellant's compensation benefits effective June 22, 2016 for refusal of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On April 8, 2008 appellant, then a 33-year-old lead firefighter, filed a traumatic injury claim (Form CA-1) alleging right shoulder and back injury as a result of loading equipment from one truck to another on March 28, 2008. He stopped work on the day.

On April 16, 2008 OWCP accepted appellant's claim for trapezius strain. He received wage-loss compensation and medical benefits on the supplemental rolls as of May 13, 2008. On May 23, 2008 OWCP expanded acceptance of the claim for thoracic back sprain and lumbar back sprain. Appellant received benefits on the periodic rolls as of May 9, 2010. On October 21, 2009 OWCP also accepted T7-8 thoracic disc herniation, right greater than left, with cord compression.

In a medical report dated January 25, 2010, Dr. David Dean, a Board-certified family practitioner, examined appellant and diagnosed intervertebral thoracic disc disorder with myelopathy of the thoracic region, and lumbar disc disorder. In a report dated October 29, 2012, Dr. Mark Didier, a Board-certified family practitioner in the same practice as Dr. Dean, noted that appellant continued to experience daily chronic pain. He diagnosed intervertebral thoracic disc disorder with myelopathy of the thoracic region, lumbar disc disorder, and noted appellant's continuing back pain. Appellant continued to treat with Dr. Dean and Dr. Didier through 2015.

As of September 3, 2014, the employing establishment continued to try to find appellant work within his medical restrictions.

On November 14, 2014 OWCP referred appellant for a second opinion examination with Dr. Aleksandar Curcin, a Board-certified orthopedic surgeon, to determine whether he still suffered residuals from his work-related injury. In a report dated December 19, 2014, Dr. Curcin examined appellant and stated that there were no objective findings supporting that appellant's accepted conditions were still active. He further noted that appellant was able to return to work at his date-of-injury position.

On January 2, 2015 OWCP referred appellant to, Dr. St. Elmo Newton, III, a Board-certified orthopedic surgeon, for an impartial medical evaluation because it determined that a conflict in the medical evidence existed between Dr. Didier and Dr. Curcin as to whether appellant continued to have residuals from his accepted injury.

In a report dated February 24, 2015, Dr. Newton diagnosed thoracolumbar sprain, thoracic disc protrusion at T7, and lumbar disc protrusion at L1. He noted that, while appellant had previously been released to full duty and returned to work, he lasted only an hour and a half before the pain became too great and he had to stop working again. Dr. Newton completed a work capacity evaluation (Form OWCP-5c) dated February 24, 2015, in which he noted permanent work restrictions of no twisting, bending/stooping, squatting, kneeling, climbing, or

operating of a motor vehicle, and limitations of pushing, pulling, and lifting of no more than 10 pounds for 15 minutes per activity. He further noted that the position "must be sedentary," that appellant was unable to perform his usual job, and that appellant was unable to work for eight hours per day with restrictions. However, Dr. Newton also noted that appellant was able to work "0" hours and it was not anticipated that he would be able to work increased hours.

On April 24, 2015 OWCP expanded acceptance of the claim to include lumbar disc protrusion at L1.

In a record of a telephone conversation dated February 22, 2016, an OWCP claims examiner noted that the employing establishment had called to inform OWCP that it had a sedentary position available for eight hours per day with restrictions. The employing establishment sought clarification on appellant's work restrictions, to which OWCP's claims examiner replied that appellant could not work any hours in his regular job, but that if the employing establishment had a modified offer fitting Dr. Newton's restrictions, that it should go ahead and offer the job to appellant and "any issues will be addressed as they come up."

By letter dated February 29, 2016, the employing establishment offered appellant a light-duty position as a facility services assistant. In terms of physical requirements, the job offer stated, "Work is normally sedentary but also includes work on hard surfaces and in work areas requiring standing. Employee will not be required to perform more than two hours a day of pushing, pulling, and lifting at 10 pounds; no squatting, kneeling, climbing, twisting, bending/stooping, or operating a motor vehicle at work; intermittent sitting, walking, and standing as necessary."

By letter dated March 16, 2016, OWCP requested clarification from Dr. Newton on the number of hours appellant was able to work. It noted that Dr. Newton's report included specific limitations and stated that the position must be sedentary. OWCP requested that Dr. Newton express appellant's work restrictions using a whole number of hours if applicable.

On March 24, 2016 an OWCP representative contacted the employing establishment to inform them that they required clarification from Dr. Newton before deeming the job offer suitable.

In a Form OWCP-5c dated April 3, 2016, Dr. Newton noted work restrictions of intermittent sitting, standing, and walking; no twisting, bending/stooping, squatting, kneeling, climbing, or operating a motor vehicle; and limitations of pushing, pulling, and lifting of no more than 10 pounds for 15 minutes per activity. He checked boxes noting that appellant was able to perform sedentary duties only, and wrote at the bottom of the form, "Sedentary job only." Dr. Newton also noted that while appellant was unable to perform his date-of-injury position for eight hours per workday, he could work eight hours per day in a sedentary position.

By letter dated April 8, 2016, OWCP informed appellant that it had found the job offer suitable in accordance with Dr. Newton's medical restrictions, and that it had been advised that appellant had failed to respond to the offered position. It advised appellant that refusal of the offer could result in termination of his entitlement to compensation and schedule award benefits. OWCP informed appellant that he had 30 days to submit additional evidence justifying his

declination of the job offer or to accept the job offer. On June 3, 2016 it noted that appellant had still not accepted the job offer or given reasons for refusal, and afforded him 15 days to take action.

By letter dated June 17, 2016, appellant declined the job offer. He explained that he was refusing the job offer because it was outside of his medical restrictions, based on Dr. Newton's statement that the job had to be sedentary.

By decision dated June 22, 2016, OWCP terminated appellant's compensation for wage-loss compensation and schedule award effective on that date. It found that he had refused an offer of suitable work and that the termination of his benefits was made pursuant to 5 U.S.C. § 8106(c)(2). OWCP stated that it had determined that his reasons for refusing the position were not justified because he had not provided any medical evidence sufficient to change his restrictions from those as provided by Dr. Newton.

LEGAL PRECEDENT

5 U.S.C. § 8106(c) provides in pertinent part, "A partially disabled employee who (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation." It is OWCP's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.[4] To justify such a termination, OWCP must show that the work offered was suitable.[5]

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.[6] 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.[7] OWCP procedures provide that acceptable reasons for refusing an offered position include medical evidence of inability to do the work.[8]

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.[9]

[4] *Henry P. Gilmore*, 46 ECAB 709 (1995).

[5] *John E. Lemker*, 45 ECAB 258 (1993).

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

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

[8] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work, Job Offer Refusal*, Chapter 2.814.5a (July 2013).

[9] *W.D.*, Docket No. 15-1297 (issued August 23, 2016).

ANALYSIS

As noted above, it is OWCP's burden of proof to establish that an offered position is medically suitable.[10]

The Board has reviewed the medical evidence and finds it sufficient to meet OWCP's burden of proof in this case as appellant refused an offer of suitable work that was within his medical restrictions, pursuant to 5 U.S.C. § 8106(c)(2).

OWCP accepted that appellant sustained trapezius strain, thoracic back sprain, lumbar back sprain, T7-8 thoracic disc herniation, and lumbar disc protrusion at L1. It terminated appellant's compensation benefits after he refused to accept the position of facility services assistant.

The Board finds that the offered position of facility services assistant, dated February 29, 2016, is within Dr. Newton's April 3, 2016 work restrictions. Dr. Newton's April 3, 2016 work restrictions indicated that appellant could work only a sedentary position. The physical requirements of a facility services assistant are described, in part, in the job offer as "Work is normally sedentary, but also includes work on hard surfaces and in work areas requiring standing."

The Department of Labor's *Dictionary of Occupational Titles* defines sedentary work as "involving exerting up to 10 pounds of force occasionally (occasionally: activity or condition exists up to 1/3 of the time) and/or a negligible amount of force frequently (frequently: activity or condition exists from 1/3 to 2/3 of the time) to lift, carry, push, pull, or otherwise move objects, including the human body. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met."[11]

Dr. Newton noted on an April 3, 2016 form that appellant could sit, stand and walk intermittently. The description in the job offer met the definition of a sedentary job as defined by the Department of Labor's *Dictionary of Occupational Titles*.

Following its suitability determination of the facility services assistant position, appellant was properly afforded 30 days to either accept the offer of suitable work or provide reasons for rejecting the offered position. In response, he submitted a letter which he argued that the offered position was outside of the medical restrictions provided by Dr. Newton, because it was not a fully sedentary position.

Once OWCP has established 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.[12] The Board has carefully reviewed the

[10] *Supra* note 5.

[11] *Dictionary of Occupational Titles*, Appendix C: *Components of the Definition Trailer*.

[12] *Supra* notes 9-12.

evidence and argument submitted by appellant in support of his refusal of the facility services assistant position and finds it insufficient to justify his refusal of the position. As previously explained, the position of facility services assistant was based upon the restriction provided by Dr. Newton and was a proper sedentary position.

As such, the Board finds that the offered position of facility services assistant was medically suitable as a sedentary position, and OWCP met its burden of proof to terminate compensation benefits for refusal of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

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 compensation benefits effective June 22, 2016 for refusal of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the June 22, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 1, 2017
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board