United States Department of Labor
Employees' Compensation Appeals Board

C.H., Appellant	)	
and	)	**Docket No. 17-0938**
	)	**Issued: November 27, 2017**
U.S. POSTAL SERVICE, POST OFFICE, Employer	)	

Appearances:
Ronald S. Webster, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 16, 2017[2] appellant, through counsel, filed a timely appeal from a September 21, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP).

[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] Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from September 21, 2016, the date of OWCP's last decision, is March 20, 2017. Since using March 27, 2017, the date the appeal was received by the Clerk of the Appellate Boards, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is March 16, 2017, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

Pursuant to the Federal Employees' Compensation Act[3] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether OWCP properly terminated appellant's wage-loss compensation and schedule award benefits, effective January 14, 2015, pursuant to 5 U.S.C. § 8106(c)(2).

On appeal counsel contends that the medical evidence established that appellant was totally disabled due to narcotic analgesics and anti-spasmodics which caused enough sedation that she is incapable of gainful employment.

FACTUAL HISTORY

On June 24, 2012 appellant, then a 50-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that she sustained a low back injury when lifting tubs of mail to the shelf in the performance of duty. She stopped work on that date.

Appellant's attending physician, Dr. Geoffrey Stewart, a Board-certified orthopedic surgeon, examined appellant on July 19, 2012 and noted her history of a prior back fusion for scoliosis. He reported that appellant was bent over lifting a mail tub which was heavier than it appeared and experienced immediate onset of severe low back pain with a pop in her back. Dr. Stewart reviewed x-rays and found that appellant had a fracture through the distal portion of her internal fixation device with severe back pain and fusion mass disruption. He attributed this fracture to appellant's work-related injury. Dr. Stewart recommended a revision lumbosacral interbody fusion.

On August 13, 2012 OWCP accepted appellant's claim for lumbar sprain. In a letter dated August 29, 2012, it placed her on the periodic rolls, effective August 25, 2012.

On August 30, 2012 Dr. Stewart provided further history of appellant's back condition noting that on January 15, 2008 he performed a surgical decompression and curve correction with instrumented arthrodesis T5-S1. Appellant returned to work and on August 19, 2010 reported symptoms following work at the employing establishment. Dr. Stewart found a hardware failure at L4-5 with broken rods and performed a revision of segmental instrumentation and fusion from L3 through S1 on September 8, 2010. He noted that on June 24, 2012 appellant lifted a tub of mail at work and immediately experienced back pain. Appellant's x-rays demonstrated a fracture through the distal portion of her right rod with recurrent deformity of the spine drifting to the left and disruption of her fusion mass. Dr. Stewart found appellant totally disabled, attributed appellant's current condition to her employment injury of June 24, 2012, and recommended further back surgery.

On January 10, 2013 OWCP expanded appellant's claim to include lumbosacral radiculitis. It approved her request for spine surgery on January 30, 2013. On February 4, 2013 Dr. Stewart performed surgical removal of spinal instrumentation from L3 through S1,

[3] 5 U.S.C. § 8101 *et seq.*

reinsertion of the spinal fixation device, exploration of the spinal fusion L3 through S1, revision bilateral hemilaminectomy at L3, and bone grafting for fusion.

On April 3 and August 27, 2013 Dr. Stewart completed work capacity evaluations (Form OWCP-5c) and provided work restrictions indicating that appellant could not work. He indicated that she could sit, walk, and stand for less than one hour each day and provided a 10-pound restriction on pushing, pulling, and lifting. Dr. Stewart also indicated that appellant could not reach, reach above the shoulder, twist, bend, stoop, or operate a motor vehicle. He restricted her squatting, kneeling, and climbing.

In a letter dated December 3, 2013, OWCP referred appellant for a second opinion evaluation with Dr. Jonathan Black, a Board-certified orthopedic surgeon, to determine whether appellant was capable of performing her date-of-injury position. Dr. Black completed a report on January 7, 2014 and described appellant's history of injury and spine surgeries. He found tenderness to palpation along the spine, decreased range of motion in the lumbar spine, normal motor strength in the lower extremities, and intact sensation. Dr. Black opined that appellant was at profound risk for further hardware failure as she smoked two packs of cigarettes a day. He determined that appellant's work-related injury did not cause the pseudoarthrosis, but instead aggravated a preexisting pseudoarthrosis. Dr. Black noted that appellant had subjective complaints of pain in line with her clinical findings and noted that she had an expected amount of ongoing discomfort. He completed a work capacity evaluation (Form OWCP-5c) on January 9, 2019 and found that appellant could not return to her date-of-injury position. Dr. Black indicated that appellant could work eight hours a day and provided a lifting restriction of 10 pounds for three hours a day.

On January 16, 2014 Dr. Stewart opined that appellant was totally disabled due to ongoing back pain with bilateral dysesthesias.

OWCP found a conflict of medical opinion between Dr. Stewart and Dr. Black regarding appellant's capacity to work. On April 15, 2014 it referred appellant for an impartial medical examination with Dr. Diana Carr, a Board-certified orthopedic surgeon, to resolve this conflict.

In a note dated April 24, 2014, Dr. Stewart found that appellant's x-rays demonstrated a fracture of the left rod, but that her alignment was unchanged and well maintained. He opined that appellant was totally disabled.

Dr. Carr completed a report on May 7, 2014 and reviewed the statement of accepted facts (SOAF) and medical records. She found that appellant had no tenderness over the scar or paravertebral muscles with no evidence of spasm. Dr. Carr found that appellant's motor and sensory examinations were normal. She noted that appellant had developed chronic pain syndrome and suggested that appellant's difficulty walking might be due to spinal claudication secondary to scarring or narrowing after multiple attempts at back fusion. Dr. Carr opined that appellant should not have a job requiring repetitive bending or twisting and should perform sedentary work with variable positioning either sitting or standing. She completed a work capacity evaluation (Form OWCP-5c) on May 12, 2014 and found that appellant could not perform her date-of-injury position. Dr. Carr found that appellant could work eight hours a day with restrictions on sitting, walking, and standing for a total of eight hours with varying

positions. She opined that appellant could not twist and could bend or stoop only rarely. Dr. Carr restricted appellant's squatting and kneeling to one to two hours a day with no weight. She also indicated that appellant should not push, pull, or lift over 10 pounds and that she could lift for only four hours a day.

OWCP referred appellant for vocational rehabilitation services on August 28, 2014. Appellant informed the vocational rehabilitation counselor that she was approved for disability retirement by the Office of Personnel Management (OPM).

Appellant had additional x-rays on September 2, 2014 due to increased back pain. These studies revealed that appellant's left spinal rod was broken in two places.

On September 24, 2014 the employing establishment offered appellant a modified position as a mail processing clerk. The duties of the position were standing, sitting, and walking for a total of eight hours in the various positions, no twisting or bending, pushing or pulling up to 10 pounds for eight hours a day, lifting up to 10 pounds for four hours, and squatting or kneeling for one to two hours a day.

Appellant contacted her vocational rehabilitation counselor on October 16, 2014 and indicated that she did not intend to return to work and was taking her OPM disability retirement.

In a letter dated November 12, 2014, OWCP informed appellant that the September 24, 2014 offered position of modified mail processing clerk constituted suitable work based on Dr. Carr's restrictions. It determined that Dr. Carr's report was entitled to special weight as it was based on an accurate history of injury and was well reasoned. OWCP informed appellant that the position was still available and afforded her 30 days to accept the position or offer her reasons for refusal. It instructed appellant of the penalty provisions of 5 U.S.C. § 8106(c) and noted that retirement was not a valid reason for refusing an offer of suitable employment.

On November 19, 2014 appellant elected Federal Employees' Retirement System (FERS) benefits rather than FECA benefits. She submitted a note dated January 22, 2015 from Dr. Stewart, who opined that she was totally disabled.

In a November 20, 2014 letter, counsel noted that Dr. Stewart indicated that appellant was totally disabled and that appellant had elected OPM benefits. On October 23, 2014 Dr. Stewart opined that appellant was totally disabled. He diagnosed chronic ongoing back pain with lower extremity dysesthesia, multiple spine surgeries, and hardware failure to a broken left rod. Dr. Stewart listed appellant's medications as Ibuprofen, Soma for spasms, Dendracin lotion, Norco, and Lyrica. On December 10, 2014 counsel noted that the employing establishment separated appellant from service on September 13, 2014 and that appellant had filed for OPM benefits. He requested clarification.

OWCP, by letter dated December 17, 2014, noted that appellant had refused to accept the offered position. It again informed her that retirement was not a valid reason for refusing an offer of suitable employment. OWCP instructed appellant that she was expected to accept the offered position and return to work if medically capable. It noted that the offered position was still available and afforded her a period of an additional 15 days to accept and report to the position. OWCP asserted that if appellant did not accept and report to the position during the

allotted period, her entitlement to wage-loss compensation and schedule award benefits would be terminated. Appellant neither accepted the offered position, nor reported for duty within the time allotted.

By decision dated January 14, 2015, OWCP terminated appellant's entitlement to wage-loss compensation and schedule award benefits, effective January 14, 2015, as she refused an offer of suitable work in accordance with 5 U.S.C. § 8106(c)(2). It noted that the offered position was within appellant's established work restrictions as determined by Dr. Carr, the impartial medical examiner.

Appellant timely requested a review of the written record from OWCP's Branch of Hearings and Review. In a July 14, 2015 decision, an OWCP hearing representative affirmed the January 14, 2015 termination decision. She found that OWCP properly determined that the offered position was suitable based on Dr. Carr's work restrictions. The hearing representative found that Dr. Stewart's reports did not overcome the special weight accorded Dr. Carr as the impartial medical specialist and were not rationalized. She noted that the fact that appellant was already retired was not a sufficient reason to refuse suitable work.

On July 23, 2015 Dr. Stewart noted that there were no changes in appellant's symptoms and that his medications provided adequate relief of pain without side effects. He continued to prescribe Ibuprofen, Soma, Norco, and Lyrica. In a note dated January 21, 2016, Dr. Stewart reduced appellant's medications to Soma and Dendracin lotion. On April 21, 2016 Dr. Stewart again included Ibuprofen and Norco within appellant's prescriptions.

Counsel requested reconsideration on July 12, 2016. He submitted additional medical evidence and contended that Dr. Stewart established that appellant was totally disabled. In a note dated July 12, 2016, Dr. Stewart described appellant's history of injury and found, "Since the time of her injury [June 24, 2012] and revision surgery she has required narcotic analgesics, anti-inflammatories, and antispasmodics on a regular basis. It is my opinion that she is permanently and totally disabled by her condition…. Additionally it is my opinion that she required narcotic analgesics and antispasmodics on an ongoing around-the-clock basis to control her symptoms and that her use of these controlled substances causes enough sedation that she is incapable of gainful employment on that basis."

By decision dated September 21, 2016, OWCP denied modification of the July 14, 2015 decision. It found that the medical evidence of record did not contain sufficient reasoning to establish that appellant was totally disabled due to required controlled substances.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[4] After it has determined that an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or

[4] *Mohamed Yunis*, 42 ECAB 325, 334 (1991); *G.R.*, Docket No. 16-0455 (issued December 13, 2016).

that it is no longer related to the employment.[5] 5 U.S.C. § 8106(c)(2) 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.[6] To justify such a termination, OWCP must show that the work offered was suitable[7] and must inform appellant of the consequences of refusal to accept such employment.[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]

To justify termination, OWCP must show that the work offered was suitable and that appellant was informed of the consequences of her refusal to accept such employment.[10] According to OWCP's procedure, a job offer must be in writing and contain a description of the duties to be performed and the specific physical requirements of the position. 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.[11] 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.[12]

After termination or modification of benefits clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant.[13]

When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of FECA which provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination and resolve the conflict of medical evidence.[14] This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and

[5] *Id.*

[6] *Henry P. Gilmore*, 46 ECAB 709 (1995); *D.S.*, Docket No. 16-1593 (issued December 21, 2016).

[7] *John E. Lemker*, 45 ECAB 258 (1993); *D.S., id.*

[8] *G.R., supra* note 4.

[9] *Joan F. Burke*, 54 ECAB 406 (2003); *G.R., supra* note 4.

[10] *T.S.*, 59 ECAB 490 (2008); *Ronald M. Jones*, 52 ECAB 190 (2000).

[11] *Catherine G. Hammond*, 41 ECAB 375, 385 (1990); 20 C.F.R. § 10.517(a).

[12] 20 C.F.R. § 10.516.

[13] *K.J.*, Docket No. 16-0846 (issued August 18, 2016); *Talmadge Miller* 47 ECAB 673, 679 (1996); *see also George Servetas*, 43 ECAB 424 (1992).

[14] 5 U.S.C. §§ 8101-8193, 8123; *B.C.*, 58 ECAB 111 (2006); *M.S.*, 58 ECAB 328 (2007).

who has no prior connection with the case.[15] In situations where there are opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[16]

ANALYSIS

The Board finds that OWCP properly terminated appellant's wage-loss compensation and schedule award benefits, effective January 14, 2015, pursuant to 5 U.S.C. § 8106(c).

OWCP accepted appellant's claim for lumbar sprain, lumbosacral radiculitis, and authorized spine surgery including surgical removal of spinal instrumentation L3-S1, reinsertion of the spinal fixation device, exploration of spinal fusion L3 through S1, revision bilateral hemilaminectomy at, L3, and bone grafting for fusion. Dr. Stewart continued to support that appellant was totally disabled for work following the February 4, 2013 surgery.

OWCP referred appellant for a second opinion evaluation with Dr. Black, who reported on January 9, 2019 that appellant could work eight hours a day and provided a lifting restriction of 10 pounds for three hours a day. Due to the disagreement between Drs. Stewart and Black regarding appellant's disability from work and work restrictions, the Board finds that OWCP properly determined that there was a conflict of medical evidence requiring referral to an impartial medical examiner. OWCP referred appellant to Dr. Carr to resolve this conflict. In her May 7, 2014 report, Dr. Carr reviewed the SOAF, reviewed the medical record, and examined appellant. She found that appellant could perform light-duty work and provided work restrictions.

Dr. Carr found that appellant could work eight hours a day with restrictions on sitting, walking, and standing for a total of eight hours with varying positions. She opined that appellant could not twist and could bend or stoop only rarely. Dr. Carr restricted appellant's squatting and kneeling to one to two hours a day with no weight. She also indicated that appellant should not push, pull, or lift over 10 pounds and that she could lift for only four hours a day. On September 24, 2014 the employing establishment offered appellant a modified position as a mail processing clerk. The physical duties of the position comported with the work restrictions established by Dr. Carr. The Board finds that Dr. Carr's report was sufficiently detailed and well reasoned to resolve the conflict of medical opinion evidence and establish appellant's work restrictions. Dr. Carr's report is entitled to the special weight accorded to an impartial medical examiner.[17] The weight of the medical evidence establishes that appellant was no longer totally disabled from work and had the physical capacity to perform the duties listed in the September 24, 2014 job offer. Thus, OWCP properly relied on Dr. Carr's opinion in finding the mail processing clerk position suitable.

[15] *R.C.*, 58 ECAB 238 (2006).

[16] *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

[17] *R.C.*, Docket No. 15-1889 (issued July 11, 2016).

In accordance with the procedural requirements under 5 U.S.C. § 8106(c), 20 C.F.R. § 10.516, and Board precedent,[18] OWCP advised appellant on November 12, 2014 that it found the job offer of modified mail processing clerk to be suitable and gave her an opportunity to provide reasons for refusing the position within 30 days. It advised her in a December 17, 2014 letter that her reason for refusing based on OPM's acceptance of her claim for disability retirement was insufficient[19] and that she had 15 additional days to accept the offered position. The Board finds that OWCP followed the established procedures prior to the termination of compensation pursuant to section 8106(c)(2).

The Board finds that the position was medically and vocationally suitable and OWCP complied with the procedural requirements of section 8106(c)(2). OWCP, therefore, met its burden of proof to terminate appellant's compensation benefits based on her refusal to accept suitable work.

The Board has explained that, if a claimant requests reconsideration of a suitable work termination, the issue remains whether appellant has established that she was unable to perform the duties of the offered position, as of the date of the termination.[20]

Appellant requested reconsideration and submitted a note from Dr. Stewart dated July 12, 2016 in which he found that since June 24, 2012 appellant has had required narcotic analgesics, anti-inflammatories, and antispasmodics on a regular basis and that her use of these controlled substances caused enough sedation that she is incapable of gainful employment on that basis. A medical report is of limited probative value on a given medical question if it is unsupported by medical rationale.[21] Dr. Stewart did not provide any medical reasoning supporting his opinion that appellant was disabled due to her use of Ibuprofen, Lyrica, Soma, or Norco. He did not specify which of appellant's prescribed medications caused drowsiness and did not explain why appellant could not perform the offered position due to these medications. Furthermore, as Dr. Stewart was on one side of the conflict that Dr. Carr resolved, the additional reports from Dr. Stewart, which lack probative value as previously noted, are insufficient to overcome the special weight accorded Dr. Carr's report as the impartial medical specialist or to create a new conflict with it.[22]

Accordingly, the Board finds the evidence submitted insufficient evidence to establish that appellant's refusal to accept the suitable job offer was justified. It is appellant's burden of proof and she has not met her burden in this case.

[18] *See supra* note 10.

[19] The Board had long held that electing to retire is not a justifiable reason to refuse an offer of suitable work. *Robert P. Mitchell*, 52 ECAB 116 (2000); *R.C., supra* note 17. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(c) (June 2013).

[20] *K.J., supra* note 13; *J.J.*, Docket No. 14-0952 (issued September 2, 2014).

[21] *T.F.*, 58 ECAB 128 (2006).

[22] *R.R.*, Docket No.16-0595 (issued August 5, 2016); *R.C., supra* note 17; *Dorothy Sidwell*, 41 ECAB 857, 874 (1990).

CONCLUSION

The Board finds that OWCP properly terminated appellant's entitlement to wage-loss compensation and schedule award benefits, effective January 14, 2015, pursuant to 5 U.S.C. § 8106(c)(2), and that appellant has not established that her refusal of the offered position was justified.

ORDER

IT IS HEREBY ORDERED THAT the September 21, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 27, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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