United States Department of Labor
Employees' Compensation Appeals Board

L.D., Appellant	)	
and	)	**Docket No. 16-1169**
	)	**Issued: September 20, 2017**
U.S. POSTAL SERVICE, POST OFFICE, Fort Worth, TX, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On May 16, 2016 appellant filed a timely appeal from a March 17, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP).[1] 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] Appellant timely requested oral argument pursuant to 20 C.F.R. § 501.5(b). By order dated November 4, 2016, the Board exercised its discretion and denied the request as appellant's arguments on appeal could be adequately addressed in a decision based on a review of the case on the record. *Order Denying Request for Oral Argument*, Docket No. 16-1169 (issued November 4, 2016).

[2] 5 U.S.C. § 8101 *et seq.*

[3] The Board notes that appellant submitted additional evidence to OWCP after the March 17, 2016 decision was issued. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, the Board lacks jurisdiction to review this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

ISSUE

The issue is whether OWCP properly terminated appellant's compensation benefits under 5 U.S.C. § 8106(c) for refusal of suitable work.

FACTUAL HISTORY

On June 7, 2011 appellant, then a 54-year-old sales, services/distribution associate, filed a notice of occupational disease (Form CA-2) alleging that she developed a right knee condition on or about March 7, 2011 due to a lot of standing and walking in the performance of duty. On November 22, 2011 OWCP accepted the claim for right knee lateral meniscus tear and right medial meniscus derangement (unspecified). Subsequently it authorized May 1 and December 21, 2012 right knee surgeries. The latter surgery involved a right total knee arthroplasty.

OWCP placed appellant on the periodic compensation rolls and paid her wage-loss compensation for temporary total disability through May 24, 2013. Appellant retired effective January 31, 2013, and her election to voluntarily retire included separation incentive pay. OWCP terminated her wage-loss compensation to avoid payment of a prohibited dual benefit.

OWCP referred appellant to Dr. James E. Butler, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the nature and extent of her employment-related conditions and to determine her work capacity. In his June 11, 2013 report, Dr. Butler found that appellant was not capable of returning to her regular job but released her to modified work with the following restrictions: no more than two hours of walking and standing, no bending or stooping, no more than four hours of operating motor vehicles, pushing, pulling, and lifting no more than 10 pounds for two hours per day, and no squatting, kneeling, or climbing.

In an August 16, 2013 report, Dr. Louise Lamarre, a Board-certified family practitioner, opined that appellant was capable of returning to light-duty work with the following restrictions: no more than two hours of walking and standing, no bending or stooping, no more than four hours of operating motor vehicles, pushing, pulling, and lifting no more than 10 pounds for two hours per day, and no squatting, kneeling, or climbing. On August 21, 2013 she asserted that appellant continued to show decreased range of motion and weakness in the right knee. However, Dr. Lamarre was still improving as anticipated.

On August 27, 2013 the employing establishment offered appellant a modified limited-duty position as a sales, services/distribution associate. The daily physical requirements of the job were fine manipulation, simple grasping, and sitting up to eight hours per day, standing and walking intermittently up to two hours per day, lifting, pushing, and pulling up to 10 pounds for two hours intermittently per day; and no squatting, kneeling, climbing, bending, or stooping. The position would involve window sales, dispatch, and mark-up.

On August 29, 2013 appellant refused the job offer noting that she had "retired."

In a September 20, 2013 letter, OWCP notified appellant that the modified position was suitable, and gave appellant 30 days to accept the position or provide a written explanation for

her refusal. It noted that, even though she was retired, that was not a valid reason for refusing a suitable offer of employment and she was expected to accept the offered position and return to work if medically capable.

Subsequently, appellant submitted physical therapy reports dated August 19, 2013 and a September 12, 2013 report from Dr. Lamarre who asserted that appellant was retired and had been referred for more physical therapy.

In a September 26, 2013 letter, OWCP notified appellant for a second time that the modified position was suitable, and gave her 30 days to accept the position or provide a written explanation for her refusal. It reiterated that, even if she was retired, that was not a valid reason for refusing a suitable offer of employment and she was expected to accept the offered position and return to work if medically capable.

On September 30, 2013 appellant elected to receive federal retirement benefits in lieu of FECA benefits.

On October 11, 2013 appellant filed a claim for a schedule award (Form CA-7). She submitted a September 13, 2013 permanent impairment rating from Dr. Lamarre who found 37 percent permanent impairment of the right lower extremity based on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (2009). She rated appellant based on a diagnosis of total knee replacement. On October 23, 2013 an OWCP medical adviser found that Dr. Lamarre had used an incorrect method of calculation and concluded that appellant had 31 percent permanent impairment of the right lower extremity.

In an October 29, 2013 letter, OWCP afforded appellant an additional 15 days to accept the modified position.

By decision dated November 13, 2013, OWCP granted appellant a schedule award for 31 percent permanent impairment of the right leg. It found that the date of maximum medical improvement was noted as September 13, 2013, however, due to an overlapping compensation period, the schedule award start date was changed to September 30, 2013, the day she elected retirement over FECA benefits. OWCP indicated that appellant's schedule award had been terminated due to refusal of an offer of suitable work and the final schedule award payment was $2,735.33 for the period October 20 to November 13, 2013.

By decision dated November 22, 2013, OWCP terminated appellant's entitlement to wage-loss compensation and schedule award benefits effective November 22, 2013 because she refused suitable work. It found that the job offer was suitable based on her restrictions as provided by Dr. Lamarre on August 16, 2013. OWCP stated that, even if appellant was retired, this was not a valid reason for refusing a suitable offer of employment.[4]

[4] OWCP subsequently paid appellant $984.72 for her entitlement to schedule award benefits for the period November 14 to 22, 2013.

On November 26, 2013 appellant requested reconsideration of the November 22, 2013 decision. She also submitted a November 27, 2013 narrative statement reiterating the factual history of her claim.

By decision dated March 3, 2014, OWCP denied modification of its November 22, 2013 decision.

On April 8, 2014 appellant again requested reconsideration and argued that OWCP had misinterpreted her retirement. She indicated that she did not medically retire and, therefore, she would not accept a job offer after her voluntary retirement.

By decision dated November 18, 2014, OWCP denied modification of its prior decision.

On December 3, 2014 appellant again requested reconsideration and submitted a November 21, 2014 report from Dr. Lamarre who reiterated her opinion that appellant had reached maximum medical improvement as of September 13, 2013 and had 37 percent permanent impairment rating of the right lower extremity. Dr. Lamarre asserted that appellant had qualified for and chosen regular retirement in January 2013.

By decision dated April 8, 2015, OWCP denied modification of its prior decision.

On October 19, 2015 appellant again requested reconsideration and inquired as to whether or not she would be able to obtain another modified job offer.

By decision dated March 17, 2016, OWCP denied modification of its prior decision. It noted that the possibility of obtaining another job offer of modified assignment was an issue appellant would have to address with the employing establishment.

LEGAL PRECEDENT

Once OWCP accepts a claim it has the burden of proof to justify termination or modification of compensation benefits.[5] This includes cases where OWCP terminates compensation under 5 U.S.C. § 8106(c) for refusal of suitable work.[6] Section 8106(c) is a penalty provision and shall be narrowly construed.[7]

A partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for him is not entitled to compensation.[8] It is the employee's burden to show that this refusal or failure to work was reasonable or justified.[9] Whether an

[5] *James B. Christenson*, 47 ECAB 775, 778 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

[6] *Y.A.*, 59 ECAB 701, 706 (2008); *Henry W. Sheperd III*, 48 ECAB 382, 384 (1997); *Shirley B. Livingston*, 42 ECAB 855, 860 (1991).

[7] *Stephen A. Pasquale*, 57 ECAB 396, 402 (2006).

[8] 5 U.S.C. § 8106(c)(2); 20 C.F.R. § 10.517.

[9] 20 C.F.R. § 10.517.

employee has the ability to perform an offered position is primarily a medical question that must be resolved by the medical evidence.[10] In evaluating the suitability of a particular position, OWCP must consider the employment-related condition(s), as well as preexisting and subsequently acquired medical conditions.[11] If medical reports in file document a condition which has arisen since the compensable injury, and this condition disables the claimant from the offered job, the job will be considered unsuitable even if the subsequently acquired condition is not work related.[12]

When OWCP considers a job to be suitable, it shall advise the employee of its finding and afford him 30 days to either accept the job or present any reasons to counter OWCP's finding of suitability.[13] If the employee presents such reasons and OWCP determines that the reasons are unacceptable, it will notify the employee of that determination and further inform the employee that he has 15 days within which to accept the offered work without penalty.[14] After providing the 30-day and 15-day notices, OWCP will terminate the employee's entitlement to further wage-loss compensation and schedule award benefits.[15] However, the employee remains entitled to medical benefits.[16]

ANALYSIS

OWCP accepted appellant's claim for right knee lateral meniscus tear, right medial meniscus derangement (unspecified), chondromalacia patella, and right localized osteoarthritis. Additionally, it authorized two right knee surgical procedures, including a December 21, 2012 total knee arthroplasty. Appellant received wage-loss compensation for temporary total disability, and had been on the periodic compensation rolls. Effective January 31, 2013, she voluntarily retired from federal service. Appellant subsequently elected to receive federal retirement benefits in lieu of FECA benefits.

OWCP referred appellant to Dr. Butler for a second opinion evaluation and in his June 11, 2013 report he found that appellant was capable of modified work with the following restrictions: no more than two hours of walking and standing, no bending or stooping, no more than four hours of operating motor vehicles, pushing, pulling, and lifting no more than 10 pounds for two hours per day, and no squatting, kneeling, or climbing. In an August 16, 2013 report, appellant's treating physician, Dr. Lamarre concurred with Dr. Butler's restrictions. On

[10] *Gayle Harris*, 52 ECAB 319, 321 (2001).

[11] *Id.*; *Martha A. McConnell*, 50 ECAB 129, 132 (1998).

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.4c(7) (June 2013).

[13] 20 C.F.R. § 10.516.

[14] *Id.* The 15-day notification need not explain why OWCP found the employee's reasons for refusal unacceptable. *Id.*

[15] 20 C.F.R. § 10.517(b).

[16] *Id.*

August 27, 2013 the employing establishment offered appellant a modified position within these restrictions.

The Board finds that there is no medical evidence of record showing that the offered position exceeded appellant's then-current medical restrictions. On August 29, 2013 appellant refused the modified assignment noting that she had "retired" effective January 31, 2013. Retirement, however, is not considered an acceptable reason for refusing an offer of suitable work.[17]

The Board further finds that appellant received proper notice prior to termination of her compensation. Appellant was given 30 days to provide reasons for refusal of the position and was given an additional 15 days to accept the position after that. Accordingly, the Board finds that OWCP complied with its procedural requirements in that it advised appellant that the position was suitable, provided her with on opportunity to accept the position or provide reasons for refusing the job offer, and gave her notice of the penalty provisions of section 8106(c).[18]

After OWCP established that the offered work was suitable, the burden shifted to appellant to show that her refusal of suitable work was reasonable or justified.[19] In an August 21, 2013 report, Dr. Lamarre asserted that appellant continued to show decreased range of motion and weakness in the right knee. On November 21, 2014 she reiterated her impairment rating and asserted that appellant had qualified for and chosen regular retirement in January 2013. The Board finds that Dr. Lamarre's reports are insufficient to establish that the offered position was unsuitable because she did not address why appellant could not perform the duties of the modified position.

Accordingly, after reviewing the evidence of record, the Board finds that the offered modified position was medically and vocationally suitable and OWCP complied with the procedural requirements of section 8106(c) of FECA. OWCP properly terminated appellant's monetary compensation due to her refusal of suitable work and that she did not, thereafter, establish that her refusal of suitable work was justified.

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 under 5 U.S.C. § 8106(c) for refusal of suitable work.

[17] *See Robert P. Mitchell*, 52 ECAB 116 (2000); *supra* note 12 at Chapter 2.814.5c(4).

[18] *See J.J.*, Docket No. 14-951 (issued September 2, 2014).

[19] *See C.E.*, Docket No. 09-725 (issued November 5, 2009).

ORDER

IT IS HEREBY ORDERED THAT the March 17, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 20, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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