United States Department of Labor
Employees' Compensation Appeals Board

D.C., Appellant	)	
and	)	**Docket No. 17-0582**
	)	**Issued: September 6, 2017**
U.S. POSTAL SERVICE, MID-HUDSON PROCESSING & DISTRIBUTION CENTER, Newburgh, NY, Employer	)	

Appearances:
Stephen Larkin, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 21, 2017 appellant, through counsel, filed a timely appeal from an October 25, 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 to consider 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 properly terminated appellant's wage-loss compensation effective November 30, 2015 for refusal of suitable work under 5 U.S.C. § 8106(c)(2).

On appeal appellant's representative contends that the evidence of record establishes that the offered position was unsuitable.

FACTUAL HISTORY

On August 19, 2013 appellant, then a 51-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging a worsening of her lumbar condition due to moving heavy machinery, heavy lifting, and daily twisting and pushing. Her duty station was listed on the claim form as a post office facility in Newburgh, NY. Appellant's home address was in Cragsmoor, NY. She stopped work on August 26, 2013 and has not returned.

OWCP accepted appellant's claim for lumbar intervertebral disc displacement without myelopathy/aggravation of L5-S1 herniated disc. By letter dated January 2, 2014, it placed appellant on the periodic rolls for temporary total disability with her first regular payment covering the period December 15, 2013 to January 11, 2014.

In a January 9, 2014 duty status form (Form CA-17), Dr. G. Giudici, a treating physician Board-certified in internal medicine and psychiatry, checked a box marked "no" to the question of whether appellant was advised that she could resume work. He noted that appellant was prohibited from driving due to her pain medication.

On January 13, 2014 OWCP received an August 2, 2013 notification from the employing establishment which was sent to appellant regarding an involuntary reassignment to the Albany Processing and Distribution Center as a mail handler for a 120-day detail. The notification did not indicate the effective dates of this reassignment.

In multiple CA-17 forms covering the period February 3 to July 20, 2015, Dr. Giudici reiterated appellant's work restrictions and prohibition on driving.

In reports dated March 20, April 23, and May 22, 2014, Dr. Giudici reviewed appellant's medical history, objective tests, and treatment and performed a physical and mental examination. He diagnosed major depression, adjustment disorder, lumbosacral disease with left-sided L4-5 and L4-5 herniated discs, L3-4 grade 1 retrolisthesis, L4-5 anterolisthesis, and right knee chondromalacia.

Dr. Giudici submitted multiple work capacity evaluation forms (Form OWCP-5c) and attending physician's reports (Form CA-20) diagnosing lumbar herniated discs and left L4 radiculopathy. He indicated that appellant had been disabled from work since August 26, 2013, that her prognosis was guarded, and she required further treatment. In support of this conclusion, Dr. Giudici noted that appellant was prohibited from driving due to her pain medication and body collapse caused by motor weakness and left L4 nerve root weakness.

On August 4, 2015 OWCP referred appellant for a second opinion evaluation with Dr. Marie Czaplieki-Margiotti, a Board-certified orthopedic surgeon, for an evaluation of appellant's disability status.

In an August 6, 2015 investigative memorandum addendum, the employing establishment Office of Inspector General (OIG) summarized its findings from a prior December 8, 2014 report and provided surveillance video obtained from December 8, 2014 to August 5, 2015. It attached a July 20, 2015 video surveillance of appellant for review.

In a letter dated August 6, 2015, OWCP informed appellant that a report and surveillance video from the employing establishment's OIG had been provided to Dr. Czaplieki-Margiotti.

In an August 26, 2015 report, Dr. Czaplieki-Margiotti detailed appellant's medical and factual history and reported the findings of the physical examination conducted that day.[3] She noted that appellant had good shoulder range of motion, some achiness in the trapezium and neck, limited neck range of motion, no motor deficits, negative wrist and elbow Tinel's signs, and negative straight leg testing. Dr. Czaplieki-Margiotti reported that she was unable to determine any real motor deficits due to appellant's failure to provide adequate effort. She found no objective findings supporting that the L4-5 lumbar herniated disc was present and that most of appellant's symptoms were subjective. Dr. Czaplieki-Margiotti also opined that the accepted employment-related aggravation was not permanent. She noted that appellant's 2013 magnetic resonance imaging (MRI) scan showed improvement over prior scans. Dr. Czaplieki-Margiotti opined that appellant's medical findings showed no residuals or disability due to the accepted employment condition and that her complaints were present prior to the 2013 episode. Given the surveillance material, it appeared that appellant's objective findings were questionable in view of her movements on the surveillance video taken the prior month.[4] Dr. Czaplieki-Margiotti found that appellant might be partially disabled due to some lumbar findings, but that she was capable of performing light-duty employment. She opined that she did not believe appellant would ever reach full recovery, but that appellant's current condition was more related to the aging process than any specific injury.

In the attached OWCP-5c form, Dr. Czaplieki-Margiotti diagnosed degenerative disc disease and provided permanent restrictions which included a 15-minute break every two hours. She noted the strength level was sedentary and physical restrictions included up to five hours of standing; up to two hours of reaching, twisting, and bending/stooping; no climbing; up to two hours of lifting 20 pounds; and up to four hours of pushing or pulling up to 20 pounds.

[3] Subsequent to OWCP's referral to Dr. Czaplieki-Margiotti, the physician noted that she had been provided a copy of the August 6, 2015 OIG investigative memorandum addendum and accompanying surveillance video.

[4] In her review of the surveillance materials, Dr. Czaplieki-Margiotti noted that there were multiple pictures and three video clips of appellant. One clip showed her entering a place called West Gate Pavilion and carrying her cane and a heavy pocketbook. Appellant was observed coming out twice to smoke and was seen walking briskly. Dr. Czaplieki-Margiotti reported that she did not believe she saw appellant using her cane. The second clip showed appellant coming out of a building to smoke and using her cane infrequently and possibly having a limp. Lastly, appellant was observed picking up her cigarette lighter after dropping it with no difficulty.

The record contains form reports completed by Dr. Giudici dated July 20 and August 26, 2015, with findings unchanged from prior form reports.

In a letter dated September 3, 2015, appellant's then-representative requested a copy of the second opinion physician's report including the statement of accepted facts (SOAF) and questions posed.

On September 29, 2015 OWCP provided appellant's then representative with the letter to the physician, the SOAF, and August 26, 2015 report.

On October 20, 2015 the employing establishment offered appellant a modified mail handler job located in the Albany, NY Processing & Distribution Center with the restrictions noted by Dr. Czaplieki-Margiotti.[5] The work restrictions included up to two hours of standing, bending, stooping, and twisting; up to five hours of walking; up to two hours of lifting 20 pounds; and up to four hours of pushing/pulling up to 40 pounds. The duties of the position were described as up to six hours of repairing damaged mail, up to two hours of tray up flats, and up to two hours of preparing "PARS."

By letter dated October 28, 2015, OWCP advised appellant that it found the job offer from the employing establishment to be suitable. Appellant was notified of the provisions of 5 U.S.C. § 8106(c)(2), and indicated the case record would be held open for 30 days for her to submit further evidence.

In CA-110 telephone call notes dated November 2, 2015, appellant informed OWCP that the second opinion physician failed to note or consider all of her prescribed medications. OWCP advised appellant to put her contentions in writing.

By decision dated December 2, 2015, OWCP terminated appellant's wage-loss compensation benefits and schedule award entitlement effective November 30, 2015 under 5 U.S.C. § 8106(c), as she had refused the offer of suitable work. It found that the offered modified mail handler position conformed to the restrictions noted by Dr. Czaplieki-Margiotti demonstrating that appellant could perform full-time modified duty.

On December 14, 2015 appellant, through her representative, requested a telephonic hearing before an OWCP hearing representative.

In a December 22, 2015 report, Dr. Giudici noted that appellant had a herniated lumbar disc, left L4 radiculopathy, lower back nerve damage, and decreased lumbar range of motion with severe spasm. He noted that appellant could not drive or operate heavy machinery due to her prescribed medication.

On December 30, 2015 OWCP received an undated statement from appellant. She wrote that she was unable to drive the 100 miles to the facility where the offered job was located since she cannot operate a motor vehicle and was unable to sit for long periods of time.

[5] The record establishes that the offered position in Albany, NY is approximately 100 miles from appellant's home in Cragsmoor, NY.

OWCP received medical reports and forms from Dr. Giudici covering the period January 22 to August 16, 2016 which reiterated work restrictions, diagnoses, physical findings, and medical history as set forth in prior reports and forms.

At the hearing held on August 10, 2016 appellant's representative noted that the second opinion physician had been sent a surveillance video. In response to questioning by her representative, appellant explained that she was at the Westgate Pavilion because she was visiting her doctor whose office was located in that facility. Next, she explained that the pocketbook seen on the surveillance video might have looked heavy, but actually was quite light as it was a quilted bag. Appellant also testified that, according to New York State Law, she was precluded from driving due to her prescribed medication.

By decision dated October 25, 2016, the hearing representative affirmed the December 2, 2015 OWCP decision. She found the evidence established that the job offer was medically suitable. The hearing representative also found that appellant refused to work after suitable work was made available to her.

LEGAL PRECEDENT

Section 8106(c)(2) of FECA states that a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by, or secured for him is not entitled to compensation.[6] Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits under section 8106(c) for refusing to accept or neglecting to perform suitable work.[7] The Board has recognized that section 8106(c) serves as a penalty provision as it may bar an employee's entitlement to future compensation and, for this reason, will be narrowly construed.[8]

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.[9]

OWCP procedures provide factors to be considered in determining what constitutes suitable work for a particular disabled employee, include the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work and other relevant factors.[10]

OWCP's regulations provide that the employing establishment, if possible, should offer suitable reemployment in the location where the employee currently resides. If this is not

[6] 5 U.S.C. § 8106(c)(2).

[7] *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

[8] *H. Adrian Osborne*, 48 ECAB 556 (1997).

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

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offer and Return to Work*, Chapter 2.814.4(a)(2) (June 2013).

practical, the employing establishment may offer suitable reemployment at the employee's former duty station or other location.[11]

ANALYSIS

The employing establishment offered appellant a sedentary position as a modified mail handler job in Albany, NY, which accommodated the work restrictions provided by Dr. Czaplieki-Margiotti, the second opinion physician. OWCP reviewed the position and found it to be suitable and therefore terminated her wage-loss compensation as it found that she refused the employing establishment's October 20, 2015 job offer. On appeal appellant's representative contends that the location of the offered position rendered it unsuitable as it was located approximately 100 miles away from appellant's home in Cragsmoor, NY and that Dr. Czaplieki-Margiotti never addressed appellant's ability to drive. Her representative also argues that surveillance video unjustly influenced Dr. Czaplieki-Margiotti's opinion.[12]

The Board finds that OWCP did not meet its burden of proof to establish that the offered position was suitable as it did not make any attempt to determine whether suitable employment was possible in or around Cragsmoor, NY, appellant's residence at the time of the job offer.

The Board has previously recognized that OWCP procedures require that if the job offer is for a site outside of the claimant's residential area, the employing establishment must document that it first searched for suitable employment in the claimant's current geographic area.[13]

The evidence of record indicates that appellant's residence is geographically located approximately 100 miles from the location of the offered position in Albany, NY. OWCP should have developed this aspect of the case before finding the offer suitable. Its regulations provide that the employing establishment should offer suitable reemployment where the employee currently resides, if possible.[14] The Board noted in *Sharon L. Dean*[15] that OWCP's regulations provide that the employing establishment "should" offer suitable reemployment where the employee currently resides, if possible. The Board further found that it was reversible error for OWCP to terminate appellant's compensation benefits without positive evidence showing that such an offer was not possible or practical in appellant's geographic location. In *W.D.*,[16] the

[11] 20 C.F.R. § 10.508; *Sharon L. Dean*, 56 ECAB 175 (2004).

[12] OWCP has the responsibility to make the claimant aware of videotape evidence it has provided to a medical expert. It properly did so here by informing appellant on August 6, 2015 that the surveillance video and report had been provided to Dr. Czaplieki-Margiotti. If the employee requests a copy of the videotape, one should be made available and the employee given a reasonable opportunity to offer any comment or explanation regarding the accuracy of the recording. Appellant provided testimony at OWCP's hearing regarding the activities seen on the video. *See J.J.*, Docket No. 15-0475 (issued September 28, 2016).

[13] *W.D.*, Docket No. 15-1297 (issued August 23, 2016); *supra* note 10.

[14] *Supra* note 10.

[15] *Sharon L. Dean*, *supra* note 11; *see also L.D.*, Docket No. 12-816 (issued April 9, 2013).

[16] *Supra* note 13.

Board reaffirmed that, if the job offer is for a site outside of the employee's residential area, the employing establishment must document that it first searched for suitable employment in the employee's current geographic area.

The Board finds that OWCP did not substantiate that the employing establishment performed a current and proper search for suitable employment in appellant's geographic area. OWCP therefore did not properly find the offered Albany, NY position was suitable. The October 25, 2016 termination decision is reversed.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation for refusal of suitable work under 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 25, 2016 is reversed.

Issued: September 6, 2017
Washington, DC

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

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

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