

**United States Department of Labor
Employees' Compensation Appeals Board**

M.W., Appellant)	
)	
and)	Docket No. 17-1205
)	Issued: April 26, 2018
DEPARTMENT OF AGRICULTURE, SWAN)	
LAKE RANGER STATION, Bigfolk, MT,)	
Employer)	
)	

Appearances: *Case Submitted on the Record*
Michael D. Overman, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 11, 2017 appellant, through counsel, filed a timely appeal from a November 22, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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, following the issuance of OWCP's November 22, 2016 decision, appellant submitted new evidence to OWCP. The Board's jurisdiction is limited to the evidence that was before OWCP at the time it issued its final decision. Thus, the Board is precluded from considering the new evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c)(1).

ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss compensation, effective June 2, 2016, as she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

On appeal counsel contends that an evaluation performed by an impartial medical examiner (IME) on October 11, 2014 is stale because it was performed 16 months prior to the employing establishment's March 8, 2016 job offer. He also contends that the IME's report is not entitled to the special weight of the medical evidence as it is not well reasoned. Lastly, counsel asserts that the offered position is not suitable because OWCP failed to consider appellant's nonwork-related conditions which resulted in her work restrictions and the medical evidence of record establishes the worsening of her back condition.

FACTUAL HISTORY

On August 4, 2008 appellant, then a 27-year-old forestry technician, filed a traumatic injury claim (Form CA-1) alleging that, on August 3, 2008, she sustained a lower and upper back injury as a result of lifting boxes weighing between 50 and 60 pounds at work.⁴ OWCP accepted the claim for lower back sacroiliac joint dysfunction and aggravation of preexisting lumbar subluxation at L4-S1.

In an October 30, 2008 letter, the employing establishment informed OWCP that appellant had been laid off on October 11, 2008 because her seasonal job had ended. It noted that her supervisor no longer had any light-duty work available.

On April 28, 2009 appellant returned to seasonal light-duty work for 10 hours a day, 40 hours a week, with accommodation of her restrictions. She stopped work on December 16, 2009 and filed a claim for compensation (Form CA-7). OWCP paid appellant wage-loss compensation for temporary total disability for the period December 16, 2009 through May 8, 2010.

Following further development of the claim, on March 14, 2013, OWCP expanded the acceptance of the claim to include lumbar disc extrusion at L4-5 and L5-S1.

On October 24, 2013 appellant underwent authorized provocation discography at L3-4, L4-5, and L5-S1. A lumbar computerized tomography (CT) scan performed on that date revealed moderate-to-advanced degenerative disc disease at L5-S1 and mild-to-moderate degenerative disc disease at L4-5.

In a January 15, 2014 medical report, Dr. Steven J. Rizzolo, an attending Board-certified orthopedic surgeon, examined appellant, assessed her as having lumbago, and recommended a two-level posterior interbody fusion. He maintained that conservative, nonsurgical procedures had not provided relief for appellant. On February 14, 2014 an OWCP district medical adviser (DMA)

⁴ OWCP assigned File No. xxxxxx388 to the present claim. In a claim adjudicated under OWCP File No. xxxxxx641, it accepted that appellant sustained lumbar and sacrum subluxations on May 27, 2008. On November 20, 2008 OWCP administratively combined File Nos. xxxxxx641 and xxxxxx388, with the former serving as the master file.

reviewed the record and agreed with Dr. Rizzolo's diagnosis of multilevel degenerative disc disease with discogenic pain greatest at the L4-5 and L5-S1 levels. However, he opined that the diagnosed condition did not warrant surgery and that the proposed surgical procedure (two-level fusion at the L4-5 and L5-S1 levels) was not within the realm of accepted medical practice.

By decision dated February 20, 2014, OWCP denied authorization of the proposed surgery based on the DMA's opinion. On August 5, 2014 an OWCP hearing representative set aside the February 20, 2014 decision, finding that there was an unresolved conflict in medical opinion between Dr. Rizzolo and the DMA, requiring referral to an IME. She remanded the case for OWCP to further develop the medical evidence.

On remand, OWCP referred appellant, together with a statement of accepted facts (SOAF), the case record, and a list of questions, to Dr. Michael Righetti, a Board-certified orthopedic surgeon, for an impartial medical examination. By letter dated November 3, 2014, it referred her for a functional capacity evaluation (FCE).

In an October 11, 2014 report,⁵ Dr. Righetti opined that the proposed surgical procedure would not be successful. He reasoned that he did not believe that appellant's discogenic pain, to whatever degree it contributed to her myofascial pain, had been proven to be her primary pain generator and to an extremely high probability would not effectively relieve her pain. Dr. Righetti noted that she had multiple pain generators. He agreed with the DMA that appellant's diagnostic studies did not demonstrate instability, spondylolisthesis, or nerve problems. Dr. Righetti disagreed, however, with the DMA's opinion that discogenic pain was never an indication for lumbar surgery. He maintained that the proposed surgery would be good for the right individual under the right circumstances, but that it would likely lead to a failed back result for appellant. Dr. Righetti completed a work capacity evaluation (Form OWCP-5c) dated November 14, 2014. He advised that appellant was not capable of performing her usual job, but she could work eight hours a day with permanent restrictions. Appellant could bend and stoop for two hours, push no more than 30 pounds for two hours, pull no more than 20 pounds for two hours, lift no more than 25 pounds for two hours, and refrain from climbing.

By decision dated January 30, 2015, OWCP again denied authorization for the proposed surgery. It found that Dr. Righetti's October 11, 2014 opinion was entitled to special weight accorded an impartial medical specialist and established that the proposed surgery was not warranted.

On March 4, 2015 OWCP received a November 17, 2014 FCE report by Timothy Tracy, an occupational therapist. Mr. Tracy noted that, although appellant could perform sedentary work, she could physically do more. He reported that she terminated activities early. Mr. Tracy related that appellant likely believed that working beyond her perceived levels may cause pain or increased discomfort. Appellant refused to participate in crawling, kneeling, squatting, desk/chair lift, resistance dynamometer activities, citing her pain level. Mr. Tracy pointed out that minimal standing tolerance of six minutes before terminating due to a high pain level also prevented him from identifying an ideal standing work height. He related that reasons given for early termination

⁵ The Board notes that it appears Dr. Righetti inadvertently dated the report October 11, 2014 as OWCP initially scheduled the impartial medical examination of appellant with Dr. Righetti for October 17, 2014 and subsequently rescheduled the examination for October 24, 2014.

of weighted activities included low back pain, pain radiating into the right lower extremity, weakness, and fatigue. Appellant was tearful throughout the assessment with this behavior increasing the final half hour. Her pain behaviors were muscle guarding, grimacing, slow transitional movements, significant limping on the right lower extremity, hands to low back, and essentially no forward bending at the waist, consistent throughout the assessment. Mr. Tracy noted a statement appellant made early in the assessment that she was not always this bad, indicated that she stopped short of her full ability, and that there was an expectation that she could work at a higher physical level.

Also, on March 4, 2015, OWCP received a September 8, 2014 report from Dr. Lawrence G. Splitter, a Board-certified occupational medicine specialist and an OWCP referral physician. Dr. Splitter reviewed appellant's medical records, noted her history, and discussed findings on examination. He assessed chronic low back pain in the setting of a degenerative disorder, depression and anxiety, and a risk for symptom magnification. Dr. Splitter opined that appellant was capable of working in any capacity based on her lumbosacral condition. He further opined that she was able to work at least at the sedentary physical demand level. Dr. Splitter related that her condition was not expected to improve. However, he related that an FCE would be beneficial. In a February 11, 2015 addendum to his September 8, 2014 report, Dr. Splitter reviewed the November 17, 2014 FCE results and advised that the original restrictions set forth in his September 8, 2014 examination were unchanged. He noted that the FCE results were found to be "conditionally valid = perceived full effort, provided submaximal effort."

On March 31, 2015 the employing establishment offered appellant a temporary full-time position as a customer service representative within her restrictions effective April 19, 2015. Major duties of the job included greeting visitors and responding to telephone and written inquiries, arranging displays of informational and natural materials in the reception area, varying or changing displays to coincide with seasonal changes and special public information programs, and using word processing software and printing equipment to create, copy, edit, store, retrieve, and print a variety of standardized documents using a glossary of prerecorded formats, form letters, standard paragraphs, and mailing lists. The position may also involve using database or spreadsheet software to enter, revise, sort, or calculate and retrieve data for standard reports and performing other duties as assigned. Additionally, it required serving as a collection officer to sell such items as national forest maps, Christmas tree permits, 2400-4s (forest product sale permits), and golden age passports, being held accountable for funds collected, and maintaining accountability records. Physical requirements involved standing, walking, stooping, reaching, and occasional lifting and carrying of small packages, etc.

On April 15, 2015 the employing establishment informed OWCP that appellant had verbally rejected the job offer.

On May 6, 2015 OWCP requested that Dr. Splitter review the November 17, 2014 FCE report and complete a Form OWCP-5c. He did not respond.

On August 11, 2015 OWCP requested that Dr. Righetti review the November 17, 2014 FCE report and advise whether the opinions set forth in his October 11, 2014 report and November 14, 2014 Form OWCP-5c remained unchanged.

In an August 31, 2015 response, Dr. Righetti reviewed the November 17, 2014 FCE report and advised that it did not change his prior opinion. He related that the FCE was conditionally valid as it indicated that it was highly likely that appellant did not put forth full effort in completing tasks. This showed a volunteer relinquishment of effort on her part for perceived inability and Dr. Righetti opined that it was not valid to support her capabilities or lack thereof. He indicated that the essence of the report showed that appellant had a very pain-focused somatic behavioral disorder. Dr. Righetti maintained that there was no objective evidence to support her subjective complaints. He reported that it was previously noted that appellant was caring for two toddlers. Dr. Righetti maintained that it was highly likely that her activities during the day exceeded semi-sedentary work. He noted that there were no focal deficits to indicate a specific disability of the upper or lower extremities. Appellant's back pain had been inconsistent. Dr. Righetti therefore concluded that, at a minimum, she should be able to perform semi-sedentary work on a full-time basis. He noted that his explanation regarding her ability to improve remained.

On November 23, 2015 the employing establishment informed OWCP that the offered position remained available to appellant. On March 7, 2016 it informed OWCP that it would reissue the job offer to appellant in response to OWCP's concerns regarding the current salary and term of appointment of the position.

By letter dated February 16, 2016, OWCP requested that appellant submit a medical report from her physician addressing her current diagnoses causally related to her work injury, objective findings of the diagnosed conditions, whether her work-related conditions had resolved, whether she could return to work without restrictions and if not, whether she could perform modified duties on a part-time or full-time basis, and her prognosis.

On March 8, 2016 the employing establishment again offered appellant the temporary full-time customer service representative position, effective April 18, 2016, based on Dr. Righetti's November 14, 2014 restrictions. It related that this was the same type of appointment she previously held. Appellant's work hours and workdays would be determined when she reported to work.

On March 23, 2016 appellant refused the job offer. She claimed that her current back condition had changed and that she was not given adequate time to accept the offered position. Appellant requested additional time to accept or decline a future job offer.

By letter dated March 31, 2016, OWCP advised appellant that it had confirmed with the employing establishment that the position remained available. It explained that the customer service representative was suitable and in accordance with the medical restrictions set forth in Dr. Righetti's November 14, 2014 Form OWCP-5c report which represented the weight of the medical evidence. OWCP noted that there was no medical evidence of record to support appellant's contention that her back condition had changed. It indicated that the case would be held open for 30 days with the expectation that she would accept the position and report to duty. The provisions of 5 U.S.C. § 8106(c)(2) were noted, and appellant was advised that, if she failed to accept the position or provide adequate reasons for refusing the job offer, her right to compensation would be terminated.

OWCP received diagnostic test results and dated June 22, 2015 to April 25, 2016 from Dr. John V. Stephens, a Board-certified physiatrist, Dr. Stephen S. Campbell, a Board-certified

neurosurgeon, Dr. N. Camden Kneeland, a pain medicine specialist, Dr. B. Frank Gray, III Dr. Mike Henson, and Dr. Anders G. Engdahl, Board-certified radiologists, which addressed appellant's back conditions and medical treatment.

On May 4, 2016 the employing establishment again confirmed that the offered job remained available to appellant.

In an April 29, 2016 letter, received on May 5, 2016 by OWCP, appellant explained that she refused the offered job because she was only given nine days to accept or refuse the offer. Regarding her contention that her back condition had changed, she noted that she was hospitalized on March 5, 2016 with severe back pain and released on March 6, 2016. Appellant indicated that on March 15, 2016 Dr. Kneeland reviewed a lumbar MRI scan and found several changes when compared to prior MRI scan studies. She claimed that he found that her pain was likely related to a new lumbar disc bulge and changed her pain medications. Appellant noted that in response to OWCP's questionnaire, Dr. Kneeland found it very difficult to identify her work restrictions without a formal FCE. She indicated that he referred her to Dr. Campbell, who performed x-rays and a CT scan which showed changes in her condition. Appellant maintained that he diagnosed her as having lumbar spondylosis and recommended a posterior lumbar intrabody fusion with pedicle screw insertion at L4-S1.

Appellant submitted a March 23, 2016 report from Dr. Campbell responding to OWCP's February 16, 2016 letter. Dr. Campbell diagnosed discogenic low back pain, lumbar spondylosis, lumbar radiculitis, and chronic myofascial pain. He advised that his diagnoses were based on a positive Kemp's test and imaging findings consistent with the diagnoses of discogenic pain and lumbar spondylosis, concordant tenderness to palpation over the lumbar paraspinatus musculature. Dr. Campbell responded that appellant was not medically able to work part time or full time without restrictions. He related that it was very difficult to state appellant's work capacity. Dr. Campbell noted that a formal FCE would be helpful. He noted that it was likely that a biaculoplasty would dramatically lessen appellant's low back pain and improve her ability to return to work. Dr. Campbell referenced his previous progress notes. OWCP also received a May 4, 2016 medical status form which contained an illegible signature. The form indicated that appellant was unable to work for four weeks.

By letter dated May 9, 2016, OWCP advised appellant that her reasons for refusing the offered position were not valid. It noted that the employing establishment confirmed that the job remained available to her. Appellant was given an additional 15 days to accept and report to the position, and advised that, if she did not report to the job within 15 days of the date of the letter, her entitlement to wage-loss and schedule award benefits would be terminated.

OWCP received reports dated March 5, April 6, and May 4, 2016 from Dr. Kyle C. Webber, a Board-certified family practitioner, Eric Belanger, a physician assistant, and Dr. Kneeland, which addressed appellant's back conditions.

On June 1, 2016 the employing establishment informed OWCP that appellant had not accepted its job offer and that the position remained open.

In a June 3, 2016 decision, OWCP terminated appellant's wage-loss compensation benefits and schedule award entitlement, effective June 2, 2016, pursuant to 5 U.S.C. § 8106(c), as she had

refused an offer of suitable work. It found that the offered position was within the restrictions set forth by Dr. Righetti.

OWCP received an additional report from Mr. Belanger and reports dated April 23, 2015 and June 15, 2016 from Dr. Robert J. Blair, a Board-certified emergency medicine specialist, and a provider with an illegible signature, which addressed appellant's back condition and disability from work.

In a letter postmarked June 30, 2016, appellant requested a review of the written record by an OWCP hearing representative. In a letter dated June 29, 2016, she contended that the medical evidence of record established that she currently had a lumbar condition and that she had not been released to return to work.

Appellant submitted reports dated June 15 through September 19 2016 signed by a physician assistant with an illegible signature, from Mr. Belanger, and Dr. Joshua L. R. Krass, a Board-certified neurologist, which also addressed appellant's back conditions and proposed surgical treatment.⁶

By decision dated November 22, 2016, an OWCP hearing representative affirmed the June 3, 2016 decision. She determined that Dr. Righetti's opinion could not be afforded special weight as he was not an impartial physician regarding appellant's ability to work. The hearing representative noted that Dr. Righetti had only resolved a medical conflict between Dr. Rizzolo and OWCP's DMA regarding a surgery request. She noted, however, that his report could still be considered for its own intrinsic value and that it represented the weight of the medical evidence and established that appellant could work with restrictions.

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 her is not entitled to compensation.⁷ 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.⁸ The implementing regulations provide that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of showing that such refusal or failure to work was reasonable or justified and shall be provided with the opportunity to make such a showing before entitlement to compensation is terminated.⁹ The Board has recognized that section 8106(c) serves as a penalty

⁶ On October 11, 2016 OWCP authorized Dr. Campbell's August 24, 2016 request to perform lumbar spine fusion, spine fusion extra segment and to apply a spine prosthetic device and insert a spine fixation device based on the opinion of a second DMA.

⁷ 5 U.S.C. § 8106(c)(2).

⁸ *Joyce M. Doll*, 53 ECAB 790 (2002); *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

⁹ 20 C.F.R. § 10.517(a).

provision as it may bar an employee's entitlement to future compensation and, for this reason, will be narrowly construed.¹⁰

To justify termination, OWCP must show that the work offered was suitable and that appellant was informed of the consequences of his or her refusal to accept such employment.¹¹ In determining what constitutes suitable work for a particular disabled employee, it considers the employee's current physical limitations, whether the work was available within the employee's demonstrated commuting area and the employee's qualifications to perform such work.¹² OWCP procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.¹³

Section 10.516 of FECA's implementing regulations provide that OWCP shall advise the employee that it has found the offered work to be suitable and afford the employee 30 days to accept the job or present any reasons to counter OWCP's finding of suitability. If the employee presents such reasons and OWCP determines that the reasons are unacceptable, it will notify the employee of that determination and that he or she has 15 days in which to accept the offered work without penalty. At that point in time, OWCP's notification need not state the reasons for finding that the employee's reasons are not acceptable.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

On March 8, 2016 the employing establishment re-offered appellant the position it had previously offered on March 31, 2015 based on a November 14, 2014 report by Dr. Righetti, an OWCP referral physician. On March 31, 2016 OWCP informed appellant that the temporary job offered by the employing establishment constituted suitable work. It found that the position was commensurate with the medical restrictions set forth in Dr. Righetti's November 14, 2014 report. On June 3, 2016 OWCP terminated appellant's wage-loss compensation effective June 2, 2016 based on her refusal of a suitable job offer. This decision was affirmed by an OWCP hearing representative on November 22, 2016. The Board finds that OWCP improperly relied on Dr. Righetti's opinion in determining that the position offered by the employing establishment constituted suitable employment.

¹⁰ See *Joan F. Burke*, 54 ECAB 406 (2003).

¹¹ *T.S.*, 59 ECAB 490 (2008); *Linda Hilton*, 52 ECAB 476 (2001); *Ronald M. Jones*, 52 ECAB 190 (2000); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon*, 43 ECAB 818 (1992).

¹² 20 C.F.R. § 10.500(b).

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work, Job Offer Refusal*, Chapter 2.814.5a (June 2013); see *E.B.*, Docket No. 13-0319 (issued May 14, 2013).

¹⁴ 20 C.F.R. § 10.516.

¹⁵ *Id.* at § 10.517(b).

¹⁶ *Id.*

Dr. Righetti's November 14, 2014 report is stale with regard to the modified job offer extended to appellant on March 8, 2016. The Board has recognized the importance of medical evidence being contemporaneous with a job offer in order to ensure that a claimant is medically capable of returning to work.¹⁷ Dr. Righetti examined appellant on October 24, 2014,¹⁸ some 15 months prior to the job offer and over 18 months prior to the termination. The Board notes that Dr. Righetti provided a more recent report on August 31, 2015 in which he reviewed the findings of a November 17, 2014 FCE report and advised that his October 11 and November 14, 2014 opinions regarding appellant's work restrictions remained unchanged. However, he did not reexamine appellant and report restrictions based upon a current examination. The Board has recognized the importance of medical evidence being contemporaneous with a job offer to ensure that a claimant is medically capable of returning to work.¹⁹ As the medical evaluation relied upon by OWCP to find the position suitable was not reasonably current, OWCP has not met its burden of proof to terminate appellant's compensation for refusing suitable work.²⁰

The record does not contain a medical report contemporaneous with OWCP's June 3, 2016 termination of appellant's compensation supporting that the offered position was suitable. The Board therefore finds that OWCP did not meet its burden of proof to terminate her compensation as a sanction for failure to accept an offer of suitable work.

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's compensation, effective June 2, 2016, for refusal of an offer of suitable work under 5 U.S.C. § 8106(c).

¹⁷ See generally *Eileen R. Kates*, 46 ECAB 573 (1995).

¹⁸ See *supra* note 5.

¹⁹ See *Ruth Churchwell*, Docket No. 02-0792 (issued October 17, 2002).

²⁰ See *A.G.*, Docket No. 08-2265 (issued September 28, 2009) (finding that the report from the impartial medical examiner was stale as she examined the claimant 23 months prior to the job offer); *P.M.*, Docket No. 07-0132 (issued April 6, 2007) (finding that a report nearly two years old at the time OWCP determined suitability was not reasonably current). See also *Keith Hanselman*, 42 ECAB 680 (1991); *Ellen G. Trimmer*, 32 ECAB 1878 (1981) (reports almost two years old deemed invalid basis for disability determination and loss of wage-earning capacity determination).

ORDER

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

Issued: April 26, 2018
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