

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

S.B., Appellant)	
)	
and)	Docket No. 17-1797
)	Issued: April 11, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
Oklahoma City, OK, Employer)	
)	

Appearances:
Appellant, pro se
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 August 18, 2017 appellant filed a timely appeal from a July 22, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ 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 The Board notes that appellant submitted additional evidence after OWCP rendered its July 22, 2017 decision. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, this additional evidence cannot be considered by the Board for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

² 5 U.S.C. § 8101 *et seq.*

³ Appellant filed a timely request for oral argument in this claim. By letter received December 19, 2017, appellant withdrew her request for oral argument.

ISSUE

The issue is whether OWCP properly terminated appellant's entitlement to wage-loss and schedule award compensation effective June 21, 2017 as she refused an offer of suitable work under 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On December 31, 2013 appellant, then a 61-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that, on that date, she injured her middle back in the performance of duty. OWCP accepted the claim for lumbar sprain and thoracic sprain and assigned OWCP File No. xxxxxx561. Following her injury, appellant returned to work with restrictions and received compensation from OWCP for intermittent disability beginning January 10, 2015. She stopped work on August 10, 2015 and did not return. OWCP paid appellant wage-loss compensation for total disability.

OWCP previously accepted that on July 12, 2001 appellant had sustained a right foot sprain and left knee abrasion under OWCP File No. xxxxxx612. It further accepted that she had sustained neck sprain, lumbosacral sprain, displacement of a cervical intervertebral disc without myelopathy, and thoracic or lumbosacral neuritis or radiculitis due to an October 2, 2007 employment injury, assigned OWCP File No. xxxxxx474.

OWCP referred appellant to Dr. Dennis Foster, a Board-certified orthopedic surgeon, for a second opinion regarding the nature and extent of any disability and residuals of the accepted work injury. In a report dated January 7, 2015, Dr. Foster reviewed the history of the December 31, 2013 work injury. He found that appellant had a degenerative back condition and should avoid extensive walking, lifting, or carrying. Dr. Foster opined that she could work with restrictions, including lifting and pulling up to 25 pounds for four hours per day.

In a January 28, 2015 Form CA-17, Dr. Jo Walia, an attending Board-certified anesthesiologist, determined that appellant could work full-time with restrictions that included lifting and carrying up to 10 pounds for 30 minutes a day.

On July 7, 2015, OWCP found that a conflict in medical opinion arose between Dr. Foster and Dr. Walia regarding the extent of appellant's disability from employment.⁴ It referred her to Dr. Sami R. Framjee, a Board-certified orthopedic surgeon, for an impartial medical examination.

On September 3, 2015 OWCP advised appellant that it had combined OWCP File Nos. xxxxxx474 and xxxxxx561 for administrative purposes.

Dr. Framjee, on October 22, 2015, discussed appellant's history of injury and provided findings on examination. He found that she could work eight hours per day at a desk job lifting up to 15 pounds for eight hours per day.

⁴ OWCP incorrectly referred to Dr. Foster as Dr. Butler.

On December 11, 2015 OWCP determined that the second opinion examination by Dr. Foster was insufficient and requested that he provide a supplemental report addressing whether she had any objective findings of any of her accepted employment injuries. It provided him with a statement of accepted facts describing the accepted conditions in OWCP File Nos. xxxxxx612, xxxxxx474, and xxxxxx561.

In a supplemental report dated December 18, 2015, Dr. Foster diagnosed a chronic work-related aggravation of thoracic and lumbar degenerative disc disease. He indicated that his work limitations were unchanged from those set forth in the January 7, 2015 report.

On March 30, 2016 Dr. Walia diagnosed degenerative changes in the thoracic spine, lumbar facet arthropathy, a lumbosacral joint/ligament sprain, thoracolumbar radiculopathy, and thoracic sprain. He opined that appellant was temporarily totally disabled pending additional therapy.

Dr. Andrew Parkinson, a Board-certified orthopedic surgeon, on May 2, 2016, diagnosed cervical disc disease, cervical radiculopathy, and cervical stenosis. He recommended cervical surgery and found that appellant was totally disabled.

OWCP determined that a conflict in medical opinion arose between Dr. Foster and Dr. Walia regarding the extent of appellant's work restrictions. It referred her to Dr. C.L. Soo, a Board-certified orthopedic surgeon, for an impartial medical examination.

Dr. Walia, on June 8, 2016, requested that OWCP expand acceptance of appellant's claim to include a cervical condition based on a magnetic resonance imaging (MRI) scan study findings. He recommended a cervical fusion.

In a report dated June 21, 2016, Dr. Soo reviewed appellant's history of work injuries and discussed her complaints of neck pain radiating into her shoulders and low back pain with abnormal sensation in the thighs after extensive walking. He diagnosed cervical spinal stenosis, a bilateral shoulder disorder, and lumbar spinal stenosis with degenerative disc disease at multiple levels, especially L2-3. Dr. Soo recommended a functional capacity evaluation (FCE) to determine appellant's work restrictions.

Dr. Soo, on June 29, 2016, noted that appellant underwent an FCE on that date that demonstrated that she could lift approximately four pounds for under three hours per day. He provided additional work restrictions, including carrying four pounds with both hands for less than six hours per day. Dr. Soo determined that appellant could sit for eight hours per day, stand and walk for less than three hours per day, and do no work involving bending, squatting, kneeling, climbing, or crawling.

An OWCP medical adviser reviewed the record on July 6, 2016. He opined that the proposed cervical discectomy and fusion at C4-5 and C5-6 was causally related to appellant's December 31, 2013 employment injury. OWCP's medical adviser found, however, that the surgery was not medically necessary as diagnostic studies did not reveal compromise of the nerve roots.

On July 20, 2016 OWCP referred appellant to Dr. Allan S. Fielding, a Board-certified neurosurgeon, regarding whether it should authorize surgery. Dr. Fielding, on August 18, 2016, noted that there was no request for lumbar spinal surgery, and questioned whether he should provide an opinion regarding the request for cervical surgery.

In a September 14, 2016 report, Dr. Walia noted that appellant was receiving treatment for depression and anxiety due to her employment injury. He found that she could work with the restrictions set forth by Dr. Soo.

In a September 22, 2016 OWCP-5c form, Dr. Soo found that appellant could work eight hours per day in sedentary employment sitting for eight hours, walking and standing for three hours, performing no reaching, twisting, bending, or stooping, lifting up to eight pounds for three hours per day, and pushing and pulling up to 75 pounds for three hours per day.

Dr. Fielding, in a report dated December 1, 2016, found that the proposed cervical surgery was not medically necessary as appellant had no signs of cervical radiculopathy and as her symptoms did not correspond to the findings on MRI scan study.⁵

OWCP, on December 6, 2016, requested that Dr. Soo clarify his work restrictions. In a December 14, 2016 response, Dr. Soo opined that appellant could “carry with both hands about [four] pounds if she does less than [three] hours a day...” He further found that she could carry two pounds for less than six hours a day and one pound for more than six hours per day. Dr. Soo opined that appellant could push or pull with a roller up to 75 pounds for under three hours per day, up to 53 pounds for under six hours per day, and up to 25 pounds for more than six hours per day. In an OWCP-5c form dated December 14, 2016, he found that appellant could sit for eight hours per day, walk and stand for three hours per day, lifting up to eight pounds for three hours per day, and push and pull up to 75 pounds for three hours per day.

The employing establishment offered appellant a position as a modified city carrier on February 24, 2017. The physical requirements of the position included lifting up to eight pounds for an average of three hours per day, walking up to three hours per day, standing up to one hour per day, and pushing and pulling up to 25 pounds per day with a roller, with no reaching or repetitive movements of the wrist or elbow. The duties of the position included delivering express mail and other delivery and office duties within appellant’s restrictions.

OWCP, on March 31, 2017, notified appellant that it had determined that the position of modified city carrier offered by the employing establishment on February 24, 2017 was suitable as it was within the physical limitations set forth by Dr. Soo on September 22, 2016. It provided her 30 days to accept the position or submit a written explanation for her refusal and advised her of the penalties for refusing suitable work under section 8106(c)(2).

⁵ On November 2, 2016 the employing establishment offered appellant a position as a modified city carrier standing and walking up to four hours per day and lifting and carrying up to 15 pounds for four hours per day. OWCP, on November 16, 2016, found that the offered position was suitable and allowed appellant to accept the position or provide written reasons for her refusal.

In an April 4, 2017 response, appellant questioned how she could perform the duties of the offered position given Dr. Soo's work restrictions and the results of the FCE. She contended that a conflict existed regarding the need for cervical surgery. Appellant asserted that she could only stand and walk under three hours, not for three hours.

On April 13, 2017 OWCP noted that it had developed appellant's request for cervical surgery under OWCP File No. xxxxxx474 by referring her to Dr. Fielding. It further advised her that it had reviewed the June 29, 2016 FCE and December 14, 2016 work restrictions from Dr. Fielding. OWCP indicated that its March 31, 2017 letter set forth appellant's responsibilities for accepting or refusing the position.

Appellant, by letter dated April 14, 2017, noted that the modified position offered by the employing establishment required lifting up to eight pounds for an average of three hours per day, standing for an average of one hour per day, and walking for an average of two hours per day, but that Dr. Soo found that she could both stand and walk for under three hours per day and could only carry with both hands about four pounds for under three hours per day and two pounds for under six hours per day. She maintained that OWCP did not consider all of her injuries in finding the position suitable.

On June 5, 2017 counsel advised that appellant was declining the offered position and questioned whether any work as a carrier could be performed without repetitive movements of the wrists and elbows. He asserted that the modified job offer did not consider the May 2, 2016 report from Dr. Parkinson, finding that she was totally disabled due to her cervical condition or the opinion of Dr. Walia that she was substantially limited.

Under OWCP File No. xxxxxx474, on June 29, 2017 OWCP found that a conflict in medical opinion arose between Dr. Fielding and Dr. Parkinson regarding whether it should authorize an anterior cervical discectomy and fusion at C4-5 and C5-6.

By decision dated July 22, 2017, OWCP terminated appellant's entitlement to wage-loss and schedule award compensation effective June 21, 2017 as she refused an offer of suitable work under section 8106(c)(2). It found that the offered position was within the restrictions provided by Dr. Soo. OWCP noted that appellant had submitted evidence subsequent to its March 31, 2017 30-day notice, but found that it did not justify her refusal to accept the modified city carrier position as it did not demonstrate a material worsening of her condition.

LEGAL PRECEDENT

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."⁶ It is OWCP's burden to terminate compensation under section 8106(c) for refusing to accept

⁶ 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

suitable work or neglecting to perform suitable work.⁷ To justify such a termination, OWCP must show that the work offered was suitable.⁸

With respect to the procedural requirements of termination under section 8106(c), the Board has held that OWCP must inform appellant of the consequences of refusal to accept suitable work, and allow him or her an opportunity to provide reasons for refusing the offered position.⁹ If appellant presents reasons for refusing the offered position, OWCP must inform the employee if it finds the reasons inadequate to justify the refusal of the offered position and afford him or her a final opportunity to accept the position.¹⁰

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.¹¹ 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.¹² After providing the 30- and 15-day notices, OWCP will terminate the employee's entitlement to further wage-loss compensation and schedule award benefits.¹³

ANALYSIS

OWCP accepted that appellant sustained lumbar and thoracic sprains under OWCP File No. xxxxxx561 and neck sprain, lumbosacral sprain, displacement of a cervical intervertebral disc without myelopathy, and thoracic or lumbosacral neuritis or radiculitis under OWCP File No. xxxxxx474. It paid her wage-loss compensation under File No. xxxxxx474 for disability beginning April 10, 2015. OWCP terminated appellant's wage-loss compensation, effective June 21, 2017 as she refused the employing establishment's February 24, 2017 offer of suitable work under section 8106(c)(2).

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's entitlement to wage-loss and schedule award compensation. As noted, OWCP's regulations provide that before imposing the penalty of termination of wage-loss and schedule award compensation under section 8106(c), OWCP should advise the claimant that the position is suitable

⁷ *Henry P. Gilmore*, 46 ECAB 709 (1995).

⁸ *John E. Lemker*, 45 ECAB 258 (1993).

⁹ *Maggie L. Moore*, 42 ECAB 484 (1991); *reaff'd on recon.*, 43 ECAB 818 (1992).

¹⁰ *Id.*

¹¹ 20 C.F.R. § 10.516; *see also C.C.*, Docket No. 15-1778 (issued August 16, 2016).

¹² *Id.*

¹³ *Id.* at § 10.517.

and afford her 30 days to accept the position or provide reasons for her refusal.¹⁴ If the claimant provides reasons and OWCP determines that the reasons are not acceptable, it should notify her of the determination and afford her 15 days to accept the offered position without penalty.¹⁵

The employing establishment offered appellant a full-time position as a modified city carrier on February 24, 2017. On March 31, 2017 OWCP advised her that the offered position was suitable.¹⁶ In response, appellant submitted statements dated April 4 and 14, 2017, asserting that the offered position was not within the work restrictions set forth by Dr. Soo and conflicted with the results of the FCE. In a June 5, 2017 statement, counsel related that she was refusing the position because she was unable to perform the job duties and argued that OWCP had not considered her employment-related cervical condition in finding the position suitable.

OWCP terminated appellant's entitlement to wage-loss and schedule award compensation on July 22, 2017 without issuing a 15-day letter giving her the opportunity to accept the offered position without penalty. As she submitted additional evidence within the 30-day period afforded by OWCP for responding to the suitability determination, she was entitled to have this evidence evaluated to determine whether or not she had provided acceptable reasons for refusing the offer of suitable work.¹⁷ OWCP should have reviewed the additional evidence and, if it determined the reasons unacceptable, issued a 15-day letter providing appellant a final opportunity to accept the position.¹⁸

The Board accordingly finds that OWCP failed to follow established procedures with respect to termination of compensation under 5 U.S.C. § 8106(c)(2).¹⁹ The Board has recognized that section 8106(c)(2) serves as a penalty provision as it may bar an employee's entitlement to future compensation and, for this reason, will be narrowly construed.²⁰ It is OWCP's burden of proof to terminate compensation and, due to the above-noted procedural error, the Board finds that OWCP failed to meet its burden of proof.²¹

¹⁴ *Id.* at § 10.516.

¹⁵ *Id.*

¹⁶ The Board notes that the medical evidence from Dr. Soo is insufficient to clearly establish that appellant could perform the offered position as he provided conflicting statements regarding her lifting restrictions. On December 14, 2016 Dr. Soo opined that she could carry with both hands four pounds for under three hours per day, but in a work capacity evaluation of the same date he found that she could lift up to eight pounds for three hours per day.

¹⁷ See *C.C.*, *supra* note 11; *K.S.*, Docket No. 15-0181 (issued June 13, 2016). Additionally, even if submitted after the 30-day period, but prior to the final decision, OWCP must evaluate the evidence to determine if acceptable reasons for refusing the position. See *M.M.*, 59 ECAB 680 (2008).

¹⁸ *R.G.*, Docket No. 15-0492 (issued November 16, 2015); see also *Maggie L. Moore*, *supra* note 9; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.5(e)(3) (June 2013) (if new evidence received, it should be identified in the 15-day letter).

¹⁹ See *L.S.*, Docket No. 15-1246 (issued September 8, 2016).

²⁰ See *R.G.*, Docket No. 15-0492 (issued November 16, 2015); *H. Adrian Osborne*, 48 ECAB 556 (1997).

²¹ See *S.M.*, Docket No. 16-1913 (issued April 11, 2017).

CONCLUSION

The Board finds that OWCP improperly terminated appellant's entitlement to wage-loss and schedule award compensation effective June 21, 2017 as she refused an offer of suitable work under 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the July 22, 2017 decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 11, 2018
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