

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

M.E., Appellant)	
)	
and)	Docket No. 18-0808
)	Issued: December 7, 2018
U.S. POSTAL SERVICE, POST OFFICE, Charlotte, NC, 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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 6, 2018 appellant filed a timely appeal from an October 10, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 has met its burden of proof to terminate appellant's entitlement to wage-loss compensation and schedule award compensation effective October 15, 2017 as he refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On April 3, 2015 appellant, then a 55-year-old customer service supervisor, filed a traumatic injury claim (Form CA-1) alleging that he developed paranoia and anxiety after a

¹ 5 U.S.C. § 8101 *et seq.*

“miscreant” pointed a gun at him on March 31, 2015 in the employing establishment parking lot.² In a March 3, 2015 narrative statement, he noted that as he and a coworker were leaving the employing establishment after work, they noticed a brown car in the parking lot. Both appellant and his coworker went to their respective vehicles. The driver of the brown car then drove behind appellant’s vehicle and got out. Appellant also exited his vehicle and the driver of the brown car pulled out a “silver automatic” pistol and accused appellant of taking his marijuana. Appellant asked what he was talking about and heard his coworker start his postal truck. He kept talking to the alleged assailant and then ran and jumped onto the driver’s side running board of the postal truck. The two employees drove away while appellant was hanging on the side of the truck. Appellant then called the police, who quickly arrived and questioned him for four hours. He noted that the alleged assailant had searched his vehicle’s glove compartment and that he was concerned that he had secured appellant’s address.

On September 4, 2015 OWCP accepted appellant’s claim for post-traumatic stress disorder (PTSD). It paid him wage-loss compensation and medical benefits on the supplemental rolls as of May 18, 2015, and on the periodic rolls as of October 18, 2015.

In a report dated June 1, 2015, Dr. Cheryl Masters, a clinical psychologist, noted appellant’s history of injury on March 31, 2015. She diagnosed PTSD. Dr. Masters opined that appellant could return to work in an environment with less stress and less contact with other people. She agreed with appellant that he should not work as a supervisor. Dr. Masters concluded that these restrictions were necessary for 12 months to allow appellant to transition back into the workplace.

In a report dated September 1, 2015, Dr. Dorata Gawlas, a Board-certified psychiatrist, opined that appellant was indefinitely totally disabled. She noted that his recent incident at work, robbery at gun point, had caused an exacerbation of his mental condition.

Dr. Masters completed a report on December 17, 2015 and found that appellant could return to work with restrictions. She noted that appellant should not work on the night shift or perform supervisory duties. Dr. Masters further noted that appellant should not lock up or be the last person to leave. She also recommended reassignment.

Dr. Masters completed a note on April 20, 2016 and recommended that appellant work on the day shift, that he not be responsible for closing alone, and that he be removed from supervisory roles. She further recommended an alternative work location.

On May 25, 2016 OWCP referred appellant for a second opinion evaluation with Dr. Patricia K. Boyer, a Board-certified psychiatrist. In her June 9, 2016 report, Dr. Boyer described the March 31, 2015 employment injury and her examination of appellant. She diagnosed major depressive disorder, recurrent, general personality disorder, and alcohol abuse. Dr. Boyer opined that the March 31, 2015 employment injury did not cause appellant’s total disability for

² The record indicates that appellant was diagnosed with depression in July 2002. He had three previous claims for emotional conditions, OWCP File Nos. xxxxxx096, xxxxxx963, and xxxxxx905 which were not accepted as employment related.

work. She found that appellant could work eight hours a day in his usual job, but that restrictions such as a nonsupervisory role would be helpful.

On October 11, 2016 OWCP drafted clarification questions for Dr. Boyer addressing whether appellant's work restrictions were temporary or permanent and whether he had reached maximum medical improvement (MMI). However, no response was received.³

Dr. Masters completed a report on November 25, 2016 and noted that appellant's initial diagnosis of PTSD had been reduced to adjustment disorder with mixed emotional features and that his diagnosis of depression from 2013 remained. She noted that appellant continued to experience symptoms of occasional insomnia, fatigue, worry, irritability, and anhedonia. Dr. Masters found that appellant's specific work-related condition had resolved. She provided work restrictions noting that appellant should not be stationed at his previous location, that he not be given the responsibility of closing up and exiting the building alone, and that he not be placed in a supervisory position.

On April 6, 2017 OWCP requested a supplemental report from Dr. Masters addressing whether appellant's accepted condition had resolved, whether there remained work-related conditions, and the relationship of appellant's work restrictions to his accepted employment injury. She responded on April 20, 2017 and repeated that appellant no longer exhibited the symptoms associated with PTSD due to the March 31, 2015 employment injury and that his initial PTSD diagnosis was reduced to adjustment disorder with mixed emotional features. Dr. Masters reported that appellant had been treated for depression for two years prior to the March 31, 2015 employment injury and that the work incident had contributed to his depression and stress level. She noted that in order to reduce the likelihood of appellant feeling threatened and causing a relapse of his PTSD, she recommended that he not be stationed at his previous location, and that he not be given the responsibility of closing up and exiting the building alone. Dr. Masters reported that these were the conditions under which the March 31, 2015 employment injury occurred and therefore were likely triggers which could cause decompensation. She further noted that appellant continued to have a low stress tolerance and irritability, especially with others, such that he should not be placed in a supervisory position. Dr. Masters opined that appellant's restrictions were permanent and that he had reached MMI.

In a letter dated June 2, 2017, OWCP informed the employing establishment that the weight of the medical evidence rested with Dr. Masters' April 20, 2017 report and requested that it offer appellant a job comporting with her restrictions. It also referred appellant for vocational rehabilitation counseling services on June 6, 2017.

On June 6, 2017 the employing establishment offered appellant a modified operations support specialist position. The hours were from 3:30 p.m. until 12:30 a.m. This position required him to review city and rural carriers, CPMS clearance, PM all clear, and night owl Amazon verification. The position did not require appellant to supervise any employees. However, it noted that appellant was to use a computer to review the activities of carriers' scanners and to review the activities of the carriers throughout the day to ensure that the carrier had met his allotted time to deliver his route, take his lunch break, and collect the mail. Appellant was to enter his findings on

³ The record does not contain a copy of OWCP's letter requesting a supplemental report from Dr. Boyer or any response from her regarding the request for clarification.

a computer program and to submit reports to the manager. The employing establishment noted that appellant's new duty station would be located 12.7 miles from the location of his employment injury site. It further noted that he would not be given the responsibility of closing up and exiting the building alone, as the new duty station was staffed around the clock. The employing establishment reported that the new duty station parking lot was secured by a locked gate and that it could only be accessed with an authorized employee identification badge. Appellant declined this position on June 12, 2017 citing that it included his regular job duties.

In a letter dated June 28, 2017, OWCP's claims examiner expressed concerns regarding the offered position to the employing establishment. She noted that the offered position was at night and that appellant would be walking to his car alone. The claims examiner further noted that she required a copy of appellant's date-of-injury position to distinguish his date-of-injury duties from the modified position duties. She queried whether appellant was performing supervisory duties as he was monitoring other employees. The claims examiner also contacted the vocational rehabilitation counselor *via* telephone and discussed these issues.

In a letter dated June 30, 2017, the employing establishment provided appellant's date-of-injury job description. It explained that in his offered modified-duty position, appellant would be assigned a parking space near the front door and that after 5:00 p.m. he could move his vehicle to the postmaster's parking spot directly outside the front door. The employing establishment noted that there was lighting around the facility and cameras at the door and each corner of the building as well as a security booth manned 24 hours a day. In regard to appellant's duties, it noted that appellant would have no interaction with craft employees and that he would have no management of employees, but instead his reviews of the employees' work would be completed *via* computer without actual personal contact.

In a telephone conference dated July 13, 2017, the employing establishment, the vocational rehabilitation counselor, and appellant's claims examiner discussed the issues of appellant's duty schedule and whether his duties included supervisory responsibilities. It agreed to include parking specifications in the job offer as well as ascertaining whether security would be available to walk appellant to his car. The vocational rehabilitation counselor distinguished the modified job from appellant's date-of-injury position as he was not interacting face-to-face with employees or with the public. On August 3, 2017 the employing establishment confirmed that a guard would be available to help appellant safely walk to his car.

On August 8, 2017 the employing establishment again offered appellant the position of modified operations support specialist with the same duties and work hours. It noted that this position was not offered at his previous duty station, that he would not be responsible for closing the employing establishment, and that he would not be placed in a supervisory position or be supervising employees. The employing establishment noted that after 5:00 p.m., when the postmaster left, appellant could move his car and park right next to the door. At the end of appellant's workday, someone would stand at the exit door and watch him get in his car. Furthermore, there were cameras on the side of the building facing the parking lot.

In a statement dated August 10, 2017, appellant indicated that he did not want to work nights. On August 12, 2017 he declined this position noting that, after the March 31, 2015 employment injury, he was afraid to be out of his house after dark.

In a letter dated August 16, 2017, OWCP informed appellant that it considered the modified operations support specialist position to be suitable based on the medical limitations provided by Dr. Masters. It found he would not be performing supervisory duties and that the offered position was at a different employing establishment location. OWCP further found appellant was not responsible for closing the new duty station. It noted the arrangements for appellant to move his car to near the entrance. OWCP afforded appellant 30 days to accept the offered positions or to provide his reasons for refusal. It also explained the penalty provisions of 5 U.S.C. § 8106(c)(2).

On August 28, 2017 Dr. Joseph L. Godfrey, a Board-certified psychiatrist, diagnosed adjustment disorder and depression. He found that appellant was totally disabled for two weeks from that date.

In a letter dated September 21, 2017, OWCP reviewed the evidence submitted by appellant and found that he had not offered a valid reason to refuse the offered position. It afforded him an additional 15 days to accept and report to the modified-duty position. OWCP noted that, if appellant did not accept and report to the position within 15 days, his entitlement to wage-loss and schedule award compensation would be terminated.

Appellant submitted a letter dated September 12, 2017 in which he refused the offered position as he was depressed and had anxiety problems. He provided a news article discussing the shooting of a postal carrier on August 31, 2017 in Charlotte, North Carolina which resulted in serious injuries. Appellant noted that mail carriers had been shot in Charlotte and that this caused him anxiety.

Dr. Godfrey repeated his findings and conclusions on September 25, 2017 and continued to support appellant's disability for work.

By decision dated October 10, 2017, OWCP found that appellant had refused an offer of suitable work and terminated his entitlement to wage-loss and schedule award compensation in accordance with 5 U.S.C. § 8106(c)(2).

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying 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 that it is no longer related to the employment.⁵ Section 8106(c) of FECA⁶ provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee is not entitled to compensation. Section 10.517 of the applicable regulations⁷ provides that an employee who refuses or neglects to work after suitable work has been offered or secure for the employee, has the burden of showing

⁴ *L.L.*, Docket No. 17-1247 (issued April 12, 2018); *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

⁵ *G.R.*, Docket No. 16-0455 (issued December 13, 2016).

⁶ 5 U.S.C. § 8106(c)(2).

⁷ 20 C.F.R. § 10.517(a).

that such refusal or failure to work was reasonable or justified, and shall be provided with the opportunity to make such showing before a determination is made with respect to termination of entitlement to compensation. To justify termination of compensation, OWCP must establish that the work offered was suitable 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

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.¹⁰ OWCP regulations provide factors to be considered in determining what constitutes suitable work for a particular disabled employee, including 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.¹¹ The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by medical evidence. All impairments, whether work related or not, must be considered in assessing the suitability of an offered position.¹² 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 proof to show that such refusal or failure to work was reasonable or justified.¹³ 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.¹⁴

After termination or modification of benefits clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant.¹⁵

ANALYSIS

The Board finds that OWCP did not meet its burden of proof to establish that the modified operations support specialist position was suitable such that it could terminate appellant's entitlement to wage-loss and schedule award compensation, effective October 15, 2017 as he refused an offer of suitable work under 5 U.S.C. § 8106(c)(2).

⁸ *L.L., supra* note 4; *Arthur C. Reck*, 47 ECAB 339, 341-42 (1995).

⁹ *L.L., id.*

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

¹¹ *L.L., id.*; *J.J.*, Docket No. 17-0410 (issued June 20, 2017); *Rebecca L. Eckert*, 54 ECAB 183 (2002).

¹² *Id.*

¹³ *L.L., supra* note 4; *Catherine G. Hammond*, 41 ECAB 375, 385 (1990); 20 C.F.R. § 10.517(a).

¹⁴ *Id.* at § 10.516.

¹⁵ *L.L., supra* note 4; *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).

In terminating appellant's entitlement to wage-loss and schedule award compensation under 5 U.S.C. § 8106(c), OWCP did not properly determine that the suitable work position was within the restrictions provided by OWCP's second opinion physician, Dr. Boyer.

OWCP referred appellant for a second opinion evaluation with Dr. Boyer and upon review of her June 9, 2016 report, determined that this report required further clarification. The record indicates that it prepared supplemental questions for Dr. Boyer, but the record does not document that a letter was issued requesting a supplemental report. The Board finds that, once OWCP undertook development of the evidence by referring appellant to a second opinion physician, it had an obligation to obtain a sufficiently reasoned report as to whether appellant could return to work and under what restrictions.¹⁶

Furthermore, appellant's treating physician, Dr. Masters, provided work restrictions based on appellant's accepted condition of PTSD. Dr. Masters found that appellant's PTSD was not totally disabling and provided work restrictions on December 17, 2015 and April 20 and November 25, 2016. These restrictions included that appellant should work the dayshift, that he should not close his duty station alone or exit the building alone, that he should not perform supervisory duties, and that he should not work at his date-of-injury location. Based on these restrictions, on August 8, 2017 the employing establishment offered appellant the position of modified operations support specialist.

The issue of whether a claimant is able to perform the duties of the offered employment position is a medical one and must be resolved by probative medical evidence.¹⁷ While OWCP found that Dr. Masters' opinions contained sufficient medical rationale to support that appellant could perform the duties contained in the offered position,¹⁸ which included working until 12:30 a.m., the Board finds her opinion is insufficient for OWCP to meet its burden of proof. Dr. Masters opined on December 17, 2015 and April 20, 2016 that appellant should not work the night shift and should work the dayshift. She noted that appellant should avoid the conditions under which the March 31, 2015 employment injury occurred which were triggers to cause decompensation. The position offered by the employing establishment included working until 12:30 a.m. While OWCP and the employing establishment explored options to make this schedule more acceptable for appellant, including parking close to the door and observed exiting of the building, there is no medical evidence in the record establishing that these attempted curative measures would be sufficient. OWCP did not secure a medical report from Dr. Masters that reviewed the job offer and provided a reasoned opinion as to its suitability for appellant, considering all existing and relevant conditions.¹⁹ The medical evidence of record, therefore, fails to establish that the offered position was suitable.

¹⁶ *W.L.*, Docket No. 17-1965 (issued September 12, 2018); *G.C.*, Docket No. 16-1109 (issued December 7, 2016); *Walter A. Fundinger, Jr.*, 37 ECAB 200, 205 (1985) (OWCP had an obligation to properly develop the medical evidence after referral to a second opinion physician).

¹⁷ *F.B.*, Docket No. 17-0216 (issued February 13, 2018); *Gayle Harris*, 52 ECAB 319 (2001).

¹⁸ *F.B.*, *id.*; *Maurissa Mack*, 50 ECAB 498 (1999).

¹⁹ *S.Y.*, Docket No. 17-1032 (issued November 21, 2017).

The Board has held that, for OWCP to meet its burden of proof in a suitable work termination, the medical evidence should be clear and unequivocal that the claimant could perform the offered position.²⁰ As a penalty provision, section 8106(c)(2) of FECA must be narrowly construed.²¹ Based on the evidence of record, the Board finds that OWCP improperly determined that the modified position offered to appellant constituted suitable work within his established limitations and capabilities. Consequently, OWCP did not meet its burden of proof to justify the termination of his entitlement to wage-loss and schedule award compensation.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's entitlement to wage-loss and schedule award compensation, effective October 15, 2017, as he refused an offer of suitable work under 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the October 10, 2017 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 7, 2018
Washington, DC

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

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

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

²⁰ *D.M.*, Docket No. 17-1668 (issued April 9, 2018).

²¹ *Id.*