United States Department of Labor
Employees' Compensation Appeals Board

F.B., Appellant	)	
and	)	**Docket No. 17-0216**
	)	**Issued: February 13, 2018**
U.S. POSTAL SERVICE, BOWLING GREEN STATION, New York City, NY, 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
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On November 7, 2016 appellant filed a timely appeal from an October 5, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's compensation benefits on October 5, 2016 pursuant to 5 U.S.C. § 8106(c).

HISTORY

On February 24, 1978 appellant, then a 31-year-old supply clerk, fractured her left ankle when she fell from a platform at work. She stopped work that day. OWCP initially accepted closed fracture of the medial malleolus of the left ankle, which was repaired surgically on

[1] 5 U.S.C. § 8101 *et seq.*

March 3, 1978. Appellant received continuation of pay from February 25 to April 10, 1978, and wage-loss compensation benefits until she returned to work on August 11, 1978.

Appellant continued to work until October 7, 1998, when she had surgery for screw removal and left ankle fusion. She thereafter received wage-loss compensation and was placed on the periodic compensation rolls. Appellant returned to a modified position for a brief period in July 1999. OWCP thereafter accepted a July 17, 1999 recurrence of disability, and she did not return to work after that date. Appellant had additional left ankle surgery on December 2, 1999. She retired from the employing establishment, effective October 11, 2001, and moved from New York to Pennsylvania. Appellant continued to receive FECA benefits on the periodic rolls. In 2012 she moved to North Carolina.

Dr. Mark W. Puffenberger, a family physician, submitted reports and work capacity evaluations (Form 5c) dated June 9, 2008 to March 23, 2015 in which he noted appellant's complaint of chronic joint pain in her left ankle following a fall at work in 1978. He described physical examination findings and diagnosed osteoarthrosis of the ankle/foot. Dr. Puffenberger advised that appellant was totally disabled and could never return to work.

In a November 14, 2014 report, Dr. Glenn E. MacNichol, Board-certified in anesthesiology, advised that appellant was under treatment for the conditions of chronic pain of the left ankle, bilateral hip pain, and chronic low back pain associated with intermittent lumbar radiculopathy. He advised that appellant's ankle pain was due to the previous ankle fracture and that her back pain was multifactorial, indicating that her gait disturbance aggravated her back pain.

In April 2015 OWCP referred appellant to Dr. Lawrence N. Larabee, a Board-certified orthopedic surgeon, for a second opinion evaluation. The statement of accepted facts (SOAF) provided to the physician indicated that the additional condition of general osteoarthritis, multiple sites, left, had been accepted. In a May 27, 2015 report, Dr. Larabee noted the history of injury and his review of the SOAF and medical record. He noted moderate swelling and marked deformity present in examination of the left ankle and that appellant limped with a left-sided antalgic gait. Dr. Larabee diagnosed fixed deformity and ankylosed midfoot and advised that the accepted conditions had not resolved. He indicated that appellant could work eight hours a day in a sitting position and that she had reached maximum medical improvement (MMI) in 2007. Dr. Larabee provided restrictions of eight hours sitting and four hours operating a motor vehicle, with no walking, standing, twisting, bending, stooping, or climbing.

OWCP asked that the employing establishment prepare a modified job offer that comported with the restrictions provided by Dr. Larabee. The employing establishment offered appellant a modified mail processing clerk position on February 22, 2016. The job offer was in New York City, with duties of casing manual letters for eight hours. The physical requirements were sitting up to eight hours with pushing, pulling, and lifting up to 20 pounds intermittently for eight hours. Appellant refused the offer on March 3, 2016, noting that she attached a report from Dr. Thomas Gennosa.[2]

[2] No report from Dr. Gennosa is found in the case record.

In a supplemental report dated April 18, 2016, Dr. Larabee advised that appellant could walk as a part of her work duties for 30 minutes daily, could walk coming and going from work for 30 minutes daily, that she could not stand and work, but could stand for 30 minutes coming and going from work. He reviewed the February 22, 2016 job offer and advised that she could perform the position. In an attached work capacity evaluation, Dr. Larabee provided permanent restrictions that appellant could walk for 1.5 hours daily, stand for 30 minutes, operate a motor vehicle for 4 hours at work and 4 hours to and from work, and that she could not twist, bend, stoop, or climb.

On May 6, 2016 the employing establishment informed OWCP that it had completed the search for a modified assignment in appellant's geographical area and had been unable to identify a suitable assignment that fit her restrictions. A priority for assignment worksheet was attached.

By letter dated May 23, 2016, OWCP informed the employing establishment that the February 22, 2016 job offer was found suitable except that relocation expenses were not authorized. It explained that, as the evidence of record indicated that appellant was no longer on the employing establishment rolls, in accordance with OWCP regulations relocation expenses should be provided since she had moved from her previous duty station.

On July 26, 2016 the employing establishment again offered appellant the modified processing clerk position. It noted that relocation expenses were authorized when the offer was accepted. Appellant refused the position on August 1, 2016, stating that she was under pain management and that she took hydrocodone four times daily, all due to her fractured left ankle.

By letter dated August 11, 2016, OWCP advised appellant that the position offered was suitable. Appellant was notified that if she failed to report to work or failed to demonstrate that the failure was justified, pursuant to section 8106(c)(2) of FECA, her right wage-loss compensation or a schedule award would be terminated. She was afforded 30 days to respond.

On September 9, 2016 appellant forwarded her August 1, 2016 refusal of the job offer. Medical evidence attached included a May 11, 2015 magnetic resonance imaging (MRI) scan of lumbar spine that demonstrated severe stenosis from L3-4 through L5-S1, moderate-to-severe facet degenerative disease, grade 1 anterolisthesis of L4 on L5, and moderate-to-severe loss of disc space height. A November 11, 2015 left ankle fracture demonstrated surgical changes and considerable degenerative change. An incomplete, unsigned emergency department report date August 4, 2016 noted diagnoses of fall with abrasion of cheek. In an August 30, 2016 report, Kristin W. Warren, a physician assistant, noted diagnoses of diabetes mellitus, tobacco dependence syndrome, localized osteoarthrosis, osteoarthritis of ankle, ankle joint pain, low back pain, and elevated blood pressure. She indicated that left ankle examination demonstrated swelling, pain with palpation, limited range of motion due to fusion, and a slight limp without ambulation. Ms. Warren diagnosed left ankle pain, described appellant's medication regimen, and advised that she could continue activities as tolerated. On September 2, 2016 Dr. Akpomudiare Otuguor, a Board-certified family physician, advised that appellant had chronic medical problems including bulging disc at the lower back for which she received steroid injections. He further noted the history of multiple surgeries including fusion of the left ankle,

that she attended pain management, and that she ambulated with a cane. Dr. Otuguor concluded that, due to these medical conditions, appellant would have difficulty with work.

By letter dated September 12, 2016, OWCP advised appellant that her reasons for refusing the offered position were not valid. Appellant was afforded an additional 15 days to accept the offered position. On October 3, 2016 the employing establishment indicated that the offered position remained available.

In an October 5, 2016 decision, OWCP terminated appellant's wage-loss compensation and right to a schedule award effective that date because she refused an offer of suitable work. It noted that the medical evidence submitted by appellant did not contain an explanation of why she could not perform the offered position and found that the weight of medical evidence rested with the opinion of Dr. Larabee who provided the second opinion evaluation.

LEGAL PRECEDENT

Section 8106(c) of FECA 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."[3] It is OWCP's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.[4] 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.[5] To justify termination, OWCP must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.[6] In determining what constitutes "suitable work" for a particular disabled employee, it considers 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.[7]

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.[8] In assessing medical evidence, the number of physicians supporting one position or another is not controlling. The weight of such evidence is determined by its reliability, its probative value, and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for and the thoroughness of physical

[3] 5 U.S.C. § 8106(c)(2).

[4] *Joyce M. Doll*, 53 ECAB 790 (2002).

[5] 20 C.F.R. § 10.517(a).

[6] *Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[7] 20 C.F.R. § 10.500(b); *see Ozine J. Hagan*, 55 ECAB 681 (2004).

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

examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.[9]

OWCP procedures provide 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.[10] If possible, the employing establishment should offer suitable employment in the location where the employee currently resides. If this is not practical, it may offer suitable reemployment at the employee's former duty station or other location.[11]

ANALYSIS

Once OWCP accepts a claim it has the burden of proof to justify termination or modification of compensation benefits.[12] This includes cases where OWCP terminates compensation under section 8106(c) of FECA for refusal of suitable work.[13] Section 8106(c) is a penalty provision and shall be narrowly construed.[14]

The Board finds that OWCP did not meet its burden of proof to terminate wage-loss compensation on October 5, 2016. OWCP found that the weight of the medical evidence rested with the opinion of Dr. Larabee who provided a second opinion evaluation. However, the Board finds that Dr. Larabee's reports are lacking because his answers in both the May 27, 2015 and April 18, 2016 reports were cursory and not well reasoned and were thus insufficient to meet OWCP's burden of proof.

In his May 27, 2015 report, Dr. Larabee provided few physical examination findings, merely noting that the left ankle had moderate swelling with a marked deformity evident and an ankylosed mid-foot. When asked for objective findings to support disability, he merely indicated "same," fixed deformity and ankylosed mid-foot. Likewise, in his April 18, 2016 supplemental report, Dr. Larabee gave only abbreviated answers and no rationale for the time restrictions he listed. To meet its burden of proof to establish that an offered position is suitable, the medical evidence on which OWCP relies should be based on current examination findings, the medical record, and a SOAF and clearly explain that appellant is physically capable of performing the

[9] *Maurissa Mack*, 50 ECAB 498 (1999).

[10] Federal (FECA) Procedure Manual, Part -- 2 Claims, *Reemployment: Determining Wage-Earning Capacity, Refusal of Job Offer*, Chapter 2.814.5 (June 2013); *see Lorraine C. Hall*, 51 ECAB 477 (2000).

[11] 20 C.F.R. § 10.508; *see S.H.*, Docket No. 15-0329 (issued June 5, 2015).

[12] *Supra* note 7.

[13] *Y.A.*, 59 ECAB 701 (2008).

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

duties of the offered position.[15] The medical evidence should be clear and unequivocal that the claimant could perform the offered employment position.[16]

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. Larabee's opinion contained sufficient medical rationale to support that appellant could perform the duties of the offered position,[18] the Board finds his opinion lacks sufficient rationale to meet OWCP's burden of proof. The medical evidence of record, therefore, fails to establish that the offered position was suitable.[19]

The employing establishment offered appellant a modified mail processing clerk position on February 22, 2016 and noted that relocation expenses were authorized when the offer was accepted. Appellant refused the position on August 1, 2016, stating that she was under pain management and that she took hydrocodone four times daily, all due to the fractured left ankle.

As previously noted, OWCP must consider all of appellant's conditions including preexisting, work related, and subsequently acquired medical conditions in determining whether a position is suitable for appellant. The record does not substantiate that OWCP considered appellant's lumbar disc disease or pain medications in reaching its decision. Therefore, OWCP has not met its burden of proof in this case.[20]

As a penalty provision, section 8106(c)(2) must be narrowly construed. Based on the evidence of record, the Board finds that OWCP improperly determined that the modified position offered appellant constituted suitable work within her physical limitations and capabilities. Consequently, OWCP did not meet its burden of proof to justify the termination of her compensation benefits pursuant to section 8106(c)(2).

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation on October 5, 2016 pursuant to 5 U.S.C. § 8106(c).

[15] *See generally*, *E.F.*, Docket No. 15-0103 (issued May 12, 2015).

[16] *D.G.*, Docket No. 16-1492 (issued January 3, 2017).

[17] *Supra* note 8.

[18] *Supra* note 9.

[19] *See Patrick A. Santucci*, 40 ECAB 151 (1988).

[20] *See H.L.*, Docket No. 16-1810 (issued March 16, 2017).

ORDER

IT IS HEREBY ORDERED THAT the October 5, 2016 decision of the Office of Workers' Compensation Programs is reversed.[21]

Issued: February 13, 2018
Washington, DC

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

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

[21] Colleen Duffy Kiko, Judge, participated in the original decision but was no longer a member of the Board effective December 11, 2017.