United States Department of Labor
Employees' Compensation Appeals Board

D.M., Appellant	)	
and	)	**Docket No. 17-1235**
	)	**Issued: February 15, 2018**
DEPARTMENT OF DEFENSE, DEFENSE LOGISTIC AGENCY, ROBINS AIR FORCE BASE, Warner Robins, GA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., 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 May 12, 2017 appellant, through counsel, filed a timely appeal from December 7, 2016 and March 23, 2017 merit decisions 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 over 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.*

ISSUES

The issues are: (1) whether OWCP properly terminated appellant's compensation under 5 U.S.C. § 8106(c)(2), effective December 8, 2016; and (2) whether appellant has established intermittent disability from work from November 29 to December 9, 2016 due to her accepted conditions.

FACTUAL HISTORY

On September 19, 2012 appellant, then a 42-year-old distribution process worker, filed a traumatic injury claim (Form CA-1) alleging that, on September 17, 2012, she injured her back in the performance of duty. OWCP accepted the claim for lumbar sprain, lumbar or thoracic neuritis or radiculitis, disorders of the sacrum, and a right disc herniation at L5-S1. Appellant stopped work on September 17, 2012, returned to part-time limited-duty employment on May 3, 2013 and stopped work again on January 7, 2014. OWCP paid her compensation on the periodic rolls beginning March 9, 2014.

On April 1, 2013 Dr. Daxes Banit, a Board-certified orthopedic surgeon, performed a discectomy on the right side at L5-S1. On August 24, 2015 he performed a spinal fusion at L5-S1, a removal of hardware, a revision decompression at L5-S1 with laminotomy and foraminotomy, and a harvesting of the right iliac crest graft.[3]

In a January 14, 2016 progress report, Dr. Banit provided examination findings and diagnosed low back pain and lumbago with right sciatica.[4] In an April 13, 2016 progress report, he diagnosed lumbago with right sciatica and low back pain. Dr. Banit related that diagnostic studies revealed a solid fusion at L5-S1. He opined that appellant had reached maximum medical improvement (MMI).

[3] On January 29, 2015 Dr. Alexander N. Doman, a Board-certified orthopedic surgeon and OWCP referral physician, found that appellant had no residuals of her work injury. OWCP, on March 20, 2015, notified her of its proposed termination of her compensation as the weight of the evidence established that she had no further work-related disability. In an April 1, 2015 report, Dr. Banit opined that diagnostic studies showed "a lack of bridging bone across the L5-S1 interspace." He advised that appellant was disabled from work due to the lack of healing at L5-S1, which he advised would require surgery. OWCP determined that a conflict existed between Dr. Doman, who found that appellant could perform her usual employment, and Dr. Banit, who found that she could not work pending further surgery. On June 5, 2015 Dr. Gary Hattaway, a Board-certified orthopedic surgeon and impartial medical examiner, diagnosed status post decompression and fusion at L5-S1 with pseudoarthrosis of the fusion mass. He concurred with Dr. Banit that appellant required surgery and probably a "new internal fixation from L5 to S1" as a result of her work injury.

[4] On February 4, 2016 OWCP referred appellant to Dr. Sarveswar I. Naidu, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated February 26, 2016, Dr. Naidu diagnosed lumbar radiculopathy with continued sciatica and degenerative lumbar disc disease unrelated to the work injury. He opined that appellant was totally disabled from work, but could be reevaluated in three months after further medical treatment and physical therapy. Dr. Naidu determined that her lumbar strain had resolved, but that she still had residuals of the lumbosacral radiculitis, disorders of the sacrum, and right disc herniation at L5-S1.

An April 26, 2015 functional capacity evaluation (FCE) indicated that appellant could perform light duty with no "prolong[ed] standing, walking, stair climbing, squatting, and kneeling."

On May 12, 2016 Dr. Banit reviewed the FCE findings and advised that appellant could not return to her date-of-injury employment. In a report dated July 1, 2016, he related that the FCE demonstrated that she could work at a light level with no extensive walking, standing, climbing, squatting, or kneeling.[5]

The employing establishment, on August 26, 2016, offered appellant a modified position as a packer in accordance with the findings of the FCE. The position description indicated that it required "a very limited amount of standing, stooping, and bending" and that physical restrictions would be accommodated.

In a September 1, 2016 response, appellant declined the offered position, noting that she had applied for disability retirement and to the Social Security Administration for benefits as a result of her medical condition.

By letter dated October 4, 2016, OWCP advised appellant that it had found the position of packer offered by the employing establishment on August 26, 2016 to be suitable. It afforded her 30 days to accept the position or provide reasons for her refusal. OWCP informed appellant of the penalty for refusing suitable work under section 8106(c)(2).

On November 4, 2016 appellant refused the position. She questioned how a short FCE could determine her ability to work a full day and described her continued symptoms.

OWCP, on November 9, 2016, notified appellant that her reasons for refusing the position were not acceptable and provided her 15 days to accept the position or have her compensation terminated.

In a letter dated November 22, 2016, appellant informed OWCP that she was accepting the position of packer.

The employing establishment advised OWCP in a report of work status (Form CA-3) that appellant had returned to work on November 28, 2016. On December 2, 2016 it clarified that she had resumed work on November 29, 2016 rather than November 28, 2016. Appellant was currently off work.

By letter dated December 5, 2016, OWCP advised appellant that it had stopped her compensation, effective November 29, 2016, based on her return to work.

On December 5, 2016 the employing establishment telephoned OWCP and related that appellant worked for one hour on November 29, 2016 and then left work for the emergency room. Appellant did not work on November 28, 2016, but was at the facility "to go to the health care…."

[5] Dr. Banit continued to provide progress reports describing his treatment of appellant for her low back condition.

By decision dated December 7, 2016, OWCP terminated appellant's entitlement to wage-loss compensation and schedule award benefits, effective December 8, 2016, as she had abandoned suitable work under section 8106(c)(2). It noted that she returned to work on November 29, 2016, but stopped work that day without showing that she sustained a recurrence of disability or otherwise explaining her inability to perform her job duties.[6]

In a medical evaluation of work status form dated November 29, 2016, received by OWCP on December 19, 2016, Dr. Marvin Taylor, an employing establishment physician specializing in occupational medicine, found that appellant could perform the offered position.

On November 30, 2016 Dr. Jonathan Velasquez, a Board-certified internist, opined that appellant could resume work on December 2, 2016 without restrictions. Dr. Dwayne Greene, Board-certified in emergency medicine, evaluated her on December 6, 2016 in the emergency room for low back and right leg pain. He noted that appellant had resumed work and believed the "new job has contributed to the increased pain." In a December 6, 2016 return to work slip, Dr. Greene advised that she could return to work on December 8, 2016 without restrictions.

In a December 6, 2016 internal e-mail, the employing establishment related that on November 28, 2016 appellant checked with medical services to get her restrictions into the system, but performed no work. On November 29, 2016 appellant received a tour of the facility at 3:30 p.m. and left at 4:00 p.m., the end of her shift. On November 30, 2016 she left work at noon after telling her supervisor that she needed to go to the emergency room due to back pain. Appellant notified her supervisor that the physician wanted her off work until December 2, 2016. She returned to work on December 5, 2016 and provided her supervisor with medical documentation showing that she could return to work on December 2, 2016, even though she had called in sick that date. At 10:30 a.m. appellant left work after telling management that she did not feel well. On December 6, 2016 she arrived in the work area at noon and gave her supervisor a physician's note indicating that she could work with restrictions.

Dr. Banit, on December 6, 2016, discussed appellant's complaints of increased pain due to walking on the job. He diagnosed lumbar radiculopathy, low back pain, and lumbago with right sciatica. In a form report dated December 6, 2016, Dr. Banit advised that appellant could resume work with restrictions in accordance with the FCE.

In a December 27, 2016 report of work status, the employing establishment indicated that appellant stopped work on November 29, 2016 and was "in and out" of work until December 6, 2016, when she resumed work with restrictions.

Appellant, on December 27, 2016, related that she reported to work on November 28, 2016 to be "cleared by the base physician to return to work." She worked seven hours on November 28, 2016. Appellant worked from November 29 to December 8, 2016, but took some time off on physician's advice due to pain. She worked eight hours for the first time on December 8, 2016. On December 29, 2016 appellant advised OWCP that she was working and wanted to continue, but experienced constant pain.

[6] OWCP referred to an August 26, 2016 report from a physician; however, this appears to be a typographical error.

On December 30, 2016 appellant filed a claim for intermittent compensation from November 28 to December 9, 2016. A time analysis (Form CA-7a) indicates that she work four hours and used four hours of leave without pay (LWOP) on November 30, 2016, used eight hours of LWOP on December 1, 2, 7, and 8, 2016, four and a half hours of LWOP on December 5, 2016, three hours of LWOP on December 6, 2016, and five hours of LWOP on December 9, 2016.

OWCP, on January 9, 2017, paid appellant wage-loss compensation for eight hours on November 28, 2016, four hours on November 30, 2016 for a medical appointment, and three hours on December 6, 2016 for a medical appointment.[7] It advised her that the medical evidence of record was insufficient to support compensation for the remaining hours claimed.

By decision dated March 23, 2017, OWCP denied appellant's claim for wage-loss compensation for intermittent disability from November 29 to December 9, 2016.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[8] It terminated appellant's compensation under section 8106(c)(2) of FECA,[9] which 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.[10] To justify termination of compensation, it must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[11] 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.[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] Section 10.516 of OWCP's regulations provide that it will advise the employee that the work offered is suitable and provide 30 days for the employee to accept the job or present any reasons to counter OWCP's finding of suitability.[14] Thus, before terminating compensation, OWCP

[7] Appellant, on January 4, 2017, requested an oral hearing before an OWCP hearing representative. On May 30, 2017 OWCP advised her that it had cancelled her request for an oral hearing as she had appealed the matter to the Board and Board review took precedence.

[8] *Linda D. Guerrero*, 54 ECAB 556 (2003).

[9] *Supra* note 2.

[10] 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

[11] *Ronald M. Jones*, 52 ECAB 190 (2000).

[12] *Joan F. Burke*, 54 ECAB 406 (2003).

[13] 20 C.F.R. § 10.517(a); *see supra* note 11.

[14] *Id.* at § 10.516.

must review the employee's proffered reasons for refusing or neglecting to work.[15] If the employee presents such reasons and OWCP finds them unacceptable, it will offer the employee an additional 15 days to accept the job without penalty.[16]

Once OWCP establishes that the work offered is suitable, the burden shifts to the employee who refuses to work to show that the refusal or failure to work was reasonable or justified.[17] The determination of whether an employee is physically capable of performing a modified assignment is a medical question that must be resolved by medical evidence.[18] OWCP procedures state that acceptable reasons for refusing an offered position may include medical evidence of inability to do the work.[19]

ANALYSIS -- ISSUE 1

The Board finds that OWCP improperly terminated appellant's compensation benefits for abandoning suitable work. As a penalty provision, section 8106(c) should be narrowly construed and not lightly invoked.[20]

OWCP accepted that, on September 17, 2012, appellant sustained lumbar sprain, lumbar or thoracic neuritis or radiculitis, disorders of the sacrum, and a right disc herniation at L5-S1. It paid her compensation effective March 9, 2014 on the periodic rolls. Dr. Banit performed a discectomy at L5-S1 on the right side on April 1, 2013 and a fusion and revision decompression at L5-S1 with a laminectomy and foraminotomy on August 24, 2015.

In an April 13, 2016 report, Dr. Banit found that appellant was at MMI. He diagnosed lumbago with sciatica on the right side and low back pain. Dr. Banit advised that studies showed a solid fusion at L5-S1 and noted that appellant's S1 joint issue was not work related. An FCE performed on April 26, 2016 indicated that she could work light duty without extensive standing, walking, climbing, squatting, or kneeling. Dr. Banit reviewed the FCE on May 12, 2016 and concurred with its findings.

The employing establishment offered appellant a modified packer position on August 26, 2016 in accordance with the restrictions of the FCE. Appellant accepted the position on November 22, 2016, underwent an examination at the employing establishment's clinic on November 28, 2016, and returned to work on November 29, 2016.

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

[16] *Supra* note 14; *see Sandra K. Cummings*, 54 ECAB 493 (2003).

[17] 20 C.F.R. § 10.517(a).

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

[19] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.5(a)(4) (June 2013).

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

On December 5, 2016 the employing establishment advised OWCP by telephone that appellant worked for one hour on November 29, 2016 and then stopped work and went to the emergency room. Based on this information, OWCP terminated her compensation for abandoning suitable work. The employing establishment, however, did not address whether appellant had taken leave to go to the emergency room or whether she had subsequently returned to work. Where it authorizes a claimant's absence from duty, there is no basis for finding abandonment of suitable work under section 8106(c)(2).[21] OWCP, consequently, did not have sufficient evidence to find that appellant abandoned suitable work. Additionally, while it followed proper procedures in offering the suitable position to her, it did not provide her with the notice necessary to establish that she had abandoned suitable work.[22] OWCP's procedures provide that, if abandonment of the job is not deemed justified, it must so advise the claimant and allow her the opportunity to return to work.[23]

Subsequent to OWCP's termination of appellant's compensation, it received a December 6, 2016 e-mail from the employing establishment. The employing establishment related that it gave her a tour of the facility for a half hour on November 29, 2016 and that she left work at noon on November 30, 2016 to go to the emergency room due to back pain. A physician took appellant off work until December 2, 2016. Appellant resumed work on December 5, 2016 and provided medical documentation addressing her absence. She left work later that day, but returned to work on December 6, 2016 with restrictions. An official breakdown of hours on a time analysis (Form CA-7a) establishes that the employing establishment granted her leave without pay for the hours lost from work from November 30 through December 9, 2016. Appellant informed OWCP on December 29, 2016 that she was still working, but was in pain.

As the Board held in the case *Dawn L. Westmoreland*,[24] where the employing establishment authorizes a claimant's absence from duty, there is no basis for finding neglect of suitable work under 5 U.S.C. § 8106(c)(2). The Board found no more neglect than if the employing establishment had authorized the use of annual leave to cover the absences in question.[25] As appellant accepted the position and resumed work, OWCP improperly terminated her compensation for abandoning suitable work under section 8106(c).[26]

LEGAL PRECEDENT -- ISSUE 2

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.[27] For each period of

[21] *See N.B.*, Docket No. 14-1778 (issued July 27, 2015); *Dawn L. Westmoreland*, 56 ECAB 446 (2005).

[22] 20 C.F.R. § 10.516; *see Y.S.*, Docket No. 08-0336 (issued June 23, 2008).

[23] *Supra* note 19 at Chapter 2.814.8(d) (June 2013).

[24] 56 ECAB 446 (2005); *see also S.G.*, Docket No. 08-1992 (issued September 22, 2009).

[25] *See P.A.*, Docket No. 15-1675 (issued December 15, 2015).

[26] *See Dawn L. Westmoreland*, *supra* note 21.

[27] *See Amelia S. Jefferson*, 57 ECAB 183 (2005); *see also Nathaniel Milton*, 37 ECAB 712 (1986).

disability claimed, the employee has the burden of proof to establish that she was disabled for work as a result of the accepted employment injury.[28] Whether a particular injury causes an employee to become disabled for work, and the duration of that disability, are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.[29]

Under FECA the term disability means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.[30] Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.[31] An employee who has a physical impairment causally related to her federal employment, but who nonetheless has the capacity to earn the wages that she was receiving at the time of injury, has no disability and is not entitled to compensation for loss of wage-earning capacity.[32] When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in her employment, she is entitled to compensation for any loss of wages.

The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so, would essentially allow an employee to self-certify his or her disability and entitlement to compensation.[33]

ANALYSIS -- ISSUE 2

Appellant filed a claim for compensation for intermittent time lost from work from November 28 to December 9, 2016. OWCP paid her compensation for eight hours on November 28, 2016, four hours on November 30, 2016 for a medical appointment, and three hours on December 6, 2016 for a medical appointment. It denied appellant's request for wage-loss compensation for four hours on November 29, 2013 and for intermittent hours lost from December 2 to 9, 2013.

Appellant has not submitted sufficient evidence to support that her claim for intermittent disability from work on November 29 and December 2 to 9, 2013. As noted, the Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.[34]

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[28] *See Amelia S. Jefferson, id.*

[29] *See Edward H. Horton*, 41 ECAB 301 (1989).

[30] *S.M.*, 58 ECAB 166 (2006); *Bobbie F. Cowart*, 55 ECAB 746 (2004); 20 C.F.R. § 10.5(f).

[31] *Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

[32] *Merle J. Marceau*, 53 ECAB 197 (2001).

[33] *See William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

[34] *See Fereidoon Kharabi, id*.

Dr. Velasquez provided a return to work form on November 30, 2016 indicating that appellant could return to work without restrictions on December 2, 2016. As he did not address the issue of disability for any specific period, his report is of little probative value.[35]

On December 6, 2016 Dr. Greene treated appellant for chronic low back and right leg pain. He noted that she had increased symptoms following her return to work. Dr. Greene diagnosed chronic back pain and found that appellant could return to work on December 8, 2016 without limitations. He did not specifically attribute any period of disability to the accepted employment injury. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship.[36]

Dr. Banit evaluated appellant on December 6, 2016 and found that she could resume work on that date in accordance with the FCE. OWCP paid her for the time lost from work for the medical appointment. Dr. Banit found that appellant could perform her modified position, and thus his opinion is insufficient to meet her burden of proof.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128 and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP improperly terminated appellant's compensation effective December 8, 2016 under section 8106(c)(2) as she abandoned suitable work. The Board further finds that she has not established that she is entitled to wage-loss compensation from November 29 through December 9, 2016.

[35] *See W.M.*, Docket No. 16-1658 (issued May 3, 2017).

[36] *See S.E.*, Docket No. 08-2214 (issued May 6, 2009).

ORDER

IT IS HEREBY ORDERED THAT the March 23, 2017 decision of the Office of Workers' Compensation Programs is affirmed and the December 7, 2016 decision is reversed.

Issued: February 15, 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