United States Department of Labor
Employees' Compensation Appeals Board

S.W., Appellant	)	
and	)	**Docket No. 18-0857**
	)	**Issued: November 26, 2018**
U.S. POSTAL SERVICE, MORGAN PROCESSING & DISTRIBUTION CENTER, New York, NY, 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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 15, 2018 appellant, through counsel, filed a timely appeal from a February 14, 2018 merit decision 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.*

ISSUE

The issue is whether OWCP has met its burden of proof to terminate appellant's entitlement to wage-loss and schedule award compensation effective August 9, 2017 pursuant to 5 U.S.C. § 8106(c)(2) for refusing an offer of suitable work.

FACTUAL HISTORY

On May 19, 2007 appellant, then a 45-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on May 18, 2007 she experienced pain on the right side of her neck and numbness in her fingers while pushing heavy, overloaded, and occasionally damaged mail containers at work. She stopped work the next day and did not return. On September 19, 2007 OWCP accepted appellant's claim for right shoulder and upper arm sprain. It paid appellant wage-loss compensation and medical benefits on the periodic rolls as of September 30, 2007.

On March 22, 2011 appellant informed OWCP of her relocation to Orlando, Florida effective June 1, 2011. On July 29, 2011 OWCP accepted the additional condition of right shoulder impingement syndrome.

In a report dated March 4, 2015, Dr. Steven Touliopoulos, a Board-certified orthopedic surgeon, diagnosed work-related right shoulder post-traumatic impingement syndrome and rotator cuff tendinosis. He reported appellant's findings on physical examination and reviewed appellant's August 21, 2009 magnetic resonance imaging (MRI) scan which demonstrated impingement on the rotator cuff with mild supraspinatus tendinitis. Dr. Touliopoulos repeated his findings and conclusions on September 30, 2015.

On August 29, 2016 OWCP referred appellant, a statement of accepted facts (SOAF), and a list of questions for a second opinion evaluation with Dr. Richard C. Smith, a Board-certified orthopedic surgeon. Dr. Smith was asked to describe appellant's functional capacity in relation to residuals of her accepted May 18, 2007 employment injury. He examined appellant's right shoulder and diagnosed right shoulder pain and impingement syndrome. Dr. Smith reviewed the SOAF and concluded that appellant had ongoing residuals of her accepted conditions and found that she was not capable of returning to her date-of-injury position due to the lifting requirements, noting that she could not perform overhead work. He completed a work capacity evaluation musculoskeletal conditions (Form OWCP-5c) and found that appellant could not return to her usual job because of the lifting requirements, but was capable of working eight hours a day with restrictions. Dr. Smith indicated that appellant could not reach above the shoulder, and provided a lifting restriction of 10 pounds.

In a report dated October 5, 2016, Dr. Touliopoulos noted that appellant was retired and continued to require treatment for her May 18, 2007 work-related right shoulder injury. He found that appellant's right shoulder examination was unchanged. Dr. Touliopoulos recommended surgery, but appellant declined.

On March 21, 2017 the employing establishment offered appellant a modified-duty assignment as a modified mail processing clerk with relocation expenses. It noted that the position was located in New York, New York, and that the duties included casing manual flats with her left

hand for up to eight hours and Express Mail mark-up for eight hours. The physical requirements were reaching above the shoulder with the left hand only, lifting up to 10 pounds, and repetitive movement up to eight hours. On March 27, 2017 appellant rejected the modified-duty position as she had lung disease, an immune system disease, and other medical conditions which prevented her from returning to work.

In a letter dated March 31, 2017, counsel noted that appellant wished to elect "retirement" system benefits rather than FECA benefits and requested an election of benefits form.

In a letter dated April 5, 2017, the employing establishment reported that appellant had refused the March 21, 2017 job offer and had asserted that she could not return to work due to lung disease, immune system disease, and other medical conditions. It noted that appellant was injured in New York, but had since moved to Orlando, Florida. The employing establishment reported, "Our agency has conducted a thorough search in Orlando, Florida and we did not find any suitable work. Our search for work efforts moved to New York where we were able to accommodate and find [appellant] a job, which is the one she has refused." The employing establishment attached documentation that positions were not available in appellant's current location and noted that the job offer would remain available to appellant throughout a suitability determination with relocation expenses included.

In a letter dated April 18, 2017, OWCP advised appellant that the modified mail processing clerk position was suitable work in accordance with Dr. Smith's work restrictions. It noted that appellant had not provided medical evidence in support of her contention that nonemployment-related medical conditions prevented her from performing the offered position. OWCP determined that Dr. Smith's report was entitled to the weight of the medical evidence. It informed appellant of the penalty provision of 5 U.S.C. § 8106(c)(2) and afforded her 30 days to accept the offered position or provide her written reasons for refusal.

The employing establishment provided a statement dated April 18, 2017 noting that a search for work for appellant within 50 miles of her current residence was unable to locate any suitable positions.

On May 1, 2017 appellant elected to receive Federal Employees Retirement System (FERS) benefits rather than FECA benefits effective May 28, 2017.

In a note dated April 24, 2017, Dr. William J. Robbins, an internist specializing in infectious disease, reported that he was treating appellant for her immune system disease. On May 5, 2017 Dr. Tony Tsai, a Board-certified endocrinologist, noted that he had treated appellant since 2004 due to endometriosis in her lungs which resulted in severe abdominal pain and expectorating blood. Appellant's treatment resulted in bone loss and peripheral neuropathy.

On May 9, 2017 appellant informed OWCP that she agreed to accept the position of modified mail processing clerk. In a letter dated May 22, 2017, the employing establishment requested that appellant return the job offer with her signature. Later, on May 30, 2017, it informed OWCP that appellant had not returned to work.

In a letter dated June 15, 2017, OWCP informed appellant that her reasons for refusing the modified mail processor position were not valid. It noted that appellant had elected to receive

FERS retirement benefits effective May 28, 2017 and that her wage-loss compensation benefits were terminated effective that date. OWCP noted that the election of retirement benefits did not exempt her from accepting a valid job offer and was not a valid reason for refusing suitable work. It again noted the penalty provisions of 5 U.S.C. § 8106(c)(2) and afforded appellant 15 days to accept and report to the position.[3]

By decision dated August 9, 2017, OWCP terminated appellant's entitlement to wage-loss compensation and schedule award compensation effective that date based on her refusal of a suitable work position in accordance with 5 U.S.C. § 8106(c)(2). It found that the offered position was suitable work based on Dr. Smith's second opinion report, that there was no medical evidence supporting that appellant could not perform the offered position, and the employing establishment had confirmed that there was no suitable work available within her local commuting area.

On August 16, 2017 counsel requested an oral hearing before an OWCP hearing representative. In a letter dated November 21, 2017, appellant informed OWCP of her change of address to Fayetteville, North Carolina.

Appellant testified at the oral hearing on January 8, 2018 before an OWCP hearing representative. She asserted that she moved to Florida due to two additional life threatening conditions, endometriosis in her lungs and her immune system disease. Appellant testified that she did not accept the modified-duty position because she could not return to New York due to her lung condition and as the employing establishment did not assist her in locating an appropriate position in Florida.

By decision dated February 14, 2018, OWCP's hearing representative found that the modified mail processing clerk was medically suitable work, that appellant's additional medical conditions preexisted her date of injury, and that there was no medical evidence supporting appellant's need for relocation. She noted that on April 5, 2017 the employing establishment reported that there were no positions available for appellant in Florida. The hearing representative further noted that appellant had recently relocated to North Carolina. She affirmed OWCP's August 9, 2017 decision.

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

[3] On July 24, 2017 appellant filed a schedule award claim (Form CA-7). In a report dated June 23, 2017, Dr. Touliopoulos opined that appellant had reached MMI. In a letter dated August 7, 2017, OWCP requested a detailed medical report in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6th ed. 2009).

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

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

8106(c)(2) of FECA[6] 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 regulations[7] provides 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 showing before a determination is made with respect to termination of entitlement to compensation. To justify termination of compensation, OWCP must show 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]

[6] 5 U.S.C. § 8106(c)(2).

[7] 20 C.F.R. § 10.517(a).

[8] *L.L., supra* note 4; *Arthur C. Rack*, 47 ECAB 339, 341-342 (1995).

[9] *L.L., supra* note 4.

[10] *L.L., supra* note 4*; T.S.*, 59 ECAB 490 (2008); *Ronald M. Jones*, 52 ECAB 190 (2000).

[11] *L.L., supra* note 4*; 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.

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.[15] 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.[16] Where the distance between the location of the offered job and the location were the employee currently resides is at least 50 miles, OWCP may pay such relocation expenses as are considered reasonable and necessary if the employee has been terminated from the employing establishment's rolls and would incur relocation expenses by accepting the offered employment.[17]

ANALYSIS

The Board finds that OWCP has not met its burden of proof to terminate appellant's entitlement to wage-loss and schedule award compensation effective August 9, 2017 pursuant to 5 U.S.C. § 8106(c)(2), for refusing an offer of suitable work.

OWCP did not establish that appellant was capable of performing the position of modified mail processing clerk. It found that this position was suitable work based on the work restrictions provided by Dr. Smith, the referral physician, and terminated appellant's entitlement to wage-loss and schedule award compensation effective August 9, 2017. The physical requirements of the position, as listed by the employing establishment, did not comply with Dr. Smith's work restrictions. Dr. Smith found that appellant could not reach above the shoulder and could not lift over 10 pounds. He did not limit this restrictions to appellant's accepted right arm only. OWCP interpreted Dr. Smith's report to allow lifting above the left shoulder, however it did not secure a report which actually confirmed that this lifting restriction was limited to the right shoulder. The Board further notes that Dr. Smith was not asked to address the issue of whether additional conditions impacted appellant's ability to return to work.[18] The Board therefore finds that OWCP did not secure a medical report 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.

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

[15] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5 (June 2013); *see F.B.*, Docket No. 17-0216 (issued February 13, 2018); *Lorraine C. Hall*, 51 ECAB 477 (2000).

[16] 20 C.F.R. § 10.508; *S.H.*, Docket No. 15-0329 (issued June 5, 2015).

[17] 20 C.F.R. § 2.814.6(d)(2); *see A.P.*, Docket No. 17-1135 (issued February 12, 2018); *W.B.*, Docket No. 13-0947 (issued August 16, 2013).

[18] *See P.S.*, Docket No. 18-0396 (issued August 17, 2018).

[19] *Id.*

the offered position.[20] As a penalty provision, section 8106(c) must be narrowly construed.[21] OWCP improperly determined that the modified position offered to appellant constituted suitable work within her physical limitations and capabilities.

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's entitlement to wage-loss and schedule award compensation effective August 9, 2017 pursuant to 5 U.S.C. § 8106(c)(2), for refusing an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the February 14, 2018 merit decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 26, 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.*