United States Department of Labor
Employees' Compensation Appeals Board

L.L., Appellant	)	
and	)	**Docket No. 18-0861**
	)	**Issued: April 5, 2019**
DEPARTMENT OF VETERANS AFFAIRS, MONTROSE VETERANS ADMINISTRATION HOSPITAL Montrose, NY, Employer	)	

Appearances:
Thomas S. Harkins, 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 14, 2018 appellant, through counsel, filed a timely appeal from a September 28, 2017 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 to consider 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 wage-loss compensation and entitlement to schedule award benefits, effective July 13, 2016, as she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

This case has previously been before the Board.[3] The facts and circumstances of the case as set forth in the prior decisions are incorporated herein by reference. The relevant facts are as follows.

On May 11, 1996 appellant, then a 46-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that on May 10, 1996 she injured her left knee while transferring a patient to a wheelchair in the performance of her federal employment duties. OWCP accepted the claim for pulled left knee ligament (left knee sprain) and subsequently expanded acceptance of the claim to include right meniscal tear, right knee osteoarthritis, left torn lateral meniscus, and left knee degenerative joint disease.

OWCP authorized left arthroscopic meniscal knee repair, which was performed on March 7, 1997, and left knee arthroscopic surgery, which was performed on May 2, 2002. Appellant did not initially stop work following the injury, but she stopped work on March 6, 1997 to undergo the surgical procedure. She returned to a limited-duty position on October 6, 1997. Appellant stopped work again on May 2, 2002 and OWCP paid her wage-loss compensation on the periodic rolls commencing September 8, 2002.

In an October 20, 2013 report, Dr. Stephen W. Smith, a treating Board-certified orthopedic surgeon, provided examination findings and concluded that appellant was permanently totally disabled. He also completed a workers' compensation status form dated October 30, 2013 indicating that appellant was permanently disabled.

On June 19, 2014 OWCP prepared a statement of accepted facts (SOAF). The SOAF noted all of the accepted conditions in the case which were left knee sprain, left torn lateral meniscus, left knee degenerative joint disease, right knee meniscus tear, and right knee osteoarthritis.

By letter dated June 27, 2014, OWCP referred appellant for a second opinion evaluation with Dr. Eric S. Furie, a Board-certified orthopedic surgeon, for an evaluation of appellant's work capacity.

Dr. Furie, in a July 22, 2014 report, noted appellant's history of injury, reviewed objective tests, and performed a physical examination. He opined that appellant was capable of performing light-duty, sedentary work. Restrictions included no pushing or pulling more than 20 pounds, no lifting more than 25 pounds, no squatting or kneeling, and climbing limited to one hour per day.

[3] Docket No. 14-796 (issued September 12, 2014); Docket No. 07-1198 (issued October 5, 2007); Docket No. 04-296 (issued August 26, 2004).

On March 24, 2015 Dr. Smith noted that appellant was struggling following bilateral knee replacements and related that she was permanently disabled.

In a letter dated September 11, 2015, OWCP referred appellant to Dr. Frederick Wener, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Smith, appellant's treating physician, and Dr. Furie, an OWCP referral physician, regarding appellant's work capacity.

In an October 8, 2015 report, Dr. Wener, based upon a review of the medical evidence, the June 19, 2014 SOAF, and physical examination, diagnosed bilateral knee contusion/strain, bilateral knee degenerative arthritis, bilateral torn meniscus, obesity, history of diabetes and asthma, and status post multiple arthroscopic surgeries followed by bilateral total knee replacements. Appellant's medical history revealed morbid obesity, left shoulder rotator cuff injuries, asthma, right wrist tendinitis, and sleep apnea. Dr. Wener noted that appellant had stated her ability to stand was limited and that she was being evaluated for gastric bypass surgery for weight loss. A physical examination revealed that appellant was significantly overweight. Physical examination also revealed significant bilateral lower extremity edema, bilateral leg chronic lymphedema, and good right hip range of motion with some discomfort. Dr. Wener noted that the modified health aid position with the "Silver Spoons" program description had not been included for his review, but he believed she was capable of working a sedentary job that required mostly sitting. In response to the additional question of whether appellant was capable of working a modified job assignment, he opined that appellant was disabled from any significant work noting her morbid obesity and significant lymphedema in her legs which would prevent her from performing such a modified job. In an attached work capacity evaluation (Form OWCP-5c) dated October 8, 2015, he indicated that appellant had permanent work restrictions of no more than six hours of sitting and repetitive wrist and elbow movement, up to six hours of pushing and pulling of 10 pounds, up to one hour of operating a motor vehicle to/from work, no hours of lifting up to 10 pounds, and no hours of walking, standing, reaching, reaching above the shoulder, twisting, bending/stooping, squatting, kneeling, climbing, and operating a motor vehicle at work.

On November 16, 2015 the employing establishment offered appellant a "Silver Spoon" assignment working six hours per day in Montrose, New York based on Dr. Wener's October 8, 2015 report. The physical requirements of the position were listed as interacting with veterans as assigned in dayrooms for up to six hours. The physical requirements included no physical interaction with veterans, sitting for up to six hours, no walking, reaching, twisting, standing, bending, lifting, driving a motor vehicle, or stooping. The employing establishment further noted that no positions had been found within 30 miles of her current address, but if she accepted the position that relocation expenses may be paid.

In a letter dated November 16, 2015, appellant refused the offered position and noted that she was scheduled to undergo gastric bypass surgery.

Dr. Smith, in a November 25, 2015 report, provided examination findings and reiterated that appellant was disabled from any gainful employment. Under past medical history, he noted diagnoses of anxiety disorder, asthma, respiratory problems, diabetes -- type 2, rheumatoid arthritis, and sleep apnea.

On March 8, 2016 the employing establishment advised that the offered position was still available.

In a March 10, 2016 letter, OWCP informed appellant that the position of health aid in the "Silver Spoons" program was suitable as it was in accordance with medical restrictions as provided by Dr. Wener, an OWCP impartial medical examiner. It noted that the offered position was still available and allowed her 30 days to accept the offered position or provide her reasons for refusal. OWCP further advised appellant that if she refused a suitable work position she would forfeit any further compensation for wage loss or entitlement to a schedule award.

In a March 29, 2016 letter, Dr. Smith reported that appellant had bilateral knee osteoarthritis due to chronic morbid obesity. He noted that appellant had difficulty ambulating due to her obesity and osteoarthritis, and used a walker to ambulate. Dr. Smith opined that appellant was totally disabled from work.

In a June 16, 2016 letter, OWCP advised appellant that it had considered the reasons she had provided for refusing to accept the offered position and found they were not valid. It provided notice that she had 15 days to accept the position or her compensation would be terminated.

In a letter dated June 27, 2016, counsel disagreed with the proposal to terminate appellant's wage-loss compensation and entitlement to schedule award benefits pursuant to 5 U.S.C. § 8106(c). He contended that the offered position was not suitable as it did not consider preexisting and subsequently-acquired medical conditions not accepted by OWCP.

By decision dated July 13, 2016, OWCP finalized the termination of appellant's wage-loss compensation and entitlement to schedule award compensation, effective that day, due to her refusal of an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

In a letter dated July 5, 2017, counsel requested reconsideration and submitted a June 16, 2017 report by Dr. Smith in support of the request.

In a June 16, 2017 report, Dr. Smith diagnosed severe bilateral knee osteoarthritis, chronic morbid obesity, type 1 diabetes, asthma, and history of depression. He reported that appellant had extreme difficulty ambulating and used a walker to ambulate. Dr. Smith reiterated his opinion that appellant was totally disabled from any type of employment.

By decision dated September 28, 2017, OWCP denied modification of its July 13, 2016 decision terminating appellant's wage-loss compensation and entitlement to schedule award compensation pursuant to 5 U.S.C. § 8106(c)(2).

LEGAL PRECEDENT

Section 8106(c)(2) of FECA provides that a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by, or secured for him/her is not entitled to compensation.[4] Once OWCP accepts a claim, it has the

[4] 5 U.S.C. § 8106(c)(2).

burden of justifying termination or modification of compensation benefits under section 8106(c) for refusing to accept or neglecting to perform suitable work.[5] The Board has recognized that section 8106(c) serves as a penalty provision as it may bar an employee's entitlement to future compensation and, for this reason, will be narrowly construed.[6]

To justify termination, OWCP must show that the work offered was suitable and that appellant was informed of the consequences of his/her refusal to accept such employment.[7] 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.[8] Section 10.516 of the Code of Federal Regulations[9] 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.[10]

The determination of whether an employee is capable of performing modified duty is a medical question that must be resolved by probative medical opinion evidence.[11] All medical conditions, whether work related or not, must be considered in assessing the suitability of an offered position.[12]

Section 8123(a) of FECA provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.[13] This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[14] When there exists opposing reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of

[5] *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

[6] *H. Adrian Osborne*, 48 ECAB 556 (1997).

[7] *T.S.*, 59 ECAB 490 (2008); *Ronald M. Jones*, 52 ECAB 190 (2000).

[8] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.4(a) (June 2013).

[9] 20 C.F.R. § 10.516.

[10] *See Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

[11] *See Gloria J. Godfrey*, 52 ECAB 486 (2001); *Robert Dickerson*, 46 ECAB 1002 (1995).

[12] *See Mary E. Woodward*, 57 ECAB 211 (2005).

[13] 5 U.S.C. § 8123(a); *see R.P.*, Docket No. 17-1133 (issued January 18, 2018); *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009); *M.S.*, 58 ECAB 328 (2007).

[14] 20 C.F.R. § 10.321; *R.C.*, 58 ECAB 238 (2006).

such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[15]

ANALYSIS

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award compensation, effective July 13, 2016, pursuant to 5 U.S.C. § 8106(c)(2) for refusal of a suitable employment position.

OWCP failed to establish that appellant was capable of performing the modified health aide suitable work position, given all of her medical conditions. It is well established that it must consider preexisting and subsequently-acquired conditions, as well as appellant's accepted employment-related conditions, in evaluating the suitability of an offered position.[16]

OWCP relied on the opinion of Dr. Wener, an impartial medical examiner. Dr. Wener noted that he had not been provided the suitable work position description for review, despite the OWCP's statement that it had been provided, but he responded that appellant could only do a sedentary type of job that would involve mostly sitting. He went on to respond in the affirmative to the question of whether appellant had other conditions that would prevent her from performing a "modified[-] job assignment." Dr. Wener explained that appellant was significantly limited by her morbid obesity, knee replacements, bilateral leg lymphedema, and other health issues.

OWCP found that Dr. Wener's opinion contained sufficient medical rationale to support that appellant could perform the physical duties contained in the offered position.[17] However, the Board finds that Dr. Wener was inconsistent in his responses to whether appellant was capable of performing such a modified-job assignment. The Board has held that medical reports are of limited probative value if they are internally inconsistent.[18]

As a penalty provision, section 8106(c)(2) of FECA must be narrowly construed.[19] Based on the evidence of record, the Board finds that OWCP improperly determined that the modified position offered to appellant constituted suitable work within her physical limitations. Consequently, OWCP has not met its burden of proof to justify the termination of her wage-loss compensation and entitlement to schedule award benefits.

[15] *See R.P., supra* note 13; *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

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

[17] *F.B.*, Docket No. 17-0216 (issued February 13, 2018); *Maurissa Mack*, 50 ECAB 498 (1999).

[18] *See Mary A. Payne*, Docket No. 00-1615 (issued March 15, 2002).

[19] *D.H.*, Docket No. 17-1014 (issued October 3, 2017).

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award benefits, effective July 13, 2016, as she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the September 28, 2017 decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 5, 2019
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