

ISSUE

The issue is whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award compensation, effective August 31, 2017, because she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On December 8, 2015 appellant, then a 56-year-old supervisor of customer service, filed a traumatic injury claim (Form CA-1) alleging that she sustained injuries to her right side, neck, shoulder, and lower back at work on December 7, 2015 due to "excessive walking and bending while working window unit." She stopped working on December 9, 2015 and then voluntarily retired, effective May 26, 2017.

OWCP initially denied the claim by decision dated February 1, 2016. Appellant requested reconsideration on February 17, 2016. By decision dated April 7, 2016, OWCP vacated its prior decision and accepted the claim for wedge compression fracture of the T9-10 and T11-12 vertebra (closed fracture) and other intervertebral disc displacement, thoracolumbar region. OWCP placed appellant on the periodic compensation rolls and paid wage-loss compensation benefits.

A magnetic resonance imaging (MRI) scan of the lumbar spine dated December 10, 2015 revealed compression fractures of several lower dorsal vertebral bodies and L1, disc space desiccation and narrowing at multiple thoracic levels as well as L3-4 and L5-S1, retrolisthesis at T12 on L1, and L5-S1 right paracentral herniation with posterior displacement and encroachment upon the right S1 nerve root.

A September 23, 2016 work capacity evaluation form (Form OWCP-5c) signed by an unidentifiable healthcare provider indicated that appellant was unable to work and had not reached maximum medical improvement (MMI).

An October 25, 2016 MRI scan of the thoracic spine showed mild scoliosis, no evidence for compression fracture, and no disc pathology or canal stenosis.

An October 25, 2016 MRI scan of the lumbar spine demonstrated remote compression fracture of L1, no evidence for an acute fracture, central to right paracentral protrusion at L5-S1 with mild canal stenosis and bilateral foraminal narrowing in conjunction with facet arthropathy, and disc bulge at T12-L1 without canal stenosis.

In a December 13, 2016 report, Dr. Robert R. Reppy, an osteopath specializing in family medicine, related that appellant's accepted diagnoses were wedge compression fracture of T9-10 and T11-12; other intervertebral disc displacement; fracture of lumbar vertebra; cerebellar contusion; contusion of face, scalp, and neck; cervical disc displacement; lumbar disc displacement; rotator cuff tear, right; umbilical hernia; and ventral hernia. He noted that appellant had sustained two work injuries, the first on February 20, 2014 and another on December 7, 2015. Dr. Reppy opined that appellant's conditions were permanent unless surgery could be successfully performed for her retrolisthesis and discectomies in the cervical and lumbar spine. He advised that appellant was not capable of lifting the loads, such as mailbags and bundles, required by her work. Dr. Reppy further advised that appellant was not capable of walking due to her retrolisthesis and wedge fractures. He opined that appellant would be capable of modified duties that would keep

her sedentary, required no lifting, allowed her 15-minute breaks from sitting each hour, and precluded any walking.

OWCP referred appellant to Dr. Fanourios Ferderigos, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the nature and extent of her accepted employment-related conditions. In his March 6, 2017 report, Dr. Ferderigos reviewed a statement of accepted facts (SOAF), history of the injury, and the medical evidence of record. He conducted a physical examination and found mild tenderness to palpation over the paravertebral region of the cervical spine. The flexion of the cervical spine was approximately 45 degrees, extension was 10 degrees, rotation to the right was 50 degrees, rotation to the left was 60 degrees, bending to the right was 35 degrees, and bending to the left was 30 degrees. Examination of the thoracic spine revealed no tenderness along the paravertebral region. Evaluation of the lumbar spine revealed tenderness to palpation over the right side of the lumbar spine from L1 to approximately S1 region. Measurements of the lumbar spine included flexion was 45 degrees, extension was 10 degrees, rotation to the right was 60 degrees, rotation to the left was 60 degrees, bending to the right was 30 degrees, and bending to the left was 30 degrees. Appellant also had increased discomfort with flexibility of the lumbar spine, especially at the extremes of motion. Examination of the lower extremities revealed no sensory changes, equal bilaterally. Reflexes of the knees were 2+, the right ankle was 1+, and the left ankle was absent. Motor activity was 5/5 of the lower extremities and straight leg raising was negative bilaterally, except for some increased discomfort to the low back.

Evaluation in the office with x-rays of the thoracic spine, AP and lateral, revealed some degenerative changes of the thoracic spine, but no obvious compression fractures on the thoracic spine that could be appreciated on the plain films. Evaluation of the lumbar spine revealed degenerative changes of the lumbar spine. There was mild irregularity of the anterior part of the superior endplate of L1 which could be consistent with an old mild compression fracture. Dr. Ferderigos diagnosed cephalgia, hypertonicity of the cervical spine with decreased range of motion, thoracic spine with a history of compression fractures without evidence of compression fractures, compression fracture of L1 superior endplate, and chronic lumbago. He opined that the compression fractures of the thoracic spine that continued to be present, as shown on the MRI scan from December 10, 2015, were healed and there was no obvious evidence of compression fractures on plain films or in the MRI scan that was performed on October 25, 2016. Dr. Ferderigos further concluded that the disc herniation at L5-S1 had not been resolved. He also noted that appellant exhibited subjective findings of having left radiculopathy with absent left ankle reflexes and concluded that appellant was not able to return to her date-of-injury job, but she was capable of working with restrictions for sitting, bending, or standing of more than two hours per day.

In a March 16, 2017 report, Dr. Reppy noted that appellant had been seen for a second opinion evaluation and was found to have the capacity for light duty. However, appellant advised him that “there was no such thing as light duty in a management position.” Dr. Reppy also noted that appellant had been approved for social security and had plans to retire on June 1, 2017.

In a May 17, 2017 work capacity evaluation form (Form OWCP-5c), Dr. Reppy advised that appellant had reached MMI and was “retiring in a few days.” He opined that she would “never” be able to achieve an eight-hour workday and was not capable of working for the next six weeks.

In a subsequently received work capacity evaluation form (Form OWCP-5c) dated May 15, 2017, Dr. Ferderigos also advised that appellant had reached MMI, but he opined that she was capable of light-duty work with restrictions of sitting, walking, and standing for up to two hours per day; pushing, pulling, and lifting no more than 20 pounds up to two hours per day; and no squatting.

On May 22, 2017 the employing establishment offered appellant an employment position as a modified customer service supervisor, effective May 27, 2017. The description of duties to be performed included supervising employee activities, the distribution and dispatch of mail, window services to the public, and ensuring compliance with vehicle maintenance and inspection schedules. The physical requirements of the position included: lifting, pushing, and pulling no more than 20 pounds for two hours; sitting, standing, and walking for two hours; simple grasping and fine manipulation for zero to six hours; and no squatting. All physical requirements were to be performed intermittently.

In a June 1, 2017 letter, the employing establishment requested a suitability ruling from OWCP on the permanent modified job offer for appellant. In the letter it indicated that she had refused the job offer and elected retirement, effective May 26, 2017.

In a work capacity evaluation form (Form OWCP-5c) dated June 14, 2017, Dr. Reppy related that appellant's work restrictions were "moot" because she had retired.

By letter dated June 27, 2017, OWCP advised appellant that the modified customer service supervisor position had been found to be suitable and conformed to the work limitations provided by Dr. Ferderigos in his second opinion reports dated March 6 and May 15, 2017. The employing establishment confirmed that the position remained available. OWCP allowed appellant 30 days to accept the position or provide her reasons for refusal and advised that an employee who refuses an offer of suitable work without reasonable cause is not entitled to compensation. It also noted that even if she was retired, her retirement was not a valid reason for refusing a suitable offer of employment.

In a report dated May 17, 2017, received on July 10, 2017, Dr. Reppy responded to an inquiry posed by OWCP regarding whether appellant was capable of returning to her date-of-injury position, to which he replied "No, she may not." He explained that appellant was no longer capable of lifting loads, such as mailbags and bundles required by her assigned job duties, noting that she "drops objects frequently, making her a potential danger to herself and her fellow workers." Dr. Reppy pointed out that, "[t]his is consequential to the cervical disc disease and its radiculopathy affecting the upper extremities, especially the poor grip strength." He noted that appellant could only perform modified-duty work "that would keep her sedentary, not require any lifting, allow her 15-minute breaks from sitting once an hour, and not require any walking." He pointed out that appellant's "ability to walk is less than that required by her job." Dr. Reppy concluded that "the present level of disability is a direct result of the work-related condition." In response to OWCP's inquiry as to the estimated date that appellant could return to duty, Dr. Reppy responded that appellant's injuries were permanent.

Attached to Dr. Reppy's report was a work restriction evaluation (Form OWCP 5c). He held appellant off work for six weeks. Appellant would then be released to sedentary light-duty work and her restrictions were permanent. When asked whether appellant would be capable of working an eight-hour workday, he responded "never."

On July 13, 2017 Dr. Reppy reported that appellant related a lessening of her low back pain and neck pain, which she “attributed to the fact that she had not done her exercise routine of walking over a mile for the last two days.”

In a July 20, 2017 report, Dr. Reppy noted that Dr. Ferderigos had spent “30 minutes total” with appellant, as opposed to the “many, many hours” he had spent with her. He disagreed with Dr. Ferderigos’ reading of appellant’s MRI scan as showing only “minor scoliosis” and “no evidence of compression fractures.” Dr. Reppy indicated that the radiologist who saw the diagnostics results reported a disc herniation at L5-S1 and retrolisthesis of T12 upon L1. He also reported that OWCP had erroneously indicated that no cervical or lumbar diagnoses were accepted under appellant’s claim, and yet she clearly had an “intervertebral disc displacement, thoracolumbar region” as one of her accepted diagnoses.

By letter dated August 10, 2017, OWCP confirmed that the modified customer service supervisor position remained available to appellant. It informed her that it had considered all reasons she had provided for refusing to accept the offered position and did not find them to be valid. OWCP allowed her an additional 15 days to accept and report to the position. It advised her that if she did not accept and report to the position during the allotted period, her entitlement to wage-loss compensation and schedule award benefits would be terminated.

In response, appellant submitted an August 24, 2017 report from Dr. Reppy who indicated that both appellant’s neck and low back pain had increased after helping her mother up from a fall out of her wheelchair.

By decision dated August 31, 2017, OWCP terminated appellant’s wage-loss compensation and entitlement to schedule award compensation effective that day because she had refused suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

On September 7, 2017 counsel requested a telephonic hearing by a representative of OWCP’s Branch of Hearings and Review.

Appellant also submitted reports dated September 20 and October 18, 2017 from Dr. Reppy who indicated that appellant walked with a two-pound weight in each hand for an hour, or about 1.5 miles. Dr. Reppy also advised on November 16, 2017 that her walking tolerance was 15 minutes or a quarter of a mile. On December 14, 2017 he noted again that appellant reported a lessening of her low back pain and neck pain, which she “attributed to the fact that she had not done her exercise routine of walking over a mile for the last two days.” Then Dr. Reppy advised on January 17, 2018 that her walking limit was one hour.

In reports dated January 8 and 29, 2018, Dr. Reppy continued to opine that appellant was not capable of returning to work because she could no longer lift the loads required by her work specifications due to her herniated lumbar disc, compression fractures, and retrolisthesis.

A telephonic hearing was held on February 16, 2018 before an OWCP hearing representative. Appellant provided testimony and the hearing representative held the case record open for 30 days for the submission of additional evidence.

Appellant subsequently submitted reports dated February 26, March 8, and April 11, 2018 from Dr. Reppy who reiterated his medical opinions and provided progress notes.

By decision dated May 3, 2018, the hearing representative affirmed OWCP's August 31, 2017 decision, finding that Dr. Ferderigos represented the weight of the medical evidence. She found that the duties of the modified job offer indicated that appellant would only supervise and the medical evidence appellant submitted failed to establish why she could not perform the modified customer service supervisor position.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.⁴ Section 8106(c)(2) of FECA 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.⁵ Section 8106(c)(2) 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.⁶

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 showing that such refusal or failure to work was reasonable or justified.⁷ 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.⁸

To justify termination, OWCP must show that the work offered was suitable and that appellant was informed of the consequences of his or her refusal to accept such employment.⁹ In determining what constitutes suitable work for a particular disabled employee, OWCP 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.¹⁰ OWCP procedures state 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.¹¹

Section 8123(a) 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

⁴ See *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

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

⁶ See *Joan F. Burke*, 54 ECAB 406 (2003).

⁷ 20 C.F.R. § 10.517(a).

⁸ *Id.* at § 10.516.

⁹ See *Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

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

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.5a (June 2013); see *E.B.*, Docket No. 13-0319 (issued May 14, 2013).

third physician who shall make an examination.¹² The implementing regulation provides that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. 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.¹³

In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical examiner for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹⁴

ANALYSIS

The Board finds that OWCP improperly terminated appellant's wage-loss compensation and entitlement to schedule award compensation pursuant to 5 U.S.C. § 8106(c)(2), effective August 31, 2017, as there remains an unresolved conflict in medical opinion evidence between Dr. Reppy, appellant's attending physician, and Dr. Ferderigos, the second opinion physician.

In his March 6, 2017 report, Dr. Ferderigos found that appellant was capable of working with restrictions of sitting, bending, or standing more than two hours per day. In his work capacity evaluation form (Form OWCP-5c) dated May 15, 2017, he further advised that appellant had reached MMI and he opined that she was capable of light-duty work, again noting restrictions of sitting, walking, and standing for up to two hours per day; pushing, pulling, and lifting no more than 20 pounds for no more than two hours per day; and no squatting.

On May 22, 2017 the employing establishment offered appellant a modified job as a modified customer service supervisor effective May 27, 2017. The description of duties to be performed included supervising employee activities, the distribution and dispatch of mail, window services to the public, and ensuring compliance with vehicle maintenance and inspection schedules. The physical requirements of the position included lifting, pushing, and pulling no more than 20 pounds for two hours, sitting, standing, and walking for two hours, simple grasping and fine manipulation for zero to six hours, and no squatting. All physical requirements were to be performed intermittently.

In his several reports, Dr. Reppy opined that appellant's conditions were permanent unless she underwent surgery. As such, he concluded that she was incapable of lifting loads, such as mailbags and bundles, and drops objects frequently, "making her a potential danger to herself and her fellow workers," adding that "[t]his is consequential to the cervical disc disease and its radiculopathy affecting the upper extremities, especially the poor grip strength." Dr. Reppy recommended sedentary work requiring no lifting, precluded walking due to retrolisthesis and wedge fractures, and allowed for 15-minute breaks per hour from sitting, all contrary to the restrictions recommended by Dr. Ferderigos. Dr. Reppy concluded in his May 17, 2017 work

¹² 5 U.S.C. § 8123(a); *see L.B.*, Docket No. 18-0560 (issued August 20, 2018).

¹³ 20 C.F.R. § 10.321; *see L.B.*, *id.*

¹⁴ *A.E.*, Docket No. 18-0891 (issued January 22, 2019); *R.C.*, 58 ECAB 238 (2006); *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

capacity evaluation that appellant would “never” be capable of working an eight-hour day and that she was incapable of working for the next six weeks.

Appellant’s treating physician, Dr. Reppy, and OWCP’s second opinion physician, Dr. Ferderigos, disagreed regarding her work capacity. As such, the Board finds that a conflict of medical opinion exists relative to this issue. OWCP should have resolved the conflict of medical opinion evidence before terminating compensation. As OWCP failed to resolve the conflict of medical opinion evidence, the Board finds that it has not met its burden of proof to terminate appellant’s wage-loss compensation and entitlement to schedule award compensation, pursuant to 5 U.S.C. § 8106(c)(2).¹⁵

CONCLUSION

The Board finds that OWCP improperly terminated appellant’s wage-loss compensation and entitlement to schedule award benefits, effective August 31, 2017.

ORDER

IT IS HEREBY ORDERED THAT the May 3, 2018 decision of the Office of Workers’ Compensation Programs is reversed.

Issued: April 1, 2019
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees’ Compensation Appeals Board

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

¹⁵ See generally, *P.P.*, Docket No. 17-0023 (issued June 4, 2018) (the Board reversed OWCP’s termination decision due to an unresolved conflict in medical opinion between appellant’s treating physician and OWCP’s second opinion physician regarding appellant’s ability to return to his full-duty position and his need for ongoing medical treatment).