

**United States Department of Labor
Employees' Compensation Appeals Board**

_____)	
J.R., Appellant)	
)	Docket No. 18-1532
and)	Issued: April 8, 2019
)	
U.S. POSTAL SERVICE, POST OFFICE,)	
Buffalo, NY, Employer)	
_____)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
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 August 6, 2018 appellant, through counsel, filed a timely appeal from a May 30, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

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.*

³ The Board notes that following the May 30, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this evidence for the first time on appeal. *Id.*

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 September 27, 2017, as he refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On September 27, 2013 appellant, then a 56-year-old city letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on September 25, 2013 he sustained a right ankle injury when he slipped on a pipe as he walked across a lawn delivering mail while in the performance of duty. He stopped work on September 27, 2013 and has not returned.

OWCP accepted that appellant sustained a right ankle sprain. It expanded acceptance of the claim to include villonodular synovitis of the right ankle and foot. OWCP paid appellant wage-loss compensation commencing November 11, 2013 and on the periodic rolls effective February 9, 2014.

On April 7, 2014 Dr. Jennifer Gurske-dePerio, a treating Board-certified orthopedic surgeon, performed an arthroscopic debridement of the right ankle, arthroscopic excision of a lesion of the right lateral talus, open treatment of a medial talar body fracture and excision of fragments, and saucerization of the right anteromedial talar neck and head.⁴ She held appellant off work. Dr. Gurske-dePerio administered a series of steroid injections to the right ankle and prescribed a custom Arizona brace.⁵

An April 21, 2016 functional capacity evaluation (FCE), performed at Dr. Gurske-dePerio's request, demonstrated appellant's capacity to perform full-time sedentary to light-duty work, with restrictions of lifting limited to 10 pounds frequently and 20 pounds occasionally, and occasional walking and standing.

On August 16, 2016 OWCP obtained a second opinion regarding the nature and extent of appellant's continuing employment-related condition from Dr. Donald Paarlberg, a Board-certified orthopedic surgeon. Dr. Paarlberg reviewed the medical record and a statement of accepted facts (SOAF). On examination of the right lower extremity he noted limited motion of the ankle in all planes with minimal swelling. Dr. Paarlberg diagnosed status post ankle injury, osteochondral defect of the talar dome with debridement, microfracturing, and subsequent arthritis. He opined that appellant continued to have residuals of the accepted injury that disabled him from his date-of-injury job. Dr. Paarlberg opined that appellant could perform full-time sedentary duty with walking and standing for up to 10 minutes, no squatting, kneeling, or climbing, and lifting limited to 10 pounds.

⁴ Appellant participated in physical therapy treatments from June to September 2014.

⁵ On January 6, 2015 OWCP obtained a second opinion regarding appellant's work capacity from Dr. Sury M. Putcha, a Board-certified orthopedic surgeon. Dr. Putcha opined that appellant could perform full-time modified duty with walking limited to two hours a day, but could not resume his date-of-injury position. The employing establishment confirmed on May 18, 2015 that there was no work available within Dr. Putcha's restrictions.

In response to OWCP's request for a supplemental report regarding appellant's work capacity, Dr. Paarlberg provided an October 6, 2016 addendum indicating that, based on the April 21, 2016 FCE, appellant could perform full-time work with occasional walking and standing, lifting up to 10 pounds frequently and 20 pounds occasionally, operating a motor vehicle for up to eight hours a day, and no squatting, kneeling, or climbing. He also submitted a work capacity evaluation for musculoskeletal conditions (Form OWCP-5c) in which he clarified that appellant could walk up to eight hours a day if he wore his Arizona brace and could stand occasionally for up to eight hours a day.

In reports dated November 22, 2016, Dr. Gurske-dePerio returned appellant to full-time, limited-duty work within the tolerances demonstrated during the April 21, 2016 FCE.

On April 10, 2017 the employing establishment offered appellant a position as a full-time modified city carrier, casing and delivering mail. During each 8-hour work shift, the position required sitting, reaching, twisting, and grasping for 8 hours; standing and walking for up to 2 hours and 40 minutes; frequent holding up to 10 pounds for 5 hours and 20 minutes; occasional holding up to 10 pounds for 2 hours and 40 minutes; and driving for up to 5 hours and 20 minutes.

By letter dated April 27, 2017, OWCP notified appellant that the offered position was suitable and provided him 30 days to accept the position or to provide reasons for his refusal. It informed him that an employee who refused an offer of suitable work was not entitled to compensation, pursuant to 5 U.S.C. § 8106(c)(2).

Appellant, in a May 25, 2017 response, rejected the offered position. He asserted that its physical requirements exceeded the work limitations noted in both the April 21, 2016 FCE and the updated medical opinions from Dr. Gurske-dePerio. In reports dated May 25, 2017, Dr. Gurske-dePerio opined that appellant's continuing right ankle soreness and limited motion was attributable, in part, to his failure to comply with postsurgical instructions against full weight bearing on the right foot for six weeks to allow the cartilage to heal. She diagnosed osteoarthritis.⁶ Dr. Gurske-dePerio opined that appellant could perform full-time work within the tolerances demonstrated by the April 21, 2016 FCE.

On July 7, 2017 OWCP advised appellant that his reasons for refusing the position were invalid and provided him an additional 15 days to accept the position or have his entitlement to wage-loss compensation benefits terminated. No response was received.

By decision dated September 27, 2017, OWCP terminated appellant's wage-loss compensation and entitlement to schedule award benefits as he had refused an offer of suitable work.

On October 6, 2017 appellant, through counsel, requested a telephonic oral hearing before an OWCP hearing representative. At the hearing, held March 15, 2018, he contended that he continued to have difficulties with his right ankle and could not stand for more than a few minutes. Appellant ambulated with a quad cane or Canadian crutch and wore a prescribed Arizona brace.

⁶ May 25, 2017 right ankle x-rays demonstrated a lesion of the lateral talus, an excised talar dome fracture, calcific changes at the Achilles insertion, and a distal tibia exostosis consistent with post-traumatic arthritis of the ankle.

He submitted a report from Dr. Gurske-dePerio dated November 29, 2017, reiterating that he could perform full-time work within the tolerances demonstrated during the April 12, 2016 FCE.

By decision dated May 30, 2018, an OWCP hearing representative affirmed OWCP's decision dated September 27, 2017, finding that the additional medical evidence did not establish that appellant was unable to perform the offered position.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.⁷ Section 8106(c)(2) of FECA⁸ 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.⁹ 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.¹⁰ 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.¹¹

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.¹² 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.¹³ Thus, before terminating compensation, OWCP must review the employee's proffered reasons for refusing or neglecting to work.¹⁴ 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.¹⁵

Once OWCP establishes that the work offered is suitable, the burden of proof shifts to the employee who refuses to work to show that the refusal or failure to work was reasonable or justified.¹⁶ The determination of whether an employee is physically capable of performing a

⁷ *Linda D. Guerrero*, 54 ECAB 556 (2003).

⁸ *Supra* note 2.

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

¹⁰ *Ronald M. Jones*, 52 ECAB 190 (2000).

¹¹ *Joan F. Burke*, 54 ECAB 406 (2003).

¹² 20 C.F.R. § 10.517(a); *Ronald M. Jones*, *supra* note 10.

¹³ 20 C.F.R. § 10.516.

¹⁴ *See Maggie L. Moore*, 42 ECAB 484 (1991); *reaff'd on recon.*, 43 ECAB 818 (1992).

¹⁵ 20 C.F.R. § 10.516; *see Sandra K. Cummings*, 54 ECAB 493 (2003).

¹⁶ *Id.* at § 10.517(a).

modified assignment is a medical question that must be resolved by medical evidence.¹⁷ OWCP procedures state that acceptable reasons for refusing an offered position include medical evidence of inability to do the work.¹⁸

ANALYSIS

The Board finds that OWCP properly terminated appellant's wage-loss compensation and entitlement to schedule award benefits, effective September 27, 2017, pursuant to 5 U.S.C. § 8106(c)(2), due to his refusal of an offer of suitable work.

Dr. Gurske-dePerio, an attending physician, obtained an April 21, 2016 FCE, which demonstrated that appellant could perform full-time sedentary to light-duty work with occasional walking and standing. Dr. Paarlberg, an OWCP referral physician, opined in an October 6, 2016 report that appellant could perform full-time light-duty work. He found that, if appellant wore his prescribed Arizona brace, he could drive, walk, and stand for up to eight hours a day.

Based on Dr. Paarlberg's report, the employing establishment offered appellant a position as a modified city carrier. The duties involved casing and delivering mail. The position required sitting for up to 8 hours a day, standing and walking for up to 2 hours and 40 minutes a day, holding up to 10 pounds for 8 hours a day, and driving up to 5 hours and 20 minutes a day. The position was within the restriction parameters set forth by Dr. Paarlberg, OWCP's referral physician. The Board finds, therefore, that OWCP properly determined that the offered position was suitable.¹⁹

In accordance with the procedural requirements of section 8106(c),²⁰ OWCP advised appellant on April 27, 2017 that it found the position offered by the employing establishment suitable and provided him the opportunity to accept the position or provide reasons for his refusal within 30 days. Appellant submitted May 25, 2017 reports from Dr. Gurske-dePerio, who reiterated that appellant could perform full-time light-duty work within the tolerances of the April 2, 2016 FCE. Dr. Gurske-dePerio did not indicate that appellant was medically unable to perform any aspect of the offered position.

By letter dated July 7, 2017, OWCP informed appellant that his reasons for refusing the position were not acceptable and provided him an additional 15 days to accept the position or have his compensation terminated. Appellant did not accept the position or otherwise report to duty. The Board, consequently, finds that OWCP followed established procedures prior to the termination of compensation pursuant to section 8106(c) of FECA.²¹

¹⁷ *D.L.*, Docket No. 18-0862 (issued October 12, 2018); *Gayle Harris*, 52 ECAB 319 (2001).

¹⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.5(a)(4) (June 2013).

¹⁹ *D.L.*, *supra* note 17.

²⁰ 5 U.S.C. § 8106(c).

²¹ *D.L.*, *supra* note 17.

After OWCP established that the offered position was suitable, the burden of proof shifted to appellant to establish that his refusal was reasonable or justified.²² Subsequent to OWCP's termination of his wage-loss compensation, appellant submitted a November 29, 2017 report from Dr. Gurske-dePerio, who reiterated that appellant could work full time within the restrictions indicated by the April 21, 2016 FCE as he continued to have right ankle discomfort. Dr. Gurske-dePerio did not indicate that appellant was medically unable to perform the modified position.

CONCLUSION

The Board finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award benefits, effective September 27, 2017, as he refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the May 30, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 8, 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

²² *Id.*; see *M.S.*, 58 ECAB 328 (2007).