United States Department of Labor
Employees' Compensation Appeals Board

S.D., Appellant	)	
and	)	**Docket No. 18-1641**
	)	**Issued: April 12, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Bellmawr, NJ, Employer	)	

Appearances:
Aaron B. Aumiller, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 27, 2018 appellant, through counsel, filed a timely appeal from a July 5, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act (FECA)[2] 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 wage-loss compensation and entitlement to schedule award benefits, effective December 18, 2017, due to his refusal of an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On July 7, 2011 appellant, then a 40-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging he developed multi-level lumbar disc herniations and L5-S1 arthrosis, which he attributed to factors of his employment including lifting, bending, and walking. He noted that he first became aware of his condition and related it to his federal employment on March 4, 2011. Appellant stopped work on April 5, 2011.

By decision dated May 21, 2012, OWCP accepted appellant's claim for L5-S1 disc herniation without myelopathy. It paid him wage-loss compensation on the supplemental rolls beginning April 5, 2011, and placed him on the periodic rolls effective July 1, 2012.

On October 29, 2015 OWCP referred appellant, along with a statement of accepted facts (SOAF) and the medical record, to Dr. Timothy Henderson, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated November 17, 2015, Dr. Henderson reviewed appellant's history of injury and noted examination findings of localized pain to the left paraspinal musculature and tenderness to palpation at the midline, T11-L1. He diagnosed lumbar back sprain with herniated disc and bilateral lumbar radiculopathy. Dr. Henderson indicated that appellant could work full time, in either light or sedentary duty. He completed a work capacity evaluation (Form OWCP-5c) which restricted appellant to sitting, walking, standing, bending and stooping, climbing, and kneeling for up to two hours, and lifting up to 20 pounds for two hours.

Based on Dr. Henderson's November 17, 2015 report, the employing establishment offered appellant a full-time, limited-duty position as a modified carrier technician on April 20, 2016. On May 3, 2016 appellant refused the modified assignment noting that he was not medically capable to return to the same job duties he performed prior to his employment injury.

In a report dated May 3, 2016, Dr. Francisco Del Valle, Board-certified in physical medicine and rehabilitation, related appellant's complaints of persistent back pain. Examination of appellant's lumbar spine showed tenderness in the bilateral lower paraspinal area and positive straight leg raise testing. Dr. Del Valle diagnosed lumbar radiculopathy, chronic lumbar disc herniation, and somatic dysfunction. In a work restriction form dated June 29, 2016, he related that appellant could work full-time sedentary duty. Dr. Del Valle noted restrictions of lifting, pushing, and pulling up to 10 pounds for 30 minutes; squatting, kneeling, and climbing for 30 minutes; bending, stooping, and operating a motor vehicle up to 15 minutes; walking, standing, and reaching up to 1 hour; and sitting up to 8 hours.

OWCP determined that a conflict in medical opinion existed between Dr. Henderson and Dr. Del Valle regarding the extent of appellant's work restrictions. It referred him to Dr. Edward Krisiloff, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated September 6, 2016, Dr. Krisiloff discussed the history of injury and the medical reports of record. Upon examination of appellant's lumbar spine, he observed no evidence of lumbar spasm or deformity. Dr. Krisiloff noted that straight leg raise testing did not elicit any significant lower extremity discomfort. He noted that appellant was able to walk, sit, and stand without undue difficulty. Range of motion testing demonstrated forward flexion to 45 degrees, extension to 20 degrees, and lateral bending to 20 degrees on either side.

Dr. Krisiloff reported that appellant's claim had been accepted for lumbar disc herniation, but opined that this diagnosis was not supported by radiographic studies. He opined that appellant suffered from degenerative disc disease in the lumbar spine. Dr. Krisiloff reported a diagnosis of degenerative disc disease of the lumbar spine and further explained that appellant suffered a "lumbar strain superimposed upon his underlying condition." He indicated that "the injury of March 4, 2011" was a temporary exacerbation and that the exacerbation had resolved. Dr. Krisiloff opined that appellant was capable of full-time work with certain restrictions in order to prevent another exacerbation episode. He explained that the underlying degenerative disc disease was a chronic condition that would not resolve. Dr. Krisiloff noted his agreement with Dr. Henderson's opinion that appellant was capable of working a full-time light-duty position with maximum lifting of 20 pounds. He completed a work restriction evaluation (Form OWCP-5c), which related that appellant could work full time with restrictions of bending and stooping, squatting, kneeling, pulling, and climbing up to two hours and pushing, and lifting up to 20 pounds for two hours.

On March 27, 2017 the employing establishment offered appellant a full-time, light-duty position as a modified carrier technician beginning March 27, 2017. The duties of the modified assignment were entering updates to carrier route books and administrative-type duties intermittently for six to eight hours and light typing intermittently for four hours. The physical requirements of the position involved sitting, with occasional standing intermittently for six to eight hours, simple grasping (computer mouse), and pushing and pulling using a computer mouse intermittently for four to six hours, and fine manipulation of keyboard intermittently for four to eight hours. The job offer also noted that appellant was restricted to pushing, pulling, lifting up to 20 pounds for two hours a day, and squatting, kneeling, bending, and stooping for two hours a day.

On April 1, 2017 appellant accepted the modified carrier technician position.

In a letter dated May 8, 2017, the employing establishment informed OWCP that appellant had failed to report to his limited-duty assignment. It advised OWCP that the modified carrier technician position remained available.

On June 12, 2017 OWCP verified with the employing establishment that the March 27, 2017 job offer for the modified carrier technician position was still available.

By letter dated June 14, 2017, OWCP notified appellant that the offered position was suitable and afforded him 30 days to accept the position or provide reasons for his refusal. It advised that employees who refuse an offer of suitable work are not entitled to compensation.

OWCP received appellant's response in an undated letter on July 17, 2017. Appellant indicated that he saw Dr. Del Valle on June 26, 2017 and was only cleared for sedentary, part-time

work. He also submitted the March 27, 2017 job offer for a modified carrier technician position, which noted that he refused the position because he had only been cleared for part-time sedentary work.

In reports dated June 26 and September 26, 2017, Dr. Del Valle related appellant's complaints of worsening of his previous back pain and of on-going severe pain radiating to both legs. He provided examination findings and diagnosed chronic lumbar radiculopathy, chronic lumbar disc herniation, chronic lumbar myofascial pain, and somatic dysfunction (new).

In an OWCP-5c form dated June 23, 2017, Dr. Del Valle noted that appellant could work 20 hours per week in a sedentary capacity. He reported restrictions of sitting, walking, standing, and repetitive wrist movements for four hours, reaching and reaching above the shoulder for two hours, twisting, squatting, bending, and stooping for one hour, and pushing, pulling, and lifting up to 10 pounds for one hour.

On August 24, 2017 OWCP advised appellant by letter that his reasons for refusing the position were invalid and provided him 15 days to accept the position or have his wage-loss compensation and entitlement to schedule award benefits terminated.

In a report dated September 26, 2017, Dr. Del Valle noted no change in appellant's back pain radiating to his legs. Examination of appellant's lumbar spine showed tenderness in the bilateral lower paraspinal area and positive straight leg raise testing with radiating pain to his legs. Dr. Del Valle diagnosed lumbar radiculopathy, lumbar disc herniation, lumbar myofascial pain, and lumbar somatic dysfunction. He reported that appellant could not return to work without restrictions because of ongoing severe pain, but that appellant could perform limited-sedentary work.

On December 19, 2017 the employing establishment confirmed that the modified carrier technician position remained available and that appellant had not returned to work.

By decision dated December 19, 2017, OWCP terminated appellant's wage-loss compensation and entitlement to schedule award benefits, effective December 18, 2017, because he refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

In a letter dated December 28, 2017, appellant, through counsel, requested an oral hearing before an OWCP hearing representative. A hearing was held on May 30, 2018.

By decision dated July 5, 2018, an OWCP hearing representative affirmed the December 19, 2017 termination decision. He found that Dr. Krisiloff's September 6, 2016 work restrictions represented the weight of the medical evidence and that the March 27, 2017 job offer position was properly based on those restrictions.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of compensation benefits.[3] 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.[4] 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.[5] 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.[6]

In determining what constitutes suitable work for a particular disabled employee, OWCP considers the employee's current physical limitations, whether the work was available within the employee's demonstrated commuting area, the employee's qualifications to perform such work, and other relevant factors.[7] 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.[8]

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.[9] Section 10.516 of OWCP's regulations provide that an 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.[10]

FECA provides that if there is disagreement between an OWCP-designated physician and an employee's physician, OWCP shall appoint a third physician who shall make an examination.[11] For a conflict to arise the opposing physicians' viewpoints must be of "virtually equal weight and

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[3] *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

[4] 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

[5] *Ronald M. Jones*, 52 ECAB 406 (2003).

[6] *Joan F. Burke*, 54 ECAB 406 (2003); *see Robert Dickerson*, 46 ECAB 1002 (1995).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(c) (June 2013); *see Lorraine C. Hall*, 51 ECAB 477 (2000).

[8] *L.L.*, Docket No. 17-1247 (issued April 12, 2018); *J.J.*, Docket No. 17-0410 (issued June 20, 2017); *Gayle Harris*, 52 ECAB 319 (2001).

[9] 20 C.F.R. § 10.517(a); *see supra* note 5.

[10] *Id.* at § 10.516.

[11] 5 U.S.C. § 8123(a); *see id.* at § 10.321; *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

rationale."[12] Where OWCP has referred the case to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[13]

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 benefits, effective December 18, 2017 pursuant to 5 U.S.C. § 8106(c)(2).

OWCP referred appellant for a second opinion evaluation with Dr. Henderson. In his November 17, 2015 report, Dr. Henderson opined that appellant was capable of returning to full-time modified duty with a lifting restriction of up to 20 pounds. In a June 29, 2016 work restriction note, Dr. Del Valle, appellant's treating physician, related that appellant could work full-time sedentary duty with a 10-pound lifting restriction. The Board finds that, due to the disagreement between Drs. Henderson and Del Valle, OWCP properly referred appellant for an impartial medical examination with Dr. Krisiloff to resolve the conflict of medical opinion evidence regarding appellant's work restrictions pursuant to 5 U.S.C. § 8123(a).

In a September 6, 2016 report, Dr. Krisiloff described appellant's employment injury and reviewed his medical history. He provided examination findings of no lumbar spasm or deformity and no significant lower extremity discomfort on straight leg raise testing. Dr. Krisiloff diagnosed degenerative disc disease of the lumbar spine. He explained that appellant sustained a lumbar strain "superimposed upon [appellant's] underlying condition," which was a temporary exacerbation that had now resolved. Dr. Krisiloff opined that appellant was capable of full-time work with certain restrictions in order to prevent another exacerbation episode. He completed an OWCP-5c form, which related that appellant could work full time with restrictions of bending and stooping, squatting, kneeling, pulling, and climbing up to two hours and pushing, and lifting up to 20 pounds for two hours.

The Board finds, however, that Dr. Krisiloff's report is not sufficiently rationalized as he did not base his opinion on appellant's ability to work on an accurate factual background and did not properly rely on the SOAF in forming his opinion.[14] Dr. Krisiloff noted a diagnosis of degenerative disc disease of the lumbar spine and indicated that appellant sustained an employment injury of "lumbar strain superimposed upon his underlying condition." As noted above, however, OWCP accepted appellant's claim for lumbar disc herniation, L5-S1. When it has accepted an employment condition as occurring in the performance of duty, the referee physician must base his or her opinion on these accepted conditions.[15] The SOAF provided to Dr. Krisiloff on August 8, 2016 noted that appellant's occupational disease claim had been accepted for herniation of lumbar disc, L5-S1 without myelopathy. Dr. Krisiloff, however, did not accept the facts as

[12] *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

[13] *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

[14] *R.D.*, Docket No. 17-0415 (issued April 13, 2018).

[15] *D.W.*, Docket No. 18-0123 (issued October 4, 2018).

presented in the SOAF in rendering his medical opinion. On the contrary, he explicitly reported that he disagreed with the accepted condition of lumbar disc herniation. OWCP's procedures and Board precedent dictate that when an OWCP medical adviser, second opinion specialist, or referee physician renders a medical opinion based on a SOAF which is incomplete or inaccurate or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.[16]

The Board thus finds that OWCP erred in relying on Dr. Krisiloff's September 6, 2016 opinion in determining that the March 27, 2017 job offer for a modified carrier technician was suitable.[17]

The Board has held that, for OWCP to meet its burden of proof in a suitable work termination, the medical evidence of record should be clear and unequivocal that the claimant could perform the offered position.[18] In this case, the Board finds that the medical evidence of record is insufficient to establish that appellant could perform the duties of the March 27, 2017 modified carrier technician position as there remains an unresolved conflict in medical evidence regarding his work restrictions.[19]

As noted above, section 8106(c)(2) of FECA must be narrowly construed as it serves as a penalty provision.[20] The Board finds that, in this case, OWCP improperly determined that the modified position offered to appellant on March 27, 2017 constituted suitable work. Consequently, OWCP has not met its burden of proof to terminate his wage-loss compensation and entitlement to schedule award benefits pursuant to section 8106(c)(2).

On January 15, 2019 the Director of OWCP filed a memorandum in justification to support OWCP's termination decision and alleged that Dr. Krisiloff provided a well-rationalized medical opinion that appellant's primary work restriction would be lifting up to 20 pounds. For the reasons set forth above, however, Dr. Krisiloff's September 6, 2016 report is not well rationalized. He based his work restrictions on an improper factual background that appellant had suffered a temporary exacerbation of an underlying degenerative disc condition, which had now resolved. As such, Dr. Krisiloff's medical report is of insufficient probative value to establish that appellant could perform the duties of the March 27, 2017 modified carrier technician position.

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[16] *See B.B.*, Docket No. 18-1121 (issued January 8, 2019); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990).

[17] *M.E.*, Docket No. 18-0808 (issued December 7, 2018).

[18] *D.M.*, Docket No. 17-1668 (issued April 9, 2018).

[19] *R.F.*, Docket No. 15-0506 (issued August 12, 2016).

[20] *Supra* note 6.

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 December 18, 2017, pursuant to 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the July 5, 2018 decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 12, 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