United States Department of Labor
Employees' Compensation Appeals Board

P.S., Appellant	)	
and	)	**Docket No. 18-1789**
	)	**Issued: April 11, 2019**
U.S. POSTAL SERVICE, GENERAL MAIL FACILITY, Brooklyn, NY, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 24, 2018 appellant filed a timely appeal from an August 9, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective August 9, 2018 due to his refusal of an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On February 23, 2012 appellant, then a 48-year-old clerk/special delivery messenger, filed a traumatic injury claim (Form CA-1) alleging that he sustained cervical tenderness and cervical

[1] 5 U.S.C. § 8101 *et seq.*

sprain on that date when a cargo door closed on his head in the performance of duty. He stopped work on February 23, 2012. OWCP accepted the claim for neck sprain and paid appellant wage-loss compensation on the supplemental rolls, effective April 10, 2012, and on the periodic rolls, effective August 26, 2012.

Appellant received treatment following his employment injury from Dr. Marina Neystat, a Board-certified neurologist. In a progress report dated October 6, 2016, Dr. Neystat diagnosed an exacerbation of cervical radiculopathy, cervicogenic headache, and cervical disc herniations with radiological cord compression. She found that appellant was totally disabled from work.

On October 17, 2016 OWCP referred appellant to Dr. Ludwig Licciardi, a Board-certified orthopedic surgeon, for a second opinion examination.[2]

In a report dated November 1, 2016, Dr. Licciardi reviewed appellant's history of injury and his current complaints of headaches and pain in his neck. On examination, he found mild tenderness to palpation at C7 to L5, some hypoesthesia bilaterally at C5-6 and C6-7, normal muscle strength and function, and no atrophy. Dr. Licciardi diagnosed a head contusion and cervical sprain, preexisting multilevel degenerative disc disease, and hypertrophic cervical changes at C4-5, C5-6, and C6-7 with mild bilateral cervical radiculopathy. He found that the February 23, 2012 employment injury may have temporarily aggravated appellant's cervical stenosis, but that "the aggravation did not significantly accelerate cervical stenosis and clinically [he] is relatively asymptomatic." Dr. Licciardi found that he had no residuals of his neck sprain, but had restrictions resulting from an aggravation of preexisting cervical stenosis. He opined that appellant could currently perform light-duty employment with restrictions on reaching above the shoulder for no more than four hours per day.

On December 22, 2016 Dr. Neystat evaluated appellant for neck pain radiating into his shoulders, headaches, and weakness in his legs. She noted that his symptoms had begun following a February 23, 2012 employment injury. On examination Dr. Neystat found decreased motion of the cervical spine. She diagnosed cervical radiculopathy, to rule out progression of myelopathy, cervicogenic headache, and cervical disc herniations with radiological cord compression. Dr. Neystat opined that appellant was totally disabled from work. She submitted similar progress reports on March 23 and June 15, 2017.

In an August 8, 2017 attending physician's report (Form CA-20), Dr. Neystat diagnosed cervical radiculopathy and checked a box marked "yes" that the condition was caused or aggravated by employment, providing as a rationale that the condition was consistent with the mechanism of injury. She found that appellant was totally disabled.

OWCP determined that a conflict existed between Dr. Neystat and Dr. Licciardi regarding the extent of appellant's employment-related disability. It referred him to Dr. Stanley Soren, a Board-certified orthopedic surgeon, for an impartial medical examination.

[2] In a report dated February 14, 2013, Dr. Joel L. Teicher, a Board-certified orthopedic surgeon and OWCP referral physician, found that appellant had sustained an aggravation of his multilevel degenerative disc disease due to his February 23, 2012 employment injury. He opined that he could perform sedentary employment.

In a report dated September 25, 2017, Dr. Soren discussed appellant's history of injury and reviewed the medical reports of record. He measured range of motion of the cervical and lumbar spine and of the upper and lower extremities. Dr. Soren diagnosed a contusion and sprain of the cervical spine, preexisting hypertrophic changes of the cervical spine, cervical degenerative disc disease especially at C5-6 and C6-7, and bilateral cervical radiculopathy at C4-5 and C5-6. He further found cervical radiculopathy as demonstrated by electrodiagnostic testing at C3-4, a disc herniation impingement on the ventral cord, a herniation at C5-6 involving the C7 root, and bulging discs at C6-7. Dr. Soren opined that appellant's February 23, 2012 employment injury had aggravated his preexisting cervical spine problems and disc herniations. He further attributed the cervical radiculopathy "to the February 23, 2012 episode by aggravation of the preexisting degenerative changes in the cervical spine." Dr. Soren advised that the aggravation was permanent. He noted that appellant had fallen from a ladder at home in 2010 and that it was unclear what injuries he had sustained as a result of the fall. Dr. Soren found that he could perform light-duty employment full time with no repetitive overhead reaching, climbing, or lifting more than 25 pounds occasionally. In a work capacity evaluation (Form OWCP-5c), he found that appellant could work reaching above the shoulder for no more than two to three hours intermittently, pushing and pulling up to 20 pounds occasionally, and occasionally lifting up to 25 pounds.

On December 26, 2017 the employing establishment offered appellant a position as a modified clerk/special delivery messenger. The duties included delivering small parcels and Express Mail and scanning parcels. The position required lifting and carrying up to 25 pounds for 2 hours and 40 minutes per day, delivering parcels up to 8 hours, and driving a vehicle for up to 8 hours. The offer indicated that it was within the restrictions provided by Dr. Soren of occasional lifting no more than 25 pounds, pushing and pulling no more than 20 pounds, and no repetitive overhead reaching. It provided two 10- to 15-minute breaks.

Appellant, on December 26, 2017, refused the offered position, indicating that he was unable to work.

In progress reports dated December 18 and 28, 2017, Dr. Neystat diagnosed cervical sprain with an exacerbation of radiculopathy, cervical disc herniations with cord compression, and cervicogenic headache. She opined that appellant was totally disabled.

By letter dated January 29, 2018, OWCP notified appellant that the offered position was suitable and provided him 30 days to accept the position or provide reasons for his refusal. It informed him that an employee who refused an offer of suitable work without cause was not entitled to compensation, pursuant to 5 U.S.C. § 8106(c)(2). OWCP advised appellant that Dr. Soren's opinion represented the weight of the evidence, noting that Dr. Neystat had failed to distinguish between his accepted condition and his preexisting condition due to falling from a ladder in 2010 in finding that he was totally disabled.

Subsequently, appellant submitted a March 10, 2017 report from Dr. Carl Paulino, a Board-certified orthopedic surgeon. Dr. Paulino obtained a history of an employment injury to his neck, head, back, and upper extremities in February 2012. He diagnosed a cervical disc prolapse with radiculopathy.

In a report dated February 14, 2018, Dr. Neystat related that beginning February 4, 2013 she had treated appellant for a February 23, 2012 employment injury. She diagnosed cervical sprain with an exacerbation of radiculopathy, cervicogenic headache, and cervical disc herniations with cord compression. Dr. Neystat questioned why OWCP found it necessary to differentiate between his employment-related condition and his 2010 injury, noting that he had performed his usual employment until 2012. She opined that he had sustained more than a cervical sprain at the time of his injury and that he had cord compression that resulted in his total disability.[3] Dr. Neystat submitted a similar progress report on March 22, 2018.

OWCP, by letter dated April 25, 2018, notified appellant that his reasons for refusing the position were not valid and provided him with an additional 15 days to accept the position, or his wage-loss compensation and entitlement to schedule award benefits would be terminated. It advised him that the position remained available.

OWCP subsequently received a May 3, 2018 report from Dr. Neystat, who diagnosed cervical radiculopathy, cord compression, and headache and found that appellant was totally disabled from work. In a May 3, 2018 progress report, she provided examination findings.

By decision dated August 9, 2018, OWCP terminated appellant's wage-loss compensation and entitlement to a schedule award, effective that date, as he had refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2). It noted that he had not accepted the offered position and resumed work following its 15-day letter. OWCP determined that the opinion of Dr. Soren constituted the special weight of the evidence and established that appellant could perform the duties of the offered 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] 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.[6] 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.[7]

[3] Dr. Neystat submitted a state workers' compensation doctor's progress report form dated December 18, 2017 and March 26, 2018. She diagnosed cervical radiculopathy, headache, and unspecified cord compression and found that appellant was totally disabled from work.

[4] *T.M.*, Docket No. 18-1368 (issued February 21, 2019).

[5] 5 U.S.C. § 8106(c)(2); *see also M.J.*, Docket No. 18-0799 (issued December 3, 2018).

[6] *See T.M.*, *supra* note 4.

[7] *Id*.

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.[8] 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.[9]

Before compensation can be terminated, however, OWCP has the burden of proof to demonstrate that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work, and establishing that a position has been offered within the employee's work restrictions and setting forth the specific job requirements of the position.[10] The determination of whether an employee is physically capable of performing a modified assignment is a medical question that must be resolved by medical evidence.[11] In a suitable work determination, OWCP must consider preexisting and subsequently-acquired medical conditions in evaluating an employee's work capacity.[12]

Section 8123(a) of FECA provides that if there is a disagreement between the physician making the examination for the United States and the physician of an 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 exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical examiner (IME) 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.[15]

ANALYSIS

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective August 9, 2018 due to his refusal of an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

[8] 20 C.F.R. § 10.517(a).

[9] *Id*. at § 10.516; *see also J.V.*, Docket No. 17-1944 (issued December 18, 2018).

[10] *See M.H.*, Docket No. 17-0210 (issued July 3, 2018).

[11] *See supra* note 4.

[12] *Id*.

[13] 5 U.S.C. § 8123(a).

[14] 20 C.F.R. § 10.321.

[15] *J.T.*, Docket No. 18-0503 (issued October 16, 2018).

OWCP accepted that appellant sustained neck sprain due to a February 23, 2012 employment injury. Beginning April 10, 2012, it paid him wage-loss compensation for total disability. OWCP placed appellant on the periodic rolls as of August 26, 2012.

OWCP properly determined that a conflict arose between Dr. Neystat and Dr. Licciardi regarding the extent of appellant's employment-related disability. It referred him to Dr. Soren, a Board-certified orthopedic surgeon, for an impartial medical examination. Where OWCP has referred the case to an IME to resolve a conflict in the medical evidence, the opinion of such specialist, if sufficiently well reasoned and based upon a proper factual background, must be given special weight.[16]

In a report dated September 25, 2017, Dr. Soren diagnosed a cervical spine contusion and sprain, preexisting hypertrophic cervical spine changes, cervical degenerative disc disease most pronounced at C5-6 and C6-7, and bilateral cervical radiculopathy at C4-5 and C5-6. He further found, based on diagnostic studies, that appellant had C3-4 radiculopathy, a disc herniation at C5-6 affecting the C7 nerve root, and bulging discs at C6-7. Dr. Soren opined that the February 23, 2012 employment injury had permanently aggravated appellant's preexisting disc herniations resulting in cervical radiculopathy. He found that he could work full time in a light-duty position lifting no more than 25 pounds occasionally, pushing and pulling up to 20 pounds occasionally, and intermittently reaching above the shoulders for no more than two to three hours. Dr. Soren's report is based on a proper factual background and supported by medical reasoning.[17] The Board thus finds that his opinion represents the special weight of the evidence and establishes that appellant could work full time with restrictions.[18]

Subsequently, Dr. Neystat, in a December 2017 progress report, diagnosed cervical sprain with an exacerbation of radiculopathy, cervical disc herniations with cord compression, and cervicogenic headache. She determined that appellant was totally disabled from employment. Dr. Neystat, however, did not explain how his condition disabled him from the modified position offered by the employing establishment. Moreover, she was on one side of the conflict resolved by Dr. Soren. The Board has held that reports from a physician who was on one side of a medical conflict are generally insufficient to overcome the special weight accorded to the IME or to create a new conflict.[19]

The employing establishment, on December 26, 2017, offered appellant a position as a modified clerk/special delivery messenger. The position required lifting and carrying up to 25 pounds for 2 hours and 40 minutes per day, delivering parcels up to 8 hours a day, and driving a vehicle for up to 8 hours a day.[20] The offer indicated that it was within the restrictions provided

[16] *See P.C.*, Docket No. 18-0956 (issued February 8, 2019).

[17] *D.L.*, Docket No. 18-0862 (issued October 12, 2018).

[18] *Id*.

[19] *C.L.*, Docket No. 18-1379 (issued February 5, 2019).

[20] Occasional is defined by the Department of Labor, *Dictionary of Occupational Titles*, as an activity/condition that exists up to one-third of the time. In this case, one-third of an 8-hour day is 2 hours and 40 minutes. *See S.H.*, Docket No. 17-0990 (issued June 12, 2018).

by Dr. Soren and additionally provided two 10- to 15-minute breaks. As the position was within the restrictions set forth by Dr. Soren as IME, the Board finds that OWCP properly determined that the offered position was suitable.[21]

Appellant refused the offered position. In accordance with the procedural requirements of 5 U.S.C. § 8106(c)(2), OWCP advised him on January 29, 2018 that it had 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 a March 10, 2017 report from Dr. Paulino, who discussed his history of a February 2012 employment injury to his neck, head, back, and upper extremities and diagnosed a cervical disc prolapse with radiculopathy. He did not, however, address the relevant issue of whether appellant was disabled from the offered modified position and, thus, his opinion is of little probative value.[22]

On February 14, 2018 Dr. Neystat indicated that she had treated appellant since February 2013 for a February 23, 2012 employment injury. She noted that he had performed his usual employment after a 2010 nonemployment-related injury, but was unable to work after his 2012 injury. Dr. Neystat diagnosed cervical sprain with an exacerbation of radiculopathy, cervicogenic headache, and cervical disc herniations compressing the cord. She opined that appellant was totally disabled due to his cord compression. In progress reports and form reports dated March through May 2018, Dr. Neystat continued to find him disabled from employment. Again, however, as she was on one side of the conflict resolved by Dr. Soren, and failed to explain how appellant's employment injury disabled him from the offered modified position, her opinion is insufficient to overcome the special weight given the IME or to create a new conflict.[23]

By letter dated April 25, 2018, OWCP informed appellant that his reasons for refusing the position were not acceptable and provided him 15 days to accept the position or have his compensation terminated. OWCP subsequently received a May 3, 2018 report from Dr. Neystat, who diagnosed cervical radiculopathy, cord compression, and headache and found that appellant was totally disabled from work. In a May 3, 2018 progress report, she provided examination findings. However, as Dr. Neystat was on one side of the conflict resolved by Dr. Soren, and failed to provide a rationalized medical explanation of how appellant's employment injury disabled him from the offered modified position, her opinion is insufficient to overcome the special weight given the IME or to create a new conflict.

The Board finds that OWCP properly followed its established procedures prior to the termination of his compensation pursuant to section 8106(c)(2).[24]

[21] *See D.C.*, Docket No. 16-1665 (issued April 13, 2017).

[22] *See D.E.*, Docket No. 17-1005 (issued October 19, 2017); *C.E.*, Docket No. 09-0725 (issued November 5, 2009).

[23] *V.H.*, Docket No. 18-1005 (issued February 1, 2019).

[24] *C.H.*, Docket No. 17-0938 (issued November 27, 2017).

For these reasons, OWCP properly terminated appellant's entitlement to wage-loss and schedule award compensation, effective August 9, 2018, as he refused an offer of suitable work.[25]

On appeal appellant asserts that the employing establishment offered him the same position that he performed prior to his injury. He notes that the Social Security Administration determined that he was disabled. As discussed, however, the position offered was within the restrictions set forth by the IME. Further, the determinations of other administrative agencies or courts regarding disability are not determinative with regard to disability arising under FECA.[26]

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective August 9, 2018, due to his refusal of an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the August 9, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 11, 2019
Washington, DC

Patricia H. Fitzgerald, Deputy 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

[25] *See supra* note 10.

[26] *J.D.*, Docket No. 18-0101 (issued August 27, 2018).