

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

_____)	
W.L., Appellant)	
)	
and)	Docket No. 18-1192
)	Issued: August 14, 2019
DEPARTMENT OF VETERANS AFFAIRS,)	
VETERANS ADMINISTRATION MEDICAL)	
CENTER, Altoona, PA, 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
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 21, 2018 appellant, through counsel, filed a timely appeal from an April 12, 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.

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 appellant has established that his abandonment of suitable work was justified.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On May 2, 2013 appellant, then a 33-year-old police officer, filed a traumatic injury claim (Form CA-1) alleging that on April 15, 2013 his left leg became swollen from doing bag strikes during defensive tactics training while in the performance of duty. OWCP accepted his claim for osteochondritis dissecans of the left lateral femoral condyle. It subsequently expanded acceptance of the claim to include left knee tear of the lateral meniscus and left lower extremity deep vein thrombosis. OWCP paid appellant disability compensation and placed him on the periodic rolls, effective October 20, 2013.

Appellant received medical treatment from Dr. Craig Mauro, a Board-certified orthopedic surgeon. In an October 16, 2014 work capacity evaluation (Form OWCP-5c), Dr. Mauro indicated that appellant could return to modified duty with the following restrictions of no lifting, carrying, pushing, or pulling more than 10 pounds; walking and standing up to two hours with breaks; reaching and reaching above the shoulder up to one hour; and no bending, climbing, squatting, or kneeling. He also recommended 15-minute breaks as needed.

In a letter dated March 13, 2015, the employing establishment offered appellant a permanent position as a security clerk, GS-4, Step 10. The physical requirements of the position were described as "sedentary in nature and normally performed sitting." It noted that appellant's physical limitations were sedentary duty, lifting up to 10 pounds, no climbing, crawling, squatting, or kneeling, and may get up and move around as needed.

On June 15, 2015 appellant accepted the suitable work offer and returned to limited duty.

On August 20, 2015 the employing establishment informed OWCP that appellant had resigned from the employing establishment, effective August 19, 2015. It also advised OWCP that the security clerk job position was still available to appellant.

By decision dated November 2, 2015, OWCP terminated appellant's wage-loss compensation and entitlement to schedule award benefits, effective November 2, 2015, because he had abandoned a suitable job position without justification in accordance with 5 U.S.C. § 8106(c)(2). By decision dated September 30, 2016, an OWCP hearing representative affirmed the November 2, 2015 termination decision.

³ Docket No. 17-0338 (issued July 25, 2017).

Appellant filed an appeal to the Board.

By decision dated July 25, 2017, the Board affirmed the September 30, 2016 decision. The Board found that OWCP properly terminated appellant's wage-loss compensation and entitlement to schedule award benefits, pursuant to 5 U.S.C. § 8106(c)(2), because he had abandoned suitable work. The Board found that OWCP properly determined that the security clerk position, as described in the employing establishment's March 13, 2015 job offer, was within his work restrictions and properly determined that his reason for abandoning the security clerk position was not justified.

On September 5, 2017 appellant, through counsel, requested reconsideration of the September 30, 2016 OWCP decision. Counsel alleged that OWCP's determination that appellant could not resign after a suitability determination violated the Thirteenth Amendment of the United States Constitution. He also related that he was submitting new medical reports dated June 30 and July 6, 2016 that were not previously considered by OWCP.

OWCP received a June 28, 2016 letter by Dr. Mauro. Dr. Mauro related that appellant was progressing well after the November 23, 2015 left knee surgery, but could not perform the full responsibilities that his job required. He reported that appellant should continue on limited duty because of the limitations from his knee. Dr. Mauro restricted appellant to lifting and carrying no more than 10 pounds and also limited climbing, crawling, squatting, kneeling, pushing, and pulling.

Appellant also received medical treatment from Dr. John G. Oas, Board-certified in psychiatry and neurology. In a June 30, 2016 treatment note, Dr. Oas indicated that appellant was seen for complaints of dizziness. He noted diagnoses of intermittent vertigo, dysautonomia, small fiber neuropathy, and lower extremity pain. In a July 6, 2016 letter, Dr. Oas related that appellant's working diagnosis was a small fiber neuropathy based on his laboratory testing.

By decision dated April 12, 2018, OWCP denied modification of the September 30, 2016 decision.

LEGAL PRECEDENT

Under FECA,⁴ once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of compensation benefits.⁵ 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.⁶

Section 10.517 of FECA's implementing regulations further 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 proof to show that such refusal or failure to work was reasonable or justified,

⁴ *Supra* note 2.

⁵ *L.L.*, Docket No. 17-1247 (issued April 12, 2018); *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

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

and shall be provided with the opportunity to make such showing before a determination is made with respect to termination of entitlement to compensation.⁷

To justify termination of compensation, OWCP must show that the work offered was suitable, that appellant was informed of the consequences of his or her refusal to accept such employment, and that he or she was allowed a reasonable period to accept or reject the position or submit evidence or provide reasons why the position is not suitable.⁸ 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.⁹

Once OWCP establishes that the work offered is suitable, the burden shifts to the employee who refuses to work to show that the refusal or failure to work was reasonable or justified.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 Its procedures provide that acceptable reasons for refusing an offered position include medical evidence of inability to do the work.¹³

ANALYSIS

The Board finds that appellant has not established that his abandonment of suitable work was justified.

On prior appeal, the Board found that OWCP had met its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award benefits pursuant to 5 U.S.C. § 8106(c)(2) because he abandoned suitable work. As the Board had previously affirmed the termination of his wage-loss compensation and entitlement to schedule award benefits on November 2, 2015 due to his abandonment of suitable work, absent further merit review of this issue by OWCP pursuant to section 8128 of FECA, this issue is *res judicata*.¹⁴

The Board has explained that, if a claimant requests reconsideration of a suitable work termination, the issue remains whether appellant has established that he was unable to perform the

⁷ 20 C.F.R. § 10.517(a); *see Ronald M. Jones*, 52 ECAB 406 (2003).

⁸ R.A., Docket No. 19-0065 (issued May 14, 2019); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4 (June 2013).

⁹ L.L., *supra* note 5; *see also Joan F. Burke*, 54 ECAB 406 (2003).

¹⁰ 20 C.F.R. § 10.517(a).

¹¹ M.A., Docket No. 18-1671 (issued June 13, 2019); *Gayle Harris*, 52 ECAB 319 (2001).

¹² P.S., Docket No. 18-1789 (issued April 11, 2019).

¹³ Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 2.814.5(a)(4) (June 2013).

¹⁴ O.W., Docket No. 19-0316 (issued June 25, 2019); *see also V.G.*, Docket No. 17-0583 (issued July 23, 2018).

duties of the offered position as of the date of the termination.¹⁵ Following OWCP's September 30, 2016 decision, OWCP received a June 28, 2016 letter by Dr. Mauro who related that appellant was still not able to go back to the full responsibilities that his job required. Dr. Mauro reported that appellant should continue working limited duty and provided work restrictions of lifting and carrying no more than 10 pounds and limited climbing, crawling, squatting, kneeling, pushing, and pulling. He did not indicate that appellant was medically unable to perform the modified security clerk position offered on March 13, 2015. Thus, this letter does not establish that appellant's failure to work was reasonable or justified.¹⁶

The June 30, 2016 treatment note and July 6, 2016 letter by Dr. Oas, also fail to establish that appellant was unable to perform the modified security clerk position as they did not address his ability to work.¹⁷

On appeal counsel asserts that there is no statutory provision as to how long a claimant must work and there was nothing preventing a claimant who had returned to work from his right to retire based on the credits he earned. He provided no legal basis for his argument. The Board notes, however, that pursuing retirement is not considered an acceptable reason for abandoning an offer of suitable work.¹⁸

Appellant has offered no justifiable reason for why he was unable to continue working the modified-duty security position. Accordingly, the Board finds that he has not met his burden of proof to establish that his abandonment of the suitable job offer was justified.¹⁹

CONCLUSION

The Board finds that appellant has not established that his abandonment of suitable work was justified.

¹⁵ See *K.J.*, Docket No. 17-1971 (issued March 5, 2018).

¹⁶ See *J.R.*, Docket No. 18-1532 (issued April 8, 2019); *D.S.*, Docket No. 16-1593 (issued December 21, 2016).

¹⁷ *H.T.*, Docket No. 18-1161 (issued March 20, 2019).

¹⁸ *Supra* note 8 at Chapter 2.814.5(c) (June 2013).

¹⁹ See *C.H.*, Docket No. 17-0938 (issued November 27, 2017).

ORDER

IT IS HEREBY ORDERED THAT the April 12, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 14, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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