

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

B.R., Appellant)	
)	
and)	Docket No. 19-0088
)	Issued: August 13, 2019
DEPARTMENT OF VETERANS AFFAIRS,)	
VETERANS CANTEEN SERVICE,)	
Washington, DC, Employer)	

Appearances: *Case Submitted on the Record*
Daniel F. Read, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On October 16, 2018 appellant, through counsel, filed a timely appeal from an August 20, 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 August 20, 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 additional 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 November 16, 2017, due to her refusal of suitable work pursuant to 5 U.S.C. § 8106(c).

FACTUAL HISTORY

On October 3, 2006 appellant, then a 58-year-old cashier, filed a traumatic injury claim (Form CA-1) alleging that on that date she sustained injuries to her knees and right hand when she slipped and fell on a wet floor caused by coffee machine drippings while in the performance of duty. OWCP accepted the claim for contusion of right wrist and hand, contusion of bilateral knee and lower leg, tear of the right medial meniscus, and sprain of other specified sites of the right knee and leg.⁴ It authorized a January 16, 2007 right knee surgery and a December 13, 2007 left knee surgery. Appellant was placed on the periodic compensation rolls effective July 8, 2007. OWCP subsequently granted appellant a schedule award for 7 percent permanent impairment of the left lower extremity and 26 percent permanent impairment of the right lower extremity. It later authorized a February 16, 2015 right total knee replacement surgery and a June 1, 2015 left total knee replacement surgery.

In a work capacity evaluation (Form OWCP-5c) dated September 9, 2016, Dr. John B. Chiavetta, a Board-certified orthopedic surgeon, attached a November 3, 2015 form which provided work restrictions of lifting, pushing, and pulling less than 25 pounds and no kneeling, squatting, or using ladders greater than three feet.

On March 31, 2017 the employing establishment offered appellant a permanent light-duty position, effective May 1, 2017, as a full-time food service worker. It also provided the option to return to a new duty station closer to appellant's current residence, in Fayetteville, Durham, or Greenville, North Carolina. The position pursuant to Dr. Chiavetta did not include lifting, pulling, or pushing over 25 pounds, required no climbing ladders greater than three feet, kneeling, or squatting.

Appellant refused the job offer on April 20, 2017. She indicated in a separate narrative statement that she was not declining the light-duty work assignment, but was respectfully declining the reassignment to either of the duty stations offered because there was no public transportation from her residential area to any of the offered duty stations, the duty stations were too far away, and she drove an unreliable 2002 Volkswagen Jetta with over 155,000 miles and she only drove her car for medical appointments, pharmaceutical, grocery, and basic shopping needs in her immediate area, not to exceed 20 to 25 miles.

In a telephone call memorandum dated June 13, 2017, OWCP confirmed that appellant was originally injured while working in Washington, DC, but had since voluntarily moved to North Carolina. The employing establishment was attempting to locate a job as close to her local commuting area as possible and the job offered on March 31, 2017 remained available to her.

⁴ Appellant has a previously accepted claim for right wrist sprain, bilateral knee contusions, and torn medial meniscus of the left knee due to slipping on water/liquid leaking from a soda machine on April 22, 2005.

By letter dated June 15, 2017, OWCP notified appellant that the modified food service worker position was suitable and afforded her 30 days to accept the position or provide a written explanation for her refusal. It noted that the fact that she resided in a different geographic area from where the injury occurred was not a valid reason for refusing a suitable offer of employment because the employing establishment had confirmed that the closest suitable work available to her current commuting area was located in Durham, North Carolina. It found that the evidence of record did not support her inability to perform the modified position previously offered.

In response, counsel argued that the job was not suitable and submitted a note dated July 11, 2017 from Tiffany Stephens, a physician assistant, who indicated that appellant was capable of limited-duty work with restrictions of limited driving.

On August 11, 2017 OWCP confirmed that the modified job offer remained available to appellant.

In a letter dated August 11, 2017, OWCP notified appellant for a second time that the modified food service worker position was suitable, and afforded her 15 days to accept and report to work. It explained that it had considered each of the reasons that she provided for refusing to accept the offered position and did not find them to be valid.

Appellant subsequently submitted an August 22, 2017 report from Dr. Chiavetta who indicated that appellant had bilateral knee replacement surgery in 2015 and also a right hallux valgus correction surgery. He noted that appellant had difficulty walking or standing for any periods of time or performing any lifting. Dr. Chiavetta restricted her from lifting greater than 50 pounds at work.

By decision dated November 15, 2017, OWCP terminated appellant's wage-loss compensation and entitlement to schedule award benefits, effective November 16, 2017, for her refusal of suitable work. It found that the March 31, 2017 job offer was suitable based on appellant's restrictions as provided by Dr. Chiavetta on September 9, 2016 and as confirmed later on August 22, 2017 because the duties of the position could be performed within the prescribed restrictions.

On January 22, 2018 appellant, through counsel, requested reconsideration and argued that driving 500 miles a week and then standing while performing work duties was medically inappropriate given appellant's persistent pain, age, and lack of overall mobility. He submitted additional medical evidence in support of appellant's refusal of suitable work, including a December 18, 2017 report from Dr. Peter Trent, a Board-certified orthopedic surgeon, who diagnosed pain in both knees. Dr. Trent opined that the job offer was not suitable because appellant would have to drive 50 miles to work each way and it required prolonged standing and walking in food service preparation.

By decision dated April 20, 2018, OWCP denied modification of its prior decision.

On June 9, 2018 appellant, through counsel, requested reconsideration and reiterated his argument that the modified job offer was not suitable because the extended driving of 100 miles daily would essentially exhaust appellant's limited endurance and make her unfit for work. He further submitted reports dated May 28 and 30, 2018 from Dr. Trent who reiterated his opinion

that the job was not suitable because the driving requirements constituted a burden, which appellant could not reasonably accommodate.

By decision dated August 20, 2018, OWCP denied modification of its prior decision.

LEGAL PRECEDENT

Section 8106(c)(2) of FECA provides that a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by, or secured for him or her is not entitled to compensation.⁵ Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits under section 8106(c) for refusing to accept or neglecting to perform suitable work.⁶ The Board has recognized that section 8106(c) serves as a penalty provision as it may bar an employee's entitlement to future compensation and, for this reason, will be narrowly construed.⁷

To justify termination, OWCP must show that the work offered was suitable and that the employee was informed of the consequences of her or his refusal to accept such employment.⁸ According to its procedures, a job offer must be in writing and contain a description of the duties to be performed and the specific physical requirements of the position.⁹ 20 C.F.R. § 10.516¹⁰ 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 establishing that such refusal or failure to work was reasonable or justified, and shall be provided with the opportunity to make such showing before a determination is made with respect to termination of entitlement to compensation.¹¹

An acceptable reason, if supported by medical evidence, for refusing an offer of suitable work can be an inability to travel to work.¹² OWCP's procedures provide that the inability to travel to work is an acceptable reason if the inability is because of residuals of the employment injury.¹³ This holding is consistent with the Board's holding that all impairments, whether work related or not, must be considered in assessing the suitability of an offered position.¹⁴

⁵ 5 U.S.C. § 8101 *et seq.*

⁶ *M.W.*, Docket No. 17-1205 (issued April 26, 2018); *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

⁷ *P.C.*, Docket No. 18-0956 (issued February 8, 2019); *H. Adrian Osborne*, 48 ECAB 556 (1997).

⁸ *M.W.*, *supra* note 6; *T.S.*, 59 ECAB 490 (2008); *Ronald M. Jones*, 52 ECAB 190 (2000).

⁹ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.4(a) (June 2013).

¹⁰ 20 C.F.R. § 10.516.

¹¹ See *P.C.*, *supra* note 7; *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

¹² *C.W.*, Docket No. 10-2074 (issued May 23, 2011); *Mary E. Woodard*, 57 ECAB 211 (2005); *Glen L. Sinclair*, 36 ECAB 664 (1985).

¹³ *Supra* note 9 at Chapter 2.814.5(a)(3) (June 2013). See also *Donna M. Stroud*, 51 ECAB 264 (2000).

¹⁴ *Edward J. Stabell*, 49 ECAB 566 (1998).

ANALYSIS

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 November 16, 2017, due to her refusal of an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

OWCP accepted appellant's claim for contusion of right wrist and hand, contusion of bilateral knee and lower leg, tear of right medial meniscus, and sprain of other specified sites of the right knee and leg and authorized knee surgeries on January 16 and December 13, 2007 and total knee replacements on February 16 and June 1, 2015. Appellant has a previously accepted claim for right wrist sprain, bilateral knee contusions, and torn medial meniscus of the left knee.

In a work capacity evaluation (Form OWCP-5c) dated September 9, 2016, Dr. Chiavetta attached a November 3, 2015 report which provided work restrictions of lifting, pushing, and pulling less than 25 pounds and no kneeling, squatting, or using ladders greater than three feet.

On March 31, 2017 the employing establishment offered appellant a full-time, limited-duty food service worker position. The position did not include lifting, pulling, or pushing over 25 pounds, no climbing ladders greater than three feet, and no kneeling or squatting and thus was within the physical limitations initially assessed by Dr. Chiavetta. The employing establishment also provided appellant the option to return to a new duty station, closer to appellant's residence in North Carolina.

Appellant refused the position on April 20, 2017. She indicated in a separate narrative statement that she was not declining the light-duty work assignment, but was respectfully declining the reassignment to either of the duty stations offered as there was no public transportation, that the commuting distance was excessive, and that she could not travel more than 20 to 25 miles from her home in her car.

As noted above, the distance of travel to and from an employing establishment can be a justifiable reason for refusing an offer of suitable employment. However, appellant voluntarily moved to a home further away from the employing establishment.¹⁵ In this case, the employing establishment attempted to accommodate appellant's voluntary move from Washington, DC to North Carolina. The difficulty in driving to the offered position is not dispositive as the commute would have been by appellant's choice, not a duty imposed by the employing establishment.¹⁶ The Board finds that appellant's stated intention that she planned to use public transportation to get to work is irrelevant.¹⁷ The only relevant factors are that appellant remained on the rolls of the employing establishment and she moved away from the employing establishment area after her accepted October 3, 2006 employment injury. The Board has held that an employee's move away from the area in which the employing establishment is located is an unacceptable reason for refusing to accept an offered position if the employee is still on the employing establishment's

¹⁵ See *R.L.*, Docket No. 16-1275 (issued September 27, 2017).

¹⁶ *Alfredo Mata*, Docket No. 98-1269 (issued May 19, 2000) (where the claimant voluntarily moved to a home further away from the employing establishment and refused an offer of suitable work, the Board found that it was irrelevant that he had contracted to buy a house prior to the date of injury and did not move until after the date of injury).

¹⁷ *Id.*

rolls.¹⁸ OWCP, therefore, properly terminated her compensation for refusal to accept suitable employment.

The Board further finds that appellant received proper notice prior to termination of her compensation. Appellant was afforded 30 days to provide reasons for refusal of the position and was later afforded an additional 15 days to accept the position.

Accordingly, the Board finds that OWCP complied with its procedural requirements in that it advised appellant that the position was suitable, provided her with an opportunity to accept the position or provide reasons for refusing the job offer, and gave her notice of the penalty provisions of section 8106(c).¹⁹

After OWCP established that the offered work is suitable, the burden shifted to appellant to show that her refusal of suitable work was reasonable or justified.²⁰ The Board notes that, in Dr. Chiavetta's August 22, 2017 report, he indicated that appellant had also undergone a right hallux valgus correction surgery and restricted her from lifting greater than 50 pounds at work. This restriction also does not preclude appellant from performing the offered position as the position did not include lifting, pulling, or pushing over 25 pounds. Further, Dr. Chiavetta did not address why appellant could not perform the duties of the modified food service worker position. Therefore, this evidence is insufficient to establish that the offered position was unsuitable.

Dr. Trent indicated that appellant experienced pain in her knees, but similarly, he failed to address why she could not perform the duties of the modified food service worker position. For this reason, this evidence is insufficient to support appellant's refusal of suitable work.

The reports from Ms. Stephens does not constitute competent medical evidence because a physician's assistant is not a "physician" as defined under FECA.²¹ As such, this evidence is also insufficient to meet appellant's burden of proof.

Accordingly, after reviewing the evidence of record, the Board finds that the offered modified food service worker position was medically and vocationally suitable and OWCP complied with the procedural requirements of section 8106(c) of FECA. OWCP properly terminated appellant's monetary compensation due to her refusal of suitable work and that she did not, thereafter, establish that her refusal of suitable work was justified.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

¹⁸ *Id.*

¹⁹ *See J.J.*, Docket No. 14-0951 (issued September 2, 2014).

²⁰ *See C.E.*, Docket No. 09-0725 (issued November 5, 2009).

²¹ 5 U.S.C. § 8101(2); *Gloria J. McPherson*, 51 ECAB 441 (2000); *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (a medical issue such as causal relationship can only be resolved through the submission of probative medical evidence from a physician).

CONCLUSION

The Board finds that OWCP properly terminated appellant's wage-loss compensation and schedule award benefits, effective November 16, 2017, under 5 U.S.C. § 8106(c) for refusal of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the August 20, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 13, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board