United States Department of Labor
Employees' Compensation Appeals Board

E.G., Appellant	)	
and	)	**Docket No. 18-0710**
	)	**Issued: February 12, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Amarillo, TX, Employer	)	

Appearances:
Kathy Davis, Esq., for the appellant[1]
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 February 12, 2018 appellant, through counsel, filed a timely appeal from an August 16, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP).[2] Pursuant to the

[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] Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of the last OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. One hundred and eighty days from August 16, 2017, the date of OWCP's decision, was February 12, 2018. Since using February 15, 2018, the date the appeal was received by the Clerk of the Appellate Boards, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is February 12, 2018, which renders the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

Federal Employees' Compensation Act[3] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[4]

ISSUE

The issue is whether OWCP properly terminated appellant's wage-loss compensation and entitlement to schedule award benefits, effective November 13, 2016, due to her refusal of an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

This case has previously been before the Board.[5] The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

OWCP accepted that, on November 28, 1994, appellant, then a 39-year-old mail clerk, sustained bilateral carpal tunnel syndrome as a result of her federal employment and paid appropriate compensation benefits. Appellant eventually separated from the employing establishment. By letter dated July 23, 2010, OWCP informed appellant that she would receive compensation benefits on the periodic rolls commencing May 3, 2010 with regular payments effective June 6, 2010.

Appellant underwent OWCP vocational rehabilitation services without success in 2011. On July 30, 2014 she signed a job offer based on work restrictions of Dr. Melburn K. Huebner, a Board-certified orthopedic surgeon. Appellant accepted the job offer, but altered the work tour times.

In an April 24, 2015 report, Dr. Huebner provided an impression of bilateral carpal tunnel syndrome. Findings included positive Tinel's signs bilaterally and tingling and numbness in the median nerve distributions. In an April 24, 2015 duty status report (Form CA-17), Dr. Huebner indicated: appellant could work full time with restrictions of lifting up to 30 pounds; standing/walking 2 hours continuous, 30 minutes intermittent; push/pull/grasp 2 hours per day, 35 minutes each hour; fine manipulation/reach above shoulder 3 hours per day, 35 minutes per hour; drive a motor vehicle 2 hours per day, 35 minutes per hour; and operate machinery 2 hours per day, 35 minutes per hour.

On July 31, 2015 the employing establishment offered appellant a position as a modified sales/service distribution associate at the Amarillo Main Post Office, Tour 2, from 0900 a.m. to

[3] 5 U.S.C. § 8101 *et seq.*

[4] The Board notes that following the August 16, 2017 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 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.*

[5] Docket No. 15-0442 (issued April 19, 2016).

1800 p.m. (6:00 p.m.) with days off on Sunday and Thursdays.[6] The daily physical requirements of the job were walking intermittently for 1 hour, lifting up to 30 pounds intermittently, standing 1 to 3 hours intermittently, sitting intermittently 1 hour, simple grasping intermittently 35 minutes up to 2 hours, and fine manipulation 35 minutes up to 3 hours intermittently. The position involved: distributing accountable mail for carrier; window operation relief; lobby assist customer; writing accountables; dues cage; and box mail accountability. The job offer indicated that it was based on Dr. Huebner's April 24, 2015 restrictions. The employing establishment advised appellant that the modified position was available as of July 31, 2015 and that she had 14 days following receipt of the letter to accept or refuse the position.

In a December 3, 2015 letter, OWCP notified appellant that the modified position was suitable, and provided her 30 days to accept the position or to provide a written explanation for her refusal. It advised of her of the penalty provisions of 5 U.S.C. § 8016(c)(2) for either refusing the offered position or neglecting to work after suitable work was offered to her, procured by, or secured for her. OWCP noted that, even though appellant was retired, it was not a valid reason for refusing a suitable offer of employment and that she was expected to accept the offered position and return to work if medically capable.

On December 15, 2015 appellant signed the July 31, 2015 rehabilitation job offer noting that she was "willing, able and available to work within my medical restrictions."[7]

In a November 3, 2015 duty status report (Form CA-7), Dr. Huebner indicated that appellant's work restrictions remained the same.

On January 8, 2016 the employing establishment noted that appellant had not returned to work and that the job offer was still available.

In a January 8, 2016 letter, OWCP afforded appellant an additional 15 days to accept and report to the modified position. It noted that the position remained available to appellant.

On May 11, 2016 the employing establishment advised OWCP that the offered position of July 31, 2015 modified sales/service distribution associate remained available.

OWCP prepared a May 11, 2016 statement of accepted facts (SOAFs) and a list of questions and referred appellant along with the medical record to Dr. Earl C. Smith, a Board-certified internist, for a second opinion medical evaluation. Dr. Smith was asked whether appellant was capable of returning to her date-of-injury position as a mail processing clerk. If not, then he was asked to describe her work-related disability and any restrictions attributable to preexisting conditions. Dr. Smith was not made aware of the pending July 31, 2015 job offer for a modified sales/service distribution associate.

[6] The employing establishment advised appellant that the times and days off were made by operations needs of service and requested that she not make any changes to the current revised job offer.

[7] On December 23, 2015 OWCP received another copy of appellant's December 15, 2015 signed rehabilitation job offer with two lines of appellant's medically defined work restrictions erased/redacted. The erased/redacted items pertained to reaching above shoulders, driving and operating machinery.

In a June 6, 2016 progress note and duty status report, Dr. Huebner indicated that appellant could continue working with her current restrictions. He noted that her condition was about the same as it had been in November 2015.

In a September 13, 2016 report, Dr. Smith noted the history of injury and presented examination findings. He also reviewed a September 1, 2016 electromyogram/nerve conduction velocity (EMG/NCV) study. Dr. Smith provided an impression of bilateral carpal tunnel syndrome. He opined that appellant could not return to her date-of-injury position as a mail processing clerk in the mark-up division as she could not do repetitive gripping, grasping, pushing or lifting over 30 pounds intermittently. Dr. Smith, however, opined that she was able to perform the clerk position at the retail store front with her previous restrictions and with the use of wrist braces, but she could not perform the culling of nonprocessable items, sweeping or loading of mail onto the transport unit. He noted that such restrictions were permanent. In the accompanying September 13, 2016 work capacity evaluation (OWCP-5c) form, Dr. Smith indicated that appellant had reached maximum medical improvement and could return to work. He indicated that she had permanent restrictions of no repetitive movements of wrist and elbow, no pushing, pulling, lifting, and climbing. A copy of the September 1, 2016 EMG/NCV study was provided.

An October 25, 2016 e-mail from the employing establishment indicated that the modified position remained available to appellant.[8]

By decision dated October 26, 2016, OWCP terminated appellant's entitlement to wage-loss compensation and schedule award benefits, effective November 13, 2016, because she refused suitable work, pursuant to 5 U.S.C. § 8106(c)(2). It found that the July 31, 2015 job offer was suitable based on the November 3, 2015 restrictions as provided by Dr. Huebner. OWCP noted that retirement was not a valid reason for refusing a suitable offer of employment.

On November 23, 2016 OWCP received appellant's November 4, 2016 request for an oral hearing before an OWCP hearing representative, which was postmarked on November 17, 2016.

In a November 17, 2016 affidavit, appellant stated that the employing establishment never provided her with a return to work date. She stated that she did not receive the July 31, 2015 job offer nor the January 8, 2016 notice giving her 15-days to respond.

In a January 4, 2017 report, Dr. Huebner opined that appellant could continue with her current work restrictions. He indicated that she had findings of mild positive Tinel's sign bilaterally at the median nerves, good thenar strength, and touch sensation in all fingers. In his January 4, 2017 Form CA-17, Dr. Huebner provided a restriction of lifting no more than 13 pounds. He also indicated that appellant could push/pull/grasp 2 hours per day, 30 minutes each hour and fine manipulation for 30 minutes intermittently for 3 hours per day.

A telephonic hearing was held on June 14, 2017. Appellant testified that the July 31, 2015 job offer was not sent to her correct home address. She also noted that the June 12, 2015 offer,

[8] OWCP noted in an October 20, 2016 e-mail to the employing establishment that Dr. Smith's restrictions differed in his narrative report and on the OWCP-5c form. It stated that the second opinion evaluation was scheduled based on case management requirements.

which she had accepted, was the same as the July 31, 2015 offer. Appellant indicated that the employing establishment never provided her with a return to work date after she had accepted the June 12, 2015 job offer.

In July 12, 2017 comments, T.W., an injury compensation specialist for the employing establishment, stated that appellant had received the July 31, 2015 job offer, as evidenced by the USPS tracking report, but she did not return the signed July 31, 2015 job offer to the employing establishment. She indicated that the prior offer, dated June 12, 2015, was invalidated when appellant altered the work tour. T.W. noted that the work tour was set at the employing establishment's discretion and not a preference selected by the employee. She further indicated that the July 31, 2015 job offer was a rehabilitation job offer which required an interactive interview followed by a return to work date. As appellant did not return the signed job offer of July 31, 2015 to the employing establishment, it was not able to provide a return to work date.

By decision dated August 16, 2017, an OWCP hearing representative affirmed OWCP's October 26, 2016 decision. He found that the July 31, 2015 job offer was suitable based on restrictions provided by Dr. Huebner in 2015 and appellant was provided appropriate notice. The hearing representative found that appellant had received the July 31, 2015 job offer in December 2015 and there was no evidence that the employing establishment had forged her initials on the position description. While appellant had indicated her acceptance of the job offer with her initials, she did not submit the required supporting documentation to the employing establishment for a rehabilitation job offer and, thus, was not provided a return to work date after she had accepted the job offer. Thus, the hearing representative found that appellant had refused the July 31, 2015 offer of modified employment.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[9] 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.[10] 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.[11] 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.[12]

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

[9] *Linda D. Guerrero*, 54 ECAB 556 (2003).

[10] 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

[11] *Ronald M. Jones*, 52 ECAB 190 (2000).

[12] *Joan F. Burke*, 54 ECAB 406 (2003).

the burden of showing that such refusal or failure to work was reasonable or justified.[13] 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.[14]

Before compensation can be terminated, however, OWCP has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work, establishing that a position has been offered within the employee's work restrictions and setting forth the specific job requirements of the position.[15] In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, OWCP has the burden of showing that the work offered to and refused by appellant was suitable.[16]

OWCP's procedures provide that if the "claimant submits evidence and/or reasons for refusing the offered position, the CE [claims examiner] must carefully evaluate the claimant's response and determine whether the claimant's reasons for refusing the job are valid."[17] Acceptable reasons for refusing the position, include medical evidence of inability to do the work.[18]

ANALYSIS

The Board finds that OWCP failed to meet its burden to proof to establish that the July 31, 2015 modified sales/service distribution associate position was suitable.

OWCP terminated appellant's wage-loss compensation and entitlement to schedule award benefits, effective November 13, 2016, because she refused suitable work. It found that the July 31, 2015 job offer was suitable based on the April 24, and November 3, 2015 restrictions provided by Dr. Huebner.

The daily physical requirements of the job were walking intermittently for 1 hour, lifting up to 30 pounds intermittently, standing 1 to 3 hours intermittently, sitting intermittently 1 hour, simple grasping intermittently 35 minutes up to 2 hours; and fine manipulation 35 minutes up to 3 hours intermittently. The position involved: distributing accountable mail for carrier; window operation relief; lobby assist customer; writing accountables; dues cage; and box mail accountability.

The Board finds that OWCP did not properly address the opinion of Dr. Smith, an OWCP second opinion physician as to whether this job offer constituted suitable work. When additional

[13] 20 C.F.R. § 10.517(a); *see supra* note 11.

[14] *Id.* at § 10.516.

[15] *See Linda Hilton*, 52 ECAB 476 (2001).

[16] *Id.*

[17] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.5 (June 2013).

[18] *Id.* at Chapter 8.814.5(a)(4) (June 2013).

medical evidence is submitted after the job offer is made, OWCP must consider the evidence in determining medical suitability.[19]

In his September 13, 2016 report, Dr. Smith opined that appellant could perform a clerk position at the retail store front with her previous restrictions and with the use of wrist braces. In his September 13, 2016 work capacity evaluation (OWCP-5c) form, although he indicated that she could return to her job as a mail clerk, she could not return to work in her previous job in the mark-up division given her restrictions. Dr. Smith related, however, that she had permanent restrictions of no repetitive movements of wrist and elbow, no pushing, pulling, lifting, and climbing for which the mail clerk job required. He offered conflicting opinions between his narrative report dated September 13, 2016 and his work capacity evaluation (Form OWCP-5c) regarding appellant's capacity to perform work. Without further clarification, Dr. Smith's restrictions could impact appellant's ability to perform the offered position.

It is well established that, proceedings under FECA are not adversarial in nature, OWCP shares responsibility in the development of the evidence to see that justice is done.[20] When OWCP selects a physician for an opinion, it has an obligation to secure, if necessary, clarification of the physician's report and to have a proper evaluation made.[21] Because it referred appellant to Dr. Smith, OWCP had the responsibility to obtain a report to resolve the issue of whether the suitable work position was within appellant's physical restrictions.

The Board has held that, for OWCP to meet its burden of proof in a suitable work termination, the medical evidence should be clear and unequivocal that the claimant could perform the offered position.[22] As a penalty provision, section 8106(c)(2) must be narrowly construed.[23] OWCP did not secure a medical report that reviewed the job offered and provide a clear, reasoned opinion as to its suitability.[24] Consequently, it has not met its burden of proof.[25]

CONCLUSION

The Board finds that OWCP improperly terminated appellant's wage-loss compensation and entitlement to schedule award benefits, effective November 13, 2016, as she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).[26]

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[19] *See e.g., S.R.*, Docket No. 10-1154 (issued December 8, 2010); *D.H.*, Docket No. 09-0381 (issued November 3, 2009); *L.N.*, Docket No. 06-0694 (issued May 2, 2007).

[20] *See Phillip L. Barnes*, 55 ECAB 426 (2004).

[21] *See M.A.*, Docket No. 17-0331 (issued June 15, 2018).

[22] *Annette Quimby*, 49 ECAB 304 (1998).

[23] *See Stephen A. Pasquale*, 57 ECAB 396 (2006).

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

[25] *See D.G.*, Docket No. 16-1492 (issued January 3, 2017).

[26] In light of the disposition of this case, appellant's arguments on appeal will not be addressed.

ORDER

IT IS HEREBY ORDERED THAT the August 16, 2017 decision of the Office of Workers' Compensation Programs is reversed.

Issued: February 12, 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