United States Department of Labor
Employees' Compensation Appeals Board

K.S., Appellant	)	
and	)	**Docket No. 19-0082**
	)	**Issued: July 29, 2019**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, North Reading, MA, Employer	)	

Appearances:
Appellant, pro se
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 October 15, 2018 appellant filed a timely appeal from an April 18, 2018 merit decision and a June 27, 2018 nonmerit 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.

ISSUES

The issues are: (1) whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective April 29, 2018, due to his refusal of suitable work, pursuant to 5 U.S.C. § 8106(c)(2); and (2) whether OWCP properly denied his request for a hearing before an OWCP hearing representative as untimely filed pursuant to 5 U.S.C. § 8124(b).

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 28, 1997 appellant, then a 38-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that, on August 22, 1997, he experienced low back pain and tingling in his legs while in the performance of duty. He stopped work on August 27, 1997. OWCP accepted the claim for lumbar strain and lumbar intervertebral disc displacement. It paid appellant wage-loss compensation on the daily rolls beginning October 14, 1997 and on the periodic rolls beginning March 29, 1998. On April 16, 1998 appellant underwent a discectomy at L5-S1.[2]

On February 8, 2011 Dr. David H. Kim, a Board-certified orthopedic surgeon, discussed appellant's history of an August 22, 1997 employment injury causing neck pain radiating into the lower back. He noted that he had a disabling spinal cord lesion at C4 that might represent a tumor or bruised cord. Dr. Kim diagnosed cervical myelomalacia at C4-5 "most likely related to distant trauma in association with ongoing cervical stenosis at multiple levels, most pronounced at the C4-5 level, multilevel cervical spondylosis and disc degeneration."

In reports dated 2011 through 2015, Dr. Jennifer C. Millen, Board-certified in emergency medicine, diagnosed cervical spondylosis with a herniated disc at C4-5, cervical stenosis, low back pain, and myofascial muscle pain. She indicated that appellant was unable to perform activities of daily living with pain.

On January 17, 2017 OWCP referred appellant to Dr. Donald J. Thomson, a Board-certified neurologist, for a second opinion examination.

In a report dated February 16, 2017, Dr. Thomson reviewed appellant's history of injury, noting that following his lumbar surgery he had experienced persistent neck pain radiating to the shoulders. He diagnosed a lumbosacral disc herniation following a discectomy at L5-S1 due to the August 22, 1997 employment injury. Dr. Thomson opined that appellant's lumbar condition had improved. He found, however, that he had limitations due to an aggravation of cervical spondylosis causally related to the accepted employment injury. In a February 16, 2017 work capacity evaluation (Form OWCP-5c), Dr. Thomson found that appellant could perform full-time sedentary work, with restrictions of standing no more than 4 hours; sitting for up to 8 hours, but with 5-minute breaks to stand every 30 minutes; minimal reaching and twisting; and occasional lifting, pushing, and pulling up to 10 pounds.

OWCP, by letter dated April 4, 2017, requested that Dr. Millen review Dr. Thomson's report and address whether she agreed with his findings regarding appellant's work capacity. In an April 13, 2017 response, Dr. Millen advised that she could not adequately respond to the second opinion evaluation as she had never formally evaluated appellant's disability status herself. She noted that she first met appellant on December 5, 2011 as a patient who had been followed by a former colleague who had performed a full evaluation of appellant. Dr. Millen indicated that she

[2] A July 5, 2000 magnetic resonance imaging (MRI) scan study of the cervical spine showed a disc protrusion or herniation indenting the cervical cord, a possible inflammatory process or demyelinating disease or malignancy, and disc bulges at C5-6 and C6-7.

merely accepted that colleague's evaluation and completed his paperwork in the same capacity as the colleague.

On May 25, 2017 the employing establishment offered appellant a modified position working in stand-alone mail preparation, rippies, and scanning. The duties of the position included cutting plastic material from flat bundles weighting 10 pounds or less and putting them in trays, repairing damaged mail, and using a handheld scanner. The physical requirements of the position consisted of sitting with the ability to stand and walk for 5 minutes every 30 minutes; lifting, pushing, and pulling up to 10 pounds; walking for 1 hour; standing for 4 hours; performing repetitive movements for 8 hours; minimal reaching, twisting, bending, and stooping; and no squatting, kneeling, or climbing.

The employing establishment, on June 21, 2017, notified OWCP that appellant had verbally refused the offered position.

In a letter dated July 7, 2017, OWCP advised appellant that it had determined that the offered position was suitable and afforded 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 for doing so, was not entitled to wage-loss or schedule award compensation, pursuant to 5 U.S.C. § 8106(c)(2).

Appellant, in an August 2, 2017 letter, provided his observation that Dr. Thomson had no receptionist, other patients, or nurses and would not review the medical evidence that he brought with him to the appointment. He asserted that Dr. Thomson's medical opinion had been predetermined and that he gave no consideration to his statements regarding his chronic pain he suffered over the past 20 years due to his employment injury.

In a report dated August 9, 2017, Dr. Frank A. Graf, a Board-certified orthopedic surgeon, indicated that he had initially evaluated appellant in January 2013 as an OWCP referral physician.[3] He noted that the most recent cervical MRI scan study of the cervical spine, dated in 2000, showed myelomalacia of the spinal cord. Dr. Graf diagnosed chronic cervical and lumbosacral pain, multilevel spinal canal stenosis and neuroforaminal stenosis as demonstrated by MRI scan studies, and cervical myelomalacia of the cervical spine with secondary hyperreflexia of the right upper and lower extremity. In an accompanying Form OWCP-5c, he found that appellant was totally disabled from employment.

Dr. Mark D. Raizin, a Board-certified internist, on August 11, 2017 diagnosed severe cervical stenosis. He opined that appellant was unable to perform the duties of the position offered by the employing establishment.

OWCP, on October 31, 2017, determined that a conflict existed between Dr. Graf and Dr. Thomson regarding appellant's work capacity. It referred him, along with a December 31,

[3] In a report dated February 19, 2013, Dr. Graf opined that appellant had residuals of his accepted conditions and also that the acceptance of his claim should be expanded to include cervical stenosis with secondary myelomalacic changes to the cervical spine. He found that he was totally disabled from employment.

2017 statement of accepted facts (SOAF) and the medical record, to Dr. Robert R. Pennell, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated January 23, 2018, Dr. Pennell reviewed appellant's history of injury, including the October 31, 2017 SOAF, and discussed the medical evidence of record. He noted that he had not experienced neck pain until four years after the accident and indicated that medical reports revealed that he had fallen on ice in 2000. On examination, Dr. Pennell noted nonphysiological findings on examination. He noted that a December 6, 2010 cervical MRI scan showed a reduction in the area of increased signal only involving the right spinal cord. Dr. Pennell advised that a May 26, 2017 MRI scan of the cervical spine showed a progression of degenerative changes and a "slight reversal of the cervical lordosis at the C4-5 and C5-6 levels." He related:

> "In summary, the cervical MRI [studies] were consistent with something, possibly an infarction, having occurred to the right side of [appellant's] spinal cord around January of 2000 with subsequent neurological symptoms over the left half of his torso and arm. Then that spinal cord abnormality healed with resolution of the associated neurological symptoms."

Dr. Pennell opined that appellant had no symptoms, physical findings, or limitations causally related to the August 22, 1997 employment injury. He found that his cervical degenerative condition was unrelated to his August 22, 1997 employment injury and resulted in "some work limitations, such as not working above head level and the avoidance of repeatedly looking to [the] right and left." In a Form OWCP-5c, dated January 23, 2018, Dr. Pennell found that appellant could perform medium work full time.

The employing establishment, on February 16, 2018, confirmed that the May 25, 2017 offered position remained available.

OWCP, by letter dated February 26, 2018, 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 him that 5 U.S.C. § 8106(c)(2) provided that an employee who refused an offer of suitable work without cause was not entitled to compensation for either disability or a schedule award.

By letter dated April 2, 2018, OWCP notified appellant that his reasons for refusing the position were not valid and provided him 15 days to accept the position, or his wage-loss compensation and entitlement to a schedule award would be terminated. It advised him that the offered position remained available.

By decision dated April 18, 2018, OWCP terminated appellant's wage-loss compensation and entitlement to a schedule award, effective April 29, 2018, finding that he had refused an offer of suitable work. 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. Pennell constituted the special weight of the evidence and established that he could perform the duties of the offered position.

Appellant, by letter dated May 23, 2018 and postmarked May 24, 2018, requested a telephonic hearing before an OWCP hearing representative.

By decision dated June 27, 2018, OWCP's hearing representative determined that appellant was not entitled to a hearing as a matter of right under section 8124(b) because his May 24, 2018 hearing request was not made within 30 days of its April 18, 2018 merit decision. She considered whether to grant a discretionary hearing, but determined that the matter could equally well be addressed by appellant requesting reconsideration and providing new evidence supporting that the offered position was not medically suitable.

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]

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

[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] *Supra* note 4.

[7] *Id*.

[8] 20 C.F.R. § 10.517(a).

[9] *Id*. at § 10.516.

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

[11] *M.A.*, Docket No. 18-1671 (issued June 13, 2019).

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 exists 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 has not met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective April 29, 2018, for refusal of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

OWCP accepted that appellant sustained lumbar strain and lumbar intervertebral disc displacement due to an August 22, 1997 employment injury. Beginning October 14, 1997, it paid him wage-loss compensation for total disability. OWCP placed appellant on the periodic rolls on March 29, 1998.

OWCP found that a conflict in medical opinion arose between Dr. Graf and Dr. Thomson regarding the extent of appellant's disability due to his August 22, 1997 employment injury. It referred him to Dr. Pennell, who found that he had no further disability due to his accepted lumbar strain and lumbar intervertebral disc displacement. Based on Dr. Pennell's opinion, OWCP determined the May 25, 2017 position offered by the employing establishment was medically suitable.

The Board finds, however, that OWCP failed to sufficiently develop the medical evidence regarding whether appellant had sustained a cervical condition causally related to his accepted employment injury prior to terminating his wage-loss compensation and entitlement to a schedule award under section 8106(c)(2).

On February 16, 2017 Dr. Thomson, an OWCP referral physician, diagnosed cervical spondylosis causally related to the accepted employment injury. In a report dated August 9, 2017, Dr. Graf, appellant's attending physician, opined that diagnostic studies showed central spinal canal stenosis and neuroforaminal stenosis at multiple levels and cervical myelomalacia of the

[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).

cervical spinal cord. He found that appellant was totally disabled from work due to myelomalacia. OWCP, however, did not expand acceptance of the claim based on the opinion of its referral physician or obtain clarification from Dr. Thomson or Dr. Graf regarding whether appellant had sustained an employment-related cervical condition.[16]

As previously noted, OWCP must consider all of appellant's preexisting, work-related, and subsequently-acquired medical conditions in determining whether a position is suitable for appellant.[17] Additionally, as a penalty provision, section 8106(c)(2) must be narrowly construed.[18] Based on the evidence of record, the Board finds that OWCP improperly determined that the modified position offered to appellant constituted suitable work within his physical limitations and capabilities. The record does not substantiate that OWCP properly considered the entirety of his medical conditions before terminating his wage-loss compensation and entitlement to a schedule award.[19] Consequently, OWCP did not meet its burden of proof to justify the termination of his compensation benefits pursuant to section 8106(c)(2).

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective April 29, 2018, for refusal of suitable work pursuant to 5 U.S.C. § 8106(c)(2).[20]

[16] *See S.B.*, Docket No. 18-0039 (issued October 15, 2018).

[17] *Id*.

[18] 5 U.S.C. § 8106(c)(2); *F.B.*, Docket No. 17-0216 (issued February 13, 2018).

[19] *See D.H.*, Docket No. 17-1014 (issued October 3, 2017); *H.L.*, Docket No. 16-1810 (issued March 16, 2017).

[20] In light of the Board's disposition in Issue 1, Issue 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the April 18, 2018 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 29, 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