United States Department of Labor
Employees' Compensation Appeals Board

M.A., Appellant	)	
and	)	**Docket No. 18-1671**
	)	**Issued: June 13, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Warwick, NY, Employer	)	

Appearances:
Paul Kalker, Esq., for the appellant[1]
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
JANICE B. ASKIN, Judge

JURISDICTION

On September 4, 2018 appellant, through counsel, filed a timely appeal from an August 14, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (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 OWCP has met its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award benefits, effective August 14, 2018, as she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On September 21, 2013 appellant, then a 59-year-old rural mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on September 18, 2013 she was involved in a motor vehicle accident when another vehicle rear-ended her postal vehicle while in the performance of duty. She stopped work on September 18, 2013 and has not returned. OWCP accepted the claim for lumbar sprain, cervical sprain, and joint derangement of right shoulder. It paid appellant wage-loss compensation on the supplemental rolls as of November 3, 2013 and she was placed on the periodic rolls as of August 24, 2014.

On September 27, 2013 appellant began treatment with Dr. Vincent J. Gulfo, a Board-certified physiatrist. In a March 4, 2014 report, Dr. Gulfo opined that her electrodiagnostic studies were consistent with right cervical radiculopathy, most severely affecting the right C5 nerve root. No evidence of myopathy or neuropathy were seen.

On July 9, 2014 appellant underwent an arthroscopic decompression of the right shoulder, which was performed by Dr. Gabriel Dassa, a Board-certified orthopedic surgeon. In a September 1, 2015 report, Dr. Dassa provided an impression of status post right shoulder arthroscopic surgery and cervical spine disc bulging and disc herniation with radiculopathy. He recommended continued physical therapy for the shoulder and pain management for the cervical spine.

In February and December 2014, appellant underwent second opinion evaluations by Dr. Harvey L. Seigel, a Board-certified orthopedic surgeon. In his December 1, 2014 report, Dr. Seigel indicated that she had reached maximum medical improvement (MMI). He opined that appellant no longer had disabling residuals of the accepted conditions and that she could return to her date-of-injury job on a full-duty basis.

A February 16, 2016 magnetic resonance imaging (MRI) scan of appellant's cervical spine revealed mild multilevel disc degenerative and osteoarthritic changes and central disc protrusion causing mild central canal stenosis at C4-5 and C6-7. A February 16, 2016 MRI scan of her lumbar spine showed multilevel degenerative disc and facet joint changes with small disc bulges.

On February 23, 2016 OWCP found a conflict in medical opinion between Drs. Gulfo and Dassa for the appellant and Dr. Seigel for the government regarding the status of her accepted conditions. Appellant was referred along with a statement of accepted facts (SOAF) and the case record to Dr. G.K. Bhanusali, a Board-certified orthopedic surgeon, for an impartial medical evaluation. In a March 17, 2016 report, Dr. Bhanusali opined that she could return to work in a full-time capacity with temporary restrictions on lifting weight, and overhead activities. He recommended a functional capacity evaluation (FCE).

In an April 29, 2016 report, Dr. Steven K. Jacobs, a neurosurgeon, diagnosed cervical disc displacement, mid-cervical region, cervical radiculopathy, and cervicalgia. He opined that he did not believe that appellant could return to her prior job as it required lifting 70 pounds or greater. Dr. Jacobs referred her for an FCE.

The September 5, 2016 FCE indicated that appellant could work in a sedentary capacity if she received continued physical therapy, a formal work-conditioning program, frequent micro breaks while working, proper ergonomic set up, and job retraining.

In a December 14, 2016 report, Dr. Richard D. Semble, a Board-certified orthopedic surgeon and OWCP second opinion physician, opined that, based on appellant's current physical examination, she had no residuals, disability, or impairment from the accepted employment injury. He opined that she had reached MMI scan and was capable of returning to work full duty without an FCE or work hardening program.

A December 27, 2016 MRI scan of appellant's cervical spine revealed multilevel disc degenerative and osteoarthritic changes and mild canal narrowing at C3-4 through C6-7. No disc herniation was seen.

In a January 20, 2017 report, Dr. Jacobs recommended anterior cervical discectomy and fusion surgery due to a herniated disc at C5-6 with mass effect on the spinal cord. However, on June 14, 2017, he recommended against any type of surgical procedure and referred appellant to pain management.

On August 15, 2017 OWCP found a conflict in medical opinion between Dr. Jacobs and Dr. Semble regarding appellant's diagnoses and whether she had continuing disability due to the accepted employment injury. Appellant was referred, along with an updated SOAF, a list of questions, and the medical record to Dr. C. Tobenna Okezie, a Board-certified orthopedic surgeon, for an impartial medical evaluation.

In an August 30, 2017 report, Dr. Okezie reviewed the SOAF and appellant's medical record. Following her physical examination, he related that there was no objective evidence that she was totally or permanently disabled due to the accepted conditions or due to a temporary aggravation of her preexisting cervical and lumbar spondylosis. Dr. Okezie opined that appellant reached MMI 18 months after the date of injury, but indicated that he would use December 14, 2016, the date she was evaluated by Dr. Semble, as the date of MMI. He indicated that there were no clinically relevant MRI scan finding or objective findings from the 2014 imagining studies that would suggest even a remote possibility of a permanent disability. Dr. Okezie explained that appellant's treating physicians utilized mildly positive age-related findings to support subjective complaints. He further explained that their interpretations of the imaging studies exceeded those of the official radiologic reports and that there was no anatomic rationale to support permanent disability. Dr. Okezie opined that appellant was capable of medium level work, noting that the FCE indicated that she could perform some work. In response to a question regarding additional medical treatment required to treat her accepted employment conditions, he related that a work hardening program was necessary to facilitate her return to work. Dr. Okezie found that appellant's lifting capacity was potentially the chief limitation as it was difficult to assess how much any 63-year-old female could lift. He completed a Form OWCP-5c, in which he indicated

that she could work a medium strength position full time with six-hour limitation on reaching above shoulder and lifting no more than 50 pounds occasionally.

In an October 23, 2017 letter, OWCP advised the employing establishment that the special weight of the medical evidence rested with Dr. Okezie. It requested that appellant be offered a permanent position within the work restrictions set forth in his report.

On November 16, 2017 the employing establishment offered appellant a permanent position as a modified rural carrier performing intermittent standing, walking, simple grasping, and fine manipulation as well as occasional bending and stooping for up to eight hours, lifting, pushing, and pulling up to 20 pounds intermittently (50 pounds occasionally) for up to eight hours per day, and reaching/reaching above shoulder intermittently for six hours per day with occasional climbing while delivering mail. The duties of the position consisted of casing and delivering mail in varying conditions. It also included processing second notices, customer service, and sales at the retail window and/or lobby, assisting with customer service and express mail delivery, for which appellant would receive appropriate training. The employing establishment advised that the assignment would remain within the physical restrictions of Dr. Okezie.

A revised January 3, 2018 job offer included the start and end times of the work schedule. The schedule indicated that appellant's hours on Saturdays were 8:30 a.m. to 5:00 p.m. with a half hour lunch. For Monday, Wednesday, Thursday, and Friday, appellant's regular work hours were 8:30 a.m. to 6:00 p.m. with an hour and a half for lunch.

In a December 4, 2017 report, Dr. Aditya Patel, a Board-certified anesthesiologist, noted the history of appellant's September 18, 2013 employment injury, reviewed medical records, and presented examination findings. He provided differential diagnoses of herniated cervical disc, herniated lumbar disc, electromyograph (EMG) documented cervical radiculopathy and lumbar radiculopathy, and internal derangement of the shoulder status postsurgery.

In a January 15, 2018 report, Dr. Sukdeb Datta, a Board-certified pain medicine specialist, opined that the differential diagnoses identified were causally related to the September 18, 2013 employment injury. He noted that appellant did not want surgical intervention and opined that she was at MMI from the pain management point of view.

On January 3, 2018 appellant refused the job offer. On January 19, 2018 she advised her rehabilitation counselor that she was unable to physically perform the duties of the modified-job offer. Appellant also indicated that she was thinking of retirement.

On January 19, 2018 the employing establishment confirmed that the offered position remained available to appellant.

Diagnostic testing from January 26, 2018 was received along with additional reports from appellant's physicians. In a January 31, 2018 report, Dr. Yigal Sasan, a chiropractor, diagnosed cervical, thoracic, and lumbar spondylosis which he opined was caused or aggravated by appellant's work-related motor vehicle accident. He indicated that she was totally disabled for the period January 22 to February 22, 2018. In a January 31, 2018 note, Dr. Sasan advised that appellant needed to attend chiropractic treatment three times a week for a month. He further advised that she was unable to perform her job duties at that time.

On February 27, 2018 OWCP advised the employing establishment that the offered January 3, 2018 modified rural carrier position was not considered suitable. It noted that appellant's schedule for Monday, Wednesday, Thursday, and Friday was in excess of eight hours and that she was scheduled to have one and a half hours for lunch on those days. OWCP requested that the employing establishment provide a written explanation for the extended lunch. No response was received from the employing establishment.

In an April 2, 2018 letter, OWCP notified appellant that the offered position was suitable and remained available to her. It provided her 30 days to accept the position or provide reasons for her refusal. OWCP also informed appellant that an employee who refused an offer of suitable work was not entitled to compensation.

In an April 6, 2018 letter, counsel indicated that appellant was physically and mentally unable to accept the offered position.

On July 3, 2018 OWCP advised appellant that her reasons for refusing the position were invalid and provided her 15 days to accept the position or have her entitlement to wage-loss compensation and schedule award benefits terminated. No additional evidence or argument was received.

By decision dated August 14, 2018, OWCP terminated appellant's wage-loss compensation and entitlement to schedule award benefits, effective that date, as she had refused an offer of suitable work.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[3] 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.[4] 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.[5] 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.[6]

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.[7] Section

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

[4] 5 U.S.C. § 8106(c)(2); *see also M.J.*, Docket No. 18-0799 (issued December 3, 2018).

[5] *See T.M.*, *supra* note 3.

[6] *Id.*

[7] 20 C.F.R. § 10.517(a).

10.516 of OWCP's regulations provide that it will advise the employee that the work offered is suitable and provide 30 days for the employee to accept the job or present any reasons to counter OWCP's finding of suitability.[8] Thus, before terminating compensation, OWCP must review the employee's proffered reasons for refusing or neglecting to work.[9] If the employee presents such reasons and OWCP finds them unacceptable, it will offer the employee an additional 15 days to accept the job without penalty.[10]

Once OWCP establishes that the work offered is suitable, the burden of proof shifts to the employee who refuses to work to show that the refusal or failure to work was reasonable or justified.[11] 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.[12] In a suitable work determination, OWCP must consider preexisting and subsequently acquired medical conditions in evaluating an employee's work capacity.[13] Its procedures state that acceptable reasons for refusing an offered position include medical evidence of inability to do the work.[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] The IME's report must actually fulfill the purpose for which it was intended. It must resolve the conflict in medical opinion.[16] OWCP should ensure that the IME's report is comprehensive, clear, and definite, and that it is based on current information and supported by substantial medical reasoning, as well as a review of the case file.[17] If the report is vague, speculative, incomplete, or not rationalized, it is OWCP's responsibility to secure a supplemental report from the IME to correct any defects.[18]

[8] *Id.*

[9] *See Maggie L. Moore,* 42 ECAB 484 (1991); *reaff'd on recon.,* 43 ECAB 818 (1992).

[10] 20 C.F.R. § 10.516; *see Sandra K. Cummings,* 54 ECAB 493 (2003).

[11] *Supra* note 7.

[12] *Gayle Harris,* 52 ECAB 319 (2001).

[13] *P.S.,* Docket No. 18-1789 (issued April 11, 2019).

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work,* Chapter 2.814.5(a)(4) (June 2013).

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

[16] *Supra* note 14 at Part 2 -- Claims, *Developing and Evaluating Medical Evidence,* Chapter 2.810.11d(2) (September 2010).

[17] *Id.*

[18] *Id.*

ANALYSIS

The Board finds that OWCP improperly terminated appellant's wage-loss compensation and entitlement to a schedule award, effective August 14, 2018, on the basis that she had refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by medical evidence.[19] OWCP properly determined that a conflict arose between Dr. Jacobs and Dr. Semble regarding appellant's disability status and referred her to Dr. Okezie for an impartial medical examination.

In an August 30, 2017 report, Dr. Okezie found that there was no objective evidence that appellant was totally or permanently disabled due to the accepted conditions or the temporary aggravation of her preexisting cervical and lumbar spondylosis. He opined that she was capable of medium level work and that a work-hardening program was necessary. Dr. Okezie noted that appellant's lifting capacity was potentially the chief limitation regarding her ability to return to work as it was difficult to assess how much any 63-year-old female could lift. In his Form OWCP-5c, he indicated that she was capable of working full time in a medium strength position with six-hour limitation on reaching above shoulder and lifting no more than 50 pounds occasionally.

However, before making a suitability determination and subjecting appellant to the penalty provision of section 8106(c)(2), OWCP should have requested clarification from Dr. Okezie as to whether she could return to work with the 50-pound lifting restriction, without first attending a work-hardening program. The Board has previously explained that a medical opinion in a suitable work termination case is of reduced probative value if it suggests that additional efforts, including a work-hardening program were likely to be necessary to reach a return to an eight-hour workday.[20] Dr. Okezie should have also been asked to clarify whether appellant was capable of performing medium level work, if in fact her age and physical condition rendered her lifting restriction difficult to determine, and in light of the fact that her September 5, 2016 FCE indicated that she could work in a sedentary capacity if she participated in a formal work conditioning program. As OWCP did not clarify these issues, Dr. Okezie's opinion is not entitled to the special weight of the medical evidence.

The Board also notes that OWCP did not properly clarify whether the offered position was suitable. In reviewing the offered January 3, 2018 (revised) modified rural carrier position, OWCP specifically advised the employing establishment on February 27, 2018 that the position was not considered suitable. It noted that appellant's schedule for Monday, Wednesday, Thursday, and Friday was in excess of eight hours and requested an explanation as to why she was scheduled to have one and a half hours for lunch on those days. The employing establishment, however, never responded. As the defect still exists, OWCP could not then find that the offered position was suitable.

[19] *See D.L.*, Docket No. 18-0862 (issued October 12, 2018); *Kathy E. Murray*, 55 ECAB 288 (2004).

[20] *G.B.*, Docket No. 07-1783 (issued February 6, 2008).

As OWCP has not established that the work offered to and refused or neglected by appellant was a suitable position or medically suitable, the Board finds that it has not met its burden of proof.

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 August 14, 2018, as she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the August 14, 2018 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 13, 2019
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board