United States Department of Labor
Employees' Compensation Appeals Board

H.T., Appellant	)	
and	)	**Docket No. 18-1161**
	)	**Issued: March 20, 2019**
U.S. POSTAL SERVICE, POST OFFICE, San Francisco, CA, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On May 22, 2018 appellant filed a timely appeal from a November 27, 2017 merit 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 to consider the merits of this case.

ISSUE

The issue is whether OWCP properly terminated appellant's entitlement to wage-loss and schedule award compensation, effective April 8, 2016, for refusal of suitable work pursuant to 5 U.S.C. § 8102(c)(2).

FACTUAL HISTORY

On August 31, 2012 appellant, then a 53-year-old process control assistant, filed an occupational disease claim (Form CA-2) alleging that, on or before September 22, 2010, sitting on

[1] 5 U.S.C. § 8101 *et seq.*

a hard chair while in the performance of duty caused pain and paresthesias throughout her spine and extremities, as well as emotional stress. She did not initially stop work. On November 3, 2012 appellant began working in a new position with reduced computer use. By decision dated February 10, 2014, OWCP accepted that she had sustained bilateral ischial tuberosity bursitis (enesopathy of hips), sciatic nerve lesion, and a temporary aggravation of lumbar spinal stenosis. It paid appellant compensation for attendance at medical appointments commencing March 3, 2014. On June 17, 2014 OWCP expanded its acceptance of the claim to include a neck sprain, brachial neuritis or radiculitis, bilateral shoulder bursitis or tendinitis, and bilateral bicipital tenosynovitis.

In a report dated July 15, 2014, Dr. Michael E. Hebrard, an attending Board-certified physiatrist, limited appellant to working sedentary duty for 4 hours a day, with 5-minute breaks every 45 minutes. On July 15, 2015 appellant began working a four-hour-a-day schedule. OWCP paid appellant wage-loss compensation for four hours a day commencing July 15, 2014.

On December 10, 2014 appellant signed and accepted a job offer as a modified human resources management specialist. On January 13, 2015 the employing establishment offered her a position as a modified customer support/window supervisor for four hours a day. The position required appellant to sit, walk, bend, lift, grasp, push, pull, and reach. Appellant signed and accepted the job offer on January 21, 2015.

In a report dated February 25, 2015, Dr. Hebrard diagnosed thoracic outlet syndrome and sciatica.[2] In a work slip dated March 17, 2015, he held appellant off from work from March 17 to 25, 2015.[3]

Dr. Hebrard held appellant off work through April 17, 2015 due to an exacerbation of the accepted conditions caused by installing a point-of-service machine at work in March 2015. In a report dated April 17, 2015, Dr. Hebrard returned appellant to sedentary duty for four hours a day, with lifting, pulling, and pushing up to 10 pounds, typing, grasping, or pinching up to 20 minutes an hour, bending, stooping, crouching, kneeling for up to 5 minutes an hour, alternating sitting and standing every 30 minutes, and 10-minute breaks each hour.

The employing establishment's Office of the Inspector General submitted investigative reports dated from April 24 to 29, 2015 describing eight incidents in April 2015 where appellant had been observed walking continuously for up to two-and-a-half hours, and one occasion where appellant knelt to observe flowers in a garden. When interviewed, appellant contended that walking was relaxing for her following a March 2015 employment injury sustained while installing a point-of-service (POS) machine.[4] The employing establishment placed her on administrative

[2] A February 19, 2015 lumbar magnetic resonance imaging (MRI) scan showed mild annular bulging at L2-3, L4-5, and L5-S1 without focal protrusion, herniation or nerve root displacement.

[3] In a letter dated March 23, 2015, R.D., appellant's supervisor, noted that appellant alleged on March 3, 2015 that her assigned duties exceeded her medical restrictions. He contended that although the customer service window position required "virtually no lifting or physical activity except standing and walking around," he offered appellant a supervisory position that required only issuing instructions. Appellant declined the position as she believed her physician would hold her off from work the following week.

[4] In a report dated May 26, 2015, Dr. Hebrard opined that appellant aggravated accepted sciatica at work on

leave effective April 24, 2015.[5] OWCP paid appellant wage-loss compensation for four hours a day.

A July 27, 2015 functional capacity evaluation demonstrated appellant's ability to perform light-duty work with occasional lifting up to 15 pounds.

On December 1, 2015 the employing establishment offered appellant a modified position as a customer support supervisor for four hours a day, performing finance and window supervisor duties with the assistance of a subordinate. The position required lifting, pulling, and pushing up to 10 pounds; typing, grasping, or pinching up to 20 minutes an hour; bending, stooping, crouching, or kneeling up to 5 minutes an hour; alternating sitting and standing every 30 minutes; and 10-minute breaks each hour. The position would be available to appellant as of December 4, 2015.

In a report dated January 25, 2016, Dr. Hebrard released appellant to sedentary work four hours a day. He modified appellant's work restrictions to reduce repetitive typing, grasping, or pinching from 20 to 10 minutes an hour and increased her necessary position changes from every 30 minutes to every 10 minutes.

Appellant did not return to work. She claimed wage-loss compensation for four hours a day.

In a notice dated February 10, 2016, appellant was informed that OWCP found the job offer suitable and in accordance with her medical limitations provided by Dr. Hebrard and that the employing establishment confirmed that the position remained open and available to her. OWCP allowed her 30 days to accept the position or provide her reasons for refusal. It advised that an employee who refuses an offer of suitable work without reasonable cause is not entitled to further compensation for wage loss or a schedule award. Appellant, however, continued to refuse to report to duty for the offered position.

In a statement dated March 1, 2016, appellant alleged that the physical requirements of the offered modified customer support supervisor position exceeded her medical restrictions, that there was no one available to assist her as the office was understaffed, and that she had aggravated the accepted conditions on March 5, 2015 after she "spent more than four hours" installing a point-of-service machine.

March 9, 2015 while bending and kneeling for one hour to install a POS machine. In a letter dated June 3, 2015, appellant clarified that she installed the unit on March 5, 2015.

[5] On May 22, 2015 appellant claimed leave buyback (Form CA-7) for 272 hours of sick leave used for the period November 22, 2011 through May 18, 2012. By decision dated March 1, 2016, OWCP denied appellant's request for leave buyback for the period November 22, 2011 to April 28, 2012 as the medical evidence of record was insufficient to support the claimed period of disability. Following a hearing conducted June 29, 2016, by decision dated August 24, 2016, an OWCP hearing representative affirmed the March 1, 2016 OWCP decision which denied appellant's request for leave buyback.

By notice dated March 17, 2016, OWCP advised appellant that her refusal of the offered position was not justified. It afforded her an additional 15 days to accept the offered position.

In response to the 15-day notice, OWCP received appellant's April 3, 2016 letter, contending that she informed her supervisor on March 28, 2016 that she would accept the position, but not report for work as she intended to apply for disability retirement.

By decision dated April 8, 2016, OWCP terminated appellant's entitlement to wage-loss and schedule award compensation benefits effective that day as she refused an offer of suitable work. It found that Dr. Hebrard's reports constituted the weight of the medical evidence regarding appellant's work tolerances and limitations.

On April 14, 2016 appellant accepted and signed the December 1, 2015 job offer, but did not return to work. In a letter dated April 19, 2016, she contended that the offered position exceeded the January 25, 2016 medical restrictions provided by Dr. Hebrard.

On May 3, 2016 appellant requested a hearing before an OWCP hearing representative. At the hearing, held on August 25, 2016, she confirmed that she did not return to work as she had elected disability retirement benefits through the Office of Personnel Management (OPM). Appellant submitted reports dated April 25 and September 29, 2016 from Dr. Hebrard finding her totally disabled for work due to pain and weakness throughout her spine and extremities.[6]

By decision dated November 9, 2016, an OWCP hearing representative affirmed OWCP's April 8, 2016 decision terminating her entitlement to wage-loss and schedule award compensation.

On February 28, 2017 OPM approved appellant's application for disability retirement. Appellant separated from the employing establishment effective March 24, 2017.

On October 31, 2017 appellant requested reconsideration. She contended that the offered position exceeded her work restrictions. Appellant submitted additional evidence.

In reports dated February 14, April 3, and June 1, 2017, Dr. Hebrard found appellant totally disabled from work due to cervical and lumbar spine pain with weakness and paresthesias in all extremities. He attributed these symptoms to an occupational aggravation of the accepted conditions.

Appellant also submitted August 27, 2014 imaging studies of the cervical and lumbar spine which demonstrated no significant changes from prior scans, and prescriptions for gym membership and a gel seat cushion.

By decision dated November 27, 2017, OWCP affirmed the prior decision, finding that the offered position did not exceed her medical restrictions.

[6] Appellant also submitted March 17 and September 23, 2015 physical therapy treatment notes and copies of evidence previously of record. A May 24, 2016 lumbar MRI scan showed severe bilateral L4-5 stenosis due to disc bulging and impingement on both descending L5 nerve roots, and severe anterior L4-5 degenerative disc disease.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[7] 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.[8] 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.[9] 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.[10]

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 establishing that such refusal or failure to work was reasonable or justified.[11] 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.[12]

Before compensation can be terminated, however, OWCP has the burden of establishing 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.[13] 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 establishing that the work offered to and refused by appellant was suitable.[14]

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.[15] 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.[16] OWCP procedures provide

[7] *S.E.*, Docket No. 17-0222 (issued December 21, 2018) *J.V.*, Docket No. 17-1944 (issued December 18, 2018); *see Linda F. Guerrero*, 54 ECAB 556 (2003).

[8] 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

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

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

[11] 20 C.F.R. § 10.517(a).

[12] *Id.* at § 10.516.

[13] *S.E.*, *supra* note 7; *J.V.*, *supra* note 10; *see Linda Hilton*, 52 ECAB 476 (2001).

[14] *Id.*

[15] 20 C.F.R. § 10.517(a).

[16] *S.E.*, *supra* note 7; *J.V.*, *supra* note 7; *see Gayle Harris*, 52 ECAB 319 (2001).

that acceptable reasons for refusing an offered position include medical evidence of an inability to do the work.[17]

ANALYSIS

The Board finds that OWCP properly terminated appellant's entitlement to wage-loss and schedule award compensation, effective April 8, 2016, pursuant to 5 U.S.C. § 8106(c)(2) for refusal of suitable work.

The Board finds that the evidence of record establishes that appellant was capable of performing the modified customer support supervisor position offered by the employing establishment on December 1, 2015. The offered position required lifting, pulling, and pushing up to 10 pounds; typing, grasping, or pinching up to 20 minutes an hour; bending, stooping, crouching, or kneeling up to 5 minutes an hour; alternating sitting and standing every 30 minutes; and a 10-minute break each hour, all within conformance of the work restrictions provided by Dr. Hebrard, on April 17, 2015.[18]

The Board notes that Dr. Hebrard subsequently modified appellant's restrictions on January 25, 2016, reducing repetitive typing, grasping or pinching from 20 minutes to 10 minutes an hour, and alternating sitting and standing every 10 minutes. However, he did not identify any objective deterioration in appellant's condition to support the January 25, 2016 increase in work limitations. Despite the amended restrictions, OWCP still found the offered position to be suitable work, as the job duties did not exceed the additional work restrictions assessed by Dr. Hebrard in his January 25, 2016 report. Appellant accepted the offer, but did not report to the position because she elected to retire.

The Board finds that the December 1, 2015 job offer was promulgated correctly, as it was made in writing, provided a detailed description of the assigned duties and their physical requirements, and instructed appellant when to report for work.[19] The Board therefore finds that OWCP has met its burden of proof to establish that the position was suitable work.[20]

In accordance with the procedural requirements under 5 U.S.C. § 8106(c), 20 C.F.R. § 10.516, and Board precedent,[21] OWCP advised appellant on February 10, 2016 that it found the job offer of modified customer care agent to be suitable and afforded her an opportunity to provide reasons, within 30 days, for refusing the position. It advised her in a March 17, 2016 letter that her refusal, based on her decision to elect retirement, was insufficient and that she had an additional 15 days to accept the offered position. The Board has long held that electing to retire is not a

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

[18] *See Richard P. Cortes*, 56 ECAB 200 (2004).

[19] *See* 20 C.F.R. § 10.507.

[20] *See Marilou Carmichael*, 56 ECAB 451 (2005).

[21] *T.S.*, 59 ECAB 490 (2008); *Ronald M. Jones*, 52 ECAB 190 (2000).

justifiable reason to refuse an offer of suitable work.[22] The Board finds that OWCP properly followed the established procedures prior to the termination of compensation pursuant to section 8106(c)(2).[23]

Following the termination of appellant's entitlement to wage-loss and schedule award compensation, she submitted reports dated April 25 and September 29, 2016 and February 14, April 3, and June 1, 2017 from Dr. Hebrard opining that she was totally disabled for work due to cervical and lumbar spine pain and generalized paresthesias. It is well established that OWCP must consider preexisting and subsequently-acquired conditions in evaluating the suitability of an offered position.[24] However, Dr. Hebrard did not identify objective changes in appellant's condition on and after December 1, 2015 that would disable her from performing the offered suitable work position. Further, the Board has held that pain is a symptom, not a medical diagnosis.[25] At the time that OWCP terminated appellant's compensation, however, Dr. Hebrard had advised that she was capable of going back to work in a sedentary, part-time position with a 10-pound lifting restriction. Therefore, the Board finds that Dr. Hebrard's reports prior to April 8, 2016 establish that the offered position was suitable work.[26]

Appellant also submitted prescription notes and August 27, 2014 imaging studies. As both the diagnostic studies and prescription slips lack medical rationale explaining why appellant's condition had worsened such that she could not perform the offered customer support supervisor position, they are irrelevant to the claim.[27]

Thus the Board finds that OWCP has met its burden to justify the termination of appellant's wage-loss and schedule award compensation.

On appeal appellant contends that she submitted a signed job offer following OWCP's April 8, 2016 termination of her entitlement to wage-loss and schedule award compensation. However, as explained above, she did not accept the offered position or report for work prior to the April 8, 2016 termination decision.

[22] *Robert P. Mitchell*, 52 ECAB 116 (2000); *see supra* note 17.

[23] *C.H.*, Docket No. 17-0938 (issued November 27, 2017).

[24] *Supra* note 21.

[25] *Z.B.*, Docket No. 17-1336 (issued January 10, 2019).

[26] *Supra* note 21.

[27] *S.E.*, *supra* note 10. The Board has also held that reports of diagnostic tests lack probative value as they do not provide an opinion on causal relationship between appellant's employment duties and a diagnosed condition. *K.L.*, Docket No. 18-1029 (issued January 9, 2019).

CONCLUSION

The Board finds that OWCP properly terminated appellant's entitlement to wage-loss and schedule award compensation, effective April 8, 2016, pursuant to 5 U.S.C. § 8102(c)(2), due to her refusal of an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the November 27, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 20, 2019
Washington, DC

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

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

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