

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

M.H., Appellant)	
)	
and)	Docket No. 18-1727
)	Issued: May 6, 2019
U.S. POSTAL SERVICE, APPALACHIAN)	
PERFORMANCE CLUSTER, Charleston, WV,)	
Employer)	
)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On September 13, 2018 appellant, through counsel, filed a timely appeal from a July 13, 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 July 13, 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 30, 2017, due to her refusal of an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On November 21, 2013 appellant, then a 39-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that, on November 20, 2013, she twisted and sprained her left ankle when she stepped in a hole while in the performance of duty. She stopped work on the date of injury. OWCP accepted the claim for left ankle and knee sprains, and subsequently expanded acceptance of the claim to include left foot tendon rupture. Appellant returned to modified sedentary work on May 28, 2014, but stopped work again on June 2, 2014. By decision dated March 3, 2015, OWCP accepted her claim for a recurrence of disability beginning June 2, 2014. It paid appellant wage-loss compensation on the periodic rolls beginning June 2, 2014.

On February 24, 2014 appellant came under the care of Dr. Kevin Brown, a podiatric surgeon, who diagnosed peroneal tendinitis and calcaneofibular sprain. OWCP subsequently received a number of progress reports from Dr. Brown diagnosing a left foot ruptured tendon and plantar fasciitis and in which he related that appellant was unable to work.

In progress notes dated June 10, 2015 and subsequent reports, Dr. Brown provided a history of injury and examination findings. He diagnosed plantar fasciitis and left lower limb reflex sympathetic dystrophy.

On October 14, 2016 OWCP prepared a statement of accepted facts (SOAF) which noted the accepted conditions and diagnostic test results.

In a letter dated October 26, 2016, OWCP referred appellant, the medical record, and the SOAF to Dr. Anbu K. Nadar, a Board-certified orthopedic surgeon, for a second opinion evaluation.

In a report dated November 16, 2016, Dr. Nadar noted his review of the SOAF and medical records. He provided examination findings regarding appellant's left ankle, foot, and knee. Dr. Nadar noted no significant swelling, erythema, warmth, or discoloration on examination of the left ankle. The left foot joint was stable to inversion and anterior Drawer test, appellant was able to extend her toes, and she was able to flex her forefoot. Dr. Nadar observed that appellant ambulated without assistance, but with a limp. A review of an August 8, 2016 magnetic resonance imaging (MRI) scan revealed small posterior foot effusions and ankle articulations, but otherwise no focal abnormality. Diagnoses included left ankle and foot sprain and left foot ruptured tendon. Dr. Nadar opined that appellant's left knee condition had completely resolved based on the lack of physical findings. He found no objective abnormality with her left foot and ankle, only her subjective complaints. Dr. Nadar opined appellant was capable of returning to work with restrictions and required no additional treatment. In an attached work capacity evaluation form (Form OWCP-5c), he provided work restrictions, including no more than two hours of walking and standing, and three hours of pushing, pulling, or lifting up to 20 pounds.

In reports dated January 1 and May 8, 2017, Dr. Brown provided examination findings and diagnosed plantar fasciitis and left lower limb reflex sympathetic dystrophy. He indicated that appellant was to continue with her restrictions.

In a May 8, 2017 disability note, Dr. Brown opined that appellant was disabled from work until July 6, 2017.

On May 23, 2017 the employing establishment offered appellant the position of a modified city carrier, effective June 10, 2017. The duties of the position included: up to two hours of casing mail with the use of a rest bar, intermittent; two hours of delivering partial route, interment; two to three hours of updating case labels; and approximately one to two hours of driving carriers to assigned routes/express mail delivery. The employing establishment noted that the physical requirements included: intermittent standing up to two hours per day; intermittent walking up to two hours per day; up to three hours of intermittent pushing, pulling, and lifting up to 20 pounds; and up to eight hours of intermittent reaching, driving, stooping/bending, and twisting.

On June 1, 2017 Dr. Brown opined that appellant was unable to wear regular shoes which confined her left ankle due to her ankle tendinitis.

On June 2, 2017 appellant rejected the job offer as her physician restricted her from wearing regular shoes.

In a letter dated June 23, 2017, OWCP advised appellant that it found the job offer suitable and in accordance with the medical limitations provided by Dr. Nadar. It further noted that the employing establishment had confirmed that the position remained open and available to her. OWCP explained that the diagnoses of plantar fasciitis and complex regional pain syndrome had not been accepted and that Dr. Brown had not provided a rationalized opinion explaining how the diagnosed conditions were caused or aggravated by the accepted employment injury. It afforded appellant 30 days to accept the position or provide her reasons for refusal. OWCP advised her 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.

On July 28, 2017 Dr. Brown reported that appellant continued to experience pain and swelling and some plantar fascial changes. He opined that she appeared to have developed complex regional pain syndrome/reflex sympathetic dystrophy based on her numbness, weakness extending up the left knee, pitting edema, and color changes. Dr. Brown opined that appellant could return to a sedentary job with limited walking and standing and ability to elevate and rest her left lower extremity.

In a letter dated September 25, 2017, 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.⁴

By decision dated November 30, 2017, OWCP terminated appellant's entitlement to wage-loss compensation and entitlement to schedule award benefits, effective that date, finding that she

⁴ The Board notes that OWCP issued a notice dated November 7, 2017 referencing a September 25, 2017 job offer from the employing establishment and affording appellant 30 days to accept the position.

had refused an offer of suitable work. It found that Dr. Nadar's report constituted the weight of the medical evidence regarding appellant's work tolerances and limitations.

In a letter postmarked December 29, 2017, received by OWCP on January 2, 2018, counsel, requested a telephonic hearing before an OWCP hearing representative.

A January 2, 2018 MRI scan of the left ankle revealed no acute fracture, anterior talofibular ligament remote tearing, and peroneus brevis tendon split tearing.

Dr. Brown, in a March 2, 2018 report, detailed the injury history and examination findings. He diagnosed small joint effusions and tendinitis, which limited her ability to walk, stand, and deliver mail. Dr. Brown reported that appellant periodically experienced lower extremity numbness. He further noted that a January 2018 MRI scan revealed anterior talofibular ligament remote tear and peroneus brevis tendon split tear, which he opined explained her instability when standing and walking, as well as her endurance and balancing issues. Dr. Brown concluded that appellant was capable of working a sedentary position which required limited walking and standing, and which would allow appellant to elevate her left lower extremity to prevent worsening her tendon tear.

In progress notes dated March 12 and May 9, 2018, Dr. Brown provided examination findings and reviewed diagnostic tests. He diagnosed left peroneal tendon tear, plantar fasciitis, left lower limb complex regional pain syndrome, and left ankle anterior talofibular ligament sprain. Dr. Brown noted that appellant was not working at that time.

A telephonic hearing was held before an OWCP hearing representative on May 30, 2018.

In a June 13, 2018 report, Dr. Brown noted that appellant had been his patient since 2014 and had a history of complex regional pain syndrome/reflex sympathetic dystrophy and left ankle ligament injury. Due to her severe pain, sensitivity, and swelling, he instructed her to refrain from wearing closed-toed shoes. Dr. Brown indicated this was likely a permanent restriction.

By decision dated July 13, 2018, OWCP's hearing representative affirmed the November 30, 2017 termination decision. He found that reports from Dr. Brown were insufficient to outweigh the well-rationalized opinion of Dr. Nadar.

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

⁵ 5 U.S.C. § 8106(c)(2).

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

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 appellant was informed of the consequences of her 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

The determination of whether an employee is capable of performing modified-duty employment is a medical question that must be resolved by probative medical opinion evidence.¹² All medical conditions, whether work related or not, must be considered in assessing the suitability of an offered position.¹³

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 30, 2017, due to her refusal of an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

Initially, OWCP accepted the claim for left ankle and knee sprains, and subsequently expanded acceptance of the claim to include left foot tendon rupture. In subsequent progress notes appellant's treating physician, Dr. Brown, diagnosed the additional conditions of plantar fasciitis and complex regional pain syndrome/reflex sympathetic dystrophy.

On October 14, 2016 OWCP prepared a statement of accepted facts for the second opinion physician, Dr. Nadar, which listed appellant's accepted conditions of left ankle, knee sprains, and left foot tendon rupture. It requested that Dr. Nadar address whether the accepted conditions had resolved and whether appellant could return to work in the offered position for which there was a job description provided. Dr. Nadar opined that the accepted conditions had completely resolved and that she was capable of returning to work.

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 See *M.W.*, *supra* note 6; *Gloria J. Godfrey*, 52 ECAB 486 (2001); *Robert Dickerson*, 46 ECAB 1002 (1995).

¹³ See *M.E.*, Docket No. 18-0808 (issued December 7, 2018); *S.Y.*, Docket No. 17-1032 (issued November 21, 2017); *Mary E. Woodward*, 57 ECAB 211 (2005).

The Board has held that all conditions, whether work related or not, must be considered in assessing the suitability of an offered position.¹⁴ Although the SOAF neglected to list the unaccepted concurrent conditions of plantar fasciitis and complex regional pain syndrome/reflex sympathetic dystrophy, both were specifically addressed by Dr. Nadar. Upon his review of appellant's history, the medical record, and his examination, he indicated that the appellant had been treated for plantar fasciitis, but opined citing diagnostic testing, that it had since resolved. He also referenced the complex regional pain syndrome/reflex sympathetic dystrophy due to appellant's subjective complaints. He opined, however, that he could not identify that diagnosis during his physical examination and that there was no supportive objective testing and therefore he concluded that he did not agree that appellant had complex regional pain syndrome/reflex sympathetic dystrophy. The Federal (FECA) Procedure Manual provides that an OWCP referral physician's findings, be it a second opinion or impartial medical evaluation, must be based on the factual underpinnings of the claim.¹⁵ Despite the fact that OWCP did not include the concurrent diagnoses in the SOAF, the second opinion physician, Dr. Nadar had been provided with the prior medical evidence of record and therefore he had knowledge of and fully addressed the two concurrent conditions, finding the plantar fasciitis resolved and that complex regional pain syndrome/reflex sympathetic dystrophy was non-existent. As such, his opinion relative to the appellant's ability to return to work contemplated these concurrent conditions.¹⁶

Subsequent reports were submitted from Dr. Brown regarding his length of treatment and a reiteration a history of plantar fasciitis and complex regional pain syndrome/reflex sympathetic dystrophy. The Board finds that these reports are insufficient to outweigh the well-rationalized report of Dr. Nadar who addressed both the accepted and concurrent conditions.

The Board finds that OWCP properly accorded the weight of medical opinion with Dr. Nadar who reported that appellant no longer had residuals or disability as a result of the November 20, 2013 employment injury. Dr. Nadar based his opinion on a proper factual and medical history and physical examination findings and provided medical rationale for his opinion that she did not have a current residual injury or work limitations and could return to work. The Board finds that Dr. Nadar provided a well-rationalized opinion based on medical evidence regarding her November 20, 2013 employment injury. Accordingly, OWCP properly relied on his November 16, 2016 second opinion relative to work tolerances and limitations in terminating appellant's entitlement to wage-loss compensation and schedule award compensation benefits effective the date she refused an offer of suitable work.¹⁷

¹⁴ *E.G.*, Docket No. 12-1011 (issued November 28, 2012)

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statement of Accepted Facts*, Chapter 2.810.11a (September 2019).

¹⁶ *Compare S.Y.*, Docket No. 17-1032 (issued November 21, 2017).

¹⁷ *See A.F.*, Docket No. 16-0393 (issued June 24, 2016).

CONCLUSION

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 30, 2017, due to her refusal of an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the July 13, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 6, 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