United States Department of Labor
Employees' Compensation Appeals Board

R.A., Appellant	)	
and	)	**Docket No. 19-0065**
	)	**Issued: May 14, 2019**
DEPARTMENT OF THE AIR FORCE, 27th COMBAT SUPPORT GROUP, CANNON AIR FORCE BASE, NM, 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 9, 2018 appellant filed a timely appeal from a September 21, 2018 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 over the merits of this case.

ISSUE

The issue is whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective April 9, 2018, due to his refusal of an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 4, 1988 appellant, then a 28-year-old temporary food service worker, filed a traumatic injury claim (Form CA-1) alleging that on October 25, 1988 he sustained injuries to his back, shoulders, neck, legs, and right foot when he lifted a bundle of rags off a top shelf while in the performance of duty. He stopped work on November 4, 1988 and received continuation of pay through December 18, 1988. OWCP accepted appellant's claim for lumbar sprain and lumbar intervertebral disc displacement without myelopathy. It paid him wage-loss compensation for temporary total disability beginning December 17, 1989. Appellant's temporary employment expired on September 29, 1989.

By decision dated January 19, 1993, OWCP reduced appellant's wage-loss compensation to zero, effective February 7, 1993, based on his capacity to earn wages as a fast food worker.

On October 30, 2003 appellant underwent OWCP-authorized lumbar surgery.[2] OWCP paid him wage-loss compensation for temporary total disability beginning October 30, 2003 and on January 25, 2004 placed him on the periodic rolls.

On June 24, 2016 OWCP referred appellant's claim, along with the statement of accepted facts (SOAF) and the medical record, to Dr. Stephen Ringel, a Board-certified orthopedic surgeon, for a second-opinion examination. In a July 22, 2016 report, Dr. Ringel indicated that he had reviewed appellant's history, including a SOAF, and his medical records. He related appellant's complaints of pain in his back and bilateral lower extremities. Upon examination of appellant's lumbar spine, Dr. Ringel observed no tenderness and limited range of motion. Straight leg raise testing in the supine position was negative. Dr. Ringel related that video surveillance of appellant taken in November 2015 indicated that he may be capable of working in some capacity. He completed a work capacity evaluation (Form OWCP-5c) dated August 20, 2016, which noted that appellant could work full time with restrictions of pushing up to 80 pounds, pulling up to 40 pounds, and lifting up to 10 pounds.

In a letter dated November 2, 2016, the employing establishment offered appellant a temporary light-duty assignment as a laborer, which he declined on November 11, 2016.

By decision dated January 26, 2017, OWCP terminated appellant's wage-loss compensation and entitlement to a schedule award, effective January 24, 2017, pursuant to 5 U.S.C. § 8106(c)(2) as he had refused an offer of suitable work.

On February 13, 2017 appellant requested an appeal of the termination of his wage-loss compensation benefits. By decision dated March 21, 2017, an OWCP hearing representative reversed the January 26, 2017 decision. She related that Dr. Ringel's medical opinion could not

[2] An operative report dated October 30, 2003 indicated that appellant underwent posterior lumbar interbody fusion bilateral, posterior instrumented fusion L4-5, L4 partial laminectomy, bilateral L4-5 lateral recess and foraminal decompression, redo discectomy at the right L4-5 and left L4-5, and harvesting of right autologous iliac crest bone graft through a separate fascial incision by Dr. Claude Gelinas, a Board-certified orthopedic surgeon.

carry the weight of medical evidence because his opinion was based on video surveillance evidence that was not in the case record and had not been provided to appellant.

By letter dated April 6, 2017, OWCP informed appellant that it was enclosing video surveillance evidence in his case, which it intended to provide to a second-opinion physician for the purpose of obtaining a medical opinion regarding his condition. It advised him that he had 30 days to comment on and explain the events captured in the surveillance video prior to referral to a second opinion physician.

On December 19, 2017 the employing establishment offered appellant a temporary light-duty assignment as a "Laborer (performing only those duties within your work restrictions)." The modified position was full time at a current pay rate of WG-03, Step 2 at $12.75 per hour. The duties of this assignment included performing manual labor tasks involving the use of common hand tools and simple power equipment. The employing establishment informed appellant that the physical requirements of the position would not exceed the work restrictions provided by Dr. Ringel.[3] It explained that appellant would not be required to push more than 80 pounds, pull more than 40 pounds, nor lift more than 10 pounds. The job offer also noted that the position would be available beginning January 7, 2018 and for no less than 90 days.

On January 5, 2018 the employing establishment informed OWCP that appellant had declined the offer of temporary employment and provided his signed statement declining the job offer. Appellant explained that he was unable to work and that he had previously appealed Dr. Ringel's assessment and had won his appeal.

By letter dated January 30, 2018, OWCP advised appellant that the December 19, 2017 job offer for a temporary light-duty position was suitable and in accordance with the medical restrictions set forth in Dr. Ringel's July 22, 2016 report. It also informed him that the employing establishment could provide a temporary job offer because he was a temporary employee on his original date of injury. OWCP noted that there was no medical evidence of record establishing a worsening of appellant's accepted conditions since the second-opinion examination occurred. It also informed him that the case would be held open for 30 days for him to accept the position or provide a written explanation for refusing the job offer. OWCP further advised that, if appellant failed to accept the position or provide adequate reasons for refusing the job offer, his right to compensation would be terminated, pursuant to 5 U.S.C. § 8106(c)(2).[4]

By letter dated March 12, 2018, OWCP advised appellant that he had failed to provide a reason for refusing to accept the offered position. It noted that the employing establishment confirmed that the job remained available. OWCP provided appellant an additional 15 days to accept and report to the position. It advised that, if he did not report to the job within 15 days of

[3] OWCP noted that appellant was restricted to lifting from the floor up to 10 pounds, lifting from the waist up to 40 pounds, pushing a wheeled cart up to 80 pounds, and pulling pressure up to 40 pounds.

[4] OWCP also noted that following the March 21, 2017 OWCP hearing representative's decision, appellant was provided with a surveillance video and given an opportunity to comment on the contents. It explained that because appellant did not comment or provide a response, it had accepted the activities he performed on the surveillance video as a fair and reasonable representation of his physical abilities.

the date of the letter, his wage-loss compensation and entitlement to schedule award benefits would be terminated.

In a letter dated March 23, 2018, appellant related that he had previously appealed Dr. Ringel's examination and that OWCP had agreed that the examination was incorrect. He indicated that he was declining the offered position because of his back injury. Appellant alleged that he could not work because he was unable to be on his feet for long periods of time.

By decision dated April 9, 2018, OWCP terminated appellant's wage-loss compensation benefits and entitlement to schedule award, effective that date, pursuant to 5 U.S.C. § 8106(c)(2) as he had refused a temporary job offer of suitable work.[5] It found that the offered position was within the restrictions set forth by Dr. Ringel in his July 22, 2016 report and August 20, 2016 OWCP-5c form.

On May 2, 2018 appellant requested a review of the written record by an OWCP hearing representative. He related that since his benefits were reinstated pursuant to a March 21, 2016 decision, he had been sent four job offers, which he had declined. Appellant explained that, because of his back injury, he was unable to stay on his feet for long periods of time. He questioned how the employing establishment could provide a job position based on Dr. Ringel's medical evaluation that was previously found to be wrong.

In a statement dated August 12, 2018, appellant related that he was enclosing copies of his first appeal letter and the March 21, 2017 reversal decision. He explained that it was his understanding that his appeal was a "one time chance" no matter the outcome so he did not understand why he was going through the process again. Appellant noted that OWCP was using the same report from Dr. Ringel and surveillance video that the hearing representative previously overturned. He also indicated that he was enclosing reports from his attending physician who had treated him for many years.[6]

By decision dated September 21, 2018, an OWCP hearing representative affirmed the April 9, 2018 decision.

[5] OWCP noted that the physical requirements of the position included performing manual labor tasks involving the use of common hand tools and simple power equipment.

[6] Appellant provided a medical report dated April 19, 1995 by Dr. George R. Swajian, an orthopedic surgeon. Dr. Swajian opined that appellant was entitled to a schedule award for 37 percent permanent impairment of his lower extremities based on L4 nerve root involvement on the left side. He noted that appellant's medical condition had not improved. In a report dated May 1, 2002, Dr. Swajian indicated that appellant had 19 percent permanent impairment of the lower extremity and 8 percent permanent impairment of the whole person pursuant to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001).

LEGAL PRECEDENT

Under FECA,[7] once OWCP accepts a claim and pays compensation, it bears the burden to justify termination or modification of benefits.[8] 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.[9] To justify termination of compensation, OWCP must show that the work offered was suitable, that appellant was informed of the consequences of his or her refusal to accept such employment, and that he or she was allowed a reasonable period to accept or reject the position or submit evidence or provide reasons why the position is not suitable.[10] 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.[11]

In determining what constitutes suitable work for a particular disabled employee, OWCP considers the employee's current physical limitations, whether the work was available within the employee's demonstrated commuting area, the employee's qualifications to perform such work and other relevant factors.[12] Atemporary job will be considered unsuitable for the purposes of 8106(c) unless the claimant was a temporary employee when injured and the temporary job reasonably represents the claimant's wage-earning capacity. Even if these conditions are met, a job which will terminate in less than 90 days will be considered unsuitable.[13]

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. All impairments, whether work related or not, must be considered in assessing the suitability of an offered position.[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]

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[7] *Supra* note 1.

[8] *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

[9] 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

[10] *Ronald M. Jones*, 52 ECAB 406 (2003); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4 (June 2013).

[11] *Joan F. Burke*, 54 ECAB 406 (2003); *see Robert Dickerson*, 46 ECAB 1002 (1995).

[12] *Supra* note 10 at Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.(4)(c) (June 2013); *see Lorraine C. Hall*, 51 ECAB 477 (2000).

[13] *Id.* at Chapter 2.814.4(c)(5) (June 2013).

[14] *L.L.*, Docket No. 17-1247 (issued April 12, 2018); *J.J.*, Docket No. 17-0410 (issued June 20, 2017); *Gayle Harris*, 52 ECAB 319 (2001).

[15] 20 C.F.R. § 10.517(a).

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.[16] Section 10.516 of OWCP's regulations provides that an 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.[17]

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 9, 2018 for refusal of an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

OWCP improperly relied on Dr. Ringel's July 22, 2016 report in determining that the modified position offered by the employing establishment on December 19, 2017 constituted suitable employment. In its April 9, 2018 termination decision, it determined that the December 19, 2017 job offer was suitable based on the work restrictions provided by Dr. Ringel in his July 22, 2016 report. OWCP, however, improperly relied on that report as a basis to terminate appellant's benefits for refusal of suitable work because the report was stale evidence with regard to his restrictions when the employing establishment extended the modified job offer to him on December 19, 2017.[18]

The Board has recognized the importance of medical evidence being contemporaneous with a job offer in order to ensure that a claimant is medically capable of returning to work.[19] In this case, Dr. Ringel's July 22, 2016 report was created approximately 20 months prior to the April 9, 2018 termination decision. The Board finds, therefore, that OWCP improperly relied on this report as a basis to terminate appellant's wage-loss compensation benefits and entitlement to a schedule award for refusal of suitable work because the report was not current with the termination decision. As the medical evaluation relied upon by OWCP to find the position suitable was not reasonably current, OWCP has not met its burden of proof to terminate appellant's compensation benefits for refusing suitable work.[20] The record does not contain a medical report contemporaneous with OWCP's April 9, 2018 termination of his compensation supporting that the offered position was suitable.

[16] *Id.; see Ronald M. Jones, supra* note 10.

[17] 20 C.F.R. § 10.516.

[18] *See D.M.*, Docket No. 18-0424 (issued September 14, 2018) (finding that OWCP improperly relied on a medical report dated 16 months prior to a termination decision because the report constituted stale medical evidence).

[19] *See Ruth Churchwell,* Docket No. 02-0792 (issued October 17, 2002); *see generally Eileen R. Kates,* 46 ECAB 573 (1995).

[20] *See M.W.*, Docket No. 17-1205 (issued April 26, 2018) (finding that the report from the OWCP impartial medical examiner was stale as he examined the claimant 15 months prior to the job offer and over 18 months prior to the termination); *P.M.*, Docket No. 07-0132 (issued April 6, 2007) (finding that a report nearly two years old at the time OWCP issued its suitability determination was not reasonably current).

As noted above, section 8106(c) of FECA must be narrowly construed as it serves as a penalty provision.[21] The Board finds that, in this case, OWCP improperly determined that the December 19, 2017 modified job offer was suitable. Consequently, OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award benefits under 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 9, 2018, due to his refusal of an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the September 21, 2018 merit decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 14, 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

[21] *Supra* note 11.