United States Department of Labor
Employees' Compensation Appeals Board

C.E., Appellant	)	
and	)	**Docket No. 19-0614**
	)	**Issued: November 1, 2019**
U.S. POSTAL SERVICE, INTERNATIONAL SERVICE CENTER, JOHN F. KENNEDY AIRPORT, Jamaica, NY, Employer	)	

Appearances:
Stephen Larkin, for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 27, 2019 appellant, through her representative, filed a timely appeal from an August 2, 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.[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 appellant submitted additional evidence on appeal. 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 February 6, 2018, due to her refusal of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On May 14, 2013 appellant, then a 44-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that on May 6, 2013 she injured the right side of her neck and her lower back when trying to catch a falling tray while in the performance of duty. She stopped work on May 6, 2013. OWCP accepted the claim for neck and lumbar strains, and herniated discs at L2-3, L4-5, and L5-S1. It paid appellant wage-loss compensation on the periodic rolls as of June 29, 2014.

In an April 13, 2017 treatment note, Dr. Kanwarpaul Grewal, an osteopathic physician specializing in orthopedic surgery, noted that appellant had persistent lumbar symptoms and radiculopathy. As he indicated that she believed that she could perform light-duty work he released her to return to work on a part-time basis.

On August 24, 2017 the employing establishment requested that Dr. Grewal provide restrictions for appellant's return to part-time work.

In a September 15, 2017 report, Dr. Grewal indicated that appellant could sit for four hours per day, stand for two hours a day, walk for one hour a day, bend up to 30 degrees, squat, kneel, and twist for four hours a day, climb zero hours a day, and lift up to 10 pounds. He limited her to a four-hour workday.

On October 11, 2017 the employing establishment offered appellant a modified mail processing clerk position and noted that it was based upon the restrictions provided by Dr. Grewal. The modified job entailed four hours of work per day and included sorting and separating letters and flats, sitting, simple grasping, and lifting individual letters and flats weighing one to three ounces, for up to four hours per day.

In a letter dated October 26, 2017, the employing establishment notified OWCP that appellant had neither accepted nor rejected the modified job offer. It indicated that the offer complied with the restrictions provided by her treating physician.

In a November 21, 2017 memorandum of telephone call (Form CA-110), the employment establishment confirmed that the job offer remained available.

On November 22, 2017 OWCP notified appellant that the modified mail processing clerk position was suitable. It noted that the position was in compliance with the restrictions provided by her treating physician and that the position remained available. OWCP advised appellant 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. It afforded her 30 days to accept the position or provide a written explanation for her refusal.

OWCP subsequently received additional evidence including physical therapy notes from August 3 to January 9, 2017.

In a December 14, 2017 disability slip, Dr. Grewal related that appellant was partially disabled. In a December 14, 2017 narrative report, he explained that she had persistent back pain, which had been worsening and that she required a repeat magnetic resonance imaging (MRI) scan for evaluation. Dr. Grewal related that the employing establishment had a part-time position for appellant, and she was awaiting approval of a straight-back chair. He related that she was willing to start work as soon as the straight-back chair was made available to her.

In a December 20, 2017 statement, appellant indicated that she spoke with the employing establishment regarding her concerns about the job offer. She noted that her manager, K.H., indicated that she would make changes and send a new job offer; however, she had not yet received a new offer.

In a letter dated January 8, 2018, the employing establishment confirmed that the modified mail processing clerk position, offered on October 11, 2017 remained available and that appellant had not returned to work.

A Form CA-110 memorandum of telephone call noted that OWCP had called the employing establishment to determine whether another job offer would be made to appellant. The employing establishment responded that no other offer would be made to her.

By letter dated January 12, 2018, OWCP notified appellant that the modified mail processing clerk position was suitable and remained available. It afforded her 15 days to accept the position and report to work or her wage-loss compensation and entitlement to a schedule award would be terminated. OWCP explained that the reasons appellant provided for refusing to accept the offered position were invalid.

In a January 26, 2018 Form CA-110 memorandum of telephone call, appellant explained that she "wanted to make it clear that she never refused an offer." OWCP explained that the job was found suitable based upon the restrictions of her treating physician. Appellant indicated that she wanted to be certain that she would have the "special chair that her supervisor agreed to." OWCP explained that she needed to follow up with her employing establishment.

In a letter dated January 30, 2018, the employing establishment noted that appellant had not returned to work and that the job offer remained available.

By decision dated February 6, 2018, OWCP terminated appellant's wage-loss compensation and entitlement to a schedule award, effective February 6, 2018, because she refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2). It determined that the weight of medical evidence with respect to her ability to work rested with the established work restrictions provided by her treating physician, Dr. Grewal.

On February 26, 2018 appellant requested an oral hearing before an OWCP hearing representative.

The hearing was held on June 26, 2018. Appellant testified that when the job offer was presented it stated nothing about a straight-back chair, but that she had her physician clarify that

the straight-back chair was necessary. She further noted that she had also requested that the employing establishment amend the job offer to show that the chair would be provided; however, the employing establishment never amended the offer. Appellant explained that was the reason she did not return to work.

OWCP subsequently received progress reports from Dr. Grewal. In a report dated July 19, 2018, Dr. Grewal noted that appellant was concerned about documentation of her need for a straight-back chair. He reviewed his past notes. Dr. Grewal explained that appellant was not able to tolerate sitting without back support. He also noted that her need for a straight-back chair was clearly mentioned in his December 14, 2017 note. Dr. Grewal explained that "most [employing establishment's] with patients with back injury (work related or not) usually offer that accommodation without significant push back to retain employee. Offering chair with straight back is easiest accommodation." He noted that the employing establishment had a part-time position for appellant, that she was willing to work, and that she was just waiting for the chair to be made available.

By decision dated August 2, 2018, OWCP's hearing representative affirmed OWCP's February 6, 2018 decision.

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.[4] Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits under section 8106(c) for refusing to accept or neglecting to perform suitable work.[5] The Board has recognized that 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.[6]

To justify termination, OWCP must show that the work offered was suitable and that the employee was informed of the consequences of her or his refusal to accept such employment.[7] 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.[8] 20 C.F.R. § 10.516 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 proof to establish that such refusal or failure to work

[4] *Supra* note 2.

[5] *See B.R.,* Docket No. 19-0614 (issued August 13, 2019); *M.W.*, Docket No. 17-1205 (issued April 26, 2018); *Howard Y. Miyashiro,* 51 ECAB 253 (1999).

[6] *P.C.,* Docket No. 18-0956 (issued February 8, 2019); *H. Adrian Osborne*, 48 ECAB 556 (1997).

[7] *M.W., supra* note 5; *T.S.*, 59 ECAB 490 (2008); *Ronald M. Jones,* 52 ECAB 190 (2000).

[8] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.4(a) (June 2013).

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.[9]

ANALYSIS

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award benefits, effective February 6, 2018, due to her refusal of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

OWCP accepted appellant's claim for lumbar and neck strains, and herniated discs at L2-3, L4-5, and L5-S1. On September 15, 2017 Dr. Grewal, appellant's treating physician, related appellant's medical restrictions and indicated that she could return to work for four hours a day. On October 11, 2017 the employing establishment offered her a modified mail processing clerk position based upon the work restrictions provided by Dr. Grewal.

On November 22, 2017 OWCP notified appellant that the modified processing clerk position was suitable work and advised her that she had 30 days to accept the position or provide a written explanation for her refusal. In response, it received a December 14, 2017 report from Dr. Grewal wherein he indicated that her symptoms were worsening. Dr. Grewal noted that appellant was waiting for a straight-back chair to be authorized by the employing establishment and that she would return to work as soon as the chair was available. In his supplemental report dated July 19, 2018, he explained that she was not able to tolerate sitting without back support, and therefore needed a straight-back chair. The Board has held that, when additional medical evidence is submitted after the job offer is made, OWCP must consider the evidence in determining medical suitability.[10] The Board has also held that for OWCP to meet its burden of proof in a suitable work termination, the medical evidence should be clear and unequivocal that the claimant could perform the offered position.[11] The evidence of record indicates that the employing establishment failed to clarify whether a straight-back chair would be provided for appellant as requested by Dr. Grewal.

As a penalty provision, section 8106(c)(2) of FECA must be narrowly construed.[12] Based on the evidence of record, the Board finds that OWCP improperly determined that the modified mail processing clerk position offered to appellant on October 11, 2017 constituted suitable work.

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award benefits, effective February 6, 2018, due to her refusal of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

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[9] *See P.C., supra* note 6; *Camillo R. DeArcangelis,* 42 ECAB 941 (1991).

[10] *See E.G.*, Docket No. 18-0710 (issued February 12, 2019).

[11] Docket No. 18-1232 (issued April 8, 2019).

[12] *G.M.*, Docket No. 18-1236 (issued June 18, 2019).

ORDER

IT IS HEREBY ORDERED THAT the August 2, 2018 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 1, 2019
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board