

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

S.V., Appellant)	
)	
and)	Docket No. 19-0349
)	Issued: October 18, 2019
U.S. POSTAL SERVICE, POST OFFICE, Wantagh, NY, Employer)	
)	

Appearances:

Thomas S. Harkins, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 3, 2018 appellant, through counsel, filed a timely appeal from a June 11, 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 June 11, 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 October 17, 2017, due to her refusal of an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On March 25, 2016 appellant, then a 56-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date she sustained a low back injury when picking up three heavy parcels while in the performance of duty. OWCP accepted the claim for lumbar spinal stenosis and lumbar radiculitis. It paid appellant wage-loss compensation on the supplemental rolls from May 16, 2016 to March 4, 2017, and on the periodic rolls beginning March 5, 2017.

On January 16, 2017 OWCP referred appellant to Dr. Leon Sultan, a Board-certified orthopedic surgeon, to determine whether she continued to have residuals and disability related to her accepted March 25, 2016 employment injury.

In a January 31, 2017 report, Dr. Sultan diagnosed post-traumatic lumbar strain/sprain, preexisting lower lumbar spondylolisthesis, and preexisting lower lumbar degenerative disc disease. He reviewed appellant's medical records, and a statement of accepted facts (SOAF). Dr. Sultan related that her physical examination findings revealed reduced lumbar range of motion, negative bilateral straight leg testing, negative bilateral Trendelenburg test, bilateral sacroiliac joint nontender on palpation, and intact toe and heel standing. He opined that appellant continued to have residuals of the accepted lumbar radiculitis and lumbar spinal stenosis, but was capable of working with restrictions. Dr. Sultan further opined that she was disabled from performing the duties of a letter carrier, but could perform sedentary work with no carrying or lifting more than 20 pounds with both hands. He indicated the restrictions he noted were temporary and that he expected appellant would be able to resume full work with no restrictions by mid-March 2017.

In a March 15, 2017 office visit note, Dr. Cheryl Daves, a Board-certified physiatrist and pain medicine physician, related appellant's history of injury and provided examination findings. She opined the appellant was currently disabled from work due to her employment injury.

On March 31, 2017 the employing establishment offered appellant a modified city carrier position for eight hours per day in accordance with the work restrictions set by Dr. Sultan. The physical requirements of the position included up to eight hours of lifting, pulling, and pushing up to 20 pounds with both hands. The employing establishment listed duties of one to two hours of casing mail, one to six hours of intermittent delivering mail on foot and by vehicle, and one to six hours of delivering parcels weighing up to 20 pounds.

On April 5, 2017 appellant declined the offered position. She explained that her refusal was based on her physician's opinion that she was totally disabled from work.

On April 17, 2016 OWCP received duty status reports (Form CA-17) dated March 17 and April 10, 2015 from Dr. Daves which related that appellant was totally disabled from work.

Dr. Daves, in an April 10, 2017 report, diagnosed lumbar spondylosis without myelopathy or radiculopathy. Physical examination findings and medical history were detailed. Dr. Daves opined that appellant could not return to work due to the pain medication appellant was using.

In a letter dated April 28, 2017, OWCP requested that Dr. Sultan review appellant's modified city carrier job offer and provide an opinion on whether appellant was capable of performing the offered position.

Dr. Sultan, in a supplemental report dated May 2, 2017, opined that the duties in the modified job offer were appropriate for appellant and that her current medication would not impact her ability to perform this position.

In a second addendum dated May 17, 2017, Dr. Sultan noted review of additional documents and again opined that duties of the offered position were suitable. He further noted that her medication would not impact her ability to perform the offered position. Dr. Sultan explained that given the examination findings of negative bilateral straight leg raising and low grade lumbar spine restriction, and lack of objective evidence confirming a positive Patrick testing, appellant was capable of casing and sorting, delivering mail and parcels, and up to 20 pounds of lifting, pushing, and pulling with both hands.

Dr. Daves, in a May 31, 2017 Form CA-17, continued to opine that appellant was totally disabled from work. She explained that appellant's lumbar facet blocks prevented her from performing the offered position.

In a report dated June 26, 2017, Dr. Daves detailed physical examination findings and diagnosed lumbar spondylosis or radiculopathy and lumbar spinal stenosis. She again noted that the required lumbar facet blocks rendered appellant unable to perform the duties of the offered position. Dr. Daves opined that appellant's lumbosacral axial pain was consistent with facet joint arthropathy.

By preliminary notice dated July 5, 2017, OWCP advised appellant that it found the employing establishment's job offer was suitable since it was in accordance with the job limitations prescribed by Dr. Sultan. It notified her of the provisions of 5 U.S.C. § 8106(c)(2) and advised that her wage-loss compensation and schedule award benefits could be terminated if she refused suitable work. OWCP indicated that the case record would be held open for 30 days for submission of additional evidence.

In a July 24, 2017 attending physician's report (Form CA-20), Dr. Daves diagnosed lumbar spondylosis without myelopathy and lumbar spinal stenosis. She again opined that appellant was totally disabled on and after March 25, 2016.

By notice dated September 15, 2017, OWCP advised appellant that her refusal of the offered modified city carrier position was not justified. It afforded her 15 additional days to accept the offered position. Appellant did not accept the offered position.

By decision dated October 17, 2017, OWCP terminated appellant's wage-loss compensation and entitlement to schedule award benefits, effective that date, as she refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2). It found that Dr. Sultan's reports

constituted the weight of the medical opinion evidence regarding appellant's work tolerances and limitations.

In an October 18, 2017 report, Dr. Daves reiterated examination findings and diagnoses from prior reports. She noted treatment provided included bilateral lumbar facet blocks and lumbar radiofrequency ablation. Dr. Daves completed a Form CA-17 on October 17 and December 18, 2017, again relating that appellant was totally disabled from work.

In reports dated December 18, 2017 and January 22, 2018, Dr. Arash Yadegar, a Board-certified physiatrist and pain medicine physician, diagnosed lumbosacral spondylosis without radiculopathy or myelopathy and chronic low back pain with sciatica. Physical examination findings included left and right lumbar paraspinal spasms and tenderness, diminished thoracic and lumbar range of motion, stiffness and pain on bending both sides, and normal bilateral lower extremities motor and tone.

A January 29, 2018 Form CA-17 from Dr. Daves again related that appellant was totally disabled from work.

On March 3, 2018 appellant, through counsel, requested reconsideration and submitted a November 27, 2017 report from Dr. Daves in support of the request. In this report, Dr. Daves discussed her request for authorization of bilateral lumbar radiofrequency ablation of L3-5.

By decision dated June 11, 2018, OWCP denied modification.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of an employee's compensation benefits.⁴ Section 8106(c) of FECA provides in pertinent part, "a partially disabled employee who (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation."⁵ It is OWCP's burden of proof to justify termination of compensation under section 8106(c) due to refusal of suitable work or neglecting to perform suitable work.⁶ The implementing regulations provide that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of showing that such refusal or failure to work was reasonable or justified and shall be provided with the opportunity to make such a showing before entitlement to compensation is terminated.⁷

To support termination, OWCP must show that the work offered was suitable and that appellant was informed of the consequences of his/her refusal to accept such employment.⁸ In

⁴ *T.M.*, Docket No. 18-1368 (issued February 21, 2019).

⁵ 5 U.S.C. § 8106(c).

⁶ *P.P.*, Docket No. 18-1232 (issued April 8, 2019); *Joyce M. Doll*, 53 ECAB 790 (2002).

⁷ 20 C.F.R. § 10.517(a).

⁸ *P.P.*, *supra* note 6; *Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

determining what constitutes suitable work for a particular disabled employee, it considers the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work and other relevant factors.⁹ OWCP's procedures provide that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.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 It is well established under this section of FECA, OWCP must consider both preexisting and subsequently-acquired conditions in the evaluation of the suitability of an offered position.¹²

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 October 17, 2017, due to her refusal of an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

OWCP accepted the claim for lumbar spinal stenosis and lumbar radiculitis. In order to determine whether appellant continued to have residuals and disability due to the accepted March 25, 2016 employment injury, on January 16, 2017, it referred her for a second opinion evaluation with Dr. Sultan. In his January 31, 2017 report, Dr. Sultan concluded that she continued to experience residuals of her accepted lumbar radiculitis and lumbar spinal stenosis, but that she was capable of working with restrictions. He limited appellant to sedentary work with no carrying or lifting more than 20 pounds with both hands. On March 31, 2017 the employing establishment offered appellant a modified city carrier job, working eight hours per day in accordance with the restrictions noted by Dr. Sultan. The physical restrictions of the position included up to eight hours of lifting, pulling, and pushing up to 20 pounds with both hands. The employing establishment listed duties of one to two hours of casing mail, one to six hours of intermittent delivering mail on foot and by vehicle, and one to six hours of delivering parcels weighing up to 20 pounds. Dr. Sultan provided a well-reasoned medical opinion based on a complete medical background and objective findings.¹³

The Board finds that OWCP properly accorded the weight of medical opinion to the reports of Dr. Sultan who opined that while appellant continued to have residuals of the accepted March 25, 2016 employment injury, she was capable of working with restrictions. Dr. Sultan based his opinion on a proper factual and medical history. He also provided appropriate physical examination findings and medical rationale for his opinion regarding her work limitations and ability to return to work. The Board finds that Dr. Sultan provided a well-rationalized opinion based on the medical evidence of record regarding her accepted March 25, 2016 employment

⁹ 20 C.F.R. § 10.500(b); *see P.P., id.*; *Ozine J. Hagan*, 55 ECAB 681 (2004).

¹⁰ Federal (FECA) Procedure Manual, Part -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a) (June 2013); *see Lorraine C. Hall*, 51 ECAB 477 (2000).

¹¹ *P.P., supra* note 6; *Gloria G. Godfrey*, 52 ECAB 486 (2001).

¹² *P.P., id.*; *Richard P. Cortes*, 56 ECAB 200 (2004).

¹³ *S.E.*, Docket No. 17-0222 (issued December 21, 2018).

injury. OWCP properly relied on his reports to determine appellant's work restrictions and to determine that the offered position was suitable.¹⁴

Prior to and subsequent to the suitable work offer, appellant submitted a number of medical reports from Dr. Daves who opined that appellant was totally disabled from work. In support of this conclusion, she indicated that the pain medication and the lumbar facet blocks used to treat appellant prevented her from performing the offered position. However, Dr. Daves offered no supporting rationale explaining why appellant's medication or the lumbar block procedures rendered appellant totally disabled from work. The Board has held that a medical report is of limited probative value on a given matter if it contains a conclusion which is unsupported by medical rationale.¹⁵ As such, Dr. Daves' reports are of limited probative value regarding appellant's ability to perform the offered position. OWCP requested that Dr. Sultan address whether appellant's medication or lumbar facet block procedures would impact her ability to perform the offered position and he explained that they would have no impact.

Following the termination of appellant's compensation benefits, OWCP received reports dated December 18, 2017 and January 22, 2018, from Dr. Yadegar. Dr. Yadegar provided examination findings and diagnosed lumbosacral spondylosis without radiculopathy or myelopathy and chronic low back pain with sciatica. After OWCP established that the offered position was suitable, the burden of proof shifted to appellant to establish that her refusal was reasonable or justified.¹⁶ Dr. Yadegar did not, however, address the relevant issue of whether appellant was capable of performing the duties of the offered position, as of October 17, 2017. Therefore, his opinion is of little probative value.¹⁷

As the reports of Dr. Sultan carry the weight of the medical evidence, the Board finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award compensation.

On appeal counsel asserts that OWCP erred in terminating appellant's compensation pursuant to section 8106(c) as there is an unresolved conflict in the medical opinion evidence between Dr. Sultan and appellant's treating physicians. For a conflict to arise the opposing physicians' viewpoints must be of "virtually equal weight and rationale."¹⁸ OWCP properly found that no conflict existed in the medical opinion evidence, as the reports from appellant's treating physicians were not of equal weight with those of Dr. Sultan. It therefore properly accorded weight of the evidence to Dr. Sultan's opinion when invoking section 8106(c).

¹⁴ *A.F.*, Docket No. 16-0393 (issued June 24, 2016).

¹⁵ *S.E.*, *supra* note 13; *C.M.*, Docket No. 14-0088 issued April 18, 2014).

¹⁶ *See J.R.*, Docket No. 18-1532 (issued April 8, 2019).

¹⁷ *R.R.*, Docket No. 19-0173 (issued May 2, 2019).

¹⁸ *See S.T.*, Docket No. 18-1144 (issued August 9, 2019).

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 October 17, 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 June 11, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 18, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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