

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 November 10, 2018, for refusing an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On December 30, 2005 appellant, then a 47-year-old mail/file clerk, filed a traumatic injury claim (Form CA-1) alleging that on December 19, 2005 she injured her right knee when she slipped in a puddle of water covered with leaves, while in the performance of duty. OWCP accepted the claim for sprain/strain of the right knee/leg, right closed fracture of tibia and fibula, sprain/strain of the cruciate ligament of the right knee, and right knee meniscus tear. Appellant underwent right knee surgical procedures on March 28, 2006, and October 6, 2011. On June 27, 2012 OWCP expanded acceptance of the claim to include consequential injuries of left knee strain and left hip strain. Appellant stopped work on July 19, 2012. She underwent left knee surgery on August 21, 2012, and has not returned to work. OWCP paid appellant wage-loss compensation on the periodic rolls effective December 16, 2012.

In a November 3, 2017 report, Dr. Gary Hatcher, an osteopathic physician specializing in occupational medicine noted that appellant was awaiting authorization for another left knee surgery. He indicated that appellant was given an opportunity to return to modified-duty work and he opined that given her work restrictions, "she certainly can be in the workplace." Dr. Hatcher explained that appellant had a history of multiple injuries for which she had undergone left hip replacement for a nonwork-related condition, and multiple surgeries to both knees for work-related conditions. He opined that her current claim was related to a 2005 injury and that it was difficult to understand why all of the treatment she received was necessary for her accepted claim as she was a clerical worker and performed her work sitting 90 percent of the time. Dr. Hatcher diagnosed internal derangement of both knees. He provided modified-duty work restrictions indicating that appellant could sit 50 percent of each hour, and could not squat, kneel, or climb ladders.

On April 10, 2018 the employing establishment offered appellant a modified mail/file clerk position. The limited-duty offer indicated that no kneeling or squatting was required and the position was to be performed while seated 50 percent of the time. Appellant did not return to work.

In a report dated April 25, 2018, Dr. Hatcher related that appellant had wanted to undergo a left total knee replacement and wanted to be placed on total disability because walking from her car to her workstation would be difficult. However, he opined that she was not totally disabled and she was capable of work. Dr. Hatcher related that appellant could perform work sitting 90 percent per hour, with no squatting, kneeling, or climbing ladders or stairs.

In a letter dated May 2, 2018, the employing establishment informed OWCP that appellant had not accepted or declined the job offer.

In a letter dated May 11, 2018, OWCP advised the employing establishment that the offered position was not determined to be suitable because a more detailed job offer was required with regard to the physical requirements and duties being offered.

On May 17, 2018 the employing establishment provided appellant a new offer of light/limited duty as a modified mail/file clerk. This offer described the duties of the position and noted that the physical aspects of the modified mail file clerk position included sitting for 90 percent of each hour, no kneeling, no squatting, and no ladder or stair climbing.

In a letter dated May 29, 2018, OWCP advised appellant of its determination that the modified mail file clerk position offered by the employing establishment was suitable based on the April 25, 2018 report of Dr. Hatcher. OWCP noted that the position was sedentary 90 percent of the time and required no squatting, kneeling, or climbing of ladders and stairs. It advised appellant that pursuant to 5 U.S.C. § 8106(c)(2) her wage-loss compensation and entitlement to a schedule award would be terminated if she did not accept the job offer or provide good cause for not doing so within 30 days of the date of the letter.

In a June 12, 2018 memorandum of telephone call (Form CA-110), appellant advised OWCP that she received a job offer, but did not believe she could return to work. OWCP noted that she was advised to provide a written response if she disagreed with the May 29, 2018 letter.

OWCP subsequently received evidence which included a copy of the April 10, 2018 job offer. Appellant circled the notation related to 50 percent sitting and indicated it was not in keeping with her 90 percent sitting requirement. She also provided a copy of the May 17, 2018 job offer.

On June 29, 2018 OWCP received a letter from appellant in which she noted her disagreement with Dr. Hatcher's opinion that she could return to work. She contended that she still required additional medication and diagnostic testing

On August 8, 2018 the employing establishment advised OWCP that appellant had not reported to work.

In a letter dated September 19, 2018, the employing establishment advised appellant that she had an intermittent work schedule; however, she was expected to report to work, if work was available.

In a September 24, 2018 Form CA-110, the employing establishment confirmed that the May 17, 2018 limited-duty job offer remained available.

In a September 24, 2018 letter, OWCP advised appellant that her reasons for refusing to accept the May 17, 2018 modified mail file clerk position were unjustified. It discussed the evidence submitted by her and found that she did not provide a valid reason for refusing to accept the position. OWCP advised appellant that her wage-loss compensation and entitlement to a schedule award would be terminated if she did not accept the position within 15 days of the date of the letter. Appellant did not respond.

On November 1 and 5, 2018 the employing establishment again advised OWCP that appellant had not reported to work and that the offered job remained available.

By decision dated November 5, 2018, OWCP terminated appellant's wage-loss compensation and entitlement to a schedule award effective November 10, 2018, because she refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2). It determined that the duties

and physical requirements of the May 17, 2018 job offer were suitable based on the work restrictions prescribed by her physician, Dr. Hatcher, in his April 25, 2018 report. OWCP found that appellant's reasons for her job refusal and her failure to report to work were not justified because the position was within her treating physician's restrictions.

On November 7, 2018 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative.

On December 6, 2018 OWCP received an unsigned statement of even date indicating that appellant had bragged about receiving workers' compensation. The statement was forwarded by a special agent for the employing establishment, who indicated that it was from a coworker of appellant's who did not want to be identified.

By decision dated June 4, 2019, OWCP's hearing representative affirmed the November 5, 2018 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying termination or modification of an employee's compensation benefits.³ 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.⁴ To justify termination of compensation, OWCP must show that the work offered was suitable, that the employee was informed of the consequences of refusal to accept such employment, and that he or she was allowed a reasonable period to accept or reject the position or submit evidence to provide reasons why the position is not suitable.⁵ 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.⁶

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, has the burden of showing that such refusal or failure to work was reasonable or justified.⁷ 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.⁸

³ See *J.R.*, Docket No. 19-0206 (issued August 14, 2019); *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

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

⁵ See *R.A.*, Docket No. 19-0065 (issued May 14, 2019); *Ronald M. Jones*, 52 ECAB 190 (2000).

⁶ *S.D.*, Docket No. 18-1641 (issued April 12, 2019); *Joan F. Burke*, 54 ECAB 406 (2003).

⁷ 20 C.F.R. § 10.517(a).

⁸ *Id.* at § 10.516.

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.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 In a suitable work determination, OWCP must consider preexisting and subsequently-acquired medical conditions in evaluating an employee's work capacity.¹¹

ANALYSIS

The Board finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective November 10, 2018, for refusing an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

On May 17, 2018 the employing establishment offered appellant a modified mail file clerk position, and on May 29, 2018, OWCP determined that position to be suitable. The physical requirements of the position included sitting for 90 percent of each hour with no kneeling, squatting, ladders, or stairs. The Board finds that the May 17, 2018 job offer was within the restrictions of treating physician Dr. Hatcher. Appellant's disagreement with her own treating physician's opinion is insufficient to justify her refusal of the offered position.

Accordingly, OWCP properly relied on Dr. Hatcher's restrictions in determining that the job offer was suitable.

The Board finds that OWCP properly followed its established procedures prior to the termination of appellant's compensation pursuant to 5 U.S.C. § 8106(c)(2), including providing her with an opportunity to accept the position offered by the employing establishment after informing her that her reasons for initially refusing the position were not valid.¹²

For these reasons, OWCP properly terminated appellant's entitlement to wage-loss and schedule award compensation, effective November 10, 2018 because she refused an offer of suitable work.¹³

⁹ *M.A.*, Docket No. 18-1671 (issued June 13, 2019); *Gayle Harris*, 52 ECAB 319 (2001).

¹⁰ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.5a (June 2013); see *E.B.*, Docket No. 13-0319 (issued May 14, 2013).

¹¹ See *G.R.*, Docket No. 16-0455 (issued December 13, 2016); *Richard P. Cortes*, 56 ECAB 200 (2004).

¹² *C.H.*, Docket No. 17-0938 (issued November 27, 2017).

¹³ See *M.H.*, Docket No. 17-0210 (issued July 3, 2018).

CONCLUSION

The Board finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective November 10, 2018, for refusing an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the June 2, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 28, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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