United States Department of Labor
Employees' Compensation Appeals Board

J.K., Appellant	)	
and	)	**Docket No. 19-0064**
	)	**Issued: July 16, 2020**
DEPARTMENT OF ENERGY, BONNEVILLE POWER ADMINISTRATION, Vancouver, WA, Employer	)	

Appearances:
Paul H. Felser, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 8, 2018 appellant, through counsel, filed a timely appeal from an April 10, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP).[2] Pursuant to the

[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] Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of a final adverse OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from April 10, 2018, the date of OWCP's last decision was October 7, 2018. As this fell on a Sunday, appellant had until the following business day, Monday, October 8, 2018. The appeal was therefore timely filed.

Federal Employees' Compensation Act[3] (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 met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award effective August 11, 2017 as he refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On June 12, 2012 appellant, then a 55-year-old electrician, filed a traumatic injury claim (Form CA-1) alleging that on June 11, 2012 he experienced eye irritation while in the performance of duty. The employing establishment indicated that his duty station was Vancouver, Washington. OWCP accepted the claim for right corneal ulcer and later expanded acceptance of the claim to include right eye corneal pannus, right eye central corneal scarring and right eye corneal scarring. Appellant stopped work on June 12, 2012 and returned to work on September 21, 2012. OWCP paid him wage-loss compensation on the supplemental rolls from June 27 to September 13, 2012. Appellant returned to modified-duty work on April 7, 2013. By decision dated May 16, 2014, OWCP reduced appellant's wage-earning capacity to zero as his actual earnings as a modified maintenance mechanic effective April 7, 2013 fairly and reasonably represented his wage-earning capacity.

Appellant stopped work again on June 29, 2015. OWCP found that the employing establishment was unable to accommodate his restrictions and paid him wage-loss compensation for total disability beginning that date. On January 26, 2018 appellant's application for disability retirement was approved due to keratitis.

In a report dated September 11, 2015, Dr. Mitchell V. Brinks, a Board-certified ophthalmologist, found that appellant had vision loss, particularly in his right eye, and significantly reduced depth perception. He advised that appellant could resume work if he could "avoid dangerous situations such as navigating stairs and ladders, drop offs, and high voltage electrical work."

On February 17, 2016 OWCP referred appellant for vocational rehabilitation services based on Dr. Brinks' work restrictions.

On April 19, 2016 Dr. William Pettit, a Board-certified ophthalmologist, diagnosed a corneal ulcer, keratitis, recurrent corneal erosions, blepharitis, corneal edema, rosacea, dysfunctional tear film, corneal scarring including central opacity of the cornea, and floppy eyelid syndrome. He noted that appellant could not see in one eye and had no depth perception. Dr. Pettit advised that he could not be exposed to high temperatures, dirt, wind, excrement, dead animal bodies, or live wires or use power tools. He further found that he could not drive a commercial

[3] 5 U.S.C. § 8101 *et seq.*

vehicle, direct others driving, climb ladders, use power tools, or be exposed to heights. Dr. Pettit noted that appellant was at a risk for falling because he had no depth perception.

On June 16, 2016 the employing establishment offered appellant a position as a permanent, full-time modified electrician in Vancouver, Washington effective July 24, 2016.

OWCP, on June 20, 2016, referred appellant to Dr. Richard H. Hopp, a Board-certified ophthalmologist, for a second opinion examination.

In a report dated July 13, 2016, Dr. Hopp reviewed appellant's history of injury and found that his maximum corrected visual acuity in the right eye was 20/400 "with a high amount of astigmatism present…." He noted that appellant had experienced 95 percent loss of visual function in the right eye due to the industrial injury. Dr. Hopp diagnosed a corneal ulcer, corneal pannus, and corneal scarring due to his employment injury, neurotrophic keratitis that might be an underlying condition and that may have been aggravated by his injury, nuclear sclerosis unrelated to the injury, and early cataracts unrelated to the injury. He opined that appellant was unable to perform the full duties of an electrician. Dr. Hopp found that appellant could work full time and related that, "[h]e would need to avoid exposure to potential ocular irritants such as smoke, wind, corneal foreign bodies, and inclement outdoor weather. [Appellant] may be able to work indoors for extended periods of time although his level of visual acuity is reduced and he would be limited as to the fine detail work that he could do."

On July 29, 2016 OWCP referred appellant's case to a district medical adviser (DMA) to determine whether the job offer dated June 16, 2016 was suitable. On July 29, 2016 the DMA opined that the job offer as written was not suitable as it required exposure to hazardous substances.

On August 9, 2016 the employing establishment amended the June 16, 2016 modified electrician job offer.

On October 18, 2016 Dr. Pettit tested appellant's ability to see color and he failed all color plates in the right eye and scored only 14 of 25 correct in the left eye indicating that he was red-green colorblind.

On April 7, 2017 Dr. Pettit, at the request of an OWCP rehabilitation specialist, reviewed the clerical positions of information clerk, customer service representative-complaint clerk and appointment clerk for suitability. He advised that considering only appellant's eyes it appeared that he could perform the duties of the positions, but noted that he had other disabilities that may preclude his performing each position. Dr. Pettit opined, "He has trouble with his hands and cannot hear on a telephone and has other issues outside of my expertise."

On April 24, 2017 the employing establishment offered appellant a permanent, full-time position as a modified motor vehicle dispatcher in Portland, Oregon, effective June 11, 2017. The duties included scheduling and dispatching vehicles through requests received verbally, in writing, and *via* the computer, assessing vehicle status, entering vehicle mileage, assessing for damages, maintaining logs, records and reports, and making individual work assignments. The work required knowledge of computers, vehicle dispatch, applicable safety standards, and the ability to understand maps and locator devices. The physical demands of the position included standing,

walking, bending, or sitting. The work environment was primarily in an office setting. The employing establishment noted that additional technology and tools were available and instructed appellant to contact the local reasonable accommodation coordinator to pursue training. It advised that the assignment would remain within the physical restrictions of his attending physician.

In an e-mail dated June 12, 2017, OWCP advised that Dr. Pettit had found that appellant could perform clerical positions considering only his accepted eye condition, but that appellant had other disabilities that might prevent his performing the offered position. An official with the employing establishment, in response, noted that OWCP had not provided Dr. Pettit with the motor vehicle dispatcher position as it had not yet determined all the details of the job.

On June 16, 2017 the employing establishment confirmed that the April 24, 2017 modified motor vehicle dispatcher job offer was still open and available.

By letter dated June 21, 2017, OWCP notified appellant that the offered position was suitable and provided him 30 days to accept the position or provide reasons for his refusal. It informed him that an employee who refused an offer of suitable work without cause was not entitled to compensation.

On July 20, 2017 counsel asserted that the offered modified motor vehicle dispatcher position was not suitable due to the accepted employment injury and appellant's other medical conditions. He noted that appellant had substantial visual disability, including from a left eye condition. Counsel contended that the job offer was not specifically tailored to appellant's work restrictions and argued that he did not have the skills necessary to perform the duties of the position, including the use of computers or transportation databases.

On July 24, 2017 the employing establishment again confirmed that the April 24, 2017 modified motor vehicle dispatcher job offer was still open and available.

On July 26, 2017 OWCP advised appellant that his reasons for refusing the position were not valid and provided him 15 days to accept the positon or have his entitlement to wage-loss compensation benefits terminated.

On August 1, 2017 appellant advised that he was not qualified to perform the duties in the job offer. He asserted that he could not operate a computer or keyboard due to problems with his vision and "debilitating hand and fingers issues." Appellant also advised that he had hearing loss and a history of a brain injury as a child. He maintained that he could not afford to relocate from the rural area where he resided, noting that the offered position was 260 miles from his home.

Thereafter, OWCP received statements from appellant's friends and coworkers who supported that he struggled with cell phones and had no computer skills. It also received March 8 and May 30, 2017 reports from a nurse practitioner, who diagnosed right shoulder rotator cuff impingement, right shoulder glenohumeral arthritis, right shoulder acromioclavicular impingement, calcified tendinitis, and partial-thickness tear of the supraspinatus, infraspinatus, subscapularis and long head of biceps tendon. The nurse practitioner recommended general weight bearing activity as tolerated without limitations.

On June 23, 2017 Dr. Adrian T. Davis, a Board-certified orthopedist, on June 23, 2017, diagnosed a right partial thickness rotator cuff tear and right glenohumeral arthritis by magnetic resonance imaging (MRI) scan. He recommended arthroscopic surgery.

On August 9, 2017 counsel asserted that appellant required shoulder surgery which would affect his ability to work. He maintained that the position was not physically or vocationally suitable, noting that the vocational rehabilitation counselor assigned by OWCP had not provided training.

By decision dated August 11, 2017, OWCP terminated appellant's "entitlement to compensation for wage-loss and schedule award" as he refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2). It found that the position was in accordance with Dr. Pettit's April 7, 2017 work restrictions. OWCP advised that the employing establishment had indicated that appellant would receive training on the job, and the necessary technology to assist him in performing the position.

On August 18, 2017 appellant, through counsel, requested an oral hearing before an OWCP hearing representative.

A telephonic hearing was held on January 16, 2018. Counsel contended that the employing establishment had not searched for a position within appellant's geographical area and that he had no computer training.

Thereafter, appellant submitted additional evidence. A December 6, 2017 MRI scan of the brain revealed small focus of posterior right frontal encephalomalacia with gliosis consistent with a history of prior brain injury with surgery. An electroencephalogram (EEG) dated December 6, 2017 was normal. An electromyogram (EMG) dated December 23, 2017 revealed moderate generalized axonal sensorimotor polyneuropathy as evidenced by abnormal sensory and motor potential due to longstanding diabetes, mild-to-moderate bilateral C6, S1 radiculopathy as evidenced by paraspinal and limb muscle denervation, and bilateral mild-to-moderate median nerve entrapment across the wrists.

In a report dated January 2, 2018, Dr. Rodrigo R. Lim, a Board-certified neurologist, advised that appellant had a neurologic diagnosis of post-traumatic brain injury at three years old with neurosurgical evacuation of a cerebral hematoma on the right side of his brain with residual left-sided clumsiness/weakness. He noted that he also had a history of "moderate diabetic polyneuropathy, cervical and lumbosacral spine strain with radiculopathy, and bilateral carpal tunnel syndrome."

On February 5, 2018 the employing establishment asserted that it did not have facilities or a business location within 50 miles of appellant's geographical location. It advised that it had periodically searched for positions in his local commuting area which was expanded when it failed to yield results. The employing establishment asserted that appellant had used Outlook previously as an employee and had taken online training courses. It related that the offered position did not have an educational requirements and that it was offered under a modified qualification position. The employing establishment indicated that appellant could learn computer skills during a 90-day

orientation period. It noted that it had advised him that he could contact a reasonable accommodation coordinator to discuss tools, aids, or assistive technology.

In a February 15, 2018 response, appellant asserted that there was an employing establishment substation in his town and requested proof that it had performed a geographical search within his commuting area. He contended that the attached positions searched had been performed in 2015 and 2016. Appellant advised that when he took classes using technology one student would sign in and the entire crew would watch.

Appellant also submitted a statement from a supervisor, who indicated that he had worked for him for four years and that during that time he did not use a computer or take any computer training while working as an electrician.

By decision dated April 10, 2018, an OWCP hearing representative affirmed the August 11, 2017 termination decision.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[4] Section 8106(c)(2) of FECA[5] 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.[6] To justify termination of compensation, it must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[7] 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.[8]

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.[9] Section 10.516 of OWCP's regulations provide that it will advise the employee that the work offered is suitable and provide 30 days for the employee to accept the job or present any reasons to counter OWCP's finding of suitability.[10]

[4] *T.M.*, Docket No. 18-1368 (issued February 21, 2019); *Linda D. Guerrero*, 54 ECAB 556 (2003).

[5] 5 U.S.C. § 8101*et seq*.

[6] 5 U.S.C. § 8106(c)(2); *see also M.J.*, Docket No. 18-0799 (issued December 3, 2018); *Geraldine Foster*, 54 ECAB 435 (2003).

[7] *J.V.*, Docket No. 17-1944 (issued December 18, 2018); *Ronald M. Jones*, 52 ECAB 190 (2000).

[8] *S.B.*, Docket No. 18-0039 (issued October 15, 2018); *Joan F. Burke*, 54 ECAB 406 (2003).

[9] 20 C.F.R. § 10.517(a); *see Ronald M. Jones*, *supra* note 7.

[10] *Id.* at § 10.516.

Before compensation can be terminated, however, OWCP has the burden of proof to demonstrate that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work, and establishing that a position has been offered within the employee's work restrictions and setting forth the specific job requirements of the position.[11] In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, OWCP has the burden of showing that the work offered to and refused by appellant was suitable.[12]

Once OWCP establishes that the work offered is suitable, the burden of proof shifts to the employee who refuses to work to show that the refusal or failure to work was reasonable or justified.[13] 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.[14] OWCP procedures state that acceptable reasons for refusing an offered position include medical evidence of inability to do the work.[15]

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 August 11, 2017as appellant was incapable of performing the offered positon of motor vehicle dispatcher.

In terminating appellant's compensation benefits, OWCP primarily relied upon the opinion of Dr. Pettit, his attending physician. Dr. Pettit opined that based solely on his eye condition, he could perform clerical positions, but that he had other medical conditions that needed to be considered. OWCP also obtained a second opinion from Dr. Hopp, who found that appellant could work full time if not exposed to ocular irritants or inclement weather, or required to perform duties requiring visual acuity.

In an April 19, 2016 report, Dr. Pettit diagnosed a corneal ulcer, keratitis, recurrent corneal erosions, blepharitis, corneal edema, rosacea, dysfunctional tear film, corneal scarring including central opacity of the cornea, and floppy eyelid syndrome. He noted that appellant could not see in one eye and had no depth perception. Dr. Pettit advised that he should not be exposed to high temperatures, dirt, wind, excrement, dead animal bodies, or live wires or use power tools, that he could not use dangerous equipment, drive a commercial vehicle or direct others driving a vehicle, and that he could not climb ladders or be exposed to heights because he was a fall risk due to his limited vision. In an October 18, 2016 report, Dr. Pettit determined that appellant was unable to see color in the right eye and was red-green colorblind in the left eye.

[11] *M.H.*, Docket No. 17-0210 (issued July 3, 2018).

[12] *J.V. supra* note 7; *Linda Hilton*, 52 ECAB 476 (2001).

[13] 20 C.F.R. § 10.517(a).

[14] *D.M.*, Docket No. 17-1235 (issued February 15, 2018); *Gayle Harris*, 52 ECAB 319 (2001).

[15] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.5(a)(4) (June 2013).

On April 7, 2017 Dr. Pettit reviewed the clerical positions of information clerk, customer service representative-complaint clerk and appointment clerk for suitability. He advised that it appeared that he could perform the duties of the positions considering only appellant's eye condition. Dr. Petit found, though, that he had other disabilities that limited his physical ability to perform the job duties, including difficulties with his hands and hearing, as well as other issues that were out of his medical expertise. The Board has held that the issue of whether a claimant is able to perform the duties of an offered position is a medical question that must be resolved by probative medical evidence.[16] In order for OWCP to meet its burden of proof in a suitable work termination, the medical evidence must clearly and unequivocally establish that the claimant could perform the duties of the offered position.[17] It, however, did not further develop the evidence to clarify whether appellant had a condition that would prevent him from performing the offered position.

OWCP further failed to provide either Dr. Pettit or Dr. Hopp with the opportunity to review the position description for the job offered by the employing establishment of motor vehicle dispatcher so that they could render an opinion regarding whether he could perform the required duties.[18] Accordingly their opinions are insufficient to establish appellant's limitations as it does not consider all of medical conditions.[19]

As previously noted, OWCP must consider all of appellant's conditions, preexisting, work-related, and subsequently-acquired, in determining whether a position is suitable.[20] Additionally, as a penalty provision, section 8106(c)(3) must be narrowly construed.[21] Based on the evidence of record, the Board finds that OWCP improperly determined that the modified position offered to appellant constituted suitable work within his physical limitations and capabilities. The record does not substantiate that OWCP properly considered the entity of his medical conditions before terminating his wage-loss compensation and entitlement to a schedule award.[22] Consequently, OWCP did not meet its burden to justify the termination of appellant's compensation benefits pursuant to 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 August 11, 2017.

[16] *K.Y.*, Docket No. 19-1079 (issued November 14, 2019); *Gayle Harris*, 52 ECAB 319 (2001).

[17] *C.E.*, Docket No., 19-0614 (issued November 1, 2019); *S.D.*, Docket No. 18-1641 (issued April 12, 2019).

[18] *See A.B.*, Docket No. 15-1947 (issued March 14, 2016).

[19] *See J.B.*, Docket No. 08-0684 (issued September 11, 2008).

[20] *See S.B.*, Docket No. 18-0039 (issued October 15, 2018).

[21] 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

[22] *See K.S.*, Docket No. 19-0082 (issued July 29, 2019); *D.H.*, Docket No. 17-1014 (issued October 3, 2017).

ORDER

IT IS HEREBY ORDERED THAT the April 10, 2018 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 16, 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