United States Department of Labor
Employees' Compensation Appeals Board

A.F., Appellant	)	
and	)	**Docket No. 19-0453**
	)	**Issued: July 6, 2020**
U.S. POSTAL SERVICE, NORTH METRO GEORGIA PROCESSING & DISTRIBUTION CENTER, Duluth, GA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Deputy Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On December 27, 2018 appellant, through counsel, filed a timely appeal from a November 28, 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, following the November 28, 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 May 2, 2018, pursuant to 5 U.S.C. § 8106(c)(2) for refusing an offer of suitable work.

FACTUAL HISTORY

On January 19, 2017 appellant, then a 50-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that she sustained a left knee contusion on January 16, 2017 while in the performance of duty. She explained that as she was chasing letters that had fallen out of a malfunctioning letter tray line machine, her leg struck a low rail next to the machine. OWCP accepted the claim for left knee contusion, sprain of lateral collateral ligament (LCL), and derangement of the anterior horn of the lateral meniscus of the left knee. Commencing April 2, 2017 it placed appellant on the periodic rolls. OWCP subsequently authorized left knee surgery which was performed by Dr. Julio Petilon, a Board-certified orthopedic surgeon, on May 24, 2017.[4]

In a September 29, 2017 work capacity evaluation (Form OWCP-5c), Dr. Petilon advised that appellant was capable of sedentary or light-duty work with restrictions of walking 15 minutes per hour; standing 30 minute per hour; pushing, pulling, and lifting 10 to 20 pounds for 8 hours per day; and no twisting, bending/stooping, operating a motor vehicle at work, squatting, kneeling, or climbing.

In a report dated September 9, 2016, Pamela E. Flatow, a licensed clinical social worker, noted treatment of appellant from April 22 to June 3, 2014 for a total of four individual psychotherapy sessions. She indicated that appellant was being treated for anxiety and depression and was also being seen for medication management through her family physician.

In an October 17, 2017 report, Dr. Rick Stallings, a Board-certified psychiatrist, indicated that he initially saw appellant on January 25, 2016 and she was scheduled for a follow-up appointment on August 1, 2017. He noted that in January 2016 he had diagnosed adjustment disorder with anxiety and opined that her condition was directly related to her difficult work situation, in part because she was deaf. Dr. Stallings explained that appellant reported a history of intimidation and harassment at work for about two years which started after she was injured at work and required shoulder surgery and a six-month medical leave. He noted that her ongoing treatment included two medications for anxiety and depression, as well as psychotherapy. Dr. Stallings reported that appellant continued to report work stressors and a difficult work environment which had contributed to anxiety and depression.

On November 9, 2017 the employing establishment offered appellant a job as a modified mail handler, which was based on the work restrictions of Dr. Petilon. The duties of the position required appellant to pick up mail, one parcel at a time, and place it in a cardboard tray. The physical requirements included: sitting at a conveyor belt and placing letter mail into a tray for up

[4] OWCP determined that she needed reasonable accommodation as a result of her hearing impairment and authorized a sign language interpreter to be present with her during medical appointments for her accepted conditions

to eight hours; walking 15 minutes per hour; standing 20 minutes per hour; pushing, pulling, and lifting 10 to 20 pounds per hour; and no bending, stooping, squatting, kneeling, and climbing.

In a letter dated November 20, 2017, appellant indicated that she had past experiences of intimidation and harassment by her supervisor, managers, and coworkers which caused her to have anxiety and depression and she was afraid for her health and safety should she return to the same situation at her regular duty station. She requested that she be offered a position with her same status at either the post office in Buford, Georgia or another post office in the district.

On November 22, 2017 appellant requested that OWCP expand the acceptance of her claim to include the additional conditions of stress, anxiety, and depression.

On November 28, 2017 the employing establishment notified OWCP that appellant refused the November 9, 2017 modified job offer, but the duties of the job offer remained available for her acceptance. In a December 4, 2017 report, Countiss Williams, an advanced registered nurse practitioner, indicated that appellant presented following a left knee arthroscopy and meniscectomy and complained of persistent pain despite physical therapy.

In a December 21, 2017 development letter, OWCP notified appellant that it had received her request to "file an additional claim" for stress, anxiety, and depression and explained that she needed to submit a claim form to her employer to describe the details of her injury. It advised that the medical notes submitted suggested that a notice of occupational disease (Form CA-2) would be most appropriate, if her injury occurred over more than one day.

Appellant subsequently submitted reports dated January 18 and 25 and February 5, 2018 from Ms. Williams who continued to advise that appellant had persistent left knee pain, low back pain into her bilateral lower extremities, and discomfort with walking and standing.

In a Form OWCP-5c dated February 5, 2018, Dr. Petilon reiterated his work restrictions.

In a February 28, 2018 letter, OWCP notified appellant that the modified mail handler position was suitable, and afforded appellant 30 days to accept the position or provide a written explanation for her refusal. It noted that fear of returning to work due to anticipation of intimidation, harassment, or of a new injury was not a valid reason to refuse a limited-duty job offer since the anticipated event had not yet occurred and the emotional reaction was self-imposed. OWCP advised appellant that an employee who refuses an offer of suitable work, without reasonable cause, is not entitled to further compensation for wage loss or a schedule award. It also noted that the evidence of record did not support her inability to perform the offered modified position.

In an April 6, 2018 telephone call memorandum, OWCP indicated that it had called appellant and spoken to her through the interpreter service about her case. Appellant stated that she wanted to retire on disability, but was concerned because there was a job offer. OWCP explained that she had work restrictions and retirement was not a valid reason to refuse a job offer. It further explained that appellant could return to work and then retire after approximately 60 days or she could retire under Office of Personnel Management (OPM) and elect OPM benefits instead of FECA. OWCP advised her that as long as she was receiving workers' compensation, it would pursue return to work.

In a letter dated April 6, 2018, OWCP notified appellant for a second time that the modified mail handler position was suitable, and afforded appellant an additional 15 days to accept and report to this position. It noted that it had considered all reasons that she provided for refusing to accept the offered position and found them to be invalid.

Appellant subsequently submitted an April 10, 2018 report from Dr. Stallings who indicated that she was seen on April 10, 2017 and was in ongoing treatment for stress, depression, anxiety, grief, and trauma.

On April 16, 2018 Tan Nguyen, an advanced practice registered nurse, indicated that appellant continued to have discomfort with walking and standing and had noticed pain to her left ankle.

The employing establishment sent appellant a notification, on January 8, 2018, that she qualified for a voluntary early retirement offer. Appellant was instructed of the necessary actions she should take if she chose the early retirement offer through OPM.

In an April 26, 2018 letter, appellant, through counsel, argued that she obviously could not accept both the employer's suitable job offer and the voluntary early retirement offer.

By decision dated May 1, 2018, OWCP terminated appellant's wage-loss compensation and entitlement to schedule award benefits, effective May 2, 2018, for her refusal of an offer of suitable work. It found that the November 9, 2017 modified job offer was suitable based on appellant's restrictions as provided by Dr. Petilon on September 29, 2017 and February 5, 2018. OWCP noted that even if appellant was retired or planned to retire, this was not a valid reason for refusing a suitable offer of employment.

On May 8, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

Appellant elected to take disability retirement through OPM under the Federal Employees Retirement System, effective June 25, 2018.

Appellant further submitted reports dated August 31 and October 8, 2018 from Dr. James W. Duckett, III, a Board-certified orthopedic surgeon, who diagnosed left knee pain and joint effusion and opined that she was capable of continuing limited-duty, sedentary work with restrictions of primarily sitting with occasional standing and/or walking and lifting or carrying no more than 10 pounds.

A telephonic hearing was held before an OWCP hearing representative on October 12, 2018. Appellant provided testimony and the hearing representative held the case record open for 30 days for the submission of additional evidence.

In response, appellant resubmitted the October 8, 2018 report from Dr. Duckett in support of her claim.

By decision dated November 28, 2018, OWCP's hearing representative affirmed the prior decision, finding that appellant had refused or failed to accept an offer of suitable employment offered pursuant to 5 U.S.C. § 8106(c).

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.[5] Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits under section 8106(c) for refusing to accept or neglecting to perform suitable work.[6] 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.[7]

To justify termination, OWCP must show that the work offered was suitable and that appellant was informed of the consequences of her refusal to accept such employment.[8] 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.[9] 20 C.F.R. § 10.516[10] 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 establishing that such refusal or failure to work 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.[11]

The determination of whether an employee is capable of performing modified-duty employment is a medical question that must be resolved by probative medical opinion evidence.[12] All medical conditions, whether work related or not, must be considered in assessing the suitability of an offered position.[13]

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.

OWCP accepted that appellant sustained a left knee contusion, LCL sprain, and derangement of anterior horn of lateral meniscus of the left knee at work on January 16, 2017.

[5] *Supra* note 2.

[6] *M.W.*, Docket No. 17-1205 (issued April 26, 2018); *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

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

[8] *M.W., supra* note 6; *T.S.*, 59 ECAB 490 (2008); *Ronald M. Jones*, 52 ECAB 190 (2000).

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

[10] 20 C.F.R. § 10.516.

[11] *P.C., supra* note 7; *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

[12] *M.W., supra* note 6; *Gloria J. Godfrey*, 52 ECAB 486 (2001); *Robert Dickerson*, 46 ECAB 1002 (1995).

[13] *M.E.*, Docket No. 18-0808 (issued December 7, 2018); *Mary E. Woodward*, 57 ECAB 211 (2005).

However, prior to her employment injury Dr. Stalling had diagnosed an adjustment disorder with anxiety during an examination on January 25, 2016.

The employing establishment offered appellant a modified mail handler position consistent with Dr. Petilon's September 29, 2017 and February 5, 2018 reports on May 1, 2018. Dr. Petilon assigned restrictions only for the accepted left knee conditions, but did not consider whether restrictions were necessary for a psychiatric condition. OWCP found that the weight of the medical opinion evidence was afforded to Dr. Petilon. However, as Dr. Petilon's opinion failed to consider her disabling preexisting psychiatric condition, his report was insufficient for OWCP to base its suitability determination.

As previously noted, the Board has held that all conditions, whether work related or not, must be considered in assessing the suitability of an offered position.[14] The Board finds that OWCP failed to consider whether appellant's previously diagnosed adjustment disorder with anxiety affected her ability to perform the duties of the modified mail handler position.

The Board has 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.[15] As a penalty provision, section 8106(c)(2) must be narrowly construed.[16] In this case the medical evidence was not clear on the issue as it was deficient in considering appellant's preexisting mental health conditions. OWCP did not secure a medical report that reviewed the job offer and provided a reasoned opinion as to its suitability for appellant, considering all existing and relevant conditions. The Board finds that it has not met its burden of proof and thus erroneously terminated her compensation entitlement under section 8106(c)(2).[17]

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 May 2, 2018, under 5 U.S.C. § 8106(c)(2) for refusing an offer of suitable work.

[14] *Id.*; *see also S.Y.*, Docket No. 17-1032 (issued November 21, 2017).

[15] *S.Y., id.*; *Annette Quimby*, 49 ECAB 304 (1998).

[16] *S.Y., id.*; *Stephen A. Pasquale*, 57 ECAB 396 (2006).

[17] *See D.C.*, Docket No. 12-0459 (issued August 10, 2012) (where the Board held that OWCP did not meet its burden of proof to terminate the employee's compensation because it failed to establish that the offered position was suitable due to his preexisting post-traumatic stress disorder condition).

ORDER

IT IS HEREBY ORDERED THAT the November 28, 2018 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 6, 2020
Washington, DC

Christopher J. Godfrey, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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