

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

C.M., Appellant)	
)	
and)	Docket No. 19-1160
)	Issued: January 10, 2020
U.S. POSTAL SERVICE, FOREST HILL POST)	
OFFICE, Richmond, VA, Employer)	
)	

Appearances:
Appellant, pro se
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 April 29, 2019 appellant filed a timely appeal from January 16 and April 22, 2019 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the April 22, 2019 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 January 16, 2019, due to her refusal of an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On August 4, 2008 appellant, then a 39-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date she injured her back when she backed her postal vehicle into a parked car as she fought off a bee that had entered her vehicle while in the performance of duty. On the reverse side of the claim form, the employing establishment indicated that she stopped work on the date of injury. By decision dated August 14, 2008, OWCP accepted appellant's claim for sprain of back, lumbar region. It initially paid her intermittent wage-loss compensation on the supplemental rolls and then paid wage-loss compensation on the periodic rolls effective August 24, 2014.

In a work capacity evaluation (Form OWCP-5c) dated April 8, 2016, received by OWCP on May 27, 2016, Dr. Charles Vokac, a physical medicine and rehabilitation specialist, noted some of appellant's physical restrictions, and indicated that he would determine further restrictions after completion of a scheduled functional capacity evaluation (FCE).

In a report dated May 2, 2016, Amanda Gallagher, a physical therapist, indicated that she had administered appellant's FCE. She indicated that appellant demonstrated tolerance to a light physical demand level with the potential need for some restrictions on certain activities, and that appellant would not be able to return to her preinjury city carrier position without multiple accommodations. Ms. Gallagher recommended an alternative sedentary position with restrictions including standing for five minutes after every hour of continuous sitting, sitting for five minutes after standing for more than two hours, no frequent below waist work, no frequent walking or climbing stairs, and no frequent lifting or carrying greater than five pounds.

In a letter dated May 25, 2016, OWCP advised the employing establishment that the weight of the medical evidence rested with Dr. Vokac's April 8, 2016 Form OWCP-5c, and requested that the employing establishment offer appellant a job within his restrictions.

On December 24, 2016 the employing establishment offered appellant a modified assignment as a collections and carrier assistant. The duties of the modified assignment included pulling collections boxes, scanning barcodes, prepping mail for trucks for three to four hours, and casing route mail for delivery, delivering express mail, answering telephones, and scheduling appointments for one to two hours.

In a letter dated January 3, 2017, appellant declined the employing establishment's modified job offer, contending that it did not fit within the restrictions set forth in the May 2, 2016 FCE.

On January 24, 2017 the employing establishment offered appellant a position as a modified city carrier. The duties included performing collection route for up six hours per day,

delivering Express Mail as instructed with restrictions for up to three hours per day, and answering telephones, and scheduling appointments for one to two hours per day. The physical requirements of this position included driving for up to five hours per day, and lifting no more than 20 pounds, walking, bending, stooping, and kneeling for up to one hour per day each.

On January 27, 2017 appellant refused the January 24, 2017 modified job offer because it exceeded her medical restrictions.

In a letter dated March 1, 2017, OWCP requested a periodic medical report from appellant's treating physician, and provided a list of questions for completion.

In response to OWCP's March 1, 2017 letter, on March 15, 2017 Dr. Vokac indicated that, based on the FCE dated May 6, 2016, appellant was to follow light-duty restrictions, with no lifting over 20 pounds. He diagnosed lumbar disc herniation and noted that her conditions could cause chronic symptoms.

In a Form OWCP-5c dated August 3, 2017, Dr. Vokac indicated that appellant was not able to perform her usual job without restrictions due to her lumbar disc herniation. He noted that she was able to work for eight hours per workday with restrictions, at the sedentary and light strength levels. Dr. Vokac noted physical limitations which included: pushing up to 2 pounds, 1/3 of the day; pulling up to 2 pounds, 1/3 of the day; lifting up to 25 pounds, 1/3 of the day; and squatting, kneeling and climbing up to 28 steps, each 1/3 of the day. He also noted that appellant could walk 10 minutes continuously and intermittently up to 20 to 30 minutes. Dr. Vokac indicated that she would require 15-minute breaks every hour.

On August 8, 2017 OWCP offered appellant a modified city carrier position. The duties of the modified assignment included answering telephones for three hours a day, scheduling passport appointments for two hours a day, and assisting customers with package pick up and certified mail each for about three hours per day. It noted that the physical requirements of this modified assignment included sitting for three hours intermittently, standing and walking each for two hours intermittently, and occasional lifting of no more than 10 pounds. The job offer also noted that appellant could stand briefly, less than five minutes, after every hour of continuous sitting; and appellant could sit briefly, less than five minutes, after standing for more than two hours.

On August 19, 2017 appellant refused the August 8, 2017 modified job offer alleging it exceeded her restrictions.

In a letter dated October 4, 2017, OWCP notified appellant that the August 8, 2017 offered position was suitable in accordance with her medical limitations and afforded her 30 days to accept the position without penalty. It advised her that employees who refused an offer of suitable work were not entitled to wage-loss or schedule award compensation.

On October 11, 2017 appellant submitted a letter dated October 10, 2017 contending that the offer of modified assignment was outside the physical restrictions furnished by Dr. Vokac in his August 3, 2017 Form OWCP-5c. She argued that the requirements of the modified job offer would exceed the sitting and walking restrictions.

In a report dated October 13, 2017, Dr. Vokac reviewed appellant's work restrictions and performed a physical examination. He diagnosed lumbar disc herniation, and noted that her work restrictions are restrictive enough that she was essentially unemployable. Dr. Vokac indicated that appellant could only stand for 20 minutes at a time and walk for 10 minutes at a time.

On April 18, 2018 OWCP referred appellant to Dr. David Sokolow, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated May 8, 2018, Dr. Sokolow reviewed the statement of accepted facts and medical record. He diagnosed lumbosacral strain with significant radicular symptoms. Dr. Sokolow related that appellant's employment-related condition had not yet resolved. He indicated that she was incompletely rehabilitated from her original musculoligamentous injury and had severe associated deconditioning and stiffness secondary to chronic pain. Dr. Sokolow noted that appellant should return to work with restrictions. He completed a Form OWCP-5c in which he indicated that she was capable of performing duties within the sedentary and light physical strength levels. Dr. Sokolow also related physical restrictions indicating that appellant could sit for 1 hour, twice per shift, walk 20 to 30 minutes, stand for ½ hour, and that she would require a 15-minute break every hour.

In a letter dated June 11, 2018, OWCP advised the employing establishment that the weight of the medical evidence rested with Dr. Sokolow's May 8, 2018 second opinion examination report, and requested that it offer appellant a job within the restrictions outlined by Dr. Sokolow.

In a letter dated July 24, 2018, the employing establishment notified OWCP that appellant retired from federal service on July 13, 2018. It informed OWCP that the August 8, 2017 job offer was still available.

In a letter dated December 12, 2018, OWCP advised appellant that it did not find her refusal of the modified job offer to be valid. It provided her an additional 15 days to accept the position or her wage-loss and schedule award compensation would be terminated. No response was received.

By decision dated January 16, 2019, OWCP terminated appellant's wage-loss compensation and entitlement to schedule award benefits, effective January 16, 2019, because she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

On January 22, 2019 appellant requested reconsideration of OWCP's January 16, 2019 decision.

In a report dated January 22, 2019, Dr. Vokac reiterated that appellant's work restrictions, as outlined by FCE dated August 3, 2017, were restrictive enough that she was essentially unemployable.

By decision dated April 22, 2019, OWCP denied modification of its January 16, 2019 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of 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 and must inform appellant of the consequences of refusal to accept such employment.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

In determining what constitutes suitable work for a particular disabled employee, OWCP considers the employee's current physical limitations, whether the work was available within the employee's demonstrated commuting area, the employee's qualifications to perform such work, and other relevant factors.⁷ The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by medical evidence. All impairments, whether work related or not, must be considered in assessing the suitability of an offered position.⁸

ANALYSIS

The Board finds that OWCP did not meet its burden of proof to terminate appellant's entitlement to wage-loss compensation and schedule award benefits, effective January 16, 2019, due to her refusal of an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

OWCP did not establish that appellant was capable of performing the modified city carrier position offered by the employing establishment on August 8, 2017. The offered position required answering telephones for three hours, scheduling passport appointments for two hours, and assisting customers with pack pick up, certified mail, *etc.* for three hours a day. The physical requirements of this modified assignment required three hours of sitting intermittently, two hours of standing intermittently, two hours of walking intermittently, and lifting up to 10 pounds. The offer also indicated that appellant could stand briefly, less than five minutes after every hour of continuous sitting, and sit briefly, less than five minutes, after standing for more than two hours. Since Dr. Sokolow reported that she could sit for one hour at a time, with a 15-minute break every

³ *S.D.*, Docket No. 18-1641 (issued April 12, 2019); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

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

⁵ *S.D.*, *supra* note 3; *Ronald M. Jones*, 52 ECAB 406 (2003).

⁶ *S.D.*, *supra* note 3; *Joan F. Burke*, 54 ECAB 406 (2003); *see Robert Dickerson*, 46 ECAB 1002 (1995).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(c) (June 2013); *see Lorraine C. Hall*, 51 ECAB 477 (2000).

⁸ *L.L.*, Docket No. 17-1247 (issued April 12, 2018); *J.J.*, Docket No. 17-0410 (issued June 20, 2017); *Gayle Harris*, 52 ECAB 319 (2001).

hour, walk between 20 to 30 minutes and stand for 1/2 hour at a time, OWCP has not established that she could perform the duties of the position, which on their face, appear to require additional concentrated periods of standing and walking, and less break time than allowed by his restrictions. The Board finds that, given the significant restrictions he placed on appellant's ability to sit, stand and walk, he did not provide a clear opinion that she could work as a modified city carrier. The Board has held that a medical report is of limited probative value on a given medical matter if it does not contain a clear opinion on that matter.⁹ The Board further notes that Dr. Vokac related on August 3, 2017 that appellant could only walk for 10 minutes continuously and intermittently up to 20 to 30 minutes, with 15-minute breaks every hour.

For these reasons, OWCP has not established that the modified city carrier position offered by the employing establishment in August 2017 was suitable. Therefore, the Board finds that OWCP improperly terminated appellant's entitlement to wage-loss and schedule award compensation, effective January 16, 2019, because she refused the offer of suitable work.¹⁰

CONCLUSION

The Board finds that OWCP improperly terminated appellant's wage-loss compensation and entitlement to schedule award benefits, effective January 16, 2019, due to her refusal of an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

⁹ *L.H.*, Docket No. 17-1930 (issued July 26, 2019); see *Charles H. Tomaszewski*, 39 ECAB 461 (1988).

¹⁰ See *L.H.*, *id.*

ORDER

IT IS HEREBY ORDERED THAT the April 22 and January 16, 2019 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: January 10, 2020
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