United States Department of Labor
Employees' Compensation Appeals Board

J.S., Appellant	)	
and	)	**Docket No. 19-1399**
	)	**Issued: May 1, 2020**
DEPARTMENT OF VETERANS AFFAIRS, PALO ALTO HEALTHCARE SYSTEM, Palo Alto, CA, 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
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 13, 2019 appellant, through counsel, filed a timely appeal from an April 3, 2019 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.

[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.*

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 August 9, 2018, because she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On October 26, 2015 appellant, then a 30-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that on October 22, 2015 she injured her right knee when she reached down to pick something up while in the performance of duty. On the reverse side of the claim form, the employing establishment noted that appellant stopped work on the date of injury.

On December 2, 2015 OWCP accepted appellant's claim for dislocation of the patella, right knee. Appellant received continuation of pay from October 23 through December 6, 2015.

On March 18 and May 13, 2016 appellant underwent authorized right knee manipulation under anesthesia and intraarticular injection. She also underwent authorized right knee arthroscopic lateral release and medial patellofemoral ligament reconstruction on July 5, 2016.

On September 13, 2017 OWCP expanded the acceptance of appellant's claim to include recurrent dislocation of the patella, unspecified subluxation, and anklyosis of the right knee.

On September 25, 2017 OWCP referred appellant for a second opinion evaluation with Dr. Bruce R. Huffer, a Board-certified orthopedic surgeon, for a report of the status of her accepted employment injuries and work capacity.

In an October 16, 2017 medical report, Dr. Huffer discussed appellant's factual and medical history and detailed the findings of his physical examination. He advised that appellant continued to have residuals of her accepted October 22, 2015 work injury. Dr. Huffer, however, advised that she could return to work with restrictions that included: walking and standing no more than 20 minutes; lifting, pushing, and pulling no more than 10 pounds; and no squatting or kneeling. He noted that appellant could participate in vocational rehabilitation. In an October 17, 2017 work capacity evaluation (Form OWCP-5c), Dr. Huffer indicated that she could not perform her usual job, but she could work eight hours a day with the same restrictions set forth in his October 16, 2017 report.

On November 22, 2017 appellant began participating in an OWCP-sponsored vocational rehabilitation program designed to return her to work.

On May 22, 2018 the employing establishment offered appellant a permanent full-time modified nursing assistant position in the Nursing Rehabilitation Service, based on the temporary work restrictions provided by Dr. Huffer.

On May 24 and June 11, 2018 appellant's vocational rehabilitation counselor determined that the modified nursing assistant position offered by the employing establishment appeared to accommodate appellant's current work limitations. The vocational rehabilitation counselor indicated, however, that appellant was going to reject the job offer since she was close to finishing

her formal licensed vocational nursing (LVN) training by the end of July 2018 and thereafter hoped to obtain her license within one month.

A memorandum of telephone call (Form CA-110) dated June 22, 2018 noted that the employing establishment informed OWCP that the offered modified nursing assistant position was still available. Also, in a letter dated June 22, 2018, OWCP advised appellant of its determination that the modified nursing assistant position offered by the employing establishment was suitable and in accordance with her medical limitations provided by Dr. Huffer in his October 16, 2017 report. It advised her that her wage-loss compensation and entitlement to a schedule award would be terminated if she did not accept the modified nursing assistant position or provide good cause for not doing so within 30 days.

In a letter dated July 5, 2018, appellant, through counsel, explained that she rejected the job offer because her professional license was no longer active since she had not been working. She maintained that she could not return to work unless her license was renewed.[3]

OWCP, in a July 25, 2018 letter, advised appellant that her reasons for refusing to accept the modified nursing assistant position were unjustified. It advised her that her wage-loss compensation and entitlement to a schedule award would be terminated if she did not accept the position and report to the position within 15 days of the date of the letter.

In a Form CA-110 dated July 24, 2018, the employing establishment informed OWCP that appellant had rejected the modified nursing assistant position. Additionally, OWCP noted in a Form CA-110 dated August 8, 2018 that it had confirmed with a manager that a license was not required for the offered position, which remained available.

By decision dated August 9, 2018, OWCP terminated appellant's wage-loss compensation and entitlement to schedule award benefits, effective that date, because she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2). It determined that the weight of the medical evidence rested with the October 16, 2017 report of Dr. Huffer. OWCP advised that this decision did not terminate her medical benefits.

In an August 13, 2018 e-mail to the employing establishment, appellant noted that during an August 7, 2018 telephone conversation she informed the employing establishment that she did not know where to report for the suitable job offer. She also noted that she had been informed that she had refused the job offer and, thus, the job was no longer available. Appellant expressed her enthusiasm to return to work.

On August 17, 2018 counsel, on behalf of appellant, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review regarding the August 9, 2018 decision. Subsequently, in an October 2018 letter, he requested that OWCP take immediate action as appellant had returned to work based on the suitability determination, but was told by the employing establishment that no work was available within her restrictions. Counsel maintained

[3] In an August 9, 2018 letter, appellant's vocational rehabilitation counselor informed OWCP that appellant completed her LVN training on July 20, 2018 and that she was scheduled to take the LVN license examination on August 22, 2018.

that she was told that she could not work unless she was released to work without restrictions. He contended that, if the employing establishment had failed to provide work to appellant after her return to work, then she was entitled to immediate compensation.

In an October 11, 2018 e-mail, appellant informed the employing establishment that she wished to return to her former certified nursing assistant position while she waited for employment as an LVN.

By decision dated April 3, 2019, an OWCP hearing representative affirmed OWCP's August 9, 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.[4] 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.[5]

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.[6] Section 8106(c) of FECA (5 U.S.C. § 8106(c)(2)), 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.[7]

Section 10.517(a) of FECA's implementing regulations provide 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.[8] 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.[9]

[4] *See R.P.*, Docket No. 17-1133 (issued January 18, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

[5] 5 U.S.C. § 8106(c)(2).

[6] *R.A.*, Docket No. 19-0065 (issued May 14, 2019); *Ronald M. Jones*, 52 ECAB 190 (2000); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.4 (June 2013).

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

[8] 20 C.F.R. § 10.517(a).

[9] *Id.* at § 10.516.

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, effective August 9, 2018, because she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

In support of her refusal to accept the offered position within 30 days of June 22, 2018, the date that OWCP advised appellant that she had 30 days to accept the offered position or provide justification for not accepting it, she contended that since she was not working she no longer had the necessary license to perform the position. OWCP then gave her an additional 15 days to accept and report to the offered position. Subsequently, on August 8, 2018 the employing establishment informed OWCP that it had confirmed that a license was not required for the offered position and the position remained available. They did not, however, afford appellant an opportunity to accept and return to the position after determining it to be a suitable offer of employment. Instead, on the next day, by decision dated August 9, 2018, OWCP terminated her wage-loss compensation and entitlement to schedule award benefits, effective that date, because she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2). OWCP's hearing representative, by decision dated April 3, 2019, affirmed the termination of appellant's compensation benefits. The Board finds that OWCP prematurely invoked the penalty provision of 5 U.S.C. § 8106(c)(2), due to the defect noted above, and thereby failed to discharge its burden of proof to support the termination of her compensation benefits.[10] Accordingly, the termination of appellant's compensation benefits effective August 9, 2018 is reversed.

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 August 9, 2018, because she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

[10] *See generally, Manolo U. Meja*, Docket No. 00-0759 (issued September 19, 2001).

ORDER

IT IS HEREBY ORDERED THAT the April 3, 2019 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 1, 2020
Washington, DC

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

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

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