United States Department of Labor
Employees' Compensation Appeals Board

E.L., Appellant	)	
and	)	**Docket No. 20-0944**
	)	**Issued: August 30, 2021**
U.S. POSTAL SERVICE, LOGISTICS DISTRIBUTION CENTER, Kearny, NJ, Employer	)	

Appearances:
Stephen Larkin, for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 29, 2020 appellant, through her representative, filed a timely appeal from a February 7, 2020 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 to consider 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 February 7, 2020 decision, appellant submitted additional evidence to OWCP. 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 met its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award compensation, effective February 5, 2019, as she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On January 9, 2014 appellant, then a 51-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that on that date she sustained a low back strain when she bent and reached for a piece of mail while in the performance of duty. She stopped work on that date.[4]

Dr. Mark A.P. Filippone, a Board-certified physiatrist, provided reports dated from January 10 through February 10, 2014 holding appellant off from work. He prescribed physical therapy.

By decision dated March 10, 2014, OWCP accepted appellant's claim for lumbar sprain and lumbosacral radiculitis. It paid her wage-loss compensation on the supplemental rolls on February 24, 2014. Appellant remained on the supplemental rolls through August 23, 2014.

Dr. Filippone submitted periodic reports dated March 10, 2014 through May 23, 2018 holding appellant off work due to lumbosacral radiculitis and L5 radiculopathy causally related to the accepted January 9, 2014 employment injury.[5] He prescribed physical therapy.

On July 30, 2018 OWCP referred appellant, along with a statement of accepted facts (SOAF), a copy of the case record, and a series of questions to Dr. Howard M. Pecker, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding the status of the January 9, 2014 employment injury and ability to work. In an August 20, 2018 report, Dr. Pecker noted his review of the SOAF and appellant's accepted lumbar spine condition. Upon physical examination, he observed limited lumbar flexion and extension, tenderness to palpation of the lower lumbar region, normal strength and sensation of the bilateral lower extremities, and some collapsing weakness in right hallux extension. Dr. Pecker diagnosed degenerative lumbar disc disease with spondylolisthesis due to idiopathic degenerative changes unrelated to the January 9, 2014 employment injury. He opined that appellant had reached maximum medical improvement. Dr. Pecker found appellant able to perform full-time modified work at the sedentary physical demand level, with lifting limited to up to 10 pounds occasionally and no repetitive lifting, pushing or pulling. On August 20, 2018 he completed a work capacity evaluation (Form OWCP-5c) with permanent restrictions limiting pushing, pulling, and lifting to 10 pounds.

[4] January 9, 2014 lumbar x-rays demonstrated degenerative disc disease and a first-degree spondylolisthesis at L4-5.

[5] A June 23, 2014 electromyography and nerve conduction velocity study of the lower extremities demonstrated a right L3-4 and L5-S1 lumbosacral radiculopathy. A May 2, 2016 lumbar magnetic resonance imaging scan demonstrated grade 1, L4 on L5 spondylolisthesis with a broad-based left paracentral disc herniation and posterior annular tear at L4-5 and bilateral facet arthropathy at L4-5 contributing to bilateral neural foraminal stenosis and mild central stenosis.

Dr. Filippone submitted reports dated from August 15 through October 12, 2018, finding that appellant remained totally disabled from work due to lumbosacral radiculopathy. He indicated that appellant's condition had remained unchanged since January 10, 2014.

On November 27, 2018 the employing establishment offered appellant a limited-duty position based on the restrictions of Dr. Pecker as a modified parcel post distribution machine clerk. Duties of the assignment included keying for eight hours. Physical requirements included sitting for up to eight hours a day, pushing, pulling, and lifting up to 10 pounds for up to eight hours a day, and occasional standing and walking.

On November 30, 2018 appellant refused the limited-duty position of a parcel post distribution machine clerk. She explained that she would "not accept or refuse the modified assignment" due to the accepted injury and her health condition.

On December 3, 2018 the employing establishment requested that OWCP review appellant's modified job offer, which it asserted was based on Dr. Pecker's August 20, 2018 permanent restrictions. It noted that she had refused the offer.

In a December 17, 2018 letter, OWCP advised appellant that it confirmed with the employing establishment that the offered position remained available. It explained that the modified parcel post distribution machine clerk position was suitable and in accordance with the restrictions set forth in Dr. Pecker's August 20, 2018 report and permanent restrictions. OWCP indicated that the case would be held open for 30 days for evaluation of the evidence. It further advised appellant that, if she failed to accept the position or provide adequate reasons for refusing the job offer, her right to compensation would be terminated pursuant to 5 U.S.C. § 8106(c)(2).

OWCP subsequently received a December 5, 2018 physical therapy prescription and attending physician's report (Form CA-20) from Dr. Filippone, physical therapy reports dated from January through April 2019, and copies of reports previously of record.

On January 30, 2019 the employing establishment informed OWCP that appellant had not returned to work and the offered position remained open and available.

By decision dated February 4, 2019, OWCP terminated appellant's wage-loss compensation benefits and entitlement to schedule award, effective February 5, 2019, pursuant to 5 U.S.C. § 8106(c)(2), as she had refused an offer of suitable work. It found that the offered position was within the restrictions set forth by Dr. Pecker in his August 20, 2018 report. OWCP noted that appellant did not respond to the December 17, 2018 notice.

On February 12, 2019 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held on June 3, 2019. During the hearing, he contended that the offered position, in her opinion, required continuous standing and walking on a concrete floor for two to three hours, and not occasional brief periods of walking as noted in the job offer. Counsel asserted that continuous walking and standing exceeded the sedentary demand level restrictions provided by Dr. Pecker.

OWCP received physical therapy and acupuncture treatment notes dated from February 6, through June 27, 2019, and reports from Dr. Filippone dated from April 22 through June 17, 2019 finding appellant disabled from work due to lumbosacral radiculopathy.

By decision dated July 22, 2019, the hearing representative affirmed OWCP's February 4, 2019 decision.

On November 13, 2019 appellant, through counsel, requested reconsideration. Counsel contended that the offered position required continuous walking exceeding the restrictions provided by Dr. Pecker.

Appellant submitted reports dated from August 13, 2019 through January 13, 2020 by Dr. Thomas P. Ragukonis, a Board-certified anesthesiologist, who opined that the January 9, 2014 employment injury permanently aggravated preexisting degenerative disc disease at L4-5, caused an annular tear at L4-5, and nerve root compromise at L2-3, L3-4, L4-5, and L5-S1 due to multilevel segmental dysfunction. Dr. Ragukonis noted work limitations against heavy lifting and prolonged sitting.

By decision dated February 7, 2020, OWCP denied modification of its July 22, 2019 decision.

LEGAL PRECEDENT

Under FECA,[6] once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of compensation benefits.[7] 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.[8]

Section 10.517 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 proof to show that such refusal or failure to work was reasonable or justified.[9] Pursuant to section 10.516, the employee shall be provided with the opportunity to make such showing before a determination is made with respect to termination of entitlement to compensation.[10]

To justify termination of compensation, OWCP must show that the work offered was suitable, that appellant was informed of the consequences of his or her refusal to accept such employment, and that he or she was allowed a reasonable period to accept or reject the position and submit evidence or provide reasons why the position is not suitable.[11] Section 8106(c)(2) will

[6] *Supra* note 2.

[7] *D.M.*, Docket No. 19-0686 (issued November 13, 2019); *L.L.*, Docket No. 17-1247 (issued April 12, 2018); *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[8] 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).

[9] 20 C.F.R. § 10.517(a).

[10] *Id*. at § 10.516; *see Ronald M. Jones*, 52 ECAB 406 (2003).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.4 (June 2013). *See also R.A.*, Docket No. 19-0065 (issued May 14, 2019).

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.[12]

Section 8123(a) of FECA which provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.[13] This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[14] When there exists opposing reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[15]

ANALYSIS

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation benefits and entitlement to a schedule award, effective February 5, 2019.

OWCP accepted appellant's January 9, 2014 traumatic injury claim for lumbar sprain and lumbosacral radiculitis. It authorized wage-loss compensation benefits beginning February 14, 2014.

Appellant provided a series of reports from Dr. Filippone dated from February 10, 2014 through September 25, 2019, finding her totally disabled from work due to lumbosacral radiculitis and L5 radiculopathy.

OWCP referred appellant for a second opinion evaluation with Dr. Pecker, and in his August 20, 2018 report, he opined that her ongoing lumbar condition was not related to the January 9, 2014 employment injury. He returned appellant to full-time sedentary duty, with lifting limited to 10 pounds.

Appellant's treating physician and OWCP's second opinion physician disagreed regarding his findings on physical examination and on her ability to return to full-time modified-duty work. As such, the Board finds that a conflict of medical opinion exists relative to this issue. OWCP should have resolved the conflict of medical opinion evidence before terminating compensation.[16] As it failed to resolve the conflict of medical opinion evidence, the Board finds that it failed to meet its burden of proof to terminate appellant's wage-loss compensation and entitlement to a

[12] *C.M.*, Docket No. 19-1160 (issued January 10, 2020); *see also Joan F. Burke*, 54 ECAB 406 (2003).

[13] 5 U.S.C. § 8123(a); *A.E.*, Docket No. 18-0891 (issued January 22, 2019); *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009); *M.S.*, 58 ECAB 328 (2007).

[14] 20 C.F.R. § 10.321; *I.L.*, Docket No. 18-1399 (issued April 1, 2019); *R.C.*, 58 ECAB 238 (2006).

[15] *V.S.*, Docket No. 19-1792 (issued August 4, 2020); *A.E.*, *supra* note13; *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[16] *K.L.*, Docket No. 19-0729 (issued November 6, 2019); *P.P.*, Docket No. 17-0023 (issued June 4, 2018).

schedule award, effective February 5, 2019, for refusal of an offer of suitable work under 5 U.S.C. § 8106(c)(2).

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective February 5, 2019.

ORDER

IT IS HEREBY ORDERED THAT the February 7, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 30, 2021
Washington, DC

Alec J. Koromilas, 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