United States Department of Labor
Employees' Compensation Appeals Board

C.M., Appellant	)	
and	)	**Docket No. 19-1896**
	)	**Issued: January 27, 2021**
DEPARTMENT OF VETERANS AFFAIRS, CLEMENT J. ZABLOCKI VETERANS AFFAIRS MEDICAL CENTER, Milwaukee, WI, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 14, 2019 appellant filed a timely appeal from April 24 and July 9, 2019 merit decisions and a September 10, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's wage-loss and compensation and entitlement to a schedule award effective April 4, 2018 because she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2); and (2) OWCP properly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 6, 2010 appellant, then a 47-year-old former licensed practical nurse, filed a traumatic injury claim (Form CA-1) alleging that on February 10, 2010 she experienced panic attacks and nightmares while in the performance of duty. She related that a patient had grabbed her, pulled her into a room, and made sexual references. Appellant indicated that she had a past history of sexual trauma while serving in the military, and that this event "triggered panic attacks and nightmares." She stopped work on February 11, 2010. Appellant resigned from employment effective March 24, 2010. OWCP accepted the claim for an aggravation of depression and an aggravation of post-traumatic stress disorder (PTSD).[2] It paid appellant wage-loss compensation on the supplemental rolls beginning March 10, 2010 and on the periodic rolls effective February 8, 2015.

On January 27, 2016 OWCP referred appellant to Dr. Ilva Van Valkenburgh, a Board-certified psychiatrist, for a second opinion examination.[3]

In a report dated February 11, 2016, Dr. Van Valkenburgh recounted appellant's history of an employment injury on February 11, 2010. She opined that appellant had continued symptoms of the aggravation of PTSD and depression based on her ongoing symptoms. Dr. Valkenburgh found that appellant's condition had been inadequately treated and that the failure of the employing establishment to rehire appellant in a modified capacity had contributed to her feeling worthless. She noted that appellant had a relapse into alcohol abuse following the February 11, 2010 employment injury after 10 years of sobriety. Dr. Van Valkenburgh related, "Despite [appellant's] frequent relapses, I would consider this to be a temporary aggravation due to [appellant's] poorly treated emotional conditions, and would expect her to achieve complete sobriety once her PTSD and depressive symptoms are better controlled." She opined that appellant had continued symptoms of "work[-]related disability" but that it was "possible for appellant's condition to improve with more aggressive treatment, and that would enable her to resume gainful employment as an LPN [licensed practical nurse] at the [employing establishment] with the only permanent restriction being that she never gets placed to work on a psychiatric unit."

On September 28, 2016 Dr. Susan Powers, a Board-certified psychiatrist, advised that she had been treating appellant for acute PTSD resulting from a work injury that had aggravated preexisting chronic PTSD resulting from an assault in the military. She opined, "This acute

[2] By decision dated May 21, 2010, OWCP denied appellant's traumatic injury claim. It found that she had failed to factually establish that the event occurred as alleged. By decision dated June 17, 2011, OWCP denied modification of the May 21, 2010 decision. By decision dated September 26, 2011, it vacated its May 21, 2010 decision and accepted the claim for an aggravation of PTSD and an aggravation of depression. In a separate decision of even date, OWCP found that appellant was not entitled to continuation of pay as the injury had not been reported on an approved form within 30 days.

[3] In a May 20, 2015 report, Dr. Edgar B. Jackson, a Board-certified psychiatrist and OWCP referral physician, advised that appellant's traumatic injury had "caused stimulation to the amygdala which eventuated in the current PTSD. However, the effects of stimulation were increased by the previous trauma which had remained on an unconscious level. As a result, the final PTSD condition is the total of the effect of the first and second injuries." Dr. Jackson opined that appellant would not return to baseline and should not work in the environment where she had experienced the trauma. He found that she could work in a nonpsychiatric unit.

exacerbation of [appellant's] PTSD, caused by her work-related trauma, is currently resolved. Dr. Powers is stable and doing very well, responding to her current psychiatric medication, with no current symptoms of depression and acute PTSD at this time…." She advised that appellant could work up to 20 hours per week without restrictions.

An electromyogram dated November 16, 2016 showed "bilateral distal median neuropathies at the wrists such as may be seen in carpal tunnel syndrome."

On March 12, 2017 appellant contended that she had sustained carpal tunnel syndrome due to her February 11, 2010 employment injury. She advised that her depression and PTSD caused her to rub her fingers against her clothing. Appellant also noted that she had incurred dental expense from grinding her teeth.

On September 6, 2017 the employing establishment offered appellant a modified position as a health technician (home health aide). It noted that her physician had found that she could work up to 20 hours per week without restrictions. The employing establishment indicated that appellant would have a tour schedule of either 3:00 p.m. to 11:30 p.m. or 2:00 p.m. to 10:30 p.m. with rotation.

By letter dated September 7, 2017, OWCP advised appellant that it had determined that the offered position was suitable, pursuant to 5 U.S.C. § 8106 (c)(2), and afforded her 30 days to accept the position or provide reasons for his refusal. It informed her that an employee who refused an offer of suitable work without cause was not entitled to wage-loss or schedule award compensation. OWCP further notified appellant that she would receive any difference in pay between the offered position and the current pay rate of the position held at the time of injury.

In a September 7, 2017 letter to the employing establishment, appellant maintained that she should have been returned to work earlier and questioned why the salary offered was less than she was making previously.

On September 14, 2017 appellant declined the offered position, asserting that she was unable to currently work.

On September 18 and October 10, 2017 the employing establishment advised OWCP that the offered position remained available.

In a report dated October 3, 2017, Dr. Maribeth Sadie, a psychologist, diagnosed employment-related PTSD with continued symptoms. She found that appellant had not recovered and that appellant occasionally had scattered thoughts and difficulty leaving her house. Dr. Sadie opined that appellant was totally disabled from employment.

In an October 18, 2017 e-mail, the employing establishment advised that it had offered appellant a position in one of its Greenhouses, which was not a mental health facility. It forwarded a July 27, 2017 e-mail from her expressing interesting in applying for a part-time positon as a health technician in one of the Greenhouses.

On November 28, 2017 OWCP again found that the position of health technician was suitable. It informed appellant that an employee who refused an offer of suitable work without

cause was not entitled to wage-loss or schedule award compensation. OWCP further notified her that she would receive any difference in pay between the offered position and the current pay rate of the positon held at the time of injury. It afforded appellant 30 days to accept the position or provide a written explanation for her refusal.

In a December 5, 2017 response, appellant indicated that she had refused the position because she continued to experience depression and was angry about the salary offered and characterized it as tantamount to being discriminatory.

By letter dated January 19, 2018, OWCP notified appellant that her reasons for refusing the position were not valid and provided her 15 days to accept the position or have her entitlement to wage-loss compensation benefits terminated. It advised her that the offered position remained available.

On January 24, 2018 Dr. Patricia Jens, a Board-certified psychiatrist, related that she was treating appellant for PTSD and bipolar affective disorder. She noted that appellant currently received workers' compensation benefits after a February 11, 2010 sexual assault at work. Dr. Jens found that appellant's mood swings had worsened since being offered a part-time position. She related, "No medication combinations have been found yet which provide the clinical stability necessary for [appellant] to return to work even part time." In an office visit note of even date, Dr. Jens noted that appellant had chronic PTSD from sexual trauma while in the military and a subsequent assault while working.

On March 27, 2018 the employing establishment confirmed that the offered position remained available.

By decision dated April 4, 2018, OWCP terminated appellant's wage-loss compensation and entitlement to a schedule award effective April 4, 2018 as she had refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2). It noted that she had not accepted the offered position and resumed work following its 15-day letter. OWCP determined that the opinion of Dr. Powers constituted the weight of the evidence and established that appellant could perform the duties of the offered position.

On April 17, 2018 appellant requested reconsideration.

Thereafter, OWCP received a report dated July 26, 2018 from Dr. Ronald Rubin, a psychiatrist, who diagnosed PTSD and bipolar disorder.[4] Dr. Rubin recommended that appellant receive treatment from providers unaffiliated with the employing establishment. He noted that she had been injured at work on a psychiatric unit and discussed her mental condition before the injury.

On July 27, 2018 appellant contended that Dr. Powers had released appellant to resume work on September 28, 2016 but four days later had referred appellant to a mental health program and indicated that her Global Assessment of Functioning (GAF) score was under 50.

[4] OWCP also received a January 11, 2018 treatment notes from Dr. Jens.

In an August 18, 2018 letter, appellant questioned Dr. Powers' finding that appellant could resume work given that a week later she had found that appellant had a GAF score below 50, which meant that she was disabled from employment. Dr. Powers also contended that appellant had developed an anxiety disorder.

Appellant submitted two September 28, 2016 letters from Dr. Powers finding that appellant could return to part-time employment.

On October 4, 2016 Dr. Powers referred appellant for to a psychosocial rehabilitation program for veterans with "severe mental illness." She diagnosed major depression or bipolar affective disorder and advised that appellant had a GAF score of 50 or lower.

Appellant submitted literature providing an explanation of GAF scores. A GAF score under 50 was applicable for individuals with serious symptoms or serious impairment in social, occupational, or school functioning.

By decision dated December 10, 2018, OWCP denied modification of its April 4, 2018 decision. It noted Dr. Powers had referred appellant to a treatment center and diagnosed major depression or bipolar affective disorder, but had not found a change in work restrictions. OWCP further indicated that bipolar disorder was a preexisting condition.

On January 25, 2019 appellant requested reconsideration. In support of her request for reconsideration, she submitted medical management notes from Dr. Jens dated January 24, 2018. Appellant further submitted an October 3, 2017 report from Dr. Sadie, a psychologist, who diagnosed PTSD from a sexual assault and found that appellant was totally disabled.

In an undated report received by OWCP on January 25, 2019, Dr. Holenarasipura Rajanna, a psychiatrist, diagnosed PTSD and recurrent major depression due to appellant's employment injury. She advised that appellant's employment-related condition had worsened due to inadequate treatment and that appellant was unable to work in an inpatient unit. Dr. Rajanna opined that appellant could work at a desk in a different building from where the incident occurred. She noted that during an inpatient stay appellant had been stabilized with medication.

By decision dated April 24, 2019, OWCP denied modification of its December 10, 2018 decision.

On May 6, 2019 appellant requested reconsideration. She advised that she had contact the employing establishment and that the job offer was for 16 hours one week and 24 hours the following week, which would violate the restrictions set forth by Dr. Powers.

In an e-mail dated June 26, 2019, the employing establishment indicated that it had extended the job offer based on the 20-hour per week restrictions and that it had intended to schedule appellant for two days per week.

By decision dated July 9, 2019, OWCP denied modification of the April 24, 2019 decision.

On September 3, 2019 appellant requested reconsideration. She advised that the offered position was not within her work schedule limitations.

By decision dated September 10, 2019, OWCP denied appellant's request for reconsideration of the merits of her claim, finding that she had not raised an argument or submitted evidence sufficient to warrant reopening her case under 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

Under FECA[5] once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[6] 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.[7]

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.[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]

To justify termination of compensation, it 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 positon and submit evidence or provide reasons why the position is not suitable.[10] Section 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.[11]

ANALYSIS -- ISSUE 1

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss and compensation and entitlement to a schedule award effective April 4, 2018 because she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

OWCP failed to establish that appellant was capable of performing the offered position of modified health technician. 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.[12] In

[5] *Supra* note 1.

[6] *D.M.*, Docket No. 19-0686 (issued November 13, 2019); *T.M.*, Docket No. 18-1368 (issued February 21, 2019).

[7] 5 U.S.C. § 8106(c)(2); *see also M.J.*, Docket No. 18-0799 (issued December 3, 2018).

[8] 20 C.F.R. § 10.517(a).

[9] *Id*. at § 10.516.

[10] 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 M ay 14, 2019).

[11] *C.M.*, Docket No. 19-1160 (issued January 10, 2020); *L.L.*, Docket No. 17-1247 (issued April 12, 2018).

[12] *See R.M.*, Docket No. 19-1236 (issued January 24, 2020).

finding the offered position suitable, OWCP relied upon the September 28, 2016 report of Dr. Powers. Dr. Powers opined that appellant's employment-related acute exacerbation of PTSD had resolved and that appellant was stable, responding to medication, and could work up to 20 hours per week without restriction. However, on October 4, 2016 she advised that appellant had a serious mental illness with a GAF score below 50 and referred her to a treatment program. Dr. Powers diagnosed major depression or bipolar affective disorder. While OWCP noted that bipolar disorder was a preexisting condition, in evaluating the suitability of a particular position, OWCP must consider the employment-related condition as well as preexisting and subsequently-acquired medical conditions.[13] The Board finds that, given the inconsistencies in Dr. Powers' findings on September 28 and October 4, 2016, her opinion is insufficient to support that appellant could work as a modified health technician.

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.[14] As a penalty provision, section 8106(c)(2) must be narrowly construed.[15] OWCP did not secure a medical report that reviewed the job offered and provide a clear, reasoned opinion as to its suitability.[16] Consequently, it has not met its burden of proof.[17]

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss and compensation and entitlement to a schedule award effective April 4, 2018 because she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).[18]

[13] *R.M., id.*; *L.D.*, Docket No. 16-1169 (issued September 20, 2017); *Gayle Harris*, 52 ECAB 319 (2001).

[14] *E.G.*, Docket No. 18-0710 (issued February 12, 2019); *Annette Quimby*, 49 ECAB 304 (1998).

[15] *See D.G.*, Docket No. 16-1492 (issued January 3, 2017); *Stephen A. Pasquale*, 57 ECAB 396 (2006).

[16] *See D.M.*, Docket No. 17-1668 (issued April 9, 2018).

[17] *E.G.*, *supra* note 14.

[18] In view of the Board's disposition of Issue 1, Issue 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the September 10, July 9, and April 24, 2019 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: January 27, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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