United States Department of Labor
Employees' Compensation Appeals Board

I.H., Appellant	)	
and	)	**Docket No. 20-1007**
	)	**Issued: June 15, 2021**
U.S. POSTAL SERVICE, POST OFFICE, Jersey City, NJ, Employer	)	

Appearances:
James D. Muirhead, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 5, 2020 appellant, through counsel, filed a timely appeal from a February 28, 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 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 met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award effective September 15, 2019, as he refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On December 19, 2008 appellant, then a 45-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on December 2, 2008 he sustained an injury to his right arm and hand while pushing a mail cart up a hill while in the performance of duty. He stopped work on December 3, 2008. On April 7, 2011 OWCP accepted the claim for a superior labrum anterior and posterior (SLAP) tear of the right shoulder, and cervical radiculopathy. On September 16, 2014 it accepted the claim for displacement of cervical disc at C5-6 on the left. OWCP paid appellant compensation on the supplemental rolls beginning January 1, 2011 and on the periodic rolls beginning July 31, 2011.

On May 14, 2009 appellant underwent a right shoulder arthroscopic synovectomy and debridement, arthroscopic repair of SLAP lesion, and limited acromioplasty and subacromial bursectomy. On November 11, 2013 he underwent arthroscopic acromioplasty, arthroscopic debridement of partial labral tear, and autologous tissue platelet graft of the right shoulder.

On November 6, 2018 OWCP referred appellant to Dr. William Dinenberg, a Board-certified orthopedic surgeon, for a second opinion examination to determine the extent and degree of appellant's work injury-related residuals, if any.

In a November 30, 2018 report, Dr. Dinenberg noted appellant's history of injury and medical treatment. He related appellant's physical examination findings and opined that appellant could work full time with restrictions. Dr. Dinenberg explained that appellant remained symptomatic regarding the right shoulder secondary to persistent impingement with diminished range of motion and positive impingement sign on the right shoulder and that appellant's accepted right shoulder condition had not resolved. He noted that brachial neuritis was not indicated on the statement of accepted facts and that appellant had subjective complaints of right upper radicular symptomatology not objectively seen on examination. Dr. Dinenberg opined that the displacement of appellant's C5-6 herniated disc had not resolved. He advised that appellant could not return to his full work duties and would need permanent restrictions as a result of his cervical spine and right shoulder conditions. Dr. Dinenberg indicated that appellant could participate in vocational rehabilitation. He completed a work capacity evaluation (Form OWCP-5c) and provided work restrictions to include no reaching above the right shoulder, and pushing, pulling, and lifting limited to no more than three hours and 20 pounds.

In a March 18, 2019 report, Dr. David Lalli, an osteopathic physician Board-certified in orthopedic surgery, noted appellant's history of injury and medical treatment. He examined appellant and diagnosed bicipital tendinitis of the right shoulder, complete rotator cuff tear and rupture of the right shoulder, strain of the muscle tendon and rotator cuff of the right shoulder, and superior glenoid labrum lesion of the right shoulder, subs. Dr. Lalli also completed a duty status

report (Form CA-17), wherein he indicated appellant's work restrictions, including lifting/carrying no more than five pounds continuously and intermittently during an eight-hour day.

On April 1, 2019 the employing establishment offered appellant a part-time flexible carrier position. It listed appellant's medical restrictions as lifting, pushing, and pulling up to three hours per day and up to 20 pounds, and no reaching above the right shoulder. The physical requirements of the position were listed as: sit/stand/walk; simple grasping; fine manipulation; pushing/pulling/ lifting up to 20 pounds; and reaching/driving. OWCP clarified by a memorandum of telephone call (Form CA-110) with the employing establishment that the position was full time, not part time.

On April 8, 2019 appellant refused to sign the modified offer. In a letter dated April 9, 2019, he noted that he had refused the job offer and explained that the only reason he refused the job offer in New Jersey was that he had lived in Florida since 2009. Appellant requested a clerical position in Lougham, Florida.

By letter dated July 9, 2019, the employing establishment requested that OWCP determine whether the offered position was suitable. It noted that a 50-mile search was completed from appellant's place of residence in Florida with a negative outcome.

By letter dated July 18, 2019, OWCP advised appellant of its determination that the full-time city carrier position offered by the employing establishment was suitable based on Dr. Dinenberg's Form OWCP-5c and recommended work restrictions. It noted that appellant's residence in a different geographical location from where the injury occurred was not a valid reason for refusing an offer of suitable employment and that it had confirmed, by letter dated July 9, 2019, that no suitable work was available in his current commuting area. The employing establishment informed appellant that his compensation would be terminated, if he did not accept the position or provide good cause for not doing so within 30 days of the date of the letter.

By letter dated July 26, 2019, counsel argued that it was "difficult to believe that [employing establishments] in Florida within 50 miles of [appellant's home] had no window clerk jobs or light jobs that he could handle."

In a letter dated August 19, 2019, the employing establishment confirmed that the modified permanent assignment offer remained available "indefinitely as long as [appellant] does not have medical which compels a change in restrictions."

By letter dated August 19, 2019, OWCP advised appellant that he had not provided a valid excuse for refusing to accept the offered position. It notified him that he had 15 days to accept the offered position or his entitlement to wage loss and schedule award benefits would be terminated.

In a letter dated August 26, 2019, counsel argued that OWCP did not explain why his legal arguments were invalid and that the burden was on the employing establishment to show that a search was made near appellant's home.

By decision dated September 9, 2019, OWCP terminated appellant's compensation benefits and entitlement to a schedule award effective September 15, 2019, because he refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2). It found that Dr. Dinenberg's

November 30, 2018 report constituted the weight of the medical evidence and established that appellant could perform the duties of the offered modified position. OWCP also related that the employing establishment had confirmed that no suitable work was available within appellant's current commuting area.

On September 16, 2019 counsel requested a telephonic hearing, which was held before a representative of OWCP's Branch of Hearings and Review on January 6, 2020. During the hearing, counsel argued that Dr. Lalli's March 18, 2019 report found that appellant was five foot six, that appellant was unable to reach up above that height, and that this precluded appellant from putting mail in boxes as required in the job description. Counsel argued that the offered job was not within appellant's work restrictions. He also argued that appellant had resided in Florida for the past 10 years, and that he should not have to move to another area, as there were multiple post offices within 50 miles of his Florida residence.

In a letter dated February 3, 2020, L.T., an employing establishment specialist, noted that a search for a position was conducted near appellant's place of residence and attached a copy of a "Priority for Assignment Worksheet" signed on February 11, 2019. L.T. explained that one office wanted to employ appellant within his medical restrictions, however, they did not have a funded vacancy. L.T. indicated that all other offices had a negative response. L.T. also noted that the only hiring in appellant's area was for noncareer employment, with no benefits and no guarantee of 40 hours per week, which excluded appellant's career position.

By decision dated February 28, 2020, OWCP's hearing representative affirmed the September 9, 2019 termination decision, finding that the report of the second opinion physician, Dr. Dinenberg, was entitled to the weight of the medical evidence and that the offered position was suitable based on Dr. Dinenberg's work restrictions. The hearing representative also found that no rationalized conflicting medical evidence was submitted and that the employing establishment properly assessed the availability of positions near appellant's place of residence.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[3] Section 8106(c)(2) of FECA[4] 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, it must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[6] Section 8106(c) will be narrowly construed as it serves as a penalty

[3] *T.M.*, Docket No. 18-1368 (issued February 21, 2019); *Linda D. Guerrero*, 54 ECAB 556 (2003).

[4] *Supra* note 2.

[5] *Id.* at § 8106(c)(2); *see also M.J.*, Docket No. 18-0799 (issued December 3, 2018); *Geraldine Foster*, 54 ECAB 435 (2003).

[6] *J.V.*, Docket No. 17-1944 (issued December 18, 2018); *Ronald M. Jones*, 52 ECAB 190 (2000).

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 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] Section 10.516 of OWCP's regulations provide that it will advise the employee that the work offered is suitable and provide 30 days for the employee to accept the job or present any reasons to counter OWCP's finding of suitability.[9]

Before compensation can be terminated, however, OWCP has the burden of proof to demonstrate that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work, and establishing that a position has been offered within the employee's work restrictions and setting forth the specific job requirements of the position.[10] In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, OWCP has the burden of showing that the work offered to and refused by appellant was suitable.[11]

Once OWCP establishes that the work offered is suitable, the burden of proof shifts to the employee who refuses to work to show that the refusal or failure to work was reasonable or justified.[12] The determination of whether an employee is physically capable of performing a modified assignment is a medical question that must be resolved by medical evidence.[13] OWCP procedures state that acceptable reasons for refusing an offered position include medical evidence of inability to do the work.[14]

ANALYSIS

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, pursuant to 5 U.S.C. § 8106(c)(2), effective September 15, 2019.[15]

[7] *S.B.*, Docket No. 18-0039 (issued October 15, 2018); *Joan F. Burke*, 54 ECAB 406 (2003).

[8] 20 C.F.R. § 10.517(a); *see Ronald M. Jones*, *supra* note 6.

[9] *Id*. at § 10.516.

[10] *M.H.*, Docket No. 17-0210 (issued July 3, 2018).

[11] *J.V. supra* note 6; *Linda Hilton*, 52 ECAB 476 (2001).

[12] 20 C.F.R. § 10.517(a).

[13] *D.M.*, Docket No. 17-1235 (issued February 15, 2018); *Gayle Harris*, 52 ECAB 319 (2001).

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.5(a)(4) (June 2013).

[15] *See E.W.*, Docket No. 19-1711 (issued July 29, 2020); *C.E.*, Docket No. 19-0614 (issued November 1, 2019).

In its February 28, 2020 termination decision, OWCP found that the April 1, 2019 job offer was suitable based on the work restrictions provided by Dr. Dinenberg in his November 30, 2018 report. The Board finds that OWCP improperly relied on Dr. Dinenberg's November 30, 2018 report in determining that the modified position offered by the employing establishment constituted suitable employment.[16]

Dr. Dinenberg indicated that appellant could work with restrictions including no reaching above the right shoulder, and pushing, pulling, and lifting for no more than three hours and 20 pounds. The Board notes that the position offered by the employing establishment listed appellant's medical restrictions as being no reaching above the right shoulder, and lifting, pushing, and pulling three hours per day up to 20 pounds. However, the employing establishment listed the physical requirements of the position to include: sit/stand/walk; simple grasping; fine manipulation; pushing/pulling/lifting up to 20 pounds; and reaching/driving. The employing establishment did not specify what type of reaching appellant would be required to perform as part of the physical requirements of the position. This is important as Dr. Dinenberg indicated that appellant could not reach above the right shoulder. The physical requirements of the position did not specify that no reaching above the shoulder would be required. Thus, the Board finds it is unclear whether the duties described are within appellant's medical restrictions, provided by Dr. Dinenberg.[17] The Board also notes that appellant's treating physician, Dr. Lalli, completed a Form CA-17 on March 18, 2019 wherein he indicated appellant's work restrictions, including lifting/carrying no more than five pounds continuously and intermittently during an eight-hour day. The job offer, however, would require lifting and carrying up to 20 pounds a day. OWCP did not specifically address Dr. Lalli's restrictions.

The Board has held that in order 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.[18] The issue of whether a claimant is able to perform the duties of the offered employment position is a medical one and must be resolved by probative medical evidence. While OWCP found that Dr. Dinenberg's opinion contained sufficient medical rationale to support that appellant could perform the physical duties contained in the offered position,[19] OWCP did not request that he review a job offer, which clearly explained the physical requirements of the offered position, and provide a reasoned opinion as to its suitability for appellant.[20] The medical evidence of record, therefore, fails to establish that the offered position was suitable.

As a penalty provision, section 8106(c)(2) of FECA must be narrowly construed.[21] Based on the evidence of record, the Board finds that OWCP improperly determined that the modified position offered to appellant constituted suitable work within his physical limitations and

[16] *R.A.*, Docket No. 19-0065 (issued May 14, 2019).

[17] *M.E.*, Docket No. 18-0808 (issued December 7, 2018).

[18] *P.P.*, Docket No. 18-1232 (issued April 8, 2019).

[19] *See G.M.*, Docket No. 18-1236 (issued June 18, 2019).

[20] *See S.Y.*, Docket No. 17-1032 (issued November 21, 2017).

[21] *D.H.*, Docket No. 17-1014 (issued October 3, 2017).

capabilities. Consequently, OWCP has not met its burden of proof to justify the termination of his compensation benefits and entitlement to a schedule award.

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 September 15, 2019.

ORDER

IT IS HEREBY ORDERED THAT the February 28, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 15, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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