United States Department of Labor
Employees' Compensation Appeals Board

H.V., Appellant	)	
and	)	**Docket No. 20-0710**
	)	**Issued: May 25, 2021**
U.S. POSTAL SERVICE, MAPLEWOOD POST OFFICE, Maplewood, 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:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 10, 2020 appellant, through counsel, filed a timely appeal from August 22 and November 26, 2019 merit decisions 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 January 25, 2019, as he refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On February 4, 2009 appellant, then a 51-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he developed pain in his left knee due to factors of his federal employment, including stress on his lower body, especially his knees, from his career as a two-ton truck driver and city letter carrier. He noted that he first became aware of his condition on December 24, 2008 and realized its relationship to his federal employment on January 5, 2009. Appellant stopped work on January 17, 2009. OWCP accepted his claim for left knee medial meniscus tear. Appellant underwent OWCP-authorized left knee arthroscopic meniscectomy on May 20, 2009. It paid him wage-loss compensation on the supplemental rolls, effective May 4, 2009, and placed him on the periodic rolls, effective September 27, 2009.

On January 20, 2012 OWCP expanded the acceptance of appellant's claim to include right knee lateral meniscus derangement. On April 11, 2012 appellant underwent OWCP-authorized right knee arthroscopic partial medial and lateral meniscectomy.

On August 23, 2017 OWCP referred appellant, along with a statement of accepted facts (SOAF), a copy of the case record, and a series of questions, to Dr. Timothy Henderson, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding the status of appellant's accepted bilateral knee conditions and ability to work. In a September 7, 2017 report, Dr. Henderson reviewed the SOAF and the medical record. He noted that appellant's claim was accepted for left knee medial meniscus tear and derangement of the lateral meniscus of the right knee. Dr. Henderson recounted appellant's current complaints of severe bilateral knee pain. Upon examination of the left knee, he observed tenderness to palpation over the lateral joint line and mild tenderness to palpation over the medial joint line. Examination of appellant's right knee revealed mild-to-moderate effusion and tenderness to palpation over the medial and lateral joint lines. Dr. Henderson reported positive McMurray's test and negative Lachman's and instability tests for both knees. In response to OWCP's questions, he opined that appellant's accepted conditions were still active and causing objective symptoms. Dr. Henderson also diagnosed permanent precipitation or acceleration of degenerative joint disease of the bilateral knees secondary to the work-related injury. He reported that appellant was unable to perform his date-of-injury job as a letter carrier, but could work full-time, sedentary duty with restrictions. In a work capacity evaluation (Form OWCP-5c), Dr. Henderson opined that appellant had permanent restrictions of sitting, reaching, reaching above the shoulder, twisting, and repetitive wrist and elbow movements for eight hours per day, pushing, pulling, and lifting up to10 pounds for four hours per day, squatting, kneeling, and climbing for two to four hours per day, and walking, standing, bending/stooping and operating a motor vehicle for one hour per day.

On December 13, 2017 the employing establishment offered appellant a modified-city carrier position. The duties required casing and delivering mail for one hour, assisting customers while sitting for one to two hours, and answering telephones for five to six hours. The physical

requirements of the position involved walking, standing, and driving a motor vehicle for one hour, lifting up to 10 pounds for four hours, and sitting and simple grasping for eight hours. The employing establishment also noted that the job offer was permanent and would remain available until medical documentation compelled a change.

In a December 30, 2017 letter, appellant refused the job offer and indicated that he believed that the modified-city carrier position was unsafe.

In a February 28, 2018 letter, OWCP advised the employing establishment that it had reviewed the modified-city carrier position offered on December 13, 2017 and found that it was not suitable. It explained that the job offer did not include all the restrictions provided by Dr. Henderson in his September 7, 2017 second-opinion report. OWCP requested that the employing establishment provide a corrected job offer. The evidence of record does not contain a response by the employing establishment.

By letter dated April 18, 2018, OWCP advised appellant that the position offered on December 13, 2017 was suitable in accordance with the medical limitations provided by Dr. Henderson in his September 7, 2017 report. It notified him that, if he failed to report to work or failed to demonstrate that the failure was justified, pursuant to 5 U.S.C. § 8106(c)(2), his right to compensation for wage loss or a schedule award would be terminated. OWCP afforded appellant 30 days to respond.

Appellant submitted May 19, 2018 bilateral knee x-ray examinations, May 29, 2019 bilateral knee magnetic resonance imaging (MRI) scans and reports dated May 18 and July 3, 2018 by Dr. Richard A. Boiardo, a Board-certified orthopedic surgeon, who recommended additional surgery.

In a May 15, 2018 letter, appellant informed OWCP that he did not report to work because he received a February 20, 2018 letter from OWCP advising him that the modified-job position offered on December 13, 2017 was found not suitable. He also alleged that his bilateral knee condition was worsening.

In a letter dated June 21, 2018, L.P., an employing establishment injury compensation specialist, informed OWCP that appellant had not returned to work and that the limited-duty job offer remained available.

By letter dated August 7, 2018, OWCP notified appellant that his reason for refusing the position was not valid and provided him 15 days to accept the position or have his entitlement to wage-loss compensation benefits terminated. It noted that it had modified its December 13, 2017 job offer after the February 20, 2018 letter. OWCP also advised appellant that the offered position remained available.

Appellant submitted a July 13, 2018 report by Dr. Boiardo, who recounted appellant's complaints of persistent pain and restricted range of motion of both knees. Dr. Boiardo conducted an examination and indicated that appellant was awaiting authorization for surgery.

By decision dated January 24, 2019, OWCP terminated appellant's wage-loss compensation and entitlement to a schedule award, effective January 25, 2019, as he had refused

an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2). It noted that he had not accepted the offered position and resumed work following its 15-day letter. OWCP determined that the opinion of Dr. Henderson as provided in his September 7, 2017 report constituted the weight of the evidence and established that appellant could perform the duties of the offered position.

On February 6, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on June 7, 2019.

The employing establishment responded to the hearing transcript in a June 19, 2019 letter. It asserted that the position of "customer care agent" was a sedentary job that allowed employees to stand and move around their cubicle as needed.

By decision dated August 22, 2019, an OWCP hearing representative affirmed the January 24, 2019 decision.

On August 29, 2019 appellant, through counsel, requested reconsideration.

By decision dated November 26, 2019, OWCP denied modification of its prior decision.

LEGAL PRECEDENT

Under FECA,[3] once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of 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]

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.[6] 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.[7]

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

[3] *Supra* note 2.

[4] *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).

[5] 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).

[6] 20 C.F.R. § 10.517(a).

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

and submit evidence or provide reasons why the position is not suitable.[8] 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.[9]

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, effective January 25, 2019, as he refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

On December 13, 2017 the employing establishment offered appellant a modified city carrier position based on the work restrictions provided by Dr. Henderson in his September 7, 2017 report. In a February 28, 2018 letter, OWCP advised the employing establishment that it had reviewed the modified city carrier position offered on December 13, 2017 and found that it was not suitable. It specifically noted that the job offer did not address all the restrictions provided by Dr. Henderson in his September 7, 2017 report. OWCP subsequently issued an April 18, 2018 letter advising appellant that the position offered on December 13, 2017 was suitable and within the medical limitations of Dr. Henderson's September 7, 2017 report. In a May 15, 2018 letter, appellant explained that he did not report to work because OWCP had advised him in a previous letter that the modified job position offered on December 13, 2017 was found not suitable.

In a letter dated August 7, 2018, OWCP notified appellant that his reason for refusing the position was not valid and provided him 15 days to accept the position or have his entitlement to wage-loss compensation benefits terminated. It noted that the employing establishment had modified its December 13, 2017 job offer after the February 20, 2018 letter from OWCP. The Board notes, however, that the evidence of record does not contain the modified job offer, other than the December 13, 2017 job offer, which OWCP initially determined was not suitable. Furthermore, in a June 19, 2019 letter, the employing establishment alleged that the position of "customer care agent" was a sedentary job offer. The Board notes that the evidence of record also does not contain a written job offer for a "customer care agent." Consequently, the Board cannot confirm whether appellant was afforded an opportunity to accept and return to a modified-duty position after OWCP determined that the modified job offer received after February 20, 2018 was a suitable offer of employment.[10] Instead, OWCP issued a January 24, 2019 termination decision, which terminated his wage-loss compensation and entitlement to a schedule award, effective January 25, 2019, as he had refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

[8] 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).

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

[10] *See J.S.*, Docket No. 19-1399 (issued May 1, 2020) (the Board reversed OWCP's termination decision because the evidence of record did not establish that the employee was afforded an opportunity to accept and return to the offered position after the employing establishment confirmed that a license was not required for the position); *see also S.J.*, Docket No. 06-2135 (issued August 21, 2007) (the Board found that the employing establishment did not make a suitable job offer because the evidence of record did not establish that the employee received a written job offer).

Based on the evidence of record, the Board finds that OWCP prematurely invoked the penalty provision of 5 U.S.C. § 8106(c)(2), and thereby failed to discharge its burden of proof to support the termination of appellant's compensation benefits.[11] Accordingly, the termination of appellant's compensation benefits, effective January 25, 2019 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 a schedule award, effective January 25, 2019, because he refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the November 26 and August 22, 2019 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: May 25, 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

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