United States Department of Labor
Employees' Compensation Appeals Board

D.C., Appellant	)	
and	)	**Docket No. 19-1297**
	)	**Issued: October 5, 2021**
U.S. POSTAL SERVICE, FAYETTEVILLE CARRIER ANNEX POST OFFICE, Fayetteville, GA, Employer	)	

Appearances:
Wayne Johnson, 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 May 22, 2019 appellant, through counsel, filed a timely appeal from a November 23, 2018 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.[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 November 23, 2018 decision, OWCP received additional evidence. 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 a schedule award, effective March 31, 2018, as she abandoned suitable work pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On September 14, 2015 appellant, then a 57-year-old rural carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained a right knee meniscal tear when unloading her mail truck while in the performance of duty. The employing establishment indicated that she stopped work on February 19, 2015. OWCP accepted the claim for right knee aggravation of osteoarthritis and tear of anterior horn of lateral meniscus. It paid appellant wage-loss compensation on the supplemental rolls as of February 26, 2015 through December 10, 2016 and on the periodic rolls as of December 11, 2016.[4]

In a report dated September 20, 2016, appellant's attending Board-certified orthopedic surgeon, Dr. Jayson A. McMath, described her medical and surgical treatment. He indicated that on March 20, 2015 she had an arthroscopic lateral meniscus repair and that on March 30, 2016 a right total knee replacement. Dr. McMath advised that appellant could return to modified duty, sedentary work only on July 11, 2016. The employing establishment, however, indicated that no sedentary work was available.

On a February 27, 2017 progress note, Dr. McMath included physical examination findings and advised that appellant could return to light duty with no squatting, kneeling, or stair climbing, and no lifting more than 20 pounds. He also noted that she had hematomas from a motor vehicle accident (MVA). Appellant did not return to work.[5]

On June 13, 2017 Dr. McMath noted appellant's complaint of continued right knee pain and symptoms of instability when walking with decreased motion. He noted an antalgic gait, limited right knee flexion with no instability, and mild tenderness over the anterior knee. Dr. McMath advised that appellant's knee prosthesis was stable, recommended a functional capacity evaluation (FCE), and indicated that her morbid obesity and chronic back pain caused lower leg pain.

A July 11, 2017 FCE demonstrated that appellant could perform light-to-medium work.

On July 20, 2017 Dr. McMath provided an impairment evaluation and indicated that appellant had 40 percent permanent impairment of the right lower extremity. He provided permanent restrictions of medium physical duty with lifting from floor to mid-thigh limited to 45 pounds, lifting from mid-thigh to shoulder limited to 20 pounds, and carrying limited to 25 pounds.

In July 2017, OWCP referred appellant to Dr. Jeremy O. Stratton, Board-certified in orthopedic surgery, for a second-opinion evaluation. By report dated August 27, 2017,

[4] OWCP assigned a medical management nurse on December 29, 2016.

[5] In an April 4, 2017 report, the assigned medical management nurse noted that appellant had been in a recent MVA and that she was not fully participating with physical therapy. In May 2017 the nurse's assignment was concluded.

Dr. Stratton noted his review of the statement of accepted facts, the medical record, and appellant's complaint of right knee pain and stiffness following a right total knee replacement. Right knee examination demonstrated limited flexion and that the knee was stable to varus and valgus stress. Dr. Stratton indicated that right knee x-rays done that day showed that the previous total knee replacement with well-aligned components in satisfactory position and no evidence of loosening. He advised that appellant was not at maximum medical improvement. Dr. Stratton diagnosed employment-related right knee medial meniscus tear, osteoarthritis, stiffness, and total knee replacement and advised that appellant had permanent residuals of the employment injury due to loss of right knee range of motion and muscle atrophy in both calf and thigh circumference with stiffness that limited certain activities. He opined that appellant could not perform rural carrier duties as she could not shift position from one side of the vehicle to the other and she could not bend her knee. Dr. Stratton also performed a permanent impairment rating, finding 31 percent right lower extremity impairment. In an attached work capacity evaluation (Form OWCP-5c), he advised that appellant had permanent restrictions, but could work eight hours a day of light or sedentary work. Dr. Stratton provided restrictions indicating that appellant could not bend, stoop, squat, kneel, or climb during the day, that appellant could walk and stand for four hours daily, that appellant could push and pull 20 pounds for two hours daily, and that she could lift 25 pounds for two hours daily.

In correspondence dated October 19, 2017, OWCP asked the employing establishment for a job offer within the restrictions provided by Dr. Stratton.[6]

OWCP referred appellant to Frankie Placide, a rehabilitation counselor, for vocational rehabilitation services on October 30, 2017. On November 9, 2017 the rehabilitation counselor notified OWCP that the employing establishment had offered appellant a modified position that she had accepted. In a letter dated November 17, 2017, the rehabilitation counselor related that she had spoken with an employing establishment human resources management specialist to recommend modification of the transition for appellant's return to work. The rehabilitation counselor further noted that she had thereafter spoken with the postmaster and had recommended that appellant be gradually transitioned into her assigned duties and that regular site visits be conducted during which the counselor would observe the employee in the performance of her assigned duties to ensure that she was performing within her prescribed limits. The postmaster agreed with the rehabilitation counselor's recommendations.

On November 20, 2017 the employing establishment forwarded to OWCP an October 26, 2017 job offer for a modified rural carrier position with duties of Express/Priority delivery, casing and delivering a route, answering telephones, and driver observations, each to be done intermittently for up to eight hours. The physical requirements were no lifting over 25 pounds intermittently up to eight hours, no squatting, kneeling, climbing, bending, or stooping intermittently up to 8 hours a day, walking and standing limited to four hours intermittently per day, and pushing and pulling 20 pounds intermittently for up to eight hours. The record indicates that appellant had accepted the offered position on November 13, 2017 and returned to work that day. Appellant had stopped work again, however, on November 17, 2017.

[6] In an October 20, 2017 report, Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as the district medical adviser (DMA), agreed with Dr. McMath that appellant had 40 percent right lower extremity impairment.

In a November 21, 2017 progress note, Dr. McMath indicated that appellant had returned to work on November 13, 2017 and had complaints of swelling, weakness, and instability, and that she had difficulty ascending stairs. He indicated that she told him her restrictions were not being upheld. Right knee examination demonstrated limited flexion, limited strength, and that all tests for stability were normal. Dr. McMath advised that he would keep appellant off work until her restrictions were adhered to and that she had permanent restrictions of lifting floor to mid-thigh of 45 pounds and mid-thigh to shoulder level of 20 pounds, with carrying limited to 25 pounds. In an attached form report, he indicated that she was unable to work until November 27, 2017 or until restrictions were adhered to, and that she could not squat, kneel, or climb/descend stairs.

The rehabilitation counselor noted in a December 5, 2017 report that at their initial meeting on November 9, 2017 appellant accepted a job offer for modified duties, but expressed concern about returning to work due to her medical restrictions, noting that she was not on good terms with the supervisor, C.M. Ms. Placide further noted that on November 13, 2017 she met with appellant and C.M. at the employing establishment and observed appellant working with others. She returned for a second visit the following day, but that appellant was delivering mail. Ms. Placide indicated that she made no other on site visits because appellant stopped work.

In a progress note dated December 20, 2017, Dr. McMath indicated that appellant was restricted from ascending stairs and, because her modified duties included climbing stairs to deliver mail, she was unable to return to work. He wrote that her restrictions were the same.[7]

On January 31, 2018 the employing establishment confirmed that the modified position remained available and that appellant last worked on November 19, 2017.

By letter dated February 2, 2018, OWCP advised appellant that the position offered was suitable. It notified her that, if she failed to report to work or failed to demonstrate that the failure was justified, pursuant to section 8106(c)(2) of FECA (5 U.S.C. § 8106(c)(2)), her right to compensation for wage loss or a schedule award would be terminated. OWCP afforded appellant 30 days to respond.

On March 5, 2018 the employing establishment informed OWCP that the offered modified position remained available.

In a memorandum of telephone call (Form CA-110) dated March 20, 2018, OWCP's claims examiner noted that appellant had called to inquire regarding her schedule award. The claims examiner informed appellant that she had been advised on February 2, 2018 that her schedule award would be suspended if she did not return to the modified rural carrier position. She thereafter advised that appellant had not received the February 2, 2018 correspondence from OWCP.

On March 21, 2018 the employing establishment again confirmed that the job remained available.

[7] By decision dated December 20, 2017, OWCP granted appellant a schedule award for 40 percent permanent impairment of the right leg for a period of 115.2 weeks, to run from November 13, 2017 to January 28, 2020.

By decision dated March 21, 2018, OWCP terminated appellant's wage-loss compensation and entitlement to schedule award benefits pursuant to 5 U.S.C. § 8106(c)(2), effective March 31, 2018 as she had abandoned suitable work.

On April 18, 2018 appellant, through counsel, requested a hearing before a representative OWCP's Branch of Hearings and Review.

During the hearing, held telephonically on September 11, 2018, appellant testified that the rehabilitation counselor came with her when she reported for work, and she and her supervisor observed her. She indicated that she occasionally delivered Express Mail and many packages where she had to get in and out of the postal vehicle and go up and down stairs. Appellant also testified that her knee started hurting such that Dr. McMath advised her to take a week off work. She also testified that, while at work, she mainly just sat at a desk answering the telephone and occasionally did computer work. Appellant indicated that, when she saw Dr. McMath in December 2017, the rehabilitation counselor accompanied her and questioned him about appellant's restrictions. She also related that, when she and the rehabilitation counselor left the examining room, they went into the waiting room, and the rehabilitation counselor called appellant's supervisor who told the nurse that there was no work available for appellant within her restrictions.

By decision dated November 23, 2018, OWCP's hearing representative affirmed the March 21, 2018 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[8] Section 8106(c)(2) of FECA[9] 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.[10] 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.[11] Section 8106(c) 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.[12]

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 proof showing that such refusal or failure to work was reasonable or justified.[13]

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

[9] *Supra* note 2.

[10] 5 U.S.C. § 8106(c)(2); *see J.K.*, Docket No. 19-0064 (issued July 16, 2020); *Geraldine Foster*, 54 ECAB 435 (2003).

[11] *A.F.*, Docket No. 19-0453 (issued July 6, 2020); *Y.A.*, 59 ECAB 701 (2008).

[12] *J.K.*, *supra* note 10; *Joan F. Burke*, 54 ECAB 403 (2003).

[13] 20 C.F.R. § 10.517(a); *J.S.*, Docket No. 19-1399 (issued May 1, 2020); *Richard P. Cortes*, 56 ECAB 200 (2004).

Section 10.516 provides that OWCP shall advise the employee that it has found the offered work to be suitable and afford the employee 30 days to accept the job or present any reasons to counter its finding of suitability. If the employee presents such reasons, and OWCP determines that the reasons are unacceptable, it will notify the employee of that determination and that he or she has 15 days in which to accept the offered work without penalty. At that point in time, OWCP's notification need not state the reasons for finding that the employee's reasons are not acceptable.[14]

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.[15] 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.[16]

The determination of whether an employee is capable of performing modified-duty employment is a medical question that must be resolved by probative medical opinion evidence.[17] All medical conditions, whether work related or not, must be considered in assessing the suitability of an offered position.[18]

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.[19] Its procedures state that acceptable reasons for refusing an offered position include medical evidence of inability to do the work.[20]

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 March 31, 2018.

To determine appellant's ability to return to work, OWCP referred appellant to Dr. Stratton for a second opinion evaluation. In his report dated August 27, 2017, Dr. Stratton opined that she could not perform rural carrier duties as she could not shift positions from one side of the vehicle to the other and she could not bend her knee. He advised that appellant had permanent restrictions, but could work eight hours a day performing light or sedentary work. Dr. Stratton provided restrictions indicating: that she could not bend, stoop, squat, kneel, or climb during the workday;

[14] *Id.* at § 10.516; *see Melvin James*, 55 ECAB 406 (2004); *see also Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[15] *K.W.*, Docket No. 19-0870 (issued September 18, 1990).

[16] *See J.K.*, *supra* note 10; *Linda Hilton*, 52 ECAB 476 (2001).

[17] *C.M.*, Docket No. 19-1160 (issued January 10, 2020); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[18] *Id.*

[19] 20 C.F.R. § 10.517(a).

[20] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.5a(4) (2013); *see J.K.*, *supra* note 10.

that she could walk and stand up to four hours daily; that she could push and pull no more than 20 pounds for two hours daily; and that she could lift 25 pounds for two hours daily.

Contrary to Dr. Stratton's recommendation that appellant not perform rural carrier duties, the employing establishment offered her a full-time position as a modified rural carrier on October 26, 2017, which included duties of Express/Priority delivery, casing and delivering a route. While the offered position was ostensibly based upon Dr. Stratton's work restrictions, it did not on its face meet his restrictions. In addition to requiring performance of rural carrier duties, including delivering a route, the suitable work position indicated that appellant's restrictions of no squatting, kneeling, climbing, bending, or stooping were to be performed intermittently up to 8 hours a day.

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.[21] As a penalty provision, section 8106(c)(2) must be narrowly construed.[22] The Board finds that OWCP has not established that the suitable work position was within appellant's work restrictions, as provided by Dr. Stratton. Therefore, the Board finds that it has not met its burden of proof and thus erroneously terminated appellant's compensation entitlement under section 8106(c)(2).

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 March 31, 2018.

[21] *A.F.*, Docket No. 19-0453 (issued July 6, 2020); *Annette Quimby*, 49 ECAB 304 (1998).

[22] *A.F.*, *id*; *Stephen A. Pasquale*, 57 ECAB 396 (2006).

ORDER

IT IS HEREBY ORDERED THAT the November 23, 2018 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 5, 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