United States Department of Labor
Employees' Compensation Appeals Board

K.P., Appellant	)	
and	)	**Docket No. 19-1917**
	)	**Issued: October 5, 2021**
U.S. POSTAL SERVICE, POST OFFICE, Fort Worth, TX, Employer	)	

Appearances:
Jesus Velasquez, 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 September 9, 2019 appellant, through counsel, filed a timely appeal from a March 14, 2019 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 March 14, 2019 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 appellant has established that his refusal of suitable work was justified.

FACTUAL HISTORY

This case has previously been before the Board.[4] The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On February 22, 2006 appellant, then a 51-year-old maintenance mechanic, filed an occupational disease claim (Form CA-2) alleging that he had developed bilateral knee pain due to repetitive motion required to perform his job duties, including kneeling, bending, squatting, and twisting. OWCP accepted appellant's claim for bilateral knee enthesopathy and bilateral prepatellar bursitis. It authorized left knee arthroscopic surgery, which was performed on January 30, 2007, right knee arthroscopic surgery, which was performed on May 1, 2007, and total right knee replacement surgery, which was performed on April 14, 2010. OWCP later expanded its acceptance of appellant's claim to include bilateral localized primary osteoarthritis of the lower leg.[5] In a letter dated February 6, 2007, it informed appellant that it had placed him on the periodic rolls for temporary total disability effective January 30, 2007.

In a January 21, 2014 duty status report (Form CA-17), Dr. Karen M. Perl, an osteopath Board-certified in pain medicine and physiatry, indicated that appellant had work restrictions based on his bilateral knee limitations of lifting/carrying 20 pounds; walking, standing, bending/stooping of zero to one hours a day; twisting one hour a day; pushing/pulling and lifting above shoulder for two hours a day; and sitting, simple grasping, and fine manipulation for four to eight hours a day. She noted that all of these restrictions were based on intermittent activity. Dr. Perl prohibited appellant from climbing or kneeling. She advised appellant that he could resume work on January 22, 2014 with the restrictions provided.

By letter dated February 28, 2014, the employing establishment offered appellant a limited-duty position as a maintenance mechanic. The daily physical requirements of the job were: intermittent lifting/carrying of 20 pounds for one to two hours; sitting for four to eight hours; standing, walking/bending/stooping for one hour; and no climbing or kneeling. The position would involve appellant performing bread rack repairs; and the offer noted that he would have to use a bicycle to travel to equipment and a stool at the equipment.

Although OWCP initially indicated on March 6, 2014 that appellant was able to perform the duties of the offered position, in a March 6, 2014 report, Dr. Perl indicated that appellant was not capable of riding a bicycle and rolling around on a stool due to his knee replacement and weakness. Dr. Perl noted that his sitting restrictions were for sedentary work sitting in a chair intermittently and not for physical activity while in a stool. She submitted an updated Form CA-17 report dated March 6, 2014, which was identical to the prior Form CA-17 report, except that it also

[4] Docket No. 14-1209 (issued June 4, 2015).

[5] On January 24, 2012 appellant's claim for disability retirement was approved by the Office of Personnel Management (OPM).

indicated that appellant was unable to use a bicycle for travel and was unable to use a rolling stool for sitting.

On March 28, 2014 the employing establishment offered appellant a modified maintenance mechanic position performing bread rack repairs eight hours per day. The position would involve: intermittent lifting and carrying of 20 pounds; sitting for four to eight hours; standing, walking, and bending/stooping for one hour; and no climbing or kneeling. The employing establishment indicated that the assignment would remain within the physical restrictions furnished by appellant's treating physician, and that appellant was advised to not exceed these restrictions. In an accompanying letter, the employing establishment indicated that the job offer was made in strict compliance with his recent medically-defined work limitations.[6]

By decision dated May 28, 2014, OWCP terminated appellant's wage-loss compensation and entitlement to schedule award benefits, effective June 1, 2014, pursuant to 5 U.S.C. § 8106(c)(2) as he refused to accept an offer of suitable work. It found that the job offer was suitable based on the work restrictions provided by Dr. Perl on March 6, 2014.

On September 19, 2014 appellant, through counsel, appealed to the Board. By decision dated June 4, 2015, the Board affirmed the termination of appellant's wage-loss compensation and entitlement to schedule award benefits. It found the offered position was within the work restrictions set by his treating physician, Dr. Perl, and that there was no medical evidence showing that he would be required to exceed those restrictions. The Board also rejected counsel's argument that the job description was not specific, finding that the job description clearly indicated the work appellant would be performing, listed the physical restrictions, and noted that appellant would not be required to exceed his restrictions. Therefore, the offered job was suitable and appellant's refusal was unjustified.

Following the Board's June 4, 2015 decision, appellant, through counsel, requested reconsideration on September 30, 2015. Counsel submitted a February 5, 2015 report from Dr. Perl in support of appellant's claim. Additionally, counsel asserted that the job offered by the employing establishment was not suitable since it failed to provide sufficient specificity defining the physical requirements of the offered position.

In a report dated February 5, 2015, Dr. Perl attributed appellant's bilateral hip issues to appellant's knee problems. She noted that appellant had right total knee replacement surgery, continues to have left knee issues, and uses a cane intermittently to assist with ambulation. In concluding, Dr. Perl requested that OWCP expand the acceptance of appellant's claim to include additional conditions of hip pain and osteoarthritis.

Dr. Perl, in reports dated September 8, 2015, July 5 and October 7, 2016, and January 20, 2017, noted that appellant had hip issues beginning in February 2015. Physical examination findings were detailed.

By decision dated March 10, 2017, OWCP denied modification, finding that the record was insufficient to establish that the offered job was unsuitable and that his refusal was justified.

[6] By letter dated April 7, 2014, appellant indicated that he wished to elect OPM retirement benefits.

On November 7, 2017 OWCP expanded the acceptance of appellant's claim to include an aggravation of bilateral hip primary osteoarthritis.

On March 9, 2018 counsel requested reconsideration and asserted that the offered position did not provide specificity regarding the physical requirements of the position and was outside of appellant's work restrictions. He submitted a March 8, 2018 report by Dr. Russell Skinner, a family medicine specialist.

Dr. Skinner, in a March 8, 2018 report, noted appellant's medical and employment injury histories and accepted conditions of bilateral knee enthesopathy, bilateral primary hip osteoarthritis, bilateral prepatellar bursitis, and localized primary lower leg osteoarthritis. Based on his review of the medical records, review of the April 5, 2014 job description, and discussion with appellant about the position, he concluded that the offered job was unsuitable at the time it was offered and continues to be unsuitable. Dr. Skinner agreed with the previous work restrictions set by Dr. Perl on February 4, 2014 releasing appellant to return to light-duty work. He opined that appellant suffered from significant deficits due to his accepted knee, hip, and feet conditions, which preclude him from working outside the restrictions recommended by Dr. Perl. Dr. Skinner found the second job offer failed to explain how appellant would travel to the equipment being repaired or how the repairs would be performed without rolling on a stool or what accommodations would be made for appellant's restrictions. For these reasons, he concluded that the offered position was and remained unsuitable for appellant.

By decision dated March 14, 2019, OWCP denied modification.

LEGAL PRECEDENT

Under FECA,[7] once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of compensation benefits.[8] 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.[9]

Section 10.517 of FECA's implementing regulations further provides that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee, has the burden of proof to show that such refusal or failure to work was reasonable or justified, and 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

[7] *Supra* note 2.

[8] *W.L.*, Docket No. 18-1192 (issued August 14, 2019); *L.L.*, Docket No. 17-1247 (issued April 12, 2018); *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[9] 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

[10] 20 C.F.R. § 10.517(a); *see S.M.*, Docket No. 19-1227 (issued August 28, 2020); *Ronald M. Jones*, 52 ECAB 406 (2003).

employment, and that he or she was allowed a reasonable period to accept or reject the position or submit evidence or provide reasons why the position is not suitable.[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]

Once OWCP establishes that the work offered is suitable, the burden shifts to the employee who refuses to work to show that the refusal or failure to work was reasonable or justified.[13] 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.[14] In a suitable work determination, OWCP must consider preexisting and subsequently-acquired medical conditions in evaluating an employee's work capacity.[15] Its procedures provide that acceptable reasons for refusing an offered position include medical evidence of inability to do the work.[16]

ANALYSIS

The Board finds that the case is not in posture for decision.

On prior appeal, the Board found that OWCP had met its burden of proof to terminate appellant's wage-loss compensation and schedule award benefits on May 28, 2014. Absent further merit review of this issue by OWCP pursuant to section 8128 of FECA, the Board's prior findings are *res judicata*.[17]

Following the Board's June 4, 2015 decision, appellant submitted additional evidence and requested that OWCP review the termination of his compensation. Based upon Dr. Perl's reports dated September 8, 2015, July 5 and October 7, 2016, and January 20, 2017, OWCP subsequently expanded the acceptance of appellant's claim to include an aggravation of bilateral hip primary osteoarthritis.

After a termination or modification of benefits clearly warranted on the basis of the evidence at the time of the decision, the burden for reinstating compensation benefits shifts to appellant.[18] The Board has explained that, if a claimant requests reconsideration of a suitable work

[11] *R.A.*, Docket No. 19-0065 (issued May 14, 2019); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4 (June 2013).

[12] *L.L., supra* note 8; *see also Joan F. Burke*, 54 ECAB 406 (2003).

[13] 20 C.F.R. § 10.517(a); *see L.A.*, Docket No. 20-0946 (issued June 25, 2021).

[14] *M.A.*, Docket No. 18-1671 (issued June 13, 2019); *Gayle Harris*, 52 ECAB 319 (2001).

[15] *P.S.*, Docket No. 18-1789 (issued April 11, 2019).

[16] Federal (FECA) Procedure Manual, *supra* note 11 at Chapter 2.814.5(a)(4) (June 2013).

[17] *W.L.*, *supra* note 8; *O.W.*, Docket No. 19-0316 (issued June 25, 2019); *see also V.G.*, Docket No. 17-0583 (issued July 23, 2018).

[18] *K.J.*, Docket No. 17-1971 (issued March 5, 2018); *Talmadge Miller*, 47 ECAB 673, 679 (1996); *see also George Servetas*, 43 ECAB 424 (1992).

termination, the issue remains whether appellant has established that he or she was unable to perform the duties of the offered position.[19]

Following the termination of appellant's compensation benefits and the acceptance of appellant's additional bilateral hip conditions, Dr. Skinner, thereafter, in a March 8, 2018 report noted appellant's conditions of bilateral knee enthesopathy, bilateral primary hip osteoarthritis, bilateral prepatellar bursitis, and localized primary lower leg osteoarthritis. Based on his review of the medical records, review of the April 5, 2014 job description, and discussion with appellant about the position, he concluded that the offered job was unsuitable at the time it was offered and continues to be unsuitable. Dr. Skinner noted that he agreed with the previous work restrictions set by Dr. Perl on February 4, 2014 releasing appellant to return to light-duty work, however, he explained that appellant had significant deficits due to his accepted knee, hip, and feet conditions, which precluded him from working outside the restrictions set by Dr. Perl. Dr. Skinner thereafter questioned whether appellant would be able to perform the duties of the offered position. He noted that the second job offer failed to explain how appellant would travel to the equipment being repaired, how the repairs would be performed without rolling on a stool, and what accommodations would be made for appellant's restrictions. Dr. Skinner thereafter concluded that the job was unsuitable, at the time it was offered.

It is well established that proceedings under FECA are non-adversarial in nature, and while the employee has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.[20]

In light of the newly accepted conditions and Dr. Skinner's report, further development is required. The Board shall, therefore, remand the case for further development. On remand, OWCP shall consider all of appellant's conditions and then determine whether the position remains suitable. After such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision.

[19] *See W.L., supra* note 8; *K.J., id*.

[20] *D.A.*, Docket No. 19-0314 (issued September 18, 2019).

ORDER

IT IS HEREBY ORDERED THAT the March 14, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: October 5, 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